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# SUPREMACY WITHOUT PRE-EMPTION? THE VERY SLOWLY EMERGENT DOCTRINE OF COMMUNITY PRE-EMPTION*

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## 1. Introduction

Legislative competences are potentialities – entitlements for future legislation – and only in the rare presence of *exclusive* Community power will they pose an immediate and direct limit to national powers. Shared competences will have no such effects. Within shared powers, two legislators are equally competent to adopt legislation. Here, legislative overlaps exist and the potential for conflict arises. Where an individual is faced with two competing normative claims, it has to know which one to follow. For the sake of legal certainty and substantive justice, normative dilemmas must be avoided. Each federal legal order opting for shared competences will, therefore, have to determine *when* conflicts between two legislative spheres exist and *how* these conflicts are to be resolved.

For the Community's shared powers, these two dimensions have indeed been developed to structure the relationship between European and national legislation. In Europe's constitutionalism they have been described as, respectively, the principle of pre-emption and the principle of supremacy: "The problem of pre-emption consists in determining whether there exists a conflict between a national measure and a rule of Community law. The problem of primacy concerns the manner in which such a conflict, if it is found to exist, will be resolved."[1] The doctrines of pre-emption and supremacy, so defined, have a remarkably different constitutional character. Pre-emption analysis and supremacy analysis ought to be distinguished. The difficulty in keeping the two doctrines apart stems from the dialectical relationship that exists between them: the doctrine of pre-emption will first determine whether a conflict between two norms exists – thereby causing the su-

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1. M. Waelbroeck, "The emergent doctrine of Community pre-emption – Consent and re-delegation", in Sandalow and Stein, *Courts and Free Markets: Perspectives from the United States and Europe*, Vol. II (OUP, 1982), pp. 548–580, at 551.

premacy principle to come into operation. Yet, a prior clarification of what is the superior norm will be necessary to determine *which* rule pre-empts the other. Pre-emption and supremacy thus represent "two sides of the same coin".[2] They are like Siamese twins: different though inseparable.

In the EC legal order, the supremacy of Community law has long been established. In the event of a conflict between Community and national law, the former will prevail. But when do such legislative conflicts between a Community and a national norm arise? How supreme is Community law? Will the national legislators lose their competence once the Community has exercised its powers – a solution known in German federalism for concurrent competences – or, alternatively, will the normative conflict be resolved at the legislative level? How much uniformity will Community legislation impose on the freedom of national legislators? In order to answer these questions, this article will investigate the two constitutional principles that structure the Community's shared competences: the twin doctrines of supremacy and pre-emption.

## 2. The rapidly emergent doctrine of Community supremacy

The resolution of legislative conflicts requires a hierarchy of norms. "Ranking rules are collision rules".[3] Modern federal States typically resolve legislative conflicts between federal and state legislation in favour of the former: federal law is the supreme law of the land.[4] This "centralist solution" has become so engrained in our constitutional mentalities that we tend to forget that the decentralized solution does not just represent a logical possibility. On the contrary, for a long time, the "subsidiarity solution" structured the (con)federal relationship between the government levels of medieval Germany. Its constitutional spirit is best preserved in the old legal proverb: "Town law breaks county law, county law breaks common law".[5] In the event

2. Krislov, Ehlermann and Weiler, "The political organs and the decision-making process in the United States and the European Community", in Cappelletti, Seccombe and Weiler (Eds.), *Integration through Law: Europe and the American Federal Experience*, Vol.1 **(**de Gruyter, 1986), pp. 3–112, at 90.

3. "Rangregeln sind Kollisionsregeln": Bülow, "Gesetzgebung" in Benda et al. (Eds), *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland*, 2nd ed. (de Gruyter, 1994), pp. 1459 at 1464.

4. Art. VI (2) of the U.S. Constitution, for example, states: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

5. "Stadtrecht bricht Landrecht, Landrecht bricht gemein Recht."

of a legislative conflict, supremacy was thus given to the rule of the smaller political entity. In modern federal States, this hierarchical solution was inverted in order to favour national integration: "The reason for the absolute supremacy of federal law lay in the fact that the federal state became the guarantor of national unity. Federal law, therefore, enjoyed an *emotional supremacy vis-à-vis* regional law."[6] This "emotional supremacy" of federal law continues to dominate the constitutionalism of modern federal States.

The simplest format for a supremacy doctrine is one that is absolute: one legal order is considered superior to the other. Absolute supremacy may – as we saw above – be given to the legal system of *either* the smaller or the bigger political community. Between these two extremes lies, however, a range of possible nuances: a constitutional hierarchy of legislative norms may be made contingent on the respective legal sources within the two legal systems. Such a nuanced supremacy doctrine has traditionally structured the hierarchical relationships between domestic and international law in the German constitutional order.[7] Alternatively, the hierarchical relationship between the two legal orders could be a function of the policy area at stake: federal law could be supreme for certain competences, while this hierarchical relationship may be inverted for other policy areas. Not many federal constitutions acknowledge this second type of "subsidiary competence", whereby in the event of a conflict between federal and state law, the *latter* would prevail. This solution can, however, be found in Canadian federalism.[8]

The 1957 Rome Treaty did not mention the supremacy of Community law. Would this mean that, in line with the ordinary canons of international law,

6. Fleiner, Bundesstaatliche und gliedstaatliche Rechtsordnung in ihrem gegenseitigen Verhältnis im Rechte Deutschlands, Österreichs und der Schweiz, (1929) 6 *Veröffentlichungen der Vereinigung deutscher Staatsrechtslehrer*, 2–24 at 3: "durch die Tatsache, daß der Bundesstaat der Garant der nationalen Einheit wurde, und das Bundesrecht daher gegenüber der gliedstaatlichen Gesetzgebung gefühlsmäßig als eine Ordnung höheren Ranges erschien. Hier light die Quelle für die Behauptung von dem unbedingten Vorrang des Bundesrechts im Bundesstaat".

7. The status of international law in the German legal order depends on its legal source. While general principles of international law assume a hierarchical position between the German constitution and federal legislation, the transformed or implemented international treaty has traditionally been placed at the hierarchical rank of normal legislation.

8. Such an inversion of the "centralist" supremacy rule can be found in relation to old age pensions. Art. 94 A introduced by the 1964 Canadian Constitution Act states: "The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter." In the event of a conflict, provincial law will prevail over federal law. The phenomenon of "subsidiary legislation" was also known in Imperial Germany; see Laband, *Das Staatsrecht des Deutschen Reiches*, Band 2, 5th Edition (Scientia Verlag, 1964), pp. 117–8.

the supremacy issue was a matter for the national legal orders? Or, was there a *Community* doctrine of supremacy? How supreme would Community law be over national law? In what way would Community law prevail over conflicting national law: would it "break" or "disapply" it? Let us tackle these questions in two sub-sections. First, let us look at the Community nature and the scope of the supremacy doctrine. The second sub-section will then investigate the effect of Community supremacy on conflicting national law.

### 2.1. *How supreme is Community law? The scope of the doctrine of Community supremacy*

The strong dualist traditions of two of the EC Member States in 1958,[9] posed a serious legal and "emotional" threat to the unity of the common market. The Court reacted. It centralized the issue of supremacy and turned it into a Community principle. In *Costa* v. *ENEL*,[10] the European judiciary was asked whether national legislation adopted after 1958 would prevail over the EC Treaty. The Italian dualist tradition had treated Community law as ordinary legislation that could be derogated from by subsequent national legislation. Would the *lex posterior* rule apply? Could a Member State unilaterally determine the status of Community law in its national legal order?

The EC Treaty, the Court pointed out, was not an ordinary international treaty:

> "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 the basis of reciprocity. *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 set out in [Article 10 (2)]*".[11]

Community law would reign supreme over national law. The Court, unsurprisingly, had to derive an "is" from an "ought" to justify the "emotional supremacy" of Community law.

But, how supreme was Community law?[12] The fact that the EC *Treaty* prevailed over national legislation did not automatically imply that *all* Commu-

9. Sasse, "The Common Market: Between international and municipal law, 75 *Yale Law Journal* (1965–6), 696–753.

10. Case 6/64, *Costa* v. *E.N.E.L.*, [1964] ECR 585.

11. Ibid. at 593–4 (emphasis added).

12. For this excellent question posed in the context of national courts, see Bebr, "How supreme is Community law in the national courts?" 11 CML Rev. (1974), 3–37.

nity law would prevail over *all* national law. There was nothing natural in having a Commission regulation prevail over national constitutional law. Would a hierarchical "subsidiarity solution" here solve legislative conflicts between Community and national law? The Treaty's silence did not preclude the "relative" supremacy of Community law and much could be said in favour or against the normative parity/priority of national constitutional law in such a situation. The European Court of Justice, however, never accepted this nuanced supremacy doctrine and quickly moved from "a relative to an absolute supremacy of the Treaty and secondary Community Law over any provision of municipal law of whatever nature and kind".[13]

In *Internationale Handelsgesellschaft*,[14] the Court was asked to address the normative relationship between Community secondary law and national constitutional law. A German administrative court had argued that "the primacy of supranational law must yield before the principles of the German Basic law".[15] Should the fundamental structural principles and human rights of national constitutions be beyond the scope of Community supremacy? The Court disagreed. Community law "cannot because of its very nature be overridden by rules of national law, however, framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question". "Therefore the validity of a Community measure or its effect within a Member State 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."[16] The Court's vision of the supremacy of Community law over national law was an absolute one: "The whole of Community law prevails over the whole of national law."[17]

13. Ibid. at 4.

14. Case 11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125.

15. Ibid., para 2.

16. Ibid., para 3.

17. Kovar, "The relationship between Community law and national law", in EC Commission (Ed.), *Thirty Years of Community Law* (EC Commission, 1981), pp. 109–149, at 112–3. The present article only deals with the hierarchical relationship between Community law and unilateral national measures. In relation to international treaties concluded by Member States, the supremacy of Community law took much longer to emerge. For a trajectory of that development, see Schütze, *From Dual to Cooperative Federalism: The Changing Structure of the Legislative Function in the European Union* (EUI Thesis, 2005), Chapter 6.

### 2.2. *The effect of Community supremacy: Disapplication and not invalidation*

What are the legal consequences of the precedence of Community law over conflicting national law? Will the supreme effect be automatic or will it depend on an official declaration by the national authorities? Moreover, must a national court "hold such provisions inapplicable to the extent to which they are incompatible with Community law" or must it "declare them void"?[18] These issues concern the constitutional effect of the supremacy doctrine in the Community legal order.

The classic answer to these questions is found in *Simmenthal II*.[19] The ruling was a constitutional afterthought to the Court's first *Simmenthal* decision.[20] The preliminary question was simply: "[W]hat consequences flow from the direct applicability of a provision of Community law in the event of incompatibility with a subsequent legislative provision of a Member State"?[21] The question concerned the supremacy, not the pre-emption of Community law.[22] According to Italian constitutional law, national legislation could only be repealed by Parliament or the Supreme Court. Would lower national courts have to apply national laws in the meantime and wait for the respective national constitutional authorities to give effect to the supremacy of Community law? Unsurprisingly, the Court of Justice rejected such a reading. Appealing to the "very foundations of the Community", national courts were under a direct obligation to give immediate effect to Com-

18. This very question was raised in Case 34/67, *Firma Gebrüder Luck* v. *Hauptzollamt Köln-Rheinau*, [1968] ECR 245.

19. Case 106/77, *Amministrazione delle Finanze dello Stato* v. *Simmenthal SpA*. But see already: Case 48/71, *Commission* v. *Italy*, [1978] ECR 629.

20. The facts of the first *Simmenthal* decision (Case 35/76, *Simmenthal SpA* v. *Ministero delle Finanze*, [1976] ECR 1871) are easily restated. Despite the existence of various legislative acts issued by the Community to give effect to the common organization of the market in beef and veal, Italian veterinary and health laws still seemed to conduct systematic veterinary and health inspections for imports. Those health checks were (partly) financed by a system of charges levied on the importers of the relevant products. Simmenthal, one of the traders affected by the national regulation, brought proceedings against the Italian administrative authority for recovery of the fees charged for inspection, claiming that the national law constituted an unjustified measure having an effect equivalent to a quantitative restriction, making the imposition of the fees equally unlawful. The ECJ agreed with Simmethal in *Simmenthal I*. The focus of the *Simmenthal II* ruling was how this finding was to be implemented in the national legal order.

21. Case 106/77, *Simmenthal*, para 13.

22. For an opposing view cf. Cross, "Pre-emption of Member State law in the European Economic Community: A framework for analysis", 29 CML Rev. (1992), 447–472 at 449, seeing *Simmenthal* as the Court's "first expression of the basic principle of pre-emption".

munity law. The direct applicability of Community law meant that "rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force".[23]

But what exactly was to happen with conflicting national provisions? What did Community supremacy *mean*? Transposing the doctrine of supremacy from German federalism would have put national courts under a duty to declare conflicting national laws void. The importation of this strong constitutional solution had been advocated by Grabitz arguing that "Community law breaks national law".[24] The legal consequence of a violation of Community law would, consequently, be the nullity of national law.

The Court of Justice, however, memorably chose a milder alternative and characterized the constitutional effect of the supremacy of Community law in the following words:

> "[I]n accordance with the *principle of precedence* of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render *automatically inapplicable* any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also preclude the valid adoption of new legislative measures to the extent to which they would be incompatible with Community provisions".[25]

The Court's preferred supremacy doctrine would not render existing national measures void, but only "inapplicable" to the extent to which they conflicted with Community law.[26] The effect of the supremacy doctrine appeared, how-

23. Case 106/77, *Simmenthal*, para 14.

24. This is the very title of Grabitz's monograph "Gemeinschaftsrecht bricht nationales Recht" (L. Appel, 1966). The author concluded that "[a]ls Ergebnis der bisherigen Untersuchung ist festzuhalten, daß Rechtsfolge des Verstoßes gegen die gemeinschaftlichen Kollisionsnormen die Nichtigkeit des nationalen Rechts ist. Der Satz 'Gemeinschaftsrecht bricht Landesrecht' ist daher als Bestandteil des positiven Gemeinschaftsrechts anzusehen" (Grabitz, ibid., at 113). This position was shared by Hallstein: "[T]he supremacy of Community law means essentially two things: its rules take precedence irrespective of the level of the two orders at which the conflict occurs, and further, Community law *not only invalidates previous national law but also limits subsequent national legislation*" (Hallstein quoted in Sasse, op. cit. *supra* note 9, 696–753 at 717 (emphasis added)).

25. Case 106/77, *Simmenthal*, para 17 (emphasis added).

26. The Court's reference to "directly applicable measures" was not designed to limit the immediate supremacy of Community law to regulations. The Community measures at issue in *Simmenthal I* were, after all, directives. This point was clarified in subsequent jurisprudence:

ever, stronger in relation to future national legislation: the supremacy of Community law would "preclude the *valid adoption* of new legislative measures to the extent to which they would be incompatible with Community provisions."[27] Was this to imply that national legislators were not even *competent* to adopt national laws that would run counter to *existing* Community legislation? Were these national laws void *ab initio*?

Some authors have indeed advocated the "non-existence" theory and considered national laws that violated prior Community rules to be void.[28] The very *competence* of national legislators would thus be pre-empted. This solution found intellectual inspiration in German federalism, where the exercise of a concurrent competence by the federal State will constitutionally pre-empt the competence of the States to adopt legislation on the same subject-matter.

This competence reading of the doctrine of supremacy goes, however, too far. In *Ministero delle Finanze* v. *IN.CO.GE.'90 Srl*,[29] the Commission had interpreted the second prong of the *Simmenthal* ruling to mean that "a Member State has *no power whatever to [subsequently] adopt* a fiscal provision that is incompatible with Community law, with the result that such a provision … must be treated as *non-existent*".[30] The European Court of Justice disagreed with this interpretation. Pointing out that *Simmenthal* "did not draw any distinction between pre-existing and subsequently adopted national law",[31] the incompatibility of subsequently adopted rules of national law with Community law did not have the effect of rendering these rules non-existent.[32] National courts were only under an obligation to disapply a conflicting provision of national legislation – be it prior *or* subsequent to the coming into force of the Community rule.

The suspension of a conflicting national law is, thereby, the direct and *automatic* consequence of the supremacy of Community law. The national leg-

cf. Case 148/78, *Criminal proceedings against Tullio Ratti*, [1979] ECR 1629; and Case 152/84, *M. H. Marshall* v. *Southampton and South-West Hampshire Area Health Authority (Teaching)*, [1986] ECR 723.

27. Case 106/77, *Simmenthal*, para 17 (emphasis added).

28. Barav, "Les effets du droit communautaire directement applicable", 14 CDE (1978), 265–86 at 275–6. See also, Grabitz and Hallstein, op. cit. *supra* note 24.

29. Joined cases C-10–22/97, *Ministero delle Finanze* v. *IN.CO.GE.'90 Srl and others*, [1998] ECR 6307.

30. Ibid., para 18 (emphasis added).

31. Arguably, the *Simmenthal* Court did indeed not envisage two different consequences for the supremacy principle. While para 17 appears to make a distinction depending on whether national legislation existed or not, the operative part of the judgment referred to both variants. It stated that a national court should refuse of its own motion to "apply any conflicting provision of national legislation" (*Simmenthal*, Case 106/77, dictum).

32. Ibid., paras. 20–21.

islator will, however, *additionally* be required to amend or repeal national provisions that give rise to legal uncertainty.[33] This secondary obligation seems to derive from Article 10 EC.[34] The adoption of Community legislation, however, does not negate the underlying legislative competence of the Member States.[35] The pre-emptive effect of Community law takes place at the *legislative* level. It suspends national legislation in conflict with Community law. The Community's non-exclusive competences are, consequently, shared and not concurrent competences.[36]

This milder supremacy doctrine has a number of advantages: first, some national legal orders may not grant their courts the power to invalidate parliamentary laws. Second, comprehensive national laws may only be adversely affected by the supremacy of Community law to the extent that they overlap with EC law: "A national rule, which is set aside for being inconsistent with Community law, is inoperative only to the extent of this inconsis-

33. Case 167/73, *Commission of the European Communities* v. *French Republic*, [1974] ECR 359, para 41: "It follows that although the objective legal position is clear, namely that [Art. 39] and Regulation 1612/68 are directly applicable in the territory of the French Republic, nevertheless the maintenance in these circumstances of the wording of the Code du Travail Maritime gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities available to them of relying on Community law."

The Court now appears generally to assume that the presence of a national provision that conflicts with Community law will *ipso facto* "give … rise to an ambiguous state of affairs in so far as it leaves persons concerned in a state of uncertainty as to the possibilities available to them relying on Community law"; see Case 104/86, *Commission* v. *Italy*, [1988] ECR 1799, para 12. See also C-185/96, *Commission* v. *Hellenic Republic*, [1998] ECR 6601, para 32: "On that point, suffice it to recall that, according to established case-law, the maintenance of national legislation which is in itself incompatible with Community law, even if the Member State concerned acts in accordance with Community law, gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities for them of relying on Community law…"

34. See e.g. Case 104/86, *Commission* v. *Italy*, [1988] ECR 1799, para 13 and Case 74/86, *Commission* v. *Germany*, [1988] ECR 2139, para 12.

35. In this sense see also Zuleeg, "Vorbehaltene Kompetenzen der Mitgliedstaaten der Europäischen Gemeinschaft auf dem Gebiete des Umweltschutzes", 6 *Neue Zeitschrift für Verwaltungsrecht* (1987), 280–286 at 281.

36. The notion of concurrent competence has been predominantly defined in the German federal order: "Es kennzeichnet den Typus konkurrierender Kompetenz, daß sie den niedrigeren Rechtsträgern so lange das Handeln ermöglichen, wie nicht der übergeordnete Kompetenzträger von seiner Kompetenz Gebrauch gemacht hat… Das Gebrauchmachen der Kompetenz löst eine *primärrechtliche Sperrwirkung* aus. Für die konkurrierende Kompetenz ist insofern kennzeichnend, daß es nicht der dem Sekundärrecht eingeschriebene Vorranganspruch ist, der dem Mitgliedstaat die Handlungsfreiheit nimmt, sondern ein unmittelbar im Vertrag angelegter und durch die Inanspruchnahme der Kompetenz ausgelöste Sperre." (Nettesheim, Kompetenzen, in von Bogdandy (Ed.), *Europäisches Verfassungsrecht: theoretische und dogmatische Grundzüge* (Springer, 2003), pp. 415–477, at 449–50 (emphasis added)).

tency; the rule may continue to be applied to cases where it is not inconsistent, or to cases which are not covered by the Community norm…"[37] National rules may continue to be valid in the national legal system.[38] They will remain operable in purely internal situations. Third, once the Community act is repealed,[39] national legislation becomes fully operational again.[40]

### 3. The very slowly emergent doctrine of Community pre-emption

The contrast between the prodigious literary presence of the supremacy doctrine and the shadowy existence of the doctrine of pre-emption in the Community law literature is arresting. Libraries have been filled with doctrinal treatments of the supremacy principle, whereas a contoured doctrine of Community pre-emption has still not materialized. The very concept of pre-emption – let alone a *doctrine* of pre-emption – has remained foreign to the Community legal order. The concept forms no element in the constitutional vocabulary of the European Court of Justice and the student of Community law will have to search hard for general treatments of the pre-emption doctrine in the majority of today's European law textbooks.[41] The constitutional

37. De Witte, "Direct effect, supremacy and the nature of the legal order", in Craig and de Búrca, *The Evolution of EU law* (OUP, 1999), pp. 177–213 at 190. The same point had been made by Zuleeg almost three decades before: "Die einfache Kollisionsregel erlaubt es, umfassende nationale Gesetze wirksam zu lassen, soweit sie sich nicht mit dem Anwendungsbereich des EWG-Rechts überschneiden. … Decken sich die Anwendungsbereiche der gemeinschaftlichen und der nationalen Regelung, bewirkt die einfache Kollisionsregel *eine bloße Suspension der Anwendung des nationalen Rechts*, *so daß dieses wieder zur Geltung kommen kann*, *wenn das Gemeinschaftsrecht aus irgendeinem Grunde aufgehoben wird*." Zuleeg, "Die Kompetenzen der Europäischen Gemeinschaften gegenüber den Mitgliedstaaten", 20 n.F. *Jahrbuch des öffentlichen Rechts* (1970), 1–64 at 25–7 (emphasis added).

38. The non-application of national laws in these cases is but a mandatory "minimum requirement" set by the Community legal order. A national legal order can, if it so wishes, offer a stricter remedy to protect the full effectiveness of Community law: Case 34/67, *Firma Gebruder Luck* v. *Hauptzollamt Koln-Rheinau*, [1968] ECR 245, at 251: Although Community law "has the effect of excluding the application of any national measure incompatible with it, the article does not restrict the powers of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for the purpose of protecting the individual rights conferred by Community law".

39. Moreover, assuming that the national legislation in conflict with Community law has not been repealed or amended in the meantime.

40. Zuleeg, op. cit. *supra* note 37, at 27; and de Witte, op. cit. *supra* note 37, at 190.

41. The word "pre-emption" hardly occurs in the judicial discourse of the ECJ. In the rare event that the Court refers to "pre-emption", it uses the concept in the specific context of European company law to refer to the "right of pre-emption" of a shareholder (cf. Case C-42/95, *Siemens AG* v. *Henry Noll*, [1995] ECR I-6017). Perhaps it is this lack of judicial recognition that has caused the relative marginalization of the doctrine of pre-emption in the major Community law textbooks. In-depth discussions of the doctrine of pre-emption in the Community

terrain of pre-emption remains "one of the most obscure areas of Community law".[42]

What are the reasons for the shadowy existence of the pre-emption doctrine in the Community legal order? Assimilating pre-emption issues to supremacy questions has been the cardinal cause for the still under-theorized nature of the pre-emption phenomenon. Though related, the two doctrines ought to be kept apart. Supremacy denotes the superior hierarchical status of the Community legal *order* over the national legal *orders* and thus gives Community law the *capacity* to pre-empt national law. The doctrine of pre-emption, on the other hand, denotes the *actual degree* to which national law will be set aside by Community legislation. "The supremacy of Community law does not mean that national law has no place within Community law dealing with the same subject-matter."[43]

The need for a clearer analytical distinction between the two doctrines was acknowledged early on. Almost thirty years ago, in an insightful article on the Common Agricultural Policy, Baumann advocated the need to introduce a pre-emption framework into the Community's federalism:

> "The pre-eminence of Community Law over national law is well established. Only a few particular questions are still open to discussion, such as the relationship between Community Law and national constitutional law, in particular regarding rights, and the procedure by which the respect for the pre-eminence of Community Law over national legislation is assured. Consequently, the problem with which lawyers are faced today is *not* the pre-eminence problem as such, but *the problem of determining the scope of application of dispositions of Community law with a view to deciding if in a given situation a conflict between Community law and national law has arisen*."[44]

legal order have, however, been undertaken by the following pioneering studies: Weiler, "The Community system: The dual character of supranationalism", 1 YEL (1981), 267–306; Waelbroeck, op. cit. *supra* note 1, pp. 548–580; Lenaerts, *Le Juge et la Constitution aux États-unis d'Amérique et dans l'Ordre Juridique Européen* (Bruyant, 1988); Cross, op. cit. *supra* note 22, 447–472; Weatherill, "Beyond preemption? Shared competence and constitutional change in the European Community", in O'Keeffe and Twomey (Eds.), *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law, 1994), pp. 13–33; as well as Furrer, *Die Sperrwirkung des sekundären Gemeinschaftsrechts auf die nationalen Rechtsordnungen: Die Grenzen des nationalen Gestaltungsspielraums durch sekundärrechtliche Vorgaben unter besonderer Berücksichtigung des "nationalen Alleingangs"* (Nomos, 1994).

42. Cf. Cappelletti, Seccombe & Weiler, "Integration through law: Europe and the American federal experience – A general introduction", in Cappelletti et al. op. cit. *supra* note 2, pp. 3–71, at 32.

43. Ipsen, *Europäisches Gemeinschaftsrecht* (Mohr, 1972), p. 287: "Vorrang des Gemeinschaftsrechts bedeutet nicht, daß nationales Recht bei themenidentischen Regelungen des Gemeinschaftsrechts keinen Platz mehr hätte."

44. Baumann, "Common organizations of the market and national law", 14 CML Rev. (1977), 303–327, at 303 (emphasis added).

It is the principle of pre-emption that is concerned with deciding when a conflict between Community legislation and national legislation has arisen. The important questions behind the doctrine of pre-emption, therefore, are: "How much conflict is enough to pre-empt?"[45] To what degree will Community legislation pre-empt national legislation governing the same subject-matter? To what extent can the Community and national legislator co-legislate in parallel? In order to address these issues, we shall first look at various pre-emption typologies developed for the Community legal order. A second sub-section will examine the mythical nature of the pre-emption phenomenon as such.

### 3.1. *Pre-emption typologies: The types of legislative conflicts in the Community legal order*

The doctrine of pre-emption is a federal theory of normative conflict. Conflicts arise where there is friction between two legal norms.[46] The spectrum of conflict is open-ended and ranges from purely hypothetical frictions to literal contradictions between norms. There is no easy way to measure normative conflicts; and, in an attempt to classify degrees of normative conflict, pre-emption typologies have been developed. Most pre-emption typologies will, to a great extent, be arbitrary classifications: there simply are no *a priori* boundaries between the various degrees of normative conflict. Pre-emption typologies will, therefore, at best *reflect* the various judicial reasons and arguments created to explain why a sub-federal norm conflicts with federal legislation. Pre-emption frameworks will serve as constitutional devices for systematizing those species of conflict that have crystallized in a particular federal legal order. For the Community legal order, each pre-emption type should, then, correspond to an argumentative *topos* used by the European Court of Justice to justify the exclusion of national law as being in violation of Community legislation.

45. Cross, op. cit. *supra* note 22, at 465.

46. Normative conflicts have recently been investigated in the context of public international law; see Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP, 2003). Pauwelyn's notion departs from the classic notion of conflict as physical impossibility to comply with two sets of rules. For the classic definition of conflict in the international law of treaties, see Jenks, "The conflict of law-making treaties", 30 *British Yearbook of International Law* (1953), 401–453, at 425: "[A] conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible …. There is no such conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it is possible to comply with the obligations of one instruments by refraining from exercising a privilege or discretion accorded by another."

3.1.1. *A brief constitutional genealogy of the doctrine of Community pre-emption*

The genealogy of the doctrine of Community pre-emption is quickly told. In the last thirty years, only a limited number of differing conceptions for the doctrine of Community pre-emption have been suggested.

The first theory reduces the doctrine to instances of field pre-emption. Positioning the pre-emption phenomenon within his theory of "normative supranationalism", Weiler defined the doctrine in the following manner: "[P]re-emption means that, *in relation to fields* in which the Community has policy-making competence, the Member States are not only precluded from enacting legislation contradictory to Community law (by virtue of the doctrine of supremacy) but they are *pre-empted from taking any action at all*".[47] This definition, while distinguishing between supremacy and pre-emption as distinct constitutional phenomena, cannot explain why Community legislation that occupies the field is superior to national legislation. The supremacy principle is strangely inoperative.

> "Supremacy, as we know, provides that once a positive Community measure already exists any conflicting national norm becomes inapplicable. *Pre-emption precedes this situation in the temporal and (legal) spatial sense. We are concerned here with a situation where there may not exist a specific Community measure, but where the entire policy area – the legal space – has become 'occupied', or even potentially occupied, by the Community in the sense that it is the duty of the Community to fill and regulate that area*. When pre-emption operates, Member States will be prevented from introducing measures – and hence the temporal dimension – even in the absence of, or before the adoption of, a specific Community rule."[48]

Pre-emption without supremacy? In *separating* the two doctrines, this model must retreat into identifying pre-emption with exclusive competences.[49] This

47. Weiler, op. cit. *supra* note 41, at 277 (emphasis added).

48. Krislov, Ehlermann and Weiler, op. cit. *supra* note 2, at 90 (emphasis added).

49. Approaching pre-emption from its "purest and most extreme form", Weiler thus identified the doctrine of pre-emption as a form of exclusive competence. The identification of the pre-emption phenomenon with exclusive competences emerges at its clearest in Weiler's 1985 Italian version of his dual supranationalism thesis. "Il sistema comunitario europeo" characterizes the pre-emption principle as "il principio della competenza esclusiva": "Nella sua forma più pura ed estrema, competenza esclusiva significa che relativamente ai campi nei quali la Comunità ha il potere di indirizzo politico gli Stati membri non solo non possono emanare leggi in contrasto con il diritto comunitario (in virtù della dottrina del primato) ma nemmeno possono intraprendere una qualsivoglia attività." Weiler, *Il sistema comunitario europeo: struttura giuridica e processo politico* (Il Mulino, 1985) at p. 61.

in itself may raise constitutional eyebrows.[50] Fatal for this theory's explanatory power, however, is its (self-confessed) misfit with the constitutional reality of the Community legal order. Reducing pre-emption to its purest form means that for the great majority of federal disputes "the theoretical basis for exclusivity moves in a gray area between supremacy and pre-emption".[51] A pre-emption theory that cannot account for this "gray area" is, with all respect, largely self-defeating.

A second conception of the doctrine of Community pre-emption has identified the doctrine with *indirect* normative conflicts: "Pre-emption problems arise in cases *where there is no outright conflict between federal (or Community) and state law* but where a state measure is alleged to be incompatible with the general policy objectives which federal (or Community) law seeks to achieve".[52] In the course of a meticulous analysis of pre-emption-like reasoning in various policy fields up to the mid-1970s, Waelbroeck famously documented two approaches to Community pre-emption that surfaced in the jurisprudence of the European Court.

Weatherill has equally viewed the pre-emption phenomenon in terms of the Community having "acquired *exclusive competence* in some sectors" to the effect that "state powers are pre-empted and the Community has 'occupied the field'." "*Pre-emption is a question of determining competence. National action is precluded not because the rules of Community law apply in the field and prevail in the event of conflict with national provisions*, but instead where, even though there are no Community rules with which national rules can come into conflict, the national action is impermissible. Pre-emption in this sense logically precedes supremacy." Weatherill, *Law and Integration in the European Union* (Clarendon Press, 1995), at pp. 136–7 (emphasis added). Pre-emption is, consequently, characterized as "the constitutional re-distribution of *competences* between the Member States and the Community"; Weatherill, "Pre-emption, harmonisation and the distribution of competence to regulate the Internal Market", in Barnard and Scott, *The Law of the Single European Market: Unpacking the Premises* (Hart, 2002), pp. 41–74, at 63 (emphasis added).

50. See Schütze, "Parallel external powers in the European Community: From 'cubist' perspectives towards 'naturalist' constitutional principles?" 23 YEL (2004), 225–274, at 260–265.

51. Weiler, "The external legal relations of non-unitary actors: Mixity and the federal principle", in Weiler, *The Constitution of Europe* (CUP, 1999), pp. 130–87, at 173. The quote refers to the ERTA ruling of the ECJ. Weiler claims that in *ERTA*, "the theoretical basis for exclusivity moves in a gray area between supremacy and pre-emption": "If the Court were to apply a simple principle of supremacy the consequence would be that the Member States would be precluded from making only those international agreements which were in direct conflict with the Community obligation. If the Court were to apply fully fledged pre-emption the consequence would be that Member States would be precluded from any international agreement in the area in question. Instead, the Court stands midway between these two concepts, prohibiting those international obligations which might *affect those rules or alter their scope*. This is more than supremacy but less than pre-emption" (ibid.).

52. Waelbroeck, op. cit. *supra* note 1, at 550 (emphasis added).

According to a "conceptualist-federalist approach", "the Community's competence is construed as being necessarily exclusive" and "the essential problem is to define the scope of the Community competence".[53] National legislators would be automatically excluded from the legislative field. This conceptualist-federalist approach could be encountered at the level of primary and secondary law and thus comprised constitutional and legislative pre-emption. A second pre-emption type was systematized under the umbrella name of "pragmatic approach". Here, the Member States would retain a "concurrent power to regulate matters falling within the reach of the Community's power, as long as in so doing they do not create a *conflict with the rules* adopted by the Community".[54] This typology, therefore, envisaged two types of pre-emption: field pre-emption and obstacle pre-emption. The model, however, still excluded *direct* normative conflicts from the scope of the pre-emption phenomenon.[55]

A third conception of the doctrine of Community pre-emption has championed a "flexible framework for pre-emption analysis" that would "include *all instances of actual and potential conflict* between Member State law and Community legislation."[56] It is the merit of Cross' study to have drawn first parallels between the U.S. American doctrine of pre-emption and the emergent doctrine of Community pre-emption. American federalism has over the last century developed a sophisticated modern pre-emption framework. The U.S. Supreme Court has summarized the different types of pre-emption in *Pacific Gas & Electric Co* v. *State Energy Resources Conservation & Development Commission* in the following manner:

> "Congress' intent to supersede state law altogether may be found from a scheme of the federal regulation so pervasive as to make reasonable the interference that Congress left no room to supplement it, because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, or because the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.… Even where Congress has not entirely displaced state regulation in a specific area, each state is pre-empted to the extent that it

53. Ibid. at 551.

54. Ibid. (emphasis added).

55. For a similar definitional limitation of the pre-emption doctrine to indirect norm conflicts, see Furrer, op .cit. *supra* note 41, pp. 20–21: "Die pre-emption Lehre untersucht vielmehr diejenigen Fälle, in denen sich solche gemeinschaftlichen Normen auf nationaler Ebene handlungsbeschränkend auswirken, was zur Folge hat, daß die Mitgliedstaaten gewisse Maßnahmen nicht mehr ergreifen können, auch wenn unmittelbar keine primär- oder sekundärrechtliche Norm entgegensteht."

56. Cross, op. cit. *supra* note 41, at 447 (emphasis added).

> actually conflicts with federal law. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility, … or where state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."[57]

The three identified pre-emption types are, respectively, field pre-emption, rule pre-emption and obstacle pre-emption.[58] Field pre-emption has been defined to refer to situations "where state law is found not to conflict *in its actual operation* with the substantive policies underlying the federal legislation" but where Congress has exercised its "jurisdictional veto".[59] The second pre-emption type has, somewhat tautologically, been defined as federal legislation "fairly interpreted" being in "actual conflict" with state law.[60] For us, rule pre-emption shall occur where the State law contradicts a federal rule. The third type of pre-emption has proven much more elusive: State law will be pre-empted wherever it stands "as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress".[61] Obstacle pre-emption, so defined, does not represent a very clear normative threshold,[62] especially if it is taken to displace "any state legislation which frustrates the *full* effectiveness of federal law".[63]

57. *Pacific Gas & Electric Co* v. *State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983), at 203–4 (quotations and references omitted).

58. There is no generally recognized pre-emption terminology in U.S. constitutionalism. On the contrary, a plethora of "pre-emption frameworks" has developed. We shall choose the terms field pre-emption, rule pre-emption and obstacle pre-emption, as they arguably reflect the ideas behind these conflict thresholds the best. This terminology differs from Cross' analysis that distinguished between "occupation of the field pre-emption", "direct conflict pre-emption" and "obstacle conflict pre-emption". Cross' terminology suggests a distinction between occupation of the field pre-emption and conflict pre-emption. The present article, on the other hand, considers field pre-emption as a form of conflict pre-emption.

59. Tribe, *American Constitutional Law*, 3rd ed. (Foundation Press, 2000), pp. 1204–05.

60. *Savage* v. *Jones*, 225 US 501, 533 (1912) (dictum).

61. *Pacific Gas & Electric Co* v. *State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983) at 204.

62. The jurisprudence of the Supreme Court has given a long commentary on the phrase. It failed, however, in establishing abstract and clear boundaries around "obstacle pre-emption": In *City of Burbank* v. *Lockheed Air Terminal Inc*., 411 U.S. 624 (1973), the Court pre-empted a state ordinance that "severely" (ibid. 639) impeded the functioning of a federal scheme. In *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981), pre-emption was said to require more than creating an obstacle to mere "*general* expressions of national policy" (ibid. at 634 (emphasis added)). In a number of cases on the pre-emptive effect of the Sherman Act, the Court would equally state that state legislation would not be invalidated simply because of some anti-competitive effect (cf. *Fisher* v. *Berkeley*, 475 U.S. 260 (1986)). For a discussion of those cases, see generally Tribe, op. cit *supra* note 59, at 1179–1195.

63. *Perez* v. *Campbell*, 401 US 637 (1971) at 652.

The modern American pre-emption framework has the advantage of identifying the pre-emption doctrine with the entire conflict spectrum. It defies the reduction of pre-emption to the black-and-white mechanism of field pre-emption and includes indirect as well as direct conflicts within its framework. Field pre-emption itself can – while independent of any *actual* conflict – be portrayed as a species of conflict pre-emption.[64] The characterization of the pre-emption doctrine as an "analysis of competing legislation"[65] however, will blind out the phenomenon of constitutional pre-emption.[66] Pre-emption so conceived is a *legislative* phenomenon and represents a *relative* doctrine: the question to be asked is not *whether* Community legislation pre-empts national law but *to what degree* is national legislation pre-empted.[67]

In the following pages we shall adopt this third pre-emption model. Viewing the notion of conflict as the underlying rationale of all forms of pre-emption, the essential differentiating factor between the various types of pre-emption will be the degree of abstraction of the conflict criterion employed. From this definitional perspective, "express" and "implied" pre-emption are *not* pre-emption *types*. They solely refer to the mode in which the Community legislator has expressed its intention to pre-empt and should, then, be analytically separated from the question to which degree the Community legislator wished to pre-empt the national level.

### 3.1.2. *Degrees of Conflict in the Jurisprudence of the European Court of Justice*

Has the European Court of Justice endorsed a modern pre-emption framework for the Community legal order?[68] Has the Court committed itself to a

64. The Supreme Court itself admitted that "field pre-emption may be understood as a species of conflict pre-emption: a state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation" (*English* v. *General Electric Co.*, 496 U.S. 72 (1990), 79 note 5). In line with the U.S. Supreme Court, Tribe has seen field pre-emption as "a facet of ordinary pre-emption of conflicting state laws" (Tribe, op. cit. *supra* note 59, at 1205).

65. Cross, op. cit. *supra* note 41, at 453.

66. Theoretically, the pre-emption phenomenon could be envisaged at the level of primary and secondary Community law. (This is, indeed, the way Waelbroeck viewed pre-emption, op. cit. *supra* note 1.) The reduction of the pre-emption doctrine to a legislative phenomenon carries several advantages. Foremost, as will be seen below, the ECJ has – in parallel with the U.S. Court – moved to an intent rationale for the doctrine of pre-emption. Pre-emption is thus conceived of as a legislative phenomenon.

67. In the same sense, Schlösser, *Die Sperrwirkung sekundären Gemeinschaftsrechts: Mitgliedstaatliche Spielräume im "harmonisierten" Umweltrecht* (Nomos, 2002), p. 60.

68. The present article will not investigate when and where which types of Community pre-emption will occur. Sophisticated attempts to explain the jurisprudence of the Court have been

principled pre-emption statement *à la Pacific Gas & Electric Co v. State Energy Resources Conservation & Development Commission*? Unfortunately, the ECJ has not (yet) done so.[69] In linguistic alliance with U.S. American constitutionalism, we shall, therefore, analyse the European Court's jurisprudence through the lens of the three pre-emption types developed in that federation in descending order – from the most abstract to the most concrete level of normative conflict.

Firstly, field pre-emption. Field pre-emption will refer to those situations, where the Court does not investigate any *material* normative tension, but simply excludes the Member States on the ground that the Community legislator has exhaustively legislated for the field. This is the most powerful format of Community pre-emption: any national legislation within the occupied field is prohibited. The reason for the total exclusion lies in the perceived fear that *any* supplementary national action may endanger or interfere with the strict uniformity of the Community regime. The total prohibition for national legislators from exercising their shared competences will, thus, to a certain extent reproduce the effects of a "real" exclusive competence within the occupied field. Underlying the idea of field pre-emption is a purely abstract conflict criterion: national legislation conflicts with the *jurisdictional* objective of the Community legislator to establish an absolutely uniform legislative standard.

In order to illustrate the argumentative structure of field pre-emption let us take a closer look at the jurisprudence of the European Court in the context of total harmonization under Article 94 EC. In *Ratti*,[70] the ECJ found that Directive 73/173 pre-empted any national measures falling within its scope. Member States were therefore "not entitled to maintain, parallel with the rules laid down by the Directive for imports, different rules for the domestic market". It was a consequence of the Community system that "a

undertaken in other studies. For the most comprehensive analysis in this repect, see Furrer, *Die Sperrwirkung des sekundären Gemeinschaftsrechts auf die nationalen Rechtsordnungen* (Nomos, 1994). A shorter English version of the argument can be found in Furrer, "The principle of pre-emption in European Union law", in Winter (Ed.), *Sources and Categories of European Union Law* (Nomos, 1996), pp. 521–540.

69. Cross mentions Case 218/85, *Association comite économique agricole régional fruits et légumes de Bretagne* v. *A. Le Campion (CERAFEL)*, [1986] ECR 3513, as a candidate. There the Court stated that "to ascertain whether and to what extent Regulation 1035/72 precludes the extension of rules established by producers' organizations to producers who are not members, either because the extension of those rules affects a matter with which the common organization has dealt exhaustively or because the rules so extended are contrary to the provisions of Community law or interfere with the proper functioning of the common organization of the market" (ibid., para 13). The Court has, however, never extrapolated this pre-emption statement from its specific CAP context. Moreover, not even in the agricultural context has *CERAFEL* become a standard point of reference in subsequent cases.

70. Case 148/78, *Criminal proceedings against Tullio Ratti*, [1979] ECR 1629.

Member State may not introduce into its national legislation conditions which are more restrictive than those laid down in the directive in question, or which are even more detailed *or in any event different*".[71] The Community measure represented an exhaustive set of rules and, thus, totally pre-empted national legislators.

Similarly strong pre-emption formulations have been used in a number of agricultural cases. In *Apple and Pear Development Council* v. *K.J. Lewis Ltd and others*,[72] the Court inspected the common organization of the market in fruit and vegetables and found that "an *exhaustive* system of quality standards applicable to the products in question" prevented national authorities from imposing unilateral quality requirements unless the Community legislation itself provided for such a power.[73] In *Commission* v. *Germany*,[74] the Court claimed that "it is one of the fundamental characteristics of a common organization of the market that in the sectors concerned the Member States can no longer take action through national provisions adopted unilaterally", wherever the organization was characterized by comprehensive rules.[75]

In contrast to field pre-emption, obstacle pre-emption – our second pre-emption type – requires some *material* conflict between Community and national law. Unlike rule pre-emption, however, it refers to a form of argumentative reasoning that does not base the exclusionary effect of Community law on the normative friction between a national law and *a particular Community rule*. The Court will not go into the details of the Community scheme, but will be content in finding that the national law somehow interferes with the proper functioning or impedes the objectives of the Community legislation. The burden of proof for finding a legislative conflict is, therefore, still relatively light.

Obstacle pre-emption reasoning can be found in *Bussone*.[76] In the "*absence of express provisions on the compatibility* with the organization of the market established by [the] Regulation … it is necessary to seek the solution to the question asked in the light of the aims and objectives of the regulations [as such]". The Court noted that the Regulation did not seek to establish uniform prices, but that the organization was "based on freedom of commercial transactions under fair competitive conditions". "[S]uch a scheme precludes the adoption of any national rules which may hinder, di-

71. Ibid., paras. 26–27 (emphasis added).
72. Case 222/82, *Apple and Pear Development Council* v. *K.J. Lewis Ltd and others*, [1983] ECR 4083.
73. Ibid., para 23 (emphasis added).
74. Case 48/85, *Commission* v. *Germany*, [1986] ECR 2549.
75. Ibid., paras. 12–3.
76. Case 31/78, *Francesco Bussone* v. *Italian Ministry of Agriculture*, [1978] ECR 2429.

rectly or indirectly, actually or potentially, trade within the Community …"[77]

This second pre-emption type can often be found in the agricultural law of the EC. Here, national legislation is frequently found to violate Community law not *because* the Community has established a Common Market Organization (CMO).[78] In the majority of cases, it is not the mere existence of a CMO that precludes all unilateral action falling within the conceptual scope of the legislative system established by Community secondary law.[79] The Court employs a functional conflict criterion to oust supplementary national legislation: those national measures that limit the scope, impede the functioning or jeopardize the aims of a CMO will conflict with Community legislation. While not as abstract and potent as field pre-emption, the virility of this functional conflict criterion is nonetheless remarkable. Where the Court selects the "affect" or "obstacle" criterion – be it in the context of EC agricultural law or the Community's external relations – Community law will potentially widely pre-empt national legislation. Any obstacle that reduces the effectiveness of the Community system may be seen to be in conflict with Community law.

The most concrete form of conflict will occur, where national legislation literally contradicts a *specific Community rule*. Compliance with both sets of rules is (physically) impossible. This scenario can be described as rule pre-emption. The violation of Community legislation by the national measure follows from its contradicting a Community rule "fairly interpreted". Put negatively, where the national law does not contradict a specific Community provision, it will *not* be pre-empted.

We can find an illustration of this third type of pre-emption in *Gallaher*.[80] Article 3(3) of Directive 89/622 concerned the labelling of tobacco products and required that health warnings should cover "at least 4 % of the corresponding surface". Reading the "at least" qualification as a provision allow-

77. Ibid., paras. 43, 46–7.

78. However, the ECJ may find field pre-emption too. For the standard formulation, see Case 16/83, *Criminal proceedings against Karl Prantl*, [1984] ECR 1299, para 13: "[O]nce rules on the common organization of the market may be regarded as forming a complete system, the Member States no longer have competence in that field unless the Community provides otherwise."

79. See already Waelbroeck, op. cit. *supra* note 1, noting a shift away from conceptual-federalist to a pragmatic reasoning of the Court. It is therefore problematic to summarize the agricultural jurisprudence as suggesting that "the modern principle is that the existence of a common organization precludes unilateral national legislation on the matters which it covers, unless it can be shown to be incomplete in the sense of not covering or not purporting to cover the matter at issue." Usher, *EC Agricultural Law* (OUP, 2001), p. 156.

80. Case C-11/92, *The Queen* v. *Secretary of State for Health*, *ex parte Gallaher Ltd*, *Imperial Tobacco Ltd and Rothmans International Tobacco (UK) Ltd*, [1993] ECR I-3545.

ing for stricter national standards, the British government had tightened the obligation on manufacturers by stipulating that the specific warning ought to cover 6% of the surfaces on which they are printed. Was this higher national standard supplementing the Community rule pre-empted and, thus, to be disapplied?

The European Court did not think so in an answer that contrasts strikingly with its previous ruling in *Ratti*. Interpreting Article 3 and 8 of the Directive, the European Court found that "[t]he expression 'at least' contained in both articles must be interpreted as meaning that, if they consider it necessary, Member States are at liberty to decide that the indications and warnings are to cover a greater surface area in view of the level of public awareness of the health risks associated with tobacco consumption".[81] The Court – applying a rule pre-emption criterion – allowed the stricter national measure. The national law did not contradict the Community rule and the national rules were, thus, not pre-empted by the Community standard.

Finally, a word of caution. It goes without saying that these three pre-emption types are not watertight concepts. The transition from one type to another is fluid. Firstly, through the application of teleological interpretation each single Community rule will be interpreted in light of the overall aims and objectives of the entire Community measure. The distinct normative thresholds for, respectively, rule pre-emption and obstacle pre-emption become, therefore, more difficult to make out.[82] Secondly, even the difference between rule pre-emption and field pre-emption may be ambivalent.[83] The Court has, sometimes, employed the language of exhaustive legislation with regard to a single provision found in Community legislation.[84] This termino-

81. Ibid., para 20.

82. See, in particular, Case 50–76, *Amsterdam Bulb BV* v. *Produktschap voor Siergewassen*, [1977] ECR 137, para 9: "The compatibility with the Community Regulations of the provisions referred to by the national court must be considered in the light not only of the express provisions of the Regulations but also of their aims and objectives."

83. Take e.g. Case 60/86, *Commission* v. *United Kingdom (Dim-Dip)*, [1988] ECR 3921. Cross views the ECJ ruling as an illustration of "direct conflict pre-emption": Cross, op. cit. *supra* note 41, at 464. Weatherill, on the other hand, treats the decision as a prime illustration of occupation of the field pre-emption: Weatherill, *Law and Integration in the European Union* (Clarendon Press, 1995), p. 139.

84. See e.g. Case 52/92, *Commission* v. *Portuguese Republic*, [1993] ECR 2961, para 19 (emphasis added): "Article 10 of Directive 90/425, which establishes a new system of precautionary measures implemented very rapidly in order to combat effectively the spread of diseases likely to constitute a serious hazard to animals or to human health, brings about the complete harmonization of the precautionary measures against such diseases and defines precisely the respective obligations and tasks of the Member States and of the Commission in this field. *The Member States thus have no power*, *in the area covered by that article and by Deci-*

logical development has introduced the idea of *partial* field pre-emption of Community legislation. The "occupied field" in such a case will be defined by the scope of a particular legislative norm within a Community measure. Here, both rule pre-emption and field pre-emption may, simultaneously, serve as possible justification for the existence of a legislative conflict.

### 3.2. *The constitutional phenomenology of pre-emption: Federalizing statutory interpretation*

The pre-emption principle's dogmatic character has been strangely shrouded in constitutional mist – even in the U.S. constitutional order. Various theories have been suggested, the majority of which orbit around the Supremacy Clause enshrined in Article VI of the American Constitution. While the Supreme Court often conceptualizes the pre-emption phenomenon in the context of the supremacy clause,[85] the conceptual fusion of the two doctrines has attracted academic criticism: pre-emption claims are not strictly "constitutional" claims, but *legislative* claims: the pre-emptive effect does not stem from the supremacy clause, but arises under the particular piece of federal legislation.[86] The legislative quality of the pre-emption phenomenon has been underlined by the Supreme Court's choice of congressional intent as the "touchstone" of its pre-emption analysis.

The more convincing view, therefore, holds that the doctrines of supremacy and pre-emption are linked, but ultimately distinct. The supremacy clause does not determine "what constitutes a conflict between state and federal law; it merely serves as a traffic cop, mandating a federal law's survival instead of a state law's."[87] Pre-emption, on the other hand, specifies when such conflicts have arisen. Briefly again, the pre-emption doctrine determines what constitutes a conflict, whereas the supremacy clause decides how that conflict is to be resolved. But if the principles of supremacy and pre-

*sion 91/237*, *adopted in implementation of that article*, *to take measures other than those expressly provided for therein*."

85. E.g. *Philadelphia* v. *New Jersey*, 430 U.S. 141 (1977), 142: "federal pre-emption of state statutes is, of course, ultimately a question under the Supremacy Clause".

86. Pre-emption cases "cannot properly be considered constitutional cases" since the "federal pre-emption question is an alleged conflict between a federal statutory or regulatory principle and a state law or action." Hoke, "Transcending conventional supremacy: A reconstruction of the supremacy clause", 24 *Connecticut Law Review* (1991–92), 829–892 at 886. In light of the erratic identification of pre-emption situations as supremacy cases, the author therefore advocates "[d]econstitutionalizing pre-emption claims": Hoke, "Preemption pathologies and civic republican values, 71 *Boston University Law Review* (1991), 685–766 at 752.

87. Hoke, "Preemption pathologies…" op. cit. *supra* note 36, at 755.

emption are different, where does the pre-emption doctrine come from and how can this constitutional phenomenon be justified? In the U.S. federal order, one answer has suggested the Necessary and Proper Clause;[88] yet, traditionally, pre-emption is associated with statutory interpretation.

The interpretation of legislative acts in federal systems will, indeed, always involve a substantive *and* a federal dimension: "On a substantive policy level, each [federal] court will have to calibrate the desirable balance between the competing social values at play in the federal legislation; while, at the same time, it will impute its global views on what it sees as the appropriate federal equilibrium."[89] In federal orders, statutory interpretation must, therefore, be seen from the perspective of the horizontal *as well as* the vertical separation of powers. The pre-emption doctrine provides the analytical framework within which the historical sensitivities and peculiarities of a particular federal order are imputed in the interpretative process. The pre-emption doctrine may, consequently, be conceived of as a *federal theory of interpretation*: it assembles those federal values and assumptions that will guide the federal judiciary in addition to the "ordinary" canons of statutory interpretation.

Even if the European Court of Justice has yet to clearly announce the (statutory) interpretation rationale behind the doctrine of Community pre-emption, its present jurisprudence already points in that direction.[90] Express pre-emption or express saving – to borrow the U.S. American terminology here once more – are already judicially accepted guidelines for the type of pre-emption *intended* by the Community legislator.[91] The Community legis-

88. Cf. Gardbaum, "The nature of pre-emption", 79 *Cornell Law Review* (1993–94), 767–815. "In the American context", the author claims, "the most common and consequential error is the belief that Congress's power of pre-emption is closely and essentially connected to the Supremacy Clause of the Constitution" (ibid. at 768). In order to correct this past error, Gardbaum proposed the "Necessary and Proper Clause" – the American constitutional equivalent of Art. 308 EC – as the constitutional source for the pre-emption doctrine.

89. Cohen, "Congressional power to define state power to regulate commerce: Consent and pre-emption", in Sandalow and Stein (Eds.), op. cit. *supra* note 1, at p. 541.

90. Cf. Case 177/78, *Pigs and Bacon Commission* v. *Mc Carren and Company Limited*, [1979] ECR 2161, where the Court had to decide on the compatibility of a levy intended to subsidize export marketing with, *inter alia*, Regulation 2759/75 on the common organization of the market in pigmeat. The Court considered the Community had "*intended* to ensure the freedom of trade within the Community by the abolition both of barriers to trade" (ibid., para 14, emphasis added). The Court may even make a reference to the legislative history of a Community measure, see *Commission* v. *UK (Dim-dip)*, *supra* note 83, para 10.

91. For an example of express pre-emption, see Art. 8 of Directive 73/173 on the classification, packaging and labelling of dangerous preparations (solvents), O.J. 1973, L 189/7 (dis-

lator will, however, not always have expressly spoken its mind about the degree to which national legislation on the same subject-matter is pre-empted. Implied pre-emption will then give considerable power to the European Court of Justice to fashion the dominant federal philosophy for the Community legal order.[92]

## 4. Conclusion: The twin doctrines of supremacy and pre-emption

Supremacy and pre-emption are twin doctrines. There is no supremacy without pre-emption. The doctrine of pre-emption is a theory of legislative conflict. The doctrine of supremacy is a theory of conflict resolution. The two doctrines are vital for any federal legal order with overlapping legislative spheres. For the Community legal order, the absolute supremacy of EC law means that all Community law prevails over all national law. The absolute nature of Community supremacy has, however, not given rise to an absolute doctrine of Community pre-emption. The scope of pre-emption has been a relative concept in the Community legal order: the question is not whether Community legislation pre-empts national law, but to what degree.

cussed in *Tullio Ratti*, *supra* note 70) prohibited Member States to "restrict or impede on the grounds of classification, packaging or labelling the placing on the market of dangerous preparations which satisfy the requirements of the Directive". See also, Art. 2(1) of Directive 76/756, as amended by Directive 83/276, O.J. 1983, L 151/47, (also discussed in *Commission* v. *UK (Dim-dip)*, cited *supra* note 83): "No Member State may: refuse, in respect of a type of vehicle, to grant EEC type-approval or national type-approval, or refuse or prohibit the sale, registration, entry into service or use of vehicles, on grounds relating to the installation on the vehicles of the lighting and light-signalling devices…" A typical express saving clause can be found in Art. 8 of Directive 85/577 EC on the protection of consumers in respect of contracts negotiated away from business premises, O.J. 1985, L 372/31: "This Directive shall not prevent Member States from adopting or maintaining more favourable provisions to protect consumers in the field which it covers." See also Art. 14(2) (a) of Directive 73/241, O.J. 1973, L 228/23: "This directive shall not affect the provisions of national laws: (a) at present authorising or prohibiting the addition of vegetable fats other than cocoa butter to the chocolate products defined in Annex I."

Disagreement exists as to how often the Community legislator expressly speaks its mind. Contrast Weatherill, op. cit. *supra* note 83, p. 142: "The legislature does not typically make explicit the intended pre-emptive scope and effect of the measure." with Geradin, "Trade and environmental protection: Community harmonization and national environmental standards", 13 YEL (1993), 151–199, at 179: "Pre-emption questions are often solved in advance by the Community legislator, since most directives contain provisions making clear whether their effect is to deprive Member States of the power to make regulations or if they only impose minimum standards."

92. For an analysis of the changing federal philosophies in the EC legal order generally, see Schütze, op. cit. *supra* note 17.

So, when will a conflict between Community and national legislation arise? There is no absolute answer to this question. The Community legislator and the European Court of Justice will not always attach the same conflict criterion to all Community legislation. Sometimes a purely "jurisdictional" conflict will be enough to pre-empt national law. In other cases, some material conflict with the Community legislative scheme is necessary. Finally, the Court may insist on a direct conflict with a specific Community rule. In parallel to U.S. American constitutionalism we consequently distinguished three pre-emption types within the Community legal order: field pre-emption, obstacle pre-emption and rule pre-emption.

The constitutional nature of the pre-emption phenomenon was described as a theory of federal interpretation. The pre-emption doctrine acknowledges the *federal* dimension in the interpretation of *federal* legislation. In federal orders, the interpretive activity will not only affect the horizontal separation of powers – the judiciary acting as a quasi-legislator – but also the vertical separation of powers. Viewing the interpretation of Community legislation as the "objective" application of the supremacy principle de-federalizes the interpretive process. This reductionist view has been responsible for the very slow emergence of a sophisticated doctrine of Community pre-emption.

But what is the rationale *behind* both supremacy and pre-emption? How can one explain the negative duties imposed on States to disapply, to repeal or even *not* to adopt legislation that would conflict with federal law? A promising constitutional rationale lies in the principle of federal comity. In the U.S. federal order, the principle's function has been defined "to help fuse into one Nation a collection of independent, sovereign states".[93] For the Community legal order, a similar – albeit much more modest – idea is expressed in Article 10 EC: Member States "shall facilitate the achievement of the Community's tasks" by "tak[ing] all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or from action taken by the institutions of the Community" and by "abstain[ing] from any measure which could jeopardise the attainment of the objectives of this Treaty".

While the principle of federal comity/fidelity has yet to clearly emerge in the U.S. American debate,[94] it has already surfaced as the principal rationale behind the twin doctrines of supremacy and pre-emption in the constitutionalism of the European Community.[95] Behind the twin Community doctrines

93. *Toomer* v. *Witsell*, 334 U.S. 385 (1948), 395.

94. For a first interesting approximation, see Halberstam, "Of power and responsibility: The political morality of federal systems", 90 *Virginia Law Review* (2004), 731–834.

95. Federal comity has been the reason justifying the supremacy of European law over

of supremacy and pre-emption, thus, stands the very idea of European integration – an emotional, but excellent reason.

national law: "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 set out in [Art. 10 (2)]*", *Costa* v. *E.N.E.L.*, *supra* note 10, at 594 (emphasis added). The ECJ has long given Art. 10 EC as the constitutional rationale underlying the twin doctrines of supremacy and pre-emption. A reference to Art. 10 EC can also be found in Case 22–70, *Commission* v. *Council (ERTA)*, [1971] ECR 263, para 21. More recently, the Court has quoted Art. 10 EC as the source of duties for the Member States in a pre-emption context in the Open Skies litigation, cf. e.g. Case 476/98, *Commission* v. *Germany (Open Skies)*, [2002] ECR 9855, para 137.