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Amedeo Arena

**The Doctrine of Union Preemption in the EU Single Market:
Between *Sein* and *Sollen***

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THE DOCTRINE OF UNION PREEMPTION IN THE EU SINGLE MARKET: BETWEEN *SEIN* AND *SOLLEN*

By Amedeo Arena^{*},^{**}

Abstract

The introduction of a competence catalogue in the TFEU by the Treaty of Lisbon eliminated the overlap between the preclusion of national lawmaking powers attributable to the exclusive character of EU competences and that stemming from the enactment of EU legislation, thus opening the doors to scholarly investigation of Union Preemption as a general theory of the effects of EU legislation in non-exclusive competence areas. The first aim of this work is to describe what Union Preemption *is* (“*Sein*”) in the context of the EU single market, thus allowing, given an item of EU legislation, to determine its preemptive scope by reference to certain “markers”, such as its legal form and the harmonization model it embodies. Against the background of the existing application uncertainties, this work further seeks to suggest what Union Preemption *ought to be* (“*Sollen*”) to meet the current needs of European integration, taking into account the diversity of situations where preemption issues arise and the changes in the legal, political, and economic context that have occurred in the single market since 1957.

^{*} Postdoctoral Research Fellow in European Union Law, Department of International and European Union Law, University of Naples “Federico II”. E-mail: amedeo.arena@unina.it

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Introduction

Once the EU legislature adopts an item legislation in an area of non-exclusive competence, what is the residual scope, if any, for national lawmaking? That is the question to which the doctrine of Union Preemption seeks to provide an answer.

Union Preemption is, under many aspects, an unsolved conundrum of the relationship between EU and national law, as shown by the sizeable amount of litigation before the European Court of Justice (ECJ) over the scope of permissible national measures in fields covered by EU legislation. Also the language of Union Preemption has long been alien to the ECJ jurisprudence, as the first express reference to “preemption” occurred only as late as February 2009 (Advocate-General Colomer’s Opinion in the *Budweiser* case).¹

Although Union Preemption is, along with direct effect and supremacy, one of the hallmarks of Community normative supranationalism, academic literature has predominantly focused on the other two features. Waelbroeck, one of the first authors to write about Union Preemption, identified two variants of Union Preemption in the ECJ case-law: a “conceptualist-federalist” and “pragmatic one”.² Weiler discussed the shift from the former to the latter in the ECJ jurisprudence³ and examined the impact of Union Preemption on consensus-building within the Council.⁴ Cross, in the early 1990s, drew substantial inspiration from the US doctrine of federal preemption and identified four possible relationships between EU and national law: “Express saving”; “Express pre-emption”; “Occupation of the field pre-emption” and “Conflict pre-emption” (and its subcategories: “Direct conflict pre-emption” and “Obstacle pre-emption”).⁵ Weatherill, in two subsequent articles, examined the correlation between Union Preemption and harmonization of national legislations in the context of the single Market.⁶ Goucha Soares, in

¹ Case C-478/07, *Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH (“Budweiser”)*, Opinion of Advocate General Ruiz-Jarabo Colomer, 2009 ECR I-07721, para 93 (“What we have here ultimately is the debate about Community ‘pre-emption’ of a measure and the situations in which the concurrent competences of the Member States in a particular field may have been displaced by the activity of the Community legislature.”)

² M. WAELBROECK, ‘The emergent doctrine of Community pre-emption - Consent and redelegation’, in SANDALOW & STEIN (eds.), *Courts and Free Markets: Perspectives from the United States and Europe* (Vol. II, OUP, 1982), 548–580.

³ J.H.H. WEILER, ‘Community system: The dual character of supranationalism’, (1981) 1 *Yearbook of European Law*, 267-306.

⁴ J.H.H. WEILER, ‘Community, Member States and European Integration: Is the Law Relevant?’, (1982) 21 *Journal of Common Market Studies*, 39-55.

⁵ EUGENE DANIEL CROSS, ‘Pre-emption of Member State law in the European Economic Community: A framework for analysis’, (1992) 29 *Common Market Law Review*, 447-472.

⁶ STEPHEN WEATHERILL, ‘Beyond preemption? Shared competence and constitutional change in the European Community’, in D. O’KEEFFE & P. TWOMEY (eds.), *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law,

1998, dealt at length with the relationship between Union Preemption and the principle of subsidiarity.⁷ Schütze, finally, contextualized Union Preemption in the framework of EU cooperative federalism⁸ and analyzed the preemptive effect of the various items of secondary legislation.⁹

The existing academic literature on the topic of Union Preemption, however, failed to provide both a reliable descriptive model and satisfactory normative model for that doctrine. A descriptive model should explain what the doctrine of Union Preemption *is* (“*Sein*”), thus allowing, given an item of EU legislation, to determine the scope of its preemptive effects. However, except for clear-cut “express pre-emption” and “express saving” cases, the existing literature does not provide valuable guidance to that effect. A normative model should describe how the doctrine of preemption *ought to be* (“*Sollen*”) to meet the current needs of the EU and of Member States. Previous contributions, however, argued for or against a certain type of preemption, leading to a one-size-fits-all normative model which fails to account for the diversity of situations where Union Preemption applies and for the changes in the legal, political, and economic context that have occurred in the EU single market since 1957.

This work consists of six Sections. The first one deals with the existing definitions of Union Preemption and provides a stipulative definition that focuses on Union Preemption as an effect of EU legislation. Section 2 investigates the origins, the development, and the functioning of the US doctrine of Federal Preemption, in the framework of a federal system which is remarkably different from the EU. Section 3 deals with three “types” of Union Preemption (“field preemption”, “obstacle preemption”, and “rule preemption”) categorized according to their impact on national lawmaking powers. Section 4 examines the repercussions of Union Preemption on the implementation of EU law (relying, to this end, on a “reverse international delegation” model), on the division of competences between the EU and Member States, and on consensus-building within the Council (especially after the introduction of qualified majority

1994), 13-33; STEPHEN WEATHERILL, ‘Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market’, in CATHERINE BARNARD & JOANNE SCOTT (eds.), *The Law of the Single European Market* (Hart Publishing, 2002), 41-73.

⁷ ANTÓNIO GOUCHA SOARES, ‘Pre-emption, Conflicts of Powers and Subsidiarity’, (1998) 23 *European Law Review*, 132-145.

⁸ ROBERT SCHÜTZE, *From dual to cooperative federalism: the changing structure of European law* (OUP 2009); ROBERT SCHÜTZE, ‘Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption’, (2006) 43 *Common Market Law Review*, 1023-1048.

⁹ ROBERT SCHÜTZE, ‘The morphology of legislative power in the European Community: legal instruments and the federal division of powers’, (2007) 25 *Yearbook of European Law* 2006, 91-151.

voting). Section 5 endeavors to put together a descriptive model of Union Preemption in the context of the EU single market, by studying the relationship between, on the one hand, preemption types and, on the other hand, EU competences, EU legislative instruments and harmonization models. Section 6 outlines a normative model of Union Preemption that is both versatile to different needs of uniformity and consistent with the current state of development of EU single market.

1. Defining Union Preemption

In 1982 Cappelletti, Seccombe, and Weiler referred to Union Preemption as “one of the most obscure areas of Community law”¹⁰ – a description which is, arguably, still accurate today. As a matter of fact, no consensus exists not only on a *doctrine* of Union Preemption, but also on its very *concept*.¹¹ This is possibly due to the circumstance that the expression “preemption” has never appeared in EU legal texts and remained alien to the vocabulary of the ECJ until 2009, when Advocate General Colomer referred to it in his opinion in *Budweiser*.¹² Another possible reason is that the (few) authors that wrote on the subject of Union Preemption provided several different definitions of that doctrine, which can be categorized in two main groups: competence-based definitions and legislation-based ones.

1.1. Competence-based definitions

The central feature of the competence-based definitions of preemption, is that the displacement of national legislation associated with the notion of preemption is linked to the *existence* of an EU competence in a certain area, rather than (or in addition) to its *exercise* through the adoption of EU legislation.

¹⁰ CAPPELLETTI, SECCOMBE & WEILER, “Integration through law: Europe and the American federal experience – A general introduction”, in CAPPELLETTI, SECCOMBE AND WEILER (Eds.), *Integration through Law: Europe and the American Federal Experience*, Vol.1 (de Gruyter, 1986), pp. 3–71, at 32.

¹¹ See ROBERT SCHÜTZE, ‘Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption’, (2006) 43 *Common Market Law Review*, 1023-1048 , at 1032.

¹² See Case C-478/07, *Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH (“Budweiser”)*, Opinion of Advocate General Ruiz-Jarabo Colomer, 2009 ECR I-07721, para 93 (“What we have here ultimately is the debate about Community ‘pre-emption’ of a measure and the situations in which the concurrent competences of the Member States in a particular field may have been displaced by the activity of the Community legislature.”)

Apart from some early contributions,¹³ that definition makes its first appearance in Weiler's 1981 work on Community supranationalism:

In its purest and most extreme form pre-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.¹⁴

That definition was criticized, several years later, by Schütze, as being unable to account for the great majority of federal disputes, which take place in a “gray area” between the two extremes of supremacy and preemption.¹⁵ Such a critique, however, seems to disregard the qualifying statement “In its purest and most extreme form”: later in his article, by employing almost the same words, Weiler clarifies that the definition above refers not to preemption as a whole, but specifically to Waelbroeck's “conceptualist-federalist” preemption type,¹⁶ which indeed entails the complete displacement of national lawmaking powers in a given field. The article, however, also mentions cases where the ECJ applied a more “pragmatic approach”,¹⁷ which “leaves the Member States concurrent competence with the Community” and can thus account for some, if not all, the federal disputes taking place in the said “grey area”.

Interestingly, in Weiler's definition, the principle of supremacy of EU law seems to play, if any, an ancillary role *vis-à-vis* preemption. That Author clarified that point in another article published in 1982:

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

¹³ See M. WAELBROECK, *Community preemption and related problems*, 1979; Jean-Victor Louis, ‘Quelques réflexions sur la répartition des compétences entre la communauté Européenne et ses états membres’, *Journal of European Integration*, Volume 2, Issue 3, 1979, pp. 355 – 374.

¹⁴ *Ibid.*, at 277.

¹⁵ See SCHÜTZE, above, at 1036.

¹⁶ *Ibid.*, at. 278 (“[T]here seems to be a shift by the Court from a ‘conceptualist-federal approach’ which corresponds to pre-emption *in its purest and most exclusive form* to a ‘pragmatic approach’, which leaves the Member States concurrent competence with the Community”. Emphasis added).

¹⁷ See Joined cases 3, 4 and 6/76, *Cornelis Kramer and others*, 1976 ECR 1279, para 39 (holding that since the Community had not “fully exercised its functions in the matter . . . the Member States had the power to assume commitments . . . [and] the right to ensure the application of those commitments within the area of their jurisdiction”)

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.*¹⁸

From that perspective – shared by Weatherill several years later¹⁹ – preemption appears to constitute the defining feature of a certain type of EU competences: the so-called exclusive competences.²⁰ As Schütze duly noted,²¹ Weiler himself equated the pre-emption phenomenon with that of exclusive competences in a subsequent work, where he employed his 1981 description of preemption to define the “principle of exclusive competence”.²²

Possibly the clearest indication of Weiler’s conception of preemption as a phenomenon linked indistinguishably to the existence of an EU competence or to its actual exercise is the following passage of his 1982 work on the relevance of law in the framework of European integration:

The obscurity of the [preemption] doctrine relates to the facts that there are no clear criteria as to the conditions under which legal/policy space will become thus occupied. There may be an explicit provision in the Treaty . . . or it may depend on the actual adoption of some measures in an area where a common policy is envisaged.²³

¹⁸ See KRISLOV, EHLERMANN & 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; J.H.H. WEILER, ‘Community, Member States and European Integration: Is the Law Relevant?’, (1982) 21 *Journal of Common Market Studies*, 48

¹⁹ See STEPHEN WEATHERILL, *Law and Integration in the European Union* (Clarendon Press, 1995), at pp. 136–7 (“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.”)

²⁰ See the definition of exclusive competence set out in Article 2(1) TFEU: “When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.”

²¹ See SCHÜTZE, above, at 1035, footnote 49.

²² See J.H.H. WEILER, *Il sistema comunitario europeo: struttura giuridica e processo politico* (Il Mulino, 1985) at p. 61 (“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.”)

²³ See J.H.H. WEILER, ‘Community, Member States and European Integration: Is the Law Relevant?’, (1982) 21 *Journal of Common Market Studies*, 39-55, at 48.

1.2. Legislation-based definitions

According to the legislation-based definitions of preemption, it is the actual enactment of an item of EU legislation that ousts national lawmaking in the area concerned.²⁴ Advocate General Colomer, in his opinion in *Budweiser*, clearly adopted that perspective in what still constitutes the only direct reference to Union Preemption in the European Court Reports:

What we have here ultimately is the debate about Community ‘pre-emption’ of a measure and the situations in which the concurrent competences of the Member States in a particular field may have been displaced *by the activity of the Community legislature*.

That approach also finds support in the definitions of shared EU competence introduced by the Treaty of Lisbon in Article 2(2) TFEU and in Protocol No. 25 on the Exercise of Shared Competence, which both refer to the consequences flowing from the “exercise” by the Union of its competences.²⁵

Self-evidently, the displacement of national lawmaking inherent in the notion of preemption can be univocally attributed to EU legislation only in areas where domestic regulation is *not* already precluded by the nature of the EU competence concerned. Put differently, the legislation-based definition of preemption is only concerned with the effects of EU legislation on national regulatory powers in areas of non-exclusive EU competence.²⁶

²⁴ See STEPHEN WEATHERILL, ‘Beyond preemption? Shared competence and constitutional change in the European Community’, in D. O’KEEFE & P. TWOMEY (eds), *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law, 1994), 13-33, 14.

²⁵ Article 2(2) TFEU (“When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not *exercised* its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.” Emphasis added.); Protocol No.25 on the Exercise of Shared Competence (“With reference to Article 2 of the Treaty on the Functioning of the European Union on shared competence, when the Union has *taken action* in a certain area, the scope of this *exercise of competence* only covers those elements governed by the *Union act* in question and therefore does not cover the whole area.” Emphasis added.)

²⁶ See ROBERT SCHÜTZE, ‘Dual federalism constitutionalised: the emergence of exclusive competences in the EC legal order’, (2007) 32 *European Law Review*, 3-28 p. 8-10 (contrasting the ECJ ruling in Joined Cases 37 and 38/73, *Sociaal Fonds voor de Diamantarbeiders v NV Indiamex et Association de fait De Belder*, 1973 ECR 1609, where the preclusion of national legislation is ambiguously linked both to the exclusivity of the Community competence in the area of Common Commercial Policy and to the existence of a specific regulation, with the decision in Case 41/76, *Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la République au tribunal de grande instance de Lille and Director General of Customs* 1976 ECR 1921).

A pivotal difference between the competence-based and the legislation-based definitions of preemption concerns the role of the principle of supremacy. In the latter approach, Union Preemption and the principle of primacy are inextricably intertwined, insofar as the former determines *when* a conflict between EU and national norms arises, while the latter determines *how* that conflict is to be resolved, i.e. through the disapplication of incompatible national legislation.

Building upon this intuition, already clearly articulated by Waelbroeck in 1982,²⁷ Schütze defined preemption as a “federal theory of normative conflict”, *viz.* a constitutional device for systematizing the species of conflict between different levels of legislation that occur in a particular federal legal order,²⁸ such as the American one.²⁹ In the EU context, the doctrine of preemption allows to identify several preemption “types”, each corresponding 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”.³⁰

1.3. Holistic and Atomistic Approaches to Normative Conflict

Having regard to the specific meaning attributed to the notion of “conflict”,³¹ legislation-based definitions of preemption can be further divided into holistic and atomistic. A clear example of the former, is Cross’ 1992 definition:

²⁷ See M. WAELBROECK, “The emergent doctrine of Community pre-emption – Consent and redelegation”, in Sandalow and Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe*, Vol. II (OUP, 1982), pp. 548–580, at 551 (“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.”)

²⁸ See ROBERT SCHÜTZE, ‘Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption’, at 1034.

²⁹ See G. GUNTHER, *Constitutional Law* (12th ed., New York: The Foundation Press, 1991) p. 291 (“In the framework of relations between the legal order of national government and that of the federated States, pre-emption covers situations where the application of laws issued by federal bodies preclude the corresponding regulatory powers of the States.”)

³⁰ See ROBERT SCHÜTZE, ‘Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption’, 1034.

³¹ It would be interesting, although beyond the scope of this work, to compare the notion of normative conflict for the purpose of the doctrine of preemption in federal and supranational systems with that employed in the context of public international law. See Jenks, ‘The conflict of lawmaking 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.”; *but see* Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP, 2003) (suggesting a broader notion of conflict between treaties).

“[P]reemption problems should be viewed . . . to include *all instances of actual and potential conflict* between Member State law and Community legislation.”³²

Cross, however, qualified that proposition specifying that preemption should be understood as concerning conflicts between EU and national “legislation” (“legislative preemption”), rather than between the latter and Treaty provisions (“constitutional preemption”).³³ Indeed, technically speaking, Treaty provisions cannot be regarded as “EU legislation”, but are attributable to the collectivity of the Member States.³⁴

Atomistic definitions, instead, link the notion of preemption with that of a specific type of normative conflict. According to Waelbroeck, for instance, pre-emption problems arise only in cases “where there is no outright conflict between federal (or Community) and state law” but the latter conflicts with “the general policy objectives” pursued by the former.³⁵

1.4. A Stipulative Definition of Union Preemption

Having regard to the scope and purpose of this work, the stipulative definition of preemption that most suits it is legislation-based and holistic.³⁶ While prior to the inclusion in the TFEU of a competence catalogue it was difficult to tell whether the displacement of national law was attributable to the exclusive nature of the EU competence or to the preemptive effects of EU legislation, Article 3(1) TFEU, introduced by the Treaty of Lisbon, exhaustively enumerates

³² See EUGENE DANIEL CROSS, ‘Pre-emption of Member State law in the European Economic Community: A framework for analysis’, (1992) 29 *Common Market Law Review*, 447-472, 453.

³³ *Ibid.* (“Preemption analysis should be understood as analysis of competing legislation, not as an analysis of conflicts that are strictly and exclusively between Member State law and Treaty provisions”). The distinction between constitutional and legislative preemption, alien to Waelbroeck’s model, is illustrated in SCHÜTZE, ‘Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption’, 1039.

³⁴ See ROBERT SCHÜTZE, ‘The morphology of legislative power in the European Community: legal instruments and the federal division of powers’, (2007) 25 *Yearbook of European Law* 2006, 91-151, at 106 (“The collectivity of the Member States—not the Community—thus constitutes the author of the constitutional norm [i.e. the Treaties]. In the Community legal order of today, constitutional legislation is, therefore, not *Community* legislation”).

³⁵ See M. WAELBROECK, “The emergent doctrine of Community pre-emption – Consent and redelegation”, in Sandalow and Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe*, Vol. II (OUP, 1982), pp. 548–580, at 550.

³⁶ See BRUNO LEONI, *Freedom and the law* (Princeton, N.J.: Van Nostrand, 1961), p. 12 (“It is customary to distinguish “stipulative” from “lexicographic” definitions. Both are descriptive of the meaning attached to a word; but the former refers to a meaning that the author of the definition proposes to adopt for the word in question, whereas the latter refers to the meaning that ordinary people give to the word in common usage).

exclusive EU competences. This work, therefore, focuses on the effects of EU legislation on national legislative powers³⁷ in areas of non-exclusive EU competence.

The doctrine of Union Preemption, therefore, is the theory that determines when there exists a conflict between national and EU legislation adopted in an area of non-exclusive EU competence. Determining the existence of a normative conflict, however, would be of little worth in itself, were it not the precondition for the resolution of that conflict through the application of the principle of primacy of EU law. Relying upon Kelsen's basic form of the rule of law,³⁸ the principle of primacy can be formulated as follows: "when national law *is* in conflict with EU law, EU law *ought to* be accorded precedence". As Union Preemption fills with content the first part of this formula, it can be described as the "material scope" of the principle of primacy, the two being indeed "sides of the same coin".³⁹

Having regard to its interaction with the principle of supremacy, Union Preemption can be functionally defined as *an effect of EU legislation*: that of ousting, in whole or in part, national lawmaking powers from non-exclusive competence areas. It follows that, the broader the notion of "conflict" inherent in the concept of Union Preemption, the wider the scope of national lawmaking competence displaced by EU legislation. The distinction between different preemption types will be examined both in the context of the US Federal preemption doctrine (Section 2) and of Union Preemption (Section 3).

2. The Precursor of Union Preemption: the US Doctrine of Federal Preemption

The doctrine of Union Preemption is complex and multifaceted: not only it has different levels of intensity (preemption "types"), but it also manifests itself in different ways (preemption "modes").⁴⁰ Most of the authors that wrote on the subject of Union Preemption have employed categories drawn from the US doctrine of Federal Preemption.⁴¹ It is indeed in US constitutional

³⁷ This work, therefore, does not address the distinct issue of "executive preemption", *viz.* the impact of EU legislation on national enforcement powers. See ROBERT SCHÜTZE, 'From Rome to Lisbon: "Executive Federalism" in the (new) European Union, (2010) 47 Common Market Law Review 1385, 1402-1405.

³⁸ See HANS KELSEN, *Pure Theory of Law* (Trans. from the 2nd German Edn. by Max Knight, Berkeley: University of California Press, 1967, Reprinted 2005) 77, 89-90 ("If *a* is, then *b* ought to be").

³⁹ See J.H.H. WEILER, 'Community, Member States and European Integration: Is the Law Relevant?', (1982) 21 *Journal of Common Market Studies*, 47-48.

⁴⁰ On the distinction between preemption "types" and "modes", see ROBERT SCHÜTZE, *From dual to cooperative federalism: the changing structure of European law* (OUP 2009), 99.

⁴¹ Although in the US federal preemption is almost certainly one of the most frequently used doctrine of constitutional law in practice, remarkably few are the scholarly reflections on the nature of that doctrine. See, *e.g.*,

law that the doctrine of preemption first emerged. Thus, before dwelling upon Union Preemption “modes” and “types” it is appropriate to examine that doctrine in its original legal context. That in turn postulates a brief comparison of the two legal systems in order to identify the key structural differences that, in each of them, are relevant to the topic of preemption.

2.1. Structural differences between US and EU federalism relevant to the topic of preemption

2.1.1. US and EU as comparable “Federal Systems”

As mentioned earlier, some authors sought to classify Union Preemption employing terminology used in respect of its American counterpart. As a preliminary point, however, it could be questioned whether it is epistemologically tenable to apply legal categories derived from a federal state to an entity whose statehood is generally contested, but whose *sui generis* characteristics make its classification as a typical international organization equally unpersuasive.⁴²

American constitutionalism suggests, however, that federalism can exist beyond the State: Americans themselves have not always thought of their Union as a federal state.⁴³ As Zoller put it, federalism can be conceived as an “in-between” in a continuum between, on the one hand, international phenomena (including confederations of states) and, on the other one, national entities such as federal states,⁴⁴ so that both the US and the EU can be caught in this federal “middle ground”.⁴⁵

David E. ENGBAHL, *Constitutional Federalism* (1987); David E. ENGBAHL, ‘Preemptive Capability of Federal Power’ 45 *U. Colo. L. Rev.* 51 (1973); S. CANDICE HOKE, ‘Preemptive Pathologies and Civic Republican Values’, 71 *B.U. L. Rev.* 685 (1991); S. CANDICE HOKE, ‘Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause’, 24 *Conn. L. Rev.* 829 (1992); STEPHEN A. GARDBAUM, ‘The Nature of Preemption’, (1994) 79 *Cornell Law Review*, 767; Michael S. GREVE, Richard EPSTEIN (eds.) *Federal Preemption: States’ Powers, National Interests* (AEI Press, 2007).

⁴² See, generally, INGOLF PERNICE, ‘The Treaty of Lisbon: Multilevel Constitutionalism in Action’, (2009) 15 *Colum. J. Eur. L.* 349; J.H.H. WEILER, JOEL P. TRACHTMAN, ‘European Constitutionalism and its Discontents’, 17 *Nw. J. Int’l L. & Bus.* 354

⁴³ ROBERT SCHÜTZE, *From dual to cooperative federalism: the changing structure of European law* (OUP 2009), 4.

⁴⁴ E. ZOLLER, ‘Aspects internationaux du droit constitutionnel, Contribution à une théorie de la fédération d’Etats’, 294 *Recueil Des Cours de L’Académie de Droit International de la Haye* 41 (2002), at 73 and 149.

⁴⁵ See ROBERT SCHÜTZE, ‘On “federal” Ground: The European Union as an (Inter)national Phenomenon’, (2009) 46 *Common Market Law Review*, 1069–1105, 1102–1105 (arguing that, in combining international and national elements, the EU stands on a federal “middle ground” and can thus be classified, in accordance with the American tradition, as a “federal union” or a “federation of States”); J.H.H. WEILER, ‘Community system: The dual character of supranationalism’, (1981) 1 *Yearbook of European Law*, 267–306 (referring to the Community as a “federal

As two “federal systems”,⁴⁶ US and EU can thus be compared,⁴⁷ and so can the constitutional frameworks fashioned by their supreme courts,⁴⁸ provided that, as Pernice put it, their “existing structural differences” are taken into account.⁴⁹ With specific regard to the doctrine of preemption, Aaken indeed noted that misunderstandings are likely to arise not so much from the transposition of legal terms, but rather from an inadequate appreciation of the profound institutional differences between US and the EU.⁵⁰ It is thus to the distinctive features of the two federal systems directly relevant to the topic of preemption that this work now turns.

2.1.2. Original design and evolutionary trends in the vertical division of powers

The US federal model is based upon a system of dual sovereignty between the states and the federal government in which the states (and the people) retain a residuary and inviolable sovereignty as per the Tenth Amendment.⁵¹ Ever since the inception of the American federal

model” in the widest sense of sharing in governance as defined by D. Elazar (ed.) *Self Rule/Shared Rule* (Turtledove 1979) 3).

⁴⁶ See INGOLF PERNICE, “Harmonization of Legislations in Federal Systems: Constitutional, Federal and Subsidiarity Aspects” in INGOLF PERNICE (Ed.) *Harmonization of Legislations in Federal Systems*, 14 (“[A] ‘federal system’ is any legal entity comprised of states for the purpose of pursuing certain common ends and which has been given, to this effect, the power to exercise limited but direct jurisdiction over their citizens, but where for all other fields of public action the individual states maintain their full autonomy. This definition, therefore, includes federal states, but does not necessarily mean that only states can be a federal system”).

⁴⁷ It is noteworthy that, in the field of Political Sciences, against the background of the International Relations approaches concerned about the integration between distinct political systems within the framework of an international or supranational organization, the most recent trend in Comparative Politics is to regard the EU as a political system in its own right, that can be analyzed and compared to other political systems such as the US. See e.g. M.P. EGAN, *Constructing a European Market: Standards, Regulation and Governance* (Oxford University Press, 2001); B. GUASTAFERRO, ‘L’Unione europea e la sineddoche democratica. Riflessioni sull’Unione europea quale “democrazia composita”’, 2006 *Il Filangieri* 195; L. HOOGHE AND G. MARKS, *Multilevel Governance and European Integration* (Rowman and Littlefield, 2001); ; H. WALLACE and W. WALLACE, *Policy Making in the European Union*, Oxford University Press, 2000; G. MAJONE, *Regulating Europe* (Routledge, 1996); D. MCKAY, *Designing Europe: Comparative Lessons from the Federal Experience* (Oxford University Press, 2001); A. SBRAGIA, ‘Thinking about the European Future: The Uses of Comparison’, in A. SBRAGIA (ed.) *Europolitics: Institutions and Policy-Making in the New European Community* (Washington, DC: The Brooking Institution, 1992).

⁴⁸ See E. STEIN, ‘Lawyers, Judges, and the Making of a Transnational Constitution’, 75 *The American Journal of International Law* 1 (1981), at 1 (“[T]he Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe . . . has construed the European Community Treaties in a constitutional mode rather than employing the traditional international law methodology”).

⁴⁹ *Ibid.*, at 18. But see JAMES BUCHANAN, ‘Europe as a social reality’, 7(4) *Constitutional Political Economy* 253-256, at 253 (“Europe, as observed does not correspond to the theorists’ model fro political federalism, and the course of history remains open as to whether or not any approximation to this model will ultimately be realized.”)

⁵⁰ See A. VAN AAKEN, ‘Supremacy and Preemption: a View from Europe’, in R. EPSTEIN & M. GREVE (eds.) *Federal preemption: States’ Powers, National Interests* (AEI Press, 2007), 277-307, at 278.

⁵¹ See *Lombardo v. Pennsylvania, Dept. of Public Welfare*, 540 F.3d 190 (3d Cir. 2008).

experience, the US Constitution has expressly enumerated the powers granted by the people to the federal government,⁵² which thus can be defined as a government of limited, enumerated, and delegated powers.⁵³

The purpose of such a sharp division of powers between the federal and state governments, as clarified by the Supreme Court, is to protect the liberty of individual citizens from excessive concentration of power in a central government.⁵⁴ That concern, mainly voiced by the Anti-Federalists,⁵⁵ ultimately led to the Massachusetts compromise and to the incorporation of the Bill of Rights, and notably of the Tenth Amendment, into the US Constitution. Although waves of centrifugal and centripetal trends have occurred since then,⁵⁶ the words “to form a more perfect Union” in the Preamble to the Federal Constitution emblematically capture the latter’s *static* vocation to “preserve” and “maintain” an accomplished model of vertical division of powers.⁵⁷

The contrast with the *dynamic* nature of EU federalism is striking. The Treaty of Rome, in its 1957 version, clearly set out the founding members’ ongoing commitment to create “an ever closer union”, whose cornerstone was the establishment of the single market. Rather than

⁵² US Const. Art. I, § 8

⁵³ See, e.g., *New York v. US*, 505 US 144 (1992); *Bute v. People of State of Ill.*, 333 US 640 (1948).

⁵⁴ See *Frank v. US*, 78 F.3d 815 (2d Cir. 1996), cert. granted, judgment vacated on other grounds, 521 US 1114, 117 S. Ct. 2501, 138 L. Ed. 2d 1007 (1997).

⁵⁵ See ROBERT YATES, ‘Powers of National Government Dangerous to State Governments; New York as an Example – Antifederalist No. 45’, in *New York Daily Patriotic Register*, June 13 and 14, 1788 (“[T]he general government, when completely organized, will absorb all those powers of the state which the framers of its constitution had declared should be only exercised by the representatives of the people of the state; . . . In a word, the new constitution will prove finally to dissolve all the power of the several state legislatures, and destroy the rights and liberties of the people; for the power of the first will be all in all, and of the latter a mere shadow and form without substance, and if adopted we may (in imitation of the Carthaginians) say, ‘Delenda vit [sic] America.’”); *But see* James MADISON, *The Federalist*, no. 45, 313-314 (“The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite.”)

⁵⁶ See INGOLF PERNICE, “Harmonization of Legislations in Federal Systems: Constitutional, Federal and Subsidiarity Aspects” in INGOLF PERNICE (Ed.) *Harmonization of Legislations in Federal Systems*, 13 (“In the US, a long initial period of *dual federalism* characterized by limited federal activities was followed by a period of *cooperative federalism* which led, under Presidents Kennedy and Johnson, to what was called *creative federalism*. An important move back to more substate responsibilities, however, was initiated by Richard Nixon and Ronald Reagan under the ‘rhetoric’ of *New Federalism*, and Bill Clinton’s *National Performance Review* continues the move for decentralization of the decision-making power.”) (Footnotes omitted)

⁵⁷ See *Carter v. Carter Coal Co.*, 298 US 238 (1936) (“There can be no loss of separate and independent autonomy to the states through their union under the Constitution since *the preservation of the states and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government*. . . . The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the Federal Constitution.”)

enumerating the competences of the Community, the Treaty laid down its objectives and the means to pursue them, including that to take the appropriate measures to pursue those objectives for the attainment of which the Treaty had not provided the necessary powers. The principle of conferral, functionally equivalent to the US Constitution Tenth Amendment, obtained primary law status only with the Treaty of Maastricht in November 1993, along with the principles of subsidiarity and proportionality. Although several attempts have been made to incorporate a competence catalogue in the text of the Treaties,⁵⁸ that was only accomplished with the Treaty of Lisbon as late as in December 2009. The vague and open ended definition of EU competences, the initial absence of substantive restraints, and the expansion and intensification of the EU powers as a result of successive amendments of the Treaties allowed the European institutions, namely the European Commission and the Court of Justice, to engineer a sizeable centripetal competence creep, which appears to be still in progress.

2.1.3. Relationship between the federal and the state level

One of the basic assumptions of US dual federalism is that, although the federal government and the states exist within the same territorial limits, each is simultaneously supreme within its sphere,⁵⁹ and is required to exercise its powers so as not to interfere with those attributed to the other (the so-called “principle of non-interference”).⁶⁰

The powers which are delegated by the Constitution to the federal government are, accordingly, comprehensive and complete, and do not require implementation by states.⁶¹ This

⁵⁸ The incorporation of a competence catalogue in the text of the Treaty was first attempted in with the Draft Treaty Establishing the European Union (1984) and later by the Treaty Establishing a Constitution for Europe (2004), neither of which entered into force. *See also* Communication of the Commission to the Council and the European Parliament, *The principle of subsidiarity*, October 27, 1992, SEC (92) 1990 final, at 7 (suggesting a list of exclusive Community competences); European Commission, White Paper on European Governance, July 25, 2001, COM(2001) 428 final, at 35 (advocating clear rules on competence-sharing between the EU and Member States).

⁵⁹ *See, e.g., Carter v. Carter Coal Co.*, 298 US 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936); *United States v. Sprague*, 282 US 716, 51 S. Ct. 220, 75 L. Ed. 640, 71 A.L.R. 1381 (1931).

⁶⁰ *See, e.g., Pacific Co. v. Johnson*, 285 US 480, 52 S. Ct. 424, 76 L. Ed. 893 (1932); *Boeing Aircraft Co. v. Reconstruction Finance Corp.*, 25 Wash. 2d 652, 171 P.2d 838, 168 A.L.R. 539 (1946). *See also Mayo v. US*, 319 US 441 (1943) (holding that no state may interfere with the free and unembarrassed exercise by the federal government of all powers conferred upon it).

⁶¹ *See Atlantic Coast Line R. Co. v. Riverside Mills*, 219 US 186 (1911); *US Nat. Bank of Omaha, Neb. v. Pamp*, 77 F.2d 9 (C.C.A. 8th Cir. 1935).

calls for a large centralized bureaucracy, totaling 2,748,978 federal employees as of 2009.⁶² By the same token, each state has broad powers to order its own affairs and govern its own people:⁶³ as the Supreme Court put it in *Addington*, the very essence of federalism is that the states must be free to develop a variety of solutions to problems, not be forced into a common, uniform mold.⁶⁴

Another corollary of the principle of non-interference is the ban on federal commandeering of State sovereignty. In *New York v. US*, the Supreme Court held that, even in subject matters falling within the federal purview, the Constitution does not empower Congress to coerce States into enacting and enforcing a federal regulatory program,⁶⁵ no matter how powerful the federal interests that may be involved in a particular matter, as that would be contrary to the Tenth Amendment.⁶⁶ Even though Congress may induce States to comply by attaching conditions on the receipt of federal funds,⁶⁷ “cooperative federalism” in the US is the exception, rather than the rule.

In areas of federal competence, however, Congress can regulate certain matters directly and preempt state regulation contrary to federal enactments.⁶⁸ The US Federal Constitution includes an express Supremacy Clause:⁶⁹ accordingly, State laws contrary to a valid act of Congress are void.⁷⁰ Conflicts between state and federal law can be established by every court, including the US Supreme Court, but are not to be sought where none clearly exist.⁷¹

⁶² See US Office of Personnel Management, Federal Employment Statistics, 2010. Employees with security agencies (CIA, NSA, etc) as well as the National Imagery and Mapping Agency are not included in this figure. 97.6% of civilian federal employees work in the executive branch of government.

⁶³ See, e.g., *Cook v. City of Delta*, 100 Colo. 7 (1937); *Home Owners' Loan Corp. v. Ariens*, 21 N.J. Misc. 339 (Dist. Ct. 1943); *Kelly v. State*, 139 Tex. Crim. 156 (1940).

⁶⁴ See *Addington v. Texas*, 441 US 418 (1979).

⁶⁵ See *New York v. US*, 505 US 144 (1992) (holding that a federal bill compelling States to enact legislation to provide for radioactive waste disposal violates the Tenth Amendment); *Printz v. United States*, 521 US 898 (1997) (holding that a federal scheme allowing the Federal government to draft the police officers of the fifty states into its service would increase its powers far beyond what the Constitution intends).

⁶⁶ See *State of Tex. v. US*, 106 F.3d 661 (5th Cir. 1997).

⁶⁷ See *New York v. United States*, 505 US 144, 145 (1992)

⁶⁸ *Ibid.*, at 145 (“[W]here Congress has the authority to regulate private activity under the Commerce Clause, it may, as part of a program of ‘cooperative federalism,’ offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.”).

⁶⁹ US Const. Art. VI, § 2

⁷⁰ See *Perez v. Campbell*, 402 US 637 (1971).

⁷¹ See *Huron Portland Cement Co. v. City of Detroit, Mich.*, 362 US 440 (1960).

In contrast, EU “cooperative” or “executive” federalism⁷² is based on the principle of sincere cooperation, expressly set out in the Treaty since 1957, pursuant to which the Union and the Member States must, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. As Weatherill put it, at the heart of the EU lies a pattern of “indirect rule”, according to which rule-making is located at the transnational level while implementation and enforcement is entrusted to national structures of law and administration.⁷³ Directives adopted by European institutions, at least according to the definition provided by the drafters, are expressly designed to achieve this form of multilevel governance,⁷⁴ which allows the EU to operate with a staff of only of 33,681 civil servants in 2009,⁷⁵ as opposed to some 2,7 million US federal employees. In short, “commandeering” is perfectly admissible in the EU.⁷⁶

As the achievement of EU goals is, except for some matters such as those falling within the EU exclusive competences, entirely dependent on the cooperation with national authorities, EU federalism devised some mechanisms to detect and to deal with the cases in which such collaboration does not take place. Two of them were, albeit not in their full-blown version, already present in the Treaty of Rome in 1957: the preliminary ruling and the enforcement procedure (at the time devoid of pecuniary sanctions). The most important ones, however, were introduced by the ECJ: direct effect, primacy, consistent interpretation, and State liability. Those doctrines transformed the preliminary ruling procedure into a formidable enforcement mechanism: although the ECJ in the context of that procedure can neither invalidate national legislation incompatible with EU law nor impose sanctions on Member States, a preliminary ruling establishing that EU law must be interpreted “as precluding” a certain national rule or that the three State liability requirements laid down in *Brasserie* have been met means that national courts should, respectively, disapply the relevant national provision or award damages against that Member State. Preliminary rulings have become also an effective tool to monitor compliance

⁷² See PHILIPP DANN, *Parlamente im Exekutivföderalismus* (Berlin, Springer, 2004).

⁷³ See STEPHEN WEATHERILL, ‘Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market’, in CATHERINE BARNARD & JOANNE SCOTT (eds), *The Law of the Single European Market* (Hart Publishing, 2002), 41-73, at 66-67 (citing T. Daintith (ed.) *Implementing EC Law in the UK: Structures for Indirect Rule* (Chichester, Deventer, Wiley, 1995).

⁷⁴ See generally N. BERNARD, *Multilevel governance in the EU* (Kluwer, The Hague, 2002); L. HOOGHE and G. MARKS, *Multilevel Governance and European Integration* (Rowman and Littlefield, 2001).

⁷⁵ See European Commission, Human Resources Key Figures Card (2009), available at: http://ec.europa.eu/civil_service/docs/key_figures_2009_externe_en.pdf

⁷⁶ See A. VAN AAKEN, ‘Supremacy and Preemption: a View from Europe’, in R. EPSTEIN & M. GREVE (eds.) *Federal preemption: States’ Powers, National Interests* (AEI Press, 2007), 277-307, at 281.

by Member States with EU law, as in case of non-compliance interested parties have an interest to bring an action before national courts and to seek a reference for a preliminary ruling to the ECJ.

2.2. Modes and types of the US Doctrine of Federal Preemption

2.2.1. The *Rice* Presumption Against Preemption

It is well-established that Congress has the power to preempt state laws.⁷⁷ The central issue in preemption cases is whether Congress has in fact exercised that power.⁷⁸ The dual character of US federalism and namely the principle of non-interference played a substantial role in the development of the doctrine of preemption.

The word “preemption” made its first appearance, in its current sense, in the Supreme Court’s opinion in *Winfield* in 1917.⁷⁹ At the time, the *Lochner* Court applied a preemption doctrine of “latent exclusivity”: as soon as Congress exercised its enumerated powers it displaced state regulation in the entire field, regardless of an actual conflict between the two sets of laws and of a Congressional intent to oust State legislation. Such an automatic application of preemption fully reflected the idea of dual federalism as involving two separate levels of government, each is simultaneously supreme within its sphere.⁸⁰ As the federal power to regulate interstate commerce expanded during the New Deal so as to include the power to regulate commerce *within* the

⁷⁷ *Northwest Central Pipeline Corp. v. State Corp. Com’n of Kansas*, 489 US 493, 109 S. Ct. 1262, 103 L. Ed. 2d 509 (1989); *Fidelity Federal Sav. & Loan Ass’n v. de la Cuesta*, 458 US 141, 152 (1982) (“The pre-emption doctrine . . . has its roots in the Supremacy Clause”). *But see* STEPHEN A. GARDBAUM, ‘The Nature of Preemption’, (1994) 79 Cornell Law Review, 767, 770 (questioning the proposition that supremacy and preemption are necessarily connected and arguing that those doctrines are “quite distinct legal concepts and constitute two alternative methods of regulating the relationship between concurrent federal and state powers”).

⁷⁸ *See, e.g.*, W. COHEN, ‘Congressional Power to Define State Power to Regulate Commerce: Consent and Preemption’ in SANDALOW & STEIN (eds.) *Courts and Free Markets: Perspectives from the United States and Europe* 523, 537 (“Congress’s power to preempt state laws which affect interstate commerce is . . . unquestioned . . . With reference to pre-emption, the problem has been to define the standards for deciding when Congress has in fact exercised that power.” And, “thus, the issue, in pre-emption cases, simply stated, is not what Congress has the power to do, but what Congress has done.”).

⁷⁹ *See N.Y. Cent. R.R. v. Winfield*, 244 US 147, 169 (1917) (cited in R. EPSTEIN & M. GREVE, ‘Introduction – Preemption in Context’, in R. EPSTEIN & M. GREVE (eds.) *Federal preemption: states’ powers, national interests*, in (AEI Press, 2007), 11).

⁸⁰ *See Carter v. Carter Coal Co.*, 298 US 238 (1936); *United States v. Sprague*, 282 US 716 (1931).

states,⁸¹ however, application of the preemption doctrine of “latent exclusivity” would have implied a wholesale collapse into the center.⁸²

The Supreme Court, therefore, espoused a more attenuated doctrine of federal preemption focusing on Congressional intent to displace state law and entailing a presumption *against* preemption. *Rice*, which is still regarded as the controlling precedent in preemption matters, enunciated that new standards in areas “traditionally regulated by States”⁸³ or involving the “historic police powers of States”,⁸⁴ but they gradually expanded to “all preemption cases”.⁸⁵ In *Dublino* the Court further noted that preemption of State laws “is not lightly to be presumed”.⁸⁶ In *Dalton* it held that in preemption cases state law should be displaced only to the extent that it actually conflicts with a federal law, and that a federal court should not extend its invalidation of a state statute any further than necessary to dispose of the case before it.⁸⁷

The modern preemption analysis, therefore, starts with the basic assumption that Congress did not intend to displace the state law,⁸⁸ unless there is a “clear and manifest purpose of Congress”.⁸⁹ This assumption provides assurance that the federal–state balance,⁹⁰ will not be

⁸¹ See *Wickard v. Filburn*, 317 US 111, 124 (1942) (“The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.”)

⁸² See S. GARDBAUM, ‘The Breath vs. the Depth of Congress’s Commerce Power: the Curious History of Preemption during the *Lochner* Era’, in R. EPSTEIN & M. GREVE (eds.) *Federal preemption: states’ powers, national interests?*, in (AEI Press, 2007), 68.

⁸³ See *California v. ARC America Corp.*, 490 US 93 (1989).

⁸⁴ See *Rice v. Santa Fe Elevator*, 331 US 218, 230 (1947); *Cipollone v. Liggett Group, Inc.*, 505 US 504, 518 (1992) (“we must construe these provisions in light of the presumption against the pre-emption of state police power regulations”). See also, *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 US 767, 780 (1947) (“Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States”) (opinion of Frankfurter, J.)

⁸⁵ *Medtronic, Inc. v. Lohr*, 518 US 470, 485 (1996) (“[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In *all pre-emption cases* . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”)

⁸⁶ See *New York State Department of Social Services v. Dublino*, 413 US 405, 413.

⁸⁷ See *Dalton v. Little Rock Family Planning Services*, 516 US 474, (1996). See also *Kelly v. State of Washington ex rel. Foss Co.*, 302 US 1 (1937) (holding that a state law is superseded by a congressional law only to such an extent as the two are inconsistent).

⁸⁸ See *Building and Const. Trades Council of Metropolitan Dist. v. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc.*, 507 US 218 (1993); 331 US 218, 230.

⁸⁹ See *Rice v. Santa Fe Elevator*, 331 US 218, 230 (1947).

⁹⁰ See *United States v. Bass*, 404 US 336, 349 (1971). See also, *Cipollone v. Liggett Group, Inc.*, 505 US 504, 533 (1992) (“The principles of federalism and respect for state sovereignty that underlie the Court’s reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously.”)

disturbed unintentionally by Congress or unnecessarily by the courts.⁹¹ Once again, the influence of the non-interference principle is self-evident.

2.2.2. Express and Implied Preemption

The *Rice* presumption against preemption can be rebutted if Congressional intent to preempt state laws is either “explicitly stated in the statute’s language” (“express preemption”) or “implicitly contained in its structure and purpose” (“implied preemption”).⁹²

The explicit statements in the language of a statute of the Congressional intent to preempt state law are usually referred to as an “express preemption clauses”.⁹³ The presence of such clauses obviates the need for further scrutiny into Congressional intent,⁹⁴ but often leaves the question open as to the actual scope of individual preemption clauses and the potential for implied preemption of matters beyond the language of those clauses.

As a rule, courts are not inclined to uphold preemption claims in areas beyond the reach of express preemption clauses.⁹⁵ For instance, an act of Congress may occupy only a limited portion of the field of regulation of a particular subject matter, leaving unimpaired the right of the several states to enact regulations covering other aspects of the subject.⁹⁶ The Supreme Court held that state law is not preempted where the activity regulated by Congress is a merely peripheral concern of federal law.⁹⁷ Scholars such as Young, in turn, argued that, in express preemption

⁹¹ See *Jones v. Rath Packing Co.*, 430 US 519, 525 (1977).

⁹² See *City of Burbank v. Lockheed Air Terminal Inc.*, 411 US 624, 633; *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 US 141, 152–53 (1982) (“Pre-emption may be either express or implied”)

⁹³ See, e.g., Fair Packaging and Labeling Act, 15 USC.A. 1461 (“It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of section 1453 of this title or regulations promulgated pursuant thereto.”)

⁹⁴ See *Cipollone v. Liggett Group, Inc.*, 505 US 504, 517 (1992). (“When Congress has considered the issue of preemption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a ‘reliable indicium of congressional intent with respect to state authority’ (citation omitted) ‘there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation.’ (citation omitted)”)

⁹⁵ *Id.*, (“Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted. . . . Therefore, we need only identify the domain expressly pre-empted by each of those sections.”)

⁹⁶ See *Hartford Accident & Indemnity Co. v. People of State of Illinois ex rel. McLaughlin*, 298 US 155 (1945).

⁹⁷ See *Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 US 311 (1981).

cases, only “extreme conflicts” should be recognized as warranting preemption beyond the express mandate, and that, at any rate, courts should never find implied field preemption.⁹⁸

Conversely, Congress may explicitly exclude preemptive effects of a federal enactment by way of an “express saving clause”. It is well-established that Congress may by statute consent to state legislation within a particular area.⁹⁹ The Court, however, has repeatedly declined to give broad effect to saving clauses where so doing would “upset the careful regulatory scheme established by federal law”¹⁰⁰ or allow State laws in actual conflict with the federal enactment to remain in place.¹⁰¹

If the statutory language contains no express indication as to the preemptive effect of the federal enactment concerned, implied Congressional intent is examined according to a framework which the Supreme Court best summarized in *Pacific Gas*:

Absent explicit preemptive language, 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 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.¹⁰²

⁹⁸ See E. A. YOUNG, ‘Federal Preemption and State Autonomy’, in R. EPSTEIN & M. GREVE (eds.) *Federal preemption: states’ powers, national interests*, in (AEI Press, 2007), 265.

⁹⁹ See *City of Philadelphia v. New Jersey*, 437 US 617 (1978).

¹⁰⁰ See, e.g., *United States v. Locke*, 529 US 89, 106 (2000); See, also, *Morales v. Trans World Airlines, Inc.*, 504 US 374, 385 (1992); *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 US 214, 227-228 (1998).

¹⁰¹ See *Geier v. Am. Honda Motor Co.*, 529 US 861, 872 (2000) (“To the extent that such an interpretation of the saving provision reads into a particular federal law toleration of a conflict that those principles would otherwise forbid, it permits that law to defeat its own objectives, or potentially . . . to destroy itself”.)

¹⁰² See *Pacific Gas & Electric Co v. State Energy Resources Conservation & Development Commission*, 461 US 190, 203-4 (1983).

From an analytical reading of that passage and of several similar ones, it is possible to distinguish three types of preemption, which will be examined seriatim: “field preemption”, “obstacle preemption”, and “rule preemption”.

2.2.3. Field Preemption

“Field preemption” takes place when Congress has “entirely displaced state regulation in a specific area” or has evidenced an intent to “occupy an entire field” ousting any state law falling within that field,¹⁰³ including those state laws that pursue the same aims underlying the federal intervention more aggressively than the latter.¹⁰⁴

Unlike other preemption types, field preemption involves no “actual conflict” between state and federal enactments.¹⁰⁵ The Supreme Court, however, conceded that field preemption can be understood as a species of conflict preemption insofar as the adoption of a state law in a preempted field “conflicts with Congress’ intent (either express or plainly implied) to exclude state regulation” in that sector.¹⁰⁶ Accordingly, American constitutionalists such as Tribe regard field preemption as “a facet of ordinary preemption of conflicting state laws”.¹⁰⁷

In *Rice*, the Supreme Court summarized some of the *indicia* that had led to a finding of field preemption in previous cases:¹⁰⁸ the dominance of the federal interest in the field,¹⁰⁹ the pervasiveness of the federal scheme,¹¹⁰ and the object it seeks and the obligations it imposes.¹¹¹ However, in *Hillsborough County* the Court promised that in the area of health and safety it

¹⁰³ See *Silkwood v. Kerr-McGee Corp.*, 464 US 238, 248 (1984) (“If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted”).

¹⁰⁴ But see *California v. ARC America Corp.*, 490 US 93 (1989) (rejecting the argument that the federal antitrust principle whereby only first purchasers from the violating monopolist or cartel can recover treble damages preempted state statutes conferring a state cause of action for treble damages also on downstream purchasers); *De Canas v. Bica*, 424 US 351 (1976) (upholding a State statutory scheme that imposed criminal sanctions against employers who knowingly hired aliens contrary to federal employment rules concerning aliens).

¹⁰⁵ See TRIBE, *American Constitutional Law*, (Foundation Press, 2000, 3rd Ed.) 1204–05.

¹⁰⁶ See *English v. General Electric Co.*, 496 US 72 (1990), 79 note 5

¹⁰⁷ See TRIBE, above, at 1205

¹⁰⁸ See *Rice v. Santa Fe Elevator Corp.*, 331 US 218, 230 (1947)

¹⁰⁹ See *Hines v. Davidowitz*, 312 US 52, 63 (1941) (“Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference”)

¹¹⁰ See *Pennsylvania R. Co. v. Public Service Commission*, 250 US 566, 569 (1919) (Holding that the “careful” requirements of the Safety Appliance Act and “most elaborate” regulation issued by the Interstate Commerce Commission precluded Pennsylvania from imposing additional obligations). See also *Cloverleaf Butter Co. v. Patterson*, 315 US 148 (1942).

¹¹¹ See, e.g., *Southern R. Co. v. Railroad Commission*, 236 US 439; *Charleston & W.C.R. Co. v. Varnville Furniture Co.*, 237 US 597; *New York Central R. Co. v. Winfield*, 244 US 147.

would seldom infer field preemption “solely from the comprehensiveness of federal regulation”.¹¹² Moreover, in *English v. General Electric* it clarified that the scope of the preempted field should be narrowly construed, so that only State laws having “some direct and substantial effect” on the federal scheme would actually be preempted.¹¹³

2.2.4. Obstacle preemption and Rule preemption

As the Supreme Court held in *Silkwood*, “If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with federal law”.¹¹⁴ That “actual conflict” arises in two cases: “when it is impossible to comply with both state and federal law” (“rule preemption”) and “where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress” (“obstacle preemption”).

Obstacle preemption is, possibly, the most conceptually vague of the three preemption types. As the Court put it in *Hines*, that type of preemption occurs when State law “stands as an obstacle to the accomplishment and execution of the *full purpose and objectives* of Congress”¹¹⁵ or, as it stated in *Perez*, when “state legislation . . . frustrates the *full effectiveness* of federal law”.¹¹⁶ In those cases, Congressional intention to preempt State law must be presumed.¹¹⁷

In the light of those broad statements, establishing a clear normative threshold for obstacle preemption from the Court’s jurisprudence is something of a daunting task: in *City of Burbank*, the Court held that a state ordinance was preempted because it “severely” impeded the functioning of a federal scheme¹¹⁸; in *International Paper Co.*, the Court appeared eager to strike down state common law claims that would have constituted a “serious interference” to the aims pursued by the Clean Water Act;¹¹⁹ in *Commonwealth Edison*, instead, the Court apparently imposed a higher burden, noting that it was necessary to look beyond general expressions of “national policy” to specific federal statutes with which the state law was claimed to conflict.¹²⁰

¹¹² *Hillsborough County Fla v. Automated Medical Laboratories*, 331 US 218, 230 (1947).

¹¹³ *English v. General Electric Co*, 496 US 72, 85 (1990).

¹¹⁴ *Silkwood v. Kerr-McGee Corp.*, 464 US 238 (1984).

¹¹⁵ *Hines v. Davidowitz*, 312 US 52, 67 (1941) *acific Gas & Electric Co v. State Energy Resources Conservation & Development Commission*, 461 US 190, 204 (1983) (emphasis added).

¹¹⁶ *Perez v. Campbell*, 401 US 637, 652 (1971) (emphasis added).

¹¹⁷ *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 US 877 (1986); *Louisiana Public Service Com’n v. F.C.C.*, 476 US 355 (1986).

¹¹⁸ *City of Burbank v. Lockheed Air Terminal Inc.*, 411 US 624, 639 (1973).

¹¹⁹ *International Paper Co. v. Ouellette*, 479 US 481, 493 (1987).

¹²⁰ *Commonwealth Edison Co. v. Montana*, 453 US 609, 634 (1981).

In the field of antitrust, moreover, the Supreme Court has been somewhat reluctant to strike down State laws having anticompetitive effects that nonetheless did not directly violate the Sherman Act:¹²¹ in *Fisher*,¹²² for instance, the Court held that a rent control ordinance authorized by a state statute could not be challenged under federal antitrust law, in spite of its adverse effects on competition.

Rule preemption takes place when federal legislation “fairly interpreted” is found to be in “actual conflict” with state law,¹²³ viz. “when it is impossible to comply with both state and federal law”.¹²⁴ Put differently, if state law either demands (as in *Calvert*)¹²⁵ or validates (as in *Midcal*)¹²⁶ a conduct prohibited under federal legislation, there is a presumption that Congress intended to displace state laws incompatible with federal antitrust rules.¹²⁷

While this type of preemption does not give rise to uncertainties comparable to those associated with obstacle preemption, the “fair interpretation” of a federal statute can be contentious. The Ninth Circuit in *Costco Wholesale Corp. v. Maleng*,¹²⁸ for instance, held that, in the field of antitrust law, state law is only preempted if it requires or authorizes a conduct that constitutes a *per se* violation of the Sherman Act, thus implying that illegality under the rule of reason or one of the quick look approaches would not warrant a presumption of preemption.¹²⁹

3. Types of Union Preemption

The brief survey of US Federal preemption in Subsection 2.2 above revealed the existence of a relatively sophisticated doctrine that courts apply following what antitrust lawyers would call a “structured framework of analysis”. The initial presumption against preemption can be rebutted in two ways (preemption “modes”): first, through an express indication of Congressional intent to preempt; second, through *indicia* warranting the inference of an implied intent to oust state laws from the entire subject-matter (“field preemption”) or only those state laws in actual

¹²¹ *Rice v. Norman Williams Co.*, 458 US 654, 659 (1982) (holding that, absent a direct conflict between a state law and the Sherman Act, the former is not preempted “simply because . . . [it] may have an anticompetitive effect”).

¹²² *Fisher v. City of Berkeley, Cal.*, 475 US 260, 270 (1986).

¹²³ *Savage v. Jones*, 225 US 501, 533 (1912).

¹²⁴ *Silkwood v. Kerr-McGee Corp.*, 464 US 238 (1984).

¹²⁵ *Schwegmann Brothers v. Calvert Distillers*, 341 US 384 (1951).

¹²⁶ *California Retail Liquor Dealers Ass’n v. Midal Aluminum, Inc.* 445 US 97 (1980)

¹²⁷ *CSX Transp., Inc. v. Easterwood*, 507 US 658 (1993).

¹²⁸ 522 F.3d 874, 885–86 (9th Cir. 2008).

¹²⁹ See William C. HOLMES, *Antitrust Law Handbook* (New York, 2009), at § 8:7 (suggesting that the Ninth Circuit might have sought not to interject the uncertainties associated with quick look approaches and the rule of reason into the already complex issue of state statutory preemption)

conflict with the rules (“rule preemption”) or the aims (“obstacle preemption”) of the federal scheme (preemption “types”).

In the EU, the ECJ neither adopted a presumption against preemption such as the one enunciated by the US Supreme Court in *Rice*,¹³⁰ nor laid down a general framework comparable to the one set out in *Pacific Gas*. It is thus for legal scholarship not only to categorize Union Preemption as an *effect* of EU law according to its different degrees (preemption “types”), but also to develop a descriptive theory that explains under what circumstances the various types of preemptive effects are produced. While the first issue will be dealt with in the present subsection, the second one will be examined in Section 5 of this work.

3.1. Modes of Union Preemption

Although the term “preemption” is virtually absent from EU legal texts,¹³¹ clauses dealing with the scope of permissible national law are not infrequent in EU legislation. However, there is no consensus among scholarly commentators as to the status of preemption “modes”. Goucha Soares took the view that, in the EU, preemption is essentially “implied”, rather than “express”.¹³² Cross, instead, averred that the possible relationships between EU and national law include not only “Occupation of the field pre-emption” and “Conflict pre-emption”, but also “Express saving” and “Express pre-emption”.¹³³ Schütze, in turn, noted that “express” and “implied” preemption are not really preemption *types*, in that they do not concern the preemptive

¹³⁰ See EUGENE DANIEL CROSS, ‘Pre-emption of Member State law in the European Economic Community: A framework for analysis’, (1992) 29 Common Market Law Review, 447-472, p. 460-461 (Arguing that in Case 218/85 *CERAFEL v. Le Champion* the Court rejected Advocate General Mancini’s suggestion to apply a presumption of lawfulness, an approach confirmed in Case 255/86 *Commission v. Belgium (Bulk Fruit)*).

¹³¹ *But see* Regulation (EC) No 460/2004 of the European Parliament and of the Council of 10 March 2004 establishing the European Network and Information Security Agency, OJ L 77, 13.3.2004, p. 1–11, recital no. 12 (“The exercise of the Agency’s tasks should not interfere with the competencies and *should not pre-empt, impede or overlap* with the relevant powers and tasks conferred on: the national regulatory authorities . . . the European standardisation bodies, the national standardisation bodies and the Standing Committee . . . the supervisory authorities of the Member States relating to the protection of individuals” Emphasis added); Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, p. 1–21, recital no. 27 (“In view of the specific Community character of an SE, the “real seat” arrangement adopted by this Regulation in respect of SEs is without prejudice to Member States’ laws and *does not pre-empt* any choices to be made for other Community texts on company law.” Emphasis added.)

¹³² ANTÓNIO GOUCHA SOARES, ‘Pre-emption, Conflicts of Powers and Subsidiarity’, (1998) 23 European Law Review, 132-145 at 133 (“When we speak about pre-emption in European Community Law, we are referring to so-called implied pre-emption, that is, the preclusion of national regulatory powers that results from a decision by the judicial branch”)

¹³³ *Id.*

effect of EU legislation, but rather preemption *modes*, i.e. ways in which the legislature expresses its intention whether and to what extent state lawmaking should be preempted.¹³⁴

While the distinction between “express” and “implied” preemption forms integral part of the US preemption *doctrine*, in that both preemption modes warrant the rebuttal of the *Rice* presumption against preemption, that distinction is impertinent to Union Preemption as an *effect* of EU legislation. “Express saving” and “express preemption” clauses will be thus examined in Section 5 of this work, along with the other *markers* that trigger the various preemption types.

3.2. The “conceptual-federalist approach” and the “pragmatic approach”

That Union Preemption is not a unitary theory, but rather a set of different theories, has been apparent ever since the earliest scholarly writings on that subject. Employing the same terminology, Waelbroeck and Weiler distinguished two types of preemption: a “conceptual-federalist approach” and a “pragmatic approach”.

The former corresponds to preemption in its purest form, *viz.* to areas of exclusive Community competence. As Waelbroeck put it, once the scope of those areas has been established, it automatically follows that Member States have no power to deal with those subject-matters.¹³⁵ This approach, which echoes the “latent exclusivity” preemption doctrine applied by the *Lochner* Court, was consistently applied by the ECJ in its rulings in the field of foreign commerce¹³⁶ and in its early jurisprudence in the agricultural sector.¹³⁷

Weiler noted that in some fields the ECJ shifted from the “conceptual-federalist approach” to a “pragmatic approach”, according to which Member States retain a “concurrent power” to regulate matters falling within the reach of the Community’s powers, so long as in so doing they

¹³⁴ SCHÜTZE, ‘Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption’, 1039.

¹³⁵ M. WAELBROECK, ‘The emergent doctrine of Community pre-emption – Consent and redelegation’, in Sandalow and Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe*, Vol. II (OUP, 1982), pp. 548–580, at 551.

¹³⁶ See Opinion of the Court of 11 November 1975, 1975 ECR 01355; Judgment of the Court of 15 December 1976, *Suzanne Criel, née Donckerwolcke and Henri Schou v Procureur de la République au tribunal de grande instance de Lille and Director General of Customs*, Case 41/76, 1976 ECR 1921; Judgment of the Court of 12 December 1973, *Criminal proceedings against Giulio and Adriano Grosoli*, Case 131/73, 1973 ECR 1555; Judgment of the Court of 13 December 1973, *Sociaal Fonds voor de Diamantarbeiders v NV Indiamex and Feitelijke Vereniging De Belder*, Joined cases 37 and 38/73, 1973 ECR 1609.

¹³⁷ Judgment of the Court of 18 February 1970, *Hauptzollamt Hamburg-Oberelbe v Firma Paul G. Bollmann*, Case 40/69, 1970 ECR 69.

“do not create a conflict with the rules adopted by the Community”.¹³⁸ The ECJ, which applied this approach in the fields of competition law¹³⁹ and external relations¹⁴⁰ as well as in its post-1976 jurisprudence in the context of agriculture,¹⁴¹ displayed in so doing “a measure of political acumen”, as insisting on pure preemption when Community institutions were not ready for their task would have hindered the development of the Community.¹⁴²

Waelbroeck and Weiler’s categorization, while having the merit of first showing that preemption is a manifold effect, cannot be resorted to in the present work for essentially two reasons. First, as clarified earlier, that approach does not differentiate between constitutional and legislative preemption: the displacement of national lawmaking powers in a “conceptual-federalist approach” case such as *Indianamax*, for instance, can be ambivalently attributed to the exclusive nature of the EU competence in the field of common commercial policy or to the preemptive effect of regulations adopted in that field,¹⁴³ whereas the present work only seeks to address the latter scenario. Second, as noted by Schütze,¹⁴⁴ neither of the two preemption approaches accounts for cases of *direct* normative conflict between national law and specific EU provisions, whereas the stipulative definition of preemption chosen for the purpose of this work is holistic in character, in that it comprises “all instances of actual and potential conflict”, including *indirect* conflicts.¹⁴⁵

¹³⁸ M. WAELBROECK, “The emergent doctrine of Community pre-emption – Consent and redelegation”, in Sandalow and Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe*, Vol. II (OUP, 1982), pp. 548–580, at 551.

¹³⁹ Judgment of the Court of 13 February 1969, *Walt Wilhelm and others v Bundeskartellamt*, Case 14-68, 1969 ECR 00001.

¹⁴⁰ Judgment of the Court of 14 July 1976, *Cornelis Kramer and others*, Joined cases 3, 4 and 6/76, 1976 ECR 01279; Opinion of the Court of 4 October 1979, *International Agreement on Natural Rubber*, Opinion 1/78, 1979 ECR 02871.

¹⁴¹ Judgment of the Court of 22 January 1976, *Carmine Antonio Russo v Azienda di Stato per gli interventi sul mercato agricolo (AIMA)*, Case 60/75, 1976 ECR 45; Judgment of the Court of 26 February 1976, *Riccardo Tasca*, Case 65/75, 1976 ECR 291; Judgment of the Court of 26 February 1976, *Società SADAM and others v Comitato Interministeriale dei Prezzi and others*, Joined cases 88 to 90/75, 1976 ECR 323.

¹⁴² J.H.H. WEILER, ‘Community system: The dual character of supranationalism’, (1981) 1 *Yearbook of European Law*, 267-306, at 278.

¹⁴³ SCHÜTZE, ‘Dual federalism constitutionalised: the emergence of exclusive competences in the EC legal order’, 8.

¹⁴⁴ SCHÜTZE, ‘Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption’, 1036 (noting that Waelbroeck’s conception of the doctrine of preemption “has identified the doctrine with *indirect* normative conflicts”)

¹⁴⁵ Eugene Daniel CROSS, ‘Pre-emption of Member State law in the European Economic Community: A framework for analysis’, (1992) 29 *Common Market Law Review*, 447-472, 453.

3.3. Preemption as a Threefold Effect of EU Legislation

According to Cross, the closest term of comparison to the US Supreme Court's ruling in *Pacific Gas* is a passage of the *CERAFEL* judgment, where the ECJ sought to ascertain:

[W]hether 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.¹⁴⁶

Building upon the work of Cross and Goucha Soares, Schütze distinguished between three types of Union Preemption (field preemption, obstacle preemption, and rule preemption) according to the implied scope of normative "conflict" and hence to the breadth of the ensuing displacement of national lawmaking powers. Preemption can thus be described as a threefold effect of EU legislation.

3.3.1. Field Preemption

Field preemption operates in a manner similar to the *per se* rule in the field of antitrust law: just like price-fixing, the adoption of national rules in a field occupied by EU law is presumed illegal and is thus prohibited without recourse to an inquiry as to its actual negative effects or its redeeming virtues. This is self-evident in the field of free movement: in the absence of harmonization at the EU level, national restrictive measures undergo a full rule of reason scrutiny encompassing their actual impact on intra-EU trade,¹⁴⁷ their suitability to pursue express justifications or judge-made overriding reasons in the general interest, and their proportionality

¹⁴⁶ Case 218/85 *CERAFEL v. Le Champion*, 1986 ECR 3513, para 13. *But see* SCHÜTZE, 'Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption', 1040, footnote 69 (arguing that the ECJ never extrapolated that preemption statement from its specific Common Agricultural Policy context and, even in that framework, did not consistently rely upon that statement in subsequent cases).

¹⁴⁷ The ECJ developed several arguments to dismiss cases where the measure concerned has no appreciable effects on intra-EU trade: purely internal situations (*see, e.g.* Judgment of the Court 8 December 1987, *Ministère public v Gauchard*, Case 20/87, 1987 ECR 4879, paras 10 to 12), certain selling arrangements (*see* Judgment of the Court of 24 November 1993, *Criminal proceedings against Bernard Keck and Daniel Mithouard*, Joined cases C-267/91 and C-268/91, 1993 ECR I-6097, paras 16-17), the remoteness doctrine (*see, e.g.*, Judgment of the Court of 27 January 2000, *Volker Graf v Filzmoser Maschinenbau GmbH*, Case C-190/98, 2000 ECR I-493, para 25). *See also* Carl Michael VON QUITZOW, *State Measures Distorting Free Competition in the EC* (The Hague, 2001), 7-8 (opining that "a de minimis criterion is contained in the philosophy of the Treaty").

vis-à-vis those aims. Conversely, if that particular matter is subject to exhaustive harmonization, national measures departing from the harmonized standards are *per se* illegal and must be set aside without any additional scrutiny.

The analogy with antitrust law should shed some light upon the rationale underlying field preemption: it implies an *ex ante* assessment that, in certain matters, the EU interest in a uniform legal framework or standard is so predominant as to require that any element of potential disharmony at the national level be nipped in the bud, regardless of its actual aims or effects. But what is the functional equivalent in the preemption context to the categories of *per se* illegal restraints in antitrust law? While that issue will be dealt with in greater detail in Section 5 of this work, at this juncture it is worth mentioning at least one domain where the ECJ has consistently applied field preemption: that of “exhaustive harmonization” within the single market.¹⁴⁸ As in the case of the antitrust *per se* rule, however, experience acquired over time may prompt the inclusion (or the removal) of a certain matter from the purview of field preemption: this is what occurred in the field of unfair commercial practices, where the EU legislature saw it fit to replace the minimum requirements set out in Directive 84/450/EEC with the uniform rules laid down in Directive 2005/29/EC.¹⁴⁹

Field preemption, however, entails a trade-off between legal certainty, enhanced by the establishment of a bright-line test, and a substantial encroachment on the lawmaking competences of Member States. It is no exaggeration to describe the application of field preemption as the removal of a subject-matter from the domain of shared competences and its inclusion in that of exclusive EU competences.¹⁵⁰

The integrationist momentum inherent in field preemption presupposes a broad and unrestrained judicial discretion when reviewing the vertical demarcation of powers between the

¹⁴⁸ See, e.g., Case 148/78, *Criminal proceedings against Tullio Ratti*, 1979 ECR 1629, paras 26-27 (holding that in the matters coordinated by Directive 73/173 Member States were precluded from introducing into their 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”).

¹⁴⁹ See in particular recitals 3-5.

¹⁵⁰ See GOUCHA SOARES, at 137; SCHÜTZE, ‘Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption’, at 1040; STEPHEN WEATHERILL, ‘Beyond preemption? Shared competence and constitutional change in the European Community’, in D. O’Keeffe & P. Twomey (eds), *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law, 1994), 13-33, 14 (“Once the Community has acted, if it acts, it then assumes exclusive competence in the field which it has occupied, thereby *transforming concurrent State/Community competence into exclusive Community competence* – the doctrine of preemption.” Emphasis added.)

EU and Member States, such as the one the ECJ enjoyed in its early jurisprudence.¹⁵¹ It is thus no wonder that Member States, at a certain stage, sought to hamper that centripetal competence creep by imposing restraints on the ECJ,¹⁵² notably the principle of subsidiarity.¹⁵³ The latter, according to Goucha Soares, should caution against the use of field preemption as a common method for the judicial adjudication of conflicts of powers between the EU and the Member States.¹⁵⁴

3.3.2. Obstacle Preemption

Obstacle preemption is, as in the US context, the most hazy and ill-defined of the three types of Union Preemption. It takes place, in the words of the ECJ, whenever a national measure “endangers the objectives”,¹⁵⁵ “obstructs the working”,¹⁵⁶ or “interferes with the proper functioning”¹⁵⁷ of an EU item of legislation, “even if the matter in question has not been exhaustively regulated by it”.¹⁵⁸

This type of preemption, therefore, requires a conflict (American constitutional law scholars would call it an “actual conflict”) between national law and an EU act: not with a specific provision of the latter, as in the case of rule preemption, but with its aims and operation. In this connection, Cross argued that the ECJ’s lack of jurisdiction to rule on the compatibility of national law with EU law in the framework of the preliminary ruling procedure might limit the application of obstacle preemption to the advantage of field preemption. This concern is,

¹⁵¹ K. LENAERTS, *Le Juge et La Constitution aux Etats-Unis d’Amerique et dans l’Ordre Juridique Europeen*, (Bruxelles: Bruylant, 1988) at 537 and 554.

¹⁵² See J.H.H WEILER, “The Reformation of European Constitutionalism” (1997) 35 J.C.M.S. 123.

¹⁵³ See GOUCHA SOARES, above, at 139 (“I would go so far as to say that subsidiarity was a legal instrument written into Community constitutional law with the aim of opposing certain centripetal tendencies caused by application of the material content of determined technical figures such as pre-emption. Subsidiarity and pre-emption were therefore figures that we may classify, at first glance, as being inspired by diametrically opposed reasons.”)

¹⁵⁴ *Id.*, at 140 (citing R. DEHOUSSE, “Community Competences: Are there Limits to Growth?”, in R. Dehousse, (ed.) *Europe After Maastricht – An Ever Closer Union?* (Munich: Law Books, 1994) p. 117).

¹⁵⁵ Judgment of the Court of 18 October 1979, *Procureur général v Hans Buys, Han Pesch and Yves Dullieux and Denavit France SARL*, Case 5/79, 1979 ECR 3203, para 4; Judgment of the Court of 12 July 1979, *Criminal proceedings against Adriano Grosoli*, Case 223/78, 1979 ECR 2621, para 13.

¹⁵⁶ Judgment of the Court of 10 March 1981, *Irish Creamery Milk Suppliers Association and others v Government of Ireland and others*, Joined cases 36 and 71/80, 1981 ECR 735, para 19.

¹⁵⁷ Judgment of the Court of 27 November 1997, *Danisco Sugar AB v Allmänna ombudet*, Case C-27/96, 1997 ECR I-06653, para 24.

¹⁵⁸ See Judgment of the Court of 25 March 2004, *Industrias de Deshidratación Agrícola SA v Administración del Estado*, Case C-118/02, 2004 ECR I-3073, para 20; Judgment of the Court of 8 January 2002, *Denavit Nederland BV v Minister van Landbouw, Natuurbeheer en Visserij and Voedselvoorzieningsin- en verkoopbureau*, Case C-507/99, 2002 ECR I-169, para 32.

arguably, misplaced: as Cross himself concedes, the ECJ has sidestepped the limits of Article 267 TFEU, ever since *Costa v. ENEL*,¹⁵⁹ by reframing questions concerning the compatibility of national law with EU law as inquiries whether EU law “must be interpreted as precluding national legislation such as that at issue in the main proceedings”.¹⁶⁰

As to the risk of underemployment of obstacle preemption highlighted by Cross, remarkably enough Goucha Soares expressed exactly the opposite concern: that the ECJ’s frequent recourse to extensive and teleological interpretation might unduly broaden the scope of that preemption type.¹⁶¹ Indeed, obstacle preemption cases abound, especially in the field of agriculture: although the ECJ in some cases found that the mere establishment of a Common Market Organization (CMO) was sufficient to trigger field preemption,¹⁶² on several other occasions it required proof that the national measures at issue limited the scope, impeded the functioning or jeopardized the aims of the CMO concerned, thus applying an obstacle preemption reasoning.¹⁶³

3.3.3. Rule Preemption

This type of preemption occurs when there is an outright conflict between national law and a specific provision of EU law. The ECJ clearly employed a rule preemption reasoning in ruling out preemption in *Gallaher*:¹⁶⁴ confronted with, on the one hand, a provision of Directive 89/622 stipulating that health warnings on tobacco products should cover “at least 4% of the

¹⁵⁹ Judgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L.*, Case 6/64, ECR (English special edition) 585, para 1 (“In the context of requests for preliminary rulings, the court has no jurisdiction . . . to decide upon the validity of a provision of domestic law in relation to the Treaty . . . Nevertheless, the court has power to extract from a question imperfectly formulated by the national court those questions which alone pertain to the interpretation of the treaty.”)

¹⁶⁰ See e.g. Judgment of the Court of 11 March 2010, *Telekomunikacja Polska SA w Warszawie v Prezes Urzędu Komunikacji Elektronicznej*, Case C-522/08, nyr, para 18; Judgment of the Court of 19 January 2010, *Seda Küçükdeveci v Swedex GmbH & Co. KG.*, Case C-555/07, para 43; Judgment of the Court of 14 January 2010, *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH*, Case C-304/08, nyr, para 20.

¹⁶¹ GOUCHA SOARES, above, at 138.

¹⁶² See, e.g., Case 222/82, *Apple and Pear Development Council v. K.J. Lewis Ltd and others*, 1983 ECR 4083, para 23 (holding that, in the framework of a CMO in fruit and vegetables, “an exhaustive system of quality standards applicable to the products in question” prevented national authorities from imposing unilateral quality requirements); Case 48/85, *Commission v. Germany*, 1986 ECR 2549, paras 12-13 (“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”).

¹⁶³ See Judgment of the Court of 25 November 1986, *Association comité économique agricole régional fruits et légumes de Bretagne v A. Le Champion*, Case 218/85, 1986 ECR 3513, para 13, and Judgment of the Court of 27 November 1997, *Danisco Sugar AB v Allmänna ombudet*, Case C-27/96, 1997 ECR I-6653, para 24.

¹⁶⁴ 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.

corresponding surface” and, on the other one, the British requirement that those warnings cover 6% of the label surface, the ECJ held that the expression “at least” ought to be interpreted as meaning that, if they deem 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”.¹⁶⁵

Goucha Soares wrote at length about rule preemption, as not only it intrudes on Member States’ regulatory sphere less than other preemption types,¹⁶⁶ but is also the one that most accords with the principle of subsidiarity,¹⁶⁷ paving the way for multilevel regulation which does not suppress the potential for regulatory competition between Member States.¹⁶⁸

4. Rationales For and Against Union Preemption

The following sections endeavor to assess the legal, political, and economic impact of Union Preemption on the functioning of the EU single market and on the overall constitutional architecture of the EU. By and large, the influence of Union Preemption is in direct ratio to its scope: the broader the displacement of national lawmaking, the stronger the overall repercussions on the European construct. Therefore, when reference is made, generically, to “preemption” or to “Union Preemption”, most of the following considerations apply specifically to preemption in its most virile form, i.e. field preemption.

The first subsection will examine what can be considered the “positive” effects of preemption: the prevention of incorrect implementation by Member States and the greater degree of uniformity in EU regulation of the single market. The second subsection, in turn, will deal with the “negative” effects of preemption: the centripetal competence transfer to the EU and the forfeiture of benefits that can derive from regulatory competition between Member States.

4.1. Positive effects: ensuring uniformity in the implementation of EU legislation

It is well-established in academic literature that the decentralized implementation and enforcement of EU legislation inherent in EU “executive” federalism entails a substantial risk

¹⁶⁵ Id., para 20.

¹⁶⁶ GOUCHA SOARES, at 138.

¹⁶⁷ Id., at 142.

¹⁶⁸ Id., at 143.

under-implementation and under-enforcement by national authorities.¹⁶⁹ Preemption, however, might contribute to ensure uniformity in the implementation of EU legislation.

This can be accounted for applying a specific principal-agent model,¹⁷⁰ referred to as “reverse international delegation”, to the process of implementation of EU legislation. Union Preemption can be accordingly characterized as a solution to the agency problems inherent in that delegation process. However, in order to properly address the issues arising in the descending phase of that agency relationship (implementation) it is appropriate to first examine its ascending part (lawmaking).

4.1.1. EU lawmaking as an instance of international delegation

“International delegation” can be defined as “a grant of authority by two or more states to an international body to make decisions or take actions”.¹⁷¹ Applications of this model to the EU, where the latter acts as “agent” and Member States act as “principals”, abound in scientific literature.¹⁷² Although the EU is a paradigmatic example of “multi-layered delegation”¹⁷³ (i.e. involving the simultaneous delegation of different types of authority to different bodies enjoying different degrees of independence)¹⁷⁴ it is worth focusing, for the sake of simplicity, on the authority delegated to the EU to adopt harmonization directives in the field of the single market.

¹⁶⁹ P. VAN DEN BOSSCHE, ‘In search of remedies for non-compliance: the experience of the EC’, (1996) 3 *Maastricht Journal* 371.

¹⁷⁰ Terry M. Moe, ‘The New Economics of Organization’, 28 *American Journal of Political Science* 739 (1984), 756 (“the principal-agent model is an analytic expression of the agency relationship, in which one party, the principal, considers entering into a contractual agreement with another, the agent, in the expectation that the agent will subsequently choose actions that produce the outcomes desired by the principal.”); Armen A. ALCHIAN and Harold DEMSETZ, ‘Production, Information Costs, and Economic Organization’, 62 *American Economic Review* 777 (1972).

¹⁷¹ Curtis A. BRADLEY & Judith G. KELLEY, ‘The concept of international delegation’, 71 *Law & Contemporary Problems* 1, at 3.

¹⁷² See, e.g., M. A. POLLACK, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU* (Oxford: Oxford University Press, 2003). Giandomenico MAJONE, ‘Two Logics of Delegation: Agency and Fiduciary Relations in the EU Governance’, 2(1) *European Union Politics* 103 (2001).

¹⁷³ Curtis A. BRADLEY & Judith G. KELLEY, ‘The concept of international delegation’, 71 *Law & Contemporary Problems* 1, at 33.

¹⁷⁴ For instance, in areas of EU exclusive competence, within the meaning of Article 2(1) TFEU, Member States engage in “agenda-setting” delegation, (bestowing on the Commission the power of legislative initiative and to decide enforcement priorities) “legislative” delegation (granting the Parliament and Council the power to enact binding legislation), “regulatory” delegation (i.e. the power to adopt implementation measures), “monitoring and enforcement” delegation (*viz.* entrusting the Commission with the task to monitor and coerce compliance), and “adjudicative delegation” (by accepting jurisdiction of the ECJ). Instead, in subject-matters where the EU has the competence to carry out “actions to support, coordinate or supplement” as per Article 2(5) TFEU, the express exclusion to adopt harmonization measures and regulation suggests that, in those areas, no “regulatory” delegation takes place, as those measures require implementation at the national level.

According to political scientists, international delegation has several benefits, including, in this particular case, the specialization of the agent, the facilitation of collective decision-making and the ability to address issue that cannot be dealt with individually by the principals.¹⁷⁵ As far as the EU single market is concerned, the crux is striking a balance between trade liberalization (thus reaping the benefits of comparative advantage)¹⁷⁶ and an adequate level of protection of non-economic interests (such as human health, consumer protection, environmental concerns etc.).¹⁷⁷

If nations of a hypothetical continent sought to liberalize trade between them on an individual basis, a “prisoner dilemma” situation would most likely arise. Due to the strong incentives to engage in protectionist conduct, especially against States that open up their markets to foreign competition,¹⁷⁸ the game’s Pareto-optimal outcome (i.e. joint liberalization of trade) would *not* be its Nash equilibrium. The establishment of a Common Market¹⁷⁹ and the delegation of monitoring, enforcement, and dispute resolution to independent international bodies may constitute a credible commitment so that the elimination of trade barriers becomes a dominant strategy for every player.

The pursuit of trade liberalization alone, however, can significantly harm non-economic interest. A Home State Control model, such as that underlying the TFEU rules on free movement, is conducive to market integration but entails the risk of a “race to the bottom”, as companies would tend to establish themselves in the Member State whose rules are most lenient, thus

¹⁷⁵ See, generally Darren HAWKINS et al., ‘Delegation Under Anarchy: States, international organizations, and principal-agent theory’, in Darren HAWKINS et al. (eds.) *Delegation and agency in international organizations* (Cambridge, UK: Cambridge University Press, 2006), 13-15.

¹⁷⁶ See David RICARDO, *On the Principles of Political Economy and Taxation* (London, 1817). The theory of comparative advantage is one of the inspiring themes of the *Brussels Report on the General Common Market* (unofficially referred to as the “Spaak Report”, 1956), which constitutes the blueprint for the Treaty of Rome provisions governing the single market.

¹⁷⁷ For the sake of simplicity, under the heading “non-economic interests” this work refers to the aims underlying both the express derogations from free movement provisions laid down in the TFEU (see Articles 36, 45(3), 52, 62, and 65) and the so-called mandatory requirements or overriding requirements in the general interest introduced by the ECJ case-law.

¹⁷⁸ See, generally, Michael J. TREBILCOCK and Robert HOWSE, *The regulation of international trade* (London: Routledge, 2005) 1-20; Paul KRUGMAN, *International economics: theory & policy* (Boston, MA Addison-Wesley, 2009) 10-34; Jeffrey CURRY, *A short course in international economics: understanding the dynamics of the international marketplace* (Novato, Calif.: World Trade Press, 2000) 115-129; Alan WINTERS, *International economics* (London: Routledge, 1998) 13-52.

¹⁷⁹ The expression “Common Market” in this hypothetical model refers to a Custom Union featuring provisions to achieve the free movement of persons, services, and capital *through negative integration only*. Cf. CATHERINE BARNARD, *The substantive law of the EU: The Four Freedoms* (OUP 2007), 8-9, Box no. 1.

prompting other States to relax their requirements to prevent capital drain.¹⁸⁰ To address this concern, the TFEU permits Host States to apply, in exceptional circumstances, trade restrictive measures in order to pursue non-economic goals. However, shifting back to a model of Host State Control, albeit exceptionally and subject to review by the ECJ, can still hinder free movement, especially if the national levels of protection of non-economic values are so heterogeneous as to substantially preclude the application of the presumption of equivalence inherent in the principle of mutual recognition.

To square the circle, Member States of a hypothetical Common Market may decide to entrust international bodies also with the task of enacting legislation to pursue positive integration. In the EU, harmonization of national legislations offers a solution to the single market conundrum, in that it re-establishes a trade-conducive model of Home State Control, but requires the Home State to apply rules which ensure a uniform level of protection of non-economic interests,¹⁸¹ thus safeguarding those values and eliminating the preconditions for a race to the bottom.¹⁸² Most notably, once harmonization is in place, Member States are precluded from invoking express Treaty derogations or judge-made overriding requirements in the general interest to depart from the harmonized rules.¹⁸³

¹⁸⁰ See, generally, CATHERINE BARNARD, *The substantive law of the EU: The Four Freedoms* (OUP 2007), 17-24.

¹⁸¹ This assumption impliedly relies on Weatherill's conception of harmonization as a re-regulatory bargain between market integration and non-economic values, between the interests of the Home and of the Host State. See STEPHEN WEATHERILL, 'Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market', in CATHERINE BARNARD & JOANNE SCOTT (eds), *The Law of the Single European Market* (Hart Publishing, 2002), 41-73, at 52-57.

¹⁸² In this simplified model, "harmonization" refers only to "exhaustive harmonization", which eliminates the risk of a race to the bottom. That risk, instead, is not eliminated in the case of minimum harmonization. See CATHERINE BARNARD, *The substantive law of the EU: The Four Freedoms* (OUP 2007), 603-604.

¹⁸³ Judgment of the Court of 8 November 1979, *Firma Denkavit Futtermittel GmbH v Minister für Ernährung, Landwirtschaft und Forsten des Landes Nordrhein-Westfalen*, Case 251/78, 1979 ECR 3369, para 7 ("[W]hen . . . Community directives provide for the harmonization of the measures necessary to guarantee the protection of animal and human health and when they establish procedures to check that they are observed, recourse to Article 36 [TFEU] is no longer justified and the appropriate checks must be carried out and the protective measures adopted within the framework outlined by the harmonizing directive.")

4.1.2. Implementation of EU legislation as an instance of reverse international delegation

Harmonization of laws in the EU¹⁸⁴ is usually carried out by way of directives, which require transposition by Member States into their respective legal orders. Moreover, the day-by-day implementation and enforcement of harmonized standards is left to the national level, namely to the authorities of the Home State.

The process of transposition, implementation, and enforcement of harmonization directives can be seen as a form of re-delegation – more correctly: of “reverse international delegation” – from the EU as principal to Member States as agents.¹⁸⁵ In the US context, political scientists have employed a principal-agent model to account for delegation and devolution processes from the federal to the state level.¹⁸⁶ It is submitted that the application of a reverse international delegation model to transposition, implementation, and enforcement of harmonization directives in the EU could be worthwhile, insofar as the three processes above involve both the benefits and the risks of a typical principal-agent relationship and preemption itself can be seen as a solution to agency problems.

¹⁸⁴ In the US context, the “dual” character of that federal system enables the Federal government to exhaustively regulate a segment of interstate commerce and to also implement and enforce that regulatory scheme without the assistance of the states.

¹⁸⁵ The expression “reverse international delegation” is preferable to “re-delegation” because in international relations the latter usually refers to the delegation of power from an international body to another entity which is not a member of the said international body. See Curtis A. BRADLEY & Judith G. KELLEY, ‘The concept of international delegation’, 71 *Law & Contemporary Problems* 1, at 17 (noting that the other entity acting as agent of the international body “may be an international organization or a private body such as a nongovernmental organization.”). The notion of reverse international delegation, therefore, is closer to that used by Waelbroeck, who however only explored this process in connection with Community exclusive competences. See M. WAELBROECK, ‘The emergent doctrine of Community pre-emption – Consent and redelegation’, in Sandalow and Stein (eds.), *Courts and Free Markets: Perspectives from the United States and Europe*, Vol. II (OUP, 1982), 548–580. Reverse international delegation, moreover, is different from “reversed intergovernmentalism”, which only occurs “in sectors formerly under national competence and in which there is no clear Treaty basis for EU intervention”. See Annabelle LITTOZ-MONNET, ‘Dynamic Multi-Level Governance – Bringing the Study of Multi-level Interactions into the Theorising of European Integration’, 14 *European Integration online Papers* 1, at 5 and 8, available at: <http://eiop.or.at/eiop/texte/2010-001a.htm>

¹⁸⁶ Interestingly, in the US context, political scientists have applied the principal-agent model to implementation and devolution from the federal to the state level. See, e.g., George A. Krause and Ann O’M. Bowman, ‘Adverse Selection, Political Parties, and Policy Delegation in the American Federal System’, *The Journal of Law, Economics & Organization*, 2005/21(2), p. 365 (‘the relationship across levels of government is suggestive of a basic tension between national (principal) and subnational (agent) policy goals consistent with principal-agent theory’); John E. Chubb, ‘The Political Economy of Federalism’, *American Political Science Review* 1985/79, p. 994; Donald R. Songer, Jeffrey A. Segal, Charles M. Cameron, ‘The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions’, *American Journal of Political Science* 1994/38(3), p. 673.

The main benefit of delegating implementation and enforcement to Member States has already been pointed out by Weatherill: that of harnessing established national legal and bureaucratic systems to the fulfillment of the aims of the EU, allowing the latter to operate as a remarkably lean administration.¹⁸⁷

As in every agency relationship, however, conflicts of interest might arise between the principal and the agent(s), resulting in action by the latter that does not match the former's *desiderata* (the so-called "agency slack").¹⁸⁸ This particularly holds true in the present case, where it is such a divergence of interests that made recourse to international delegation necessary in the first place. In essence, Home State authorities may have an incentive to under-implement and under-enforce harmonized standards, thus favoring domestic companies active in other Member States and disregarding the interests of Host State consumers.¹⁸⁹ Such a dysfunctional outcome of the reverse delegation model is entirely consistent with the domestic political process,¹⁹⁰ which constitutes yet another link in this complex chain of delegation:¹⁹¹ after all, the constituents of Home State authorities are domestic companies, not out-of-State consumers. This might eventually bring back the risk of a race to the bottom under the guise of a corrosive spiral of competitive under-implementation.¹⁹² By the same token, Host State authorities might be tempted to over-implement harmonized standards, for instance by introducing additional

¹⁸⁷ STEPHEN WEATHERILL, 'Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market', in CATHERINE BARNARD & JOANNE SCOTT (eds), *The Law of the Single European Market* (Hart Publishing, 2002), 41-73, at 68 (citing G. Majone, *Regulating Europe* (London, Routledge, 1996)).

¹⁸⁸ See Darren HAWKINS et al., 'Delegation Under Anarchy: States, international organizations, and principal-agent theory', in Darren HAWKINS et al. (eds.) *Delegation and agency in international organizations* (Cambridge, UK: Cambridge University Press, 2006), 8 ("Agency slack" is independent action by an agent that is undesired by the principal. Slack occurs in two primary forms: *shirking*, when an agent minimizes the effort it exerts on its principal's behalf, and *slippage*, when an agent shifts policy away from its principal's preferred outcome and toward its own preferences.")

¹⁸⁹ STEPHEN WEATHERILL, 'Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market', in CATHERINE BARNARD & JOANNE SCOTT (eds), *The Law of the Single European Market* (Hart Publishing, 2002), 41-73, at 68-69.

¹⁹⁰ *Id.*, at 68 ("The model of home state enforcement on behalf of parties in the host State runs directly counter to the basics of national-level representative democracy.")

¹⁹¹ See Curtis A. BRADLEY & Judith G. KELLEY, 'The concept of international delegation', 71 *Law & Contemporary Problems* 1, at 5 ("The delegation from states to an international body is typically part of a longer "chain of delegation" There is also, generally, a prior domestic link within each state, because international delegation is itself the product of delegation within the state, for example, from citizens to a legislative body, or from a legislative body to an executive body"). See also Torbjörn BERGMAN, Wolfgang C. MÜLLER & Kaare STRØM, 'Parliamentary Democracy and the Chain of Delegation', 37 *European Journal of Political Research* 255, 257-259 (2000).

¹⁹² STEPHEN WEATHERILL, 'Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market', in CATHERINE BARNARD & JOANNE SCOTT (eds), *The Law of the Single European Market* (Hart Publishing, 2002), 41-73, at 69.

requirements to those laid down in the directive, where doing so can place domestic companies or professionals at a competitive advantage *vis-à-vis* competitors from other Member States.

4.1.3. Preemption as a remedy to agency slack and as an anti-circumvention device

A common solution to the problem of agency slack is redefining the agency contract from a discretion-based model (maximizing both the benefits from agent specialization and the risk of agency slack) to a rule-based one, which severely constrains the autonomy of the agent(s).¹⁹³ Preemption seems to follow the same logic: by completely displacing or substantially constraining Member States' lawmaking powers, it prevents them from taking advantage of *lacunae* and textual ambiguities of EU legislation to over- or under-implement it.

Preemption can thus be seen as an anti-circumvention device.¹⁹⁴ Indeed, aware of the principle of primacy of EU law, Member States are more likely to attempt to circumvent EU legislation, for instance by adding their own requirements or specifications to those set out at the EU level, than to expressly contradict specific EU provisions.¹⁹⁵ In such cases, a pure rule preemption reasoning often is unable to prevent circumvention, thus calling for broader types of preemption such as obstacle or field preemption.

The Wilson case is a paradigmatic example. Directive 98/5 allows European lawyers to practice on a permanent basis in any other Member State under their home-country professional

¹⁹³ See Darren HAWKINS et al., 'Delegation Under Anarchy: States, international organizations, and principal-agent theory', in Darren HAWKINS et al. (eds.) *Delegation and agency in international organizations* (Cambridge, UK: Cambridge University Press, 2006), 27-28 (arguing that since rule-based delegation reduces the gains from specialization and reduces flexibility, it is relatively inefficient and should only be used when agents are difficult to control through other means). Cf. Daniel NIELSON & Michael J. TIERNEY, 'Delegation to International Organizations: Agency Theory and World Bank Environmental Reform' 57(2) *International Organization* 241-276 (2003) (discussing the costly changes to World Bank's governance in order to ensure greater oversight by governments and a narrower margin of agent discretion).

¹⁹⁴ For similar arguments in respect of the US Doctrine of Federal preemption, see R. EPSTEIN & M. GREVE, 'Conclusion: Preemption Doctrine and its Limits', in R. EPSTEIN & M. GREVE (eds.) *Federal preemption: States' Powers, National Interests* (AEI Press, 2007), 309-337, at 312 ("Once Congress has divvied up power between federal and state governments in specific ways, its decision should not be undone by the dark art of statutory interpretation. . . . An anti-circumvention principle . . . is anything but a hand-crafted adjustment to . . . the lack of congressional capacity to adjust convoluted statutes, time and again, to unforeseen circumstances and ever-more creative evasions.").

¹⁹⁵ EUGENE DANIEL CROSS, 'Pre-emption of Member State law in the European Economic Community: A framework for analysis', (1992) 29 *Common Market Law Review*, 447-472, at 463-464. See also A. VAN AAKEN, 'Supremacy and Preemption: a View from Europe', in R. EPSTEIN & M. GREVE (eds.) *Federal preemption: States' Powers, National Interests* (AEI Press, 2007), 277-307, at 297.

title. In order to do so, a European lawyer must register with the competent authority in the host State. Article 3(2) of the Directive reads as follows:

The competent authority in the host Member State shall register the lawyer upon presentation of a certificate attesting to his registration with the competent authority in the home Member State. It may require that, when presented by the competent authority of the home Member State, the certificate be not more than three months old. It shall inform the competent authority in the home Member State of the registration.

Mr. Graham Wilson, an English barrister, applied for registration with the Luxembourg Bar Council, but in addition to the requirements set out in the directive, he was also requested to take a language test in order to determine his proficiency in French, German and Letzeburgesch. As Mr. Wilson refused to take the test, his application was rejected.

Was the Host state allowed to provide for a registration requirement that was not set forth in the Directive? Applying a pure rule preemption reasoning, the answer should have been in the affirmative, as no provision in the Directive prohibits language tests. That outcome, however, would have seriously compromised the purpose of Directive 98/5, *viz.* “to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained”. The ECJ therefore had no choice but to conclude that the Directive had “carried out a *complete harmonisation* of the prior conditions for the exercise of the right it confers”.¹⁹⁶

Commission v. UK (Dim-Dip) is another good example: while Directive 76/756/EEC provided for the EU-wide marketability of vehicles whose lighting devices complied with the requirements set out in its annex, UK law further required, as a condition for sale in the UK, that vehicles be equipped with dim-dip lighting devices (not listed in the Directive annex). The ECJ once again followed a field preemption reasoning and reached the conclusion that the Directive requirements were “exhaustive”, so that a Member State could not “unilaterally require manufacturers who have complied with those requirements to comply with a requirement not provided for by this directive.”¹⁹⁷

¹⁹⁶ See the Court judgment in *Wilson*, para 66.

¹⁹⁷ Judgment of the Court of 12 July 1988, *Commission v. UK (Dim-Dip)*, Case 60/86, 1988 ECR 3921, para 12.

4.1.4. The other advantages of enhanced uniformity

The uniformity that preemption entails, especially when it is associated with exhaustive harmonization, has also other advantages than ensuring the correct implementation of EU law, widely recognized by academic literature.¹⁹⁸

First, as briefly discussed above, centralized regulation can be an effective remedy against the risks of market failure inherent in a decentralized system, such as the one of a race to the bottom. Moreover, uniformity reduces the costs stemming from evasion through forum shopping, externalization, and extraterritoriality.¹⁹⁹ The “level playing field” rhetoric pervades the Commission notices and working documents²⁰⁰ and increasingly imbues single market legislation.²⁰¹ Interestingly, the minimization of “the federalism risks that lie at the heart of the dormant Commerce Clause”, *viz.* state protectionism, balkanization, and cost externalization, is also the purposes that, according to Epstein and Greve, the US Doctrine of Federal Preemption should chiefly pursue.²⁰²

Second, uniformity can remedy regulatory failures, such as representative malfunctions and regulatory capture. To illustrate this, it is useful to turn back to the facts of the *Wilson* case. The

¹⁹⁸ See, generally, F. EASTERBROOK, ‘Antitrust and the Economics of Federalism’, 26 *Journal of Law and Economics* 23, 24 (1983); C. TIEBOUT, ‘A pure theory of Local Expenditure’, 64(5) *Journal of Political Economy* 416 (1956); G. WAGNER, ‘The economics of harmonisation: the case of contract law’, 39 *Common Market Law Review* 995 (2002).

¹⁹⁹ J. TRACHTMAN, ‘International Regulatory Competition: Externalization and Jurisdiction’, 34 *Harvard International Law Journal* 47 (1993).

²⁰⁰ See, e.g., Commission Staff Working Document, *The Single Market Review: one year on* (Brussels, 16.12.2008 SEC(2008) 3064), at 10 (“The level playing field that has benefited all Member States, their firms and citizens, over several decades must be maintained and safeguarded if it should come under threat”); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A single market for 21st century Europe*, (COM(2007) 725 final, 20 November 2007) at 10 (“Rules in place at EU level recognise fundamental rights for workers, for instance in terms of information and consultation, and provide for minimum requirements which guarantee a level playing field for workers and companies”). See also MARIO MONTI, *A new strategy for the single market at the service of Europe’s economy and society*, Report to the President of the European Commission (9 May 2010), at 27, 43, and 86.

²⁰¹ See, e.g., Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ L 95, 15.4.2010, p. 1–24, recitals 10, 80, and 91; Regulation (EC) No 1222/2009 of the European Parliament and of the Council of 25 November 2009 on the labelling of tyres with respect to fuel efficiency and other essential parameters, OJ L 342, 22.12.2009, p. 46–58, recital 22; Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users’ rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 337, 18.12.2009, p. 11–36, recital 70.

²⁰² See R. EPSTEIN & M. GREVE, ‘Conclusion: Preemption Doctrine and its Limits’, in R. EPSTEIN & M. GREVE (eds.) *Federal preemption: States’ Powers, National Interests* (AEI Press, 2007), 309–337, at 312.

unwelcoming attitude of the Luxembourg Bar Council could be seen as an attempt to prevent a non-voting newcomer (Mr. Wilson) from depriving its constituents (the members of the Luxembourg Bar) of their monopoly privilege rents (being members of a regulated profession in a profitable market for legal services). By eliminating host State discretion in the definition of the entry requirements, the ECJ effectively coerced the Luxembourg authorities to take into account the unrepresented out-of-state interests of European lawyers, thus remedying to a “representative malfunction” inherent in the EU “indirect rule”.²⁰³

The *Wilson* case can also be taken as an example of regulatory capture leading to market distortions liable to nullify or reduce the output maximization effects of trade liberalization,²⁰⁴ thus undermining the very purpose of the EU single market construct. Economic studies on the topic of regulatory capture abound.²⁰⁵ Regulated firms, on the one hand, know that regulation can be used to increase their profits by imposing taxes on others to subsidize the regulated industry, by restricting entry and eliminating competitive restraints, or by regulating prices thus suppressing price competition.²⁰⁶ Governments, on the other hand, in return for financial and electoral support from regulated firms, have an incentive to supply regulation with a view of creating rents and distributing them to regulated firms.²⁰⁷ Drawing the locus of rule-making away from the regulated individuals and firms by concentrating regulation at the EU level can thus contribute to prevent regulatory capture.

²⁰³ See STEPHEN WEATHERILL, ‘Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market’, in Catherine Barnard & Joanne Scott (eds.), *The Law of the Single European Market* (Hart Publishing, 2002), 41-73, at 67-68; Cf. MIGUEL POIARES MADURO, *We the court: the European Court of Justice and the European Economic Constitution : a critical reading of Article 30 of the EC Treaty* (Oxford: Hart Pub. Press, 1998) 174 (suggesting that the ECJ should apply the free movement Treaty provisions only when there is a basis for suspicion that representative malfunctions exists and have worked to the disadvantage of nationals and undertakings of other Member States); *But cf.* WULF-HENNING ROTH, ‘The European Court of Justice’s Case Law on Freedom to Provide Services: is *Keck* Relevant?’ in MADS ANDENAS and WULF-HENNING ROTH (eds.) *Services and free movement in EU law* (Oxford: Oxford University Press, 2002) at 8-10 (arguing that Maduro’s suggestion is not supported by the ECJ case-law).

²⁰⁴ L. Alan Winters, *International economics* (London: Routledge, 1998) p. 81-82.

²⁰⁵ See, generally, J. J. LAFFONT & J. TIROLE, ‘The politics of government decision making. A theory of regulatory capture’ 106(4), *Quarterly Journal of Economics* 1089-1127 (1991); M. E. LEVINE & J. L. FORRENCE, ‘Regulatory capture, public interest, and the public agenda. Toward a synthesis’, 6 *Journal of Law Economics & Organization* 167-198 (1990).

²⁰⁶ R. NOLL, R. ‘Economic Perspectives on the Politics of Regulation’, in R. SCHMALENSEE and R. WILLIG (eds.) *Handbook of Industrial Organization*. (Amsterdam: North-Holland 1989) 1253–1288 (demonstrating how small, cohesive interest groups, with high per capita stakes and similar preferences, have lower organization costs and are thus optimally-situated to monitor and influence the regulatory policy process to their own advantage).

²⁰⁷ R. POSNER, ‘Taxation by Regulation’, 2 *Bell Journal of Economics* 22 (1971) (showing how regulation can be used by politicians to redistribute income through cross-subsidization in order to gain the support of influential interest groups).

Third, a uniform set of rules improves legal certainty, thus minimizing transaction costs and information asymmetries. Even Weatherill, one of the most outspoken critics of “classic” preemption, conceded that there are “enormous advantages for commercial certainty in fixing a Community rule”, which obviates for the uncertainties associated with the balkanization deriving from unilateral national deviations and the uneasy and costly balancing exercise carried out by courts reviewing of such national measures.²⁰⁸

4.2. Negative effects: centripetal competence creep and the suppression of regulatory competition

The minimization of agency slack and the uniformity that preemption brings about come at a twofold price: the suppression of regulatory competition between Member States and the irrevocable creation of an EU exclusive competence. As to the former, regard will be had to the possible beneficial effects of regulatory competition, to the possibility of adjusting the preemptive effects of EU legislation to the actual need for uniformity of each market, to the existence of alternatives to preemption as a solution to agency problems in the implementation process, and to the EU institutions’ exposure to agency slack and regulatory capture. As to the latter, it will be shown how the EU constitutional architecture has become extremely hostile to the centripetal competence creep that preemption entails.

4.2.1. The forfeiture of the benefits of regulatory competition and other undesirable effects of preemption

As suggested in the previous subsection, preemption can be seen as a solution to an agency problem occurring in the implementation process. However, not only it could be objected that there are less restrictive solutions, but the characterization of divergent implementations as an agency “problem” can be contested in the first place.

As noted above, the main concern with decentralized implementation is that it may result in a destructive competition among Member States, resulting in a “race to the bottom”. Game theory,

²⁰⁸ STEPHEN WEATHERILL, ‘Beyond preemption? Shared competence and constitutional change in the European Community’, in D. O’KEEFE & P. TWOMEY (eds.), *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law, 1994), 13-33, 18.

however, shows that, depending on the assumptions made, competition between regulators can result either in a “race to the bottom” or in a “race to the top”.²⁰⁹

The US federal experience offers two excellent examples of beneficial regulatory competition: Delaware and California. The former has been extremely successful in attracting companies to incorporate in the state,²¹⁰ thanks to the comprehensiveness of its corporate law statutes and its effective court system specialized in corporate matters,²¹¹ inducing other American states to revise and improve their corporate laws to prevent capital drain and the loss of incorporation fees. California, in turn, enacted environmental standards stricter than other states, ultimately inducing the latter to raise their own standards to enable their firms to operate on the profitable Californian market (the so-called “California effect”).²¹²

Regulatory competition could prove equally beneficial in the EU single market. Scharpf suggested that stricter domestic product requirements may serve as a certificate of superior quality, thus attracting manufacturers instead of driving them away.²¹³ Economics, indeed, shows that price competition is the most common, but not the only form of competition. Scharpf’s assumptions, therefore, could prove true especially in markets characterized by substantial product differentiation and non-price competition.²¹⁴

Furthermore, the rigidity inherent in EU legislation having broad preemptive effects may prove undesirable in a diverse and rapidly-evolving environment such as the EU single market. As Weatherill put it, therefore, “Preemption risks creating a level but barren playing field”.²¹⁵ The EU legislature, indeed, has a limited ability to foresee technological innovations and

²⁰⁹ J. R. MARKUSEN, E. R. MOREY & N. D. OLEWILER, ‘Environmental policy when market structure and plant locations are endogenous’, 24 *Journal of Environmental Economics and Management* 69 (1993).

²¹⁰ See D. CHARNY, ‘Competition among Jurisdictions in Formulating Corporate Law Rules: an American perspective on the “Race to the Bottom” in the European Communities’ 32 *Harvard International Law Journal* 422, at 428 (1991) (reporting that a substantial share of the companies listed in the New York Stock Exchange and of the so-called “Fortune 500” companies are incorporated in Delaware).

²¹¹ See R. ROMANO, ‘Law as a Product: Some Pieces of the Incorporation Puzzle’, 1 *Journal of Law, Economics & Organization* 225, 257-258 (1985) (analyzing the “virtuous circle” implications of the Delaware experience: superior corporate law brought about higher incorporation revenues; reliance on high incorporation revenues creates incentives to further improve corporation laws).

²¹² D. VOGEL, ‘Trading up and Governing Across: Transnational Governance and Environmental Protection’ 4 *Journal of European Public Policy* 556 (1997).

²¹³ F. SCHARPF, ‘Introduction: the Problem-solving Capacity of Multi-level Governance’ (1997) 2 *JEPP* 520.

²¹⁴ See, generally, R. A. WINTER, “Vertical Control and Price versus Nonprice Competition.” 108 *Quarterly Journal of Economics* 61–76 (1993).

²¹⁵ STEPHEN WEATHERILL, ‘Beyond preemption? Shared competence and constitutional change in the European Community’, in D. O’KEEFE & P. TWOMEY (eds.), *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law, 1994), 13-33, 19.

changes in market conditions. Nor can the EU legislative drafting be regarded as 100% circumvention-proof. If Member States are granted some leeway in the implementation process, they can adapt EU legislation to those unexpected developments. According to the “laboratory of democracy” theory,²¹⁶ moreover, experimentation and diversity in the search of effective legal solutions can provide valuable comparative data to assist in regulatory reform.²¹⁷ In this connection, it has been suggested that the notification requirement under Article 114(4) TFEU may allow national regulatory initiatives to provide a creative impulse for the modernization of the harmonized rules from which Member States seek to derogate.²¹⁸

However, even in markets where a race to the bottom is the most likely prospect and diversified implementation can be correctly characterized as agency slack, preemption is only one of the possible solutions – and arguably one of the less efficient ones. As a preliminary remark, thanks to “express saving” and “express preemption” clauses, the preemptive effects of an item of EU legislation can be tailored to the specific need of each market for uniform regulation. The single market harmonization experience is, in this connection, illuminating: along with exhaustive harmonization, the EU legislature routinely employs more flexible harmonization models, such as minimum, partial, and optional harmonization, which ensure a certain degree of uniformity while allowing for discretion in the implementation phase within predefined limits.²¹⁹

According to the general theory on international delegation there are at least two other solutions that can be applied in alternative or in addition to preemption: monitoring and sanctions. Monitoring can take two forms: “police patrols”, if surveillance is carried out by the principal, and “fire alarms” if the principal relies upon affected third parties to report cases of

²¹⁶ D. TARULLO, ‘Federalism Issues in the United States’ in A. CASTRO, P. MÉHAUT, & J. RUBERY, *International integration and labour market organization* (London, Academic Press, 1992), 101.

²¹⁷ See R. VAN DEN BERGH, ‘The Subsidiarity principle in European Community Law: some insights from Law and Economics’, 1 *Maastricht Journal of European and Comparative Law* 337 (1994).

²¹⁸ STEPHEN WEATHERILL, ‘Beyond preemption? Shared competence and constitutional change in the European Community’, in D. O’KEEFE & P. TWOMEY (eds.), *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law, 1994), 13-33, 30.

²¹⁹ See, generally, PETER ROTT, ‘Minimum Harmonisation for the completion of the Internal Market? The example of consumer sales law’, (2003) 40 *Common Market Law Review*, 1107-1135; MICHAEL DOUGAN, ‘Minimum Harmonisation and the Internal Market’, (2000) 37 *Common Market Law Review*, 853-885; PIET JAN SLOT, ‘Harmonisation’, (1996) 21 *European Law Review*, 378-387.

agency slack.²²⁰ Unsurprisingly, both methods are widely employed in the EU internal market: the Commission carries out a number of surveys on the implementation status of directives,²²¹ most of which expressly require Member States to notify the Commission of the implementation measures.²²² In some cases, comitology procedures and contact committees are also used to this end.²²³ Interestingly, the EU legislature increasingly relies on “fire alarm” mechanisms,²²⁴ such as direct effect of directives,²²⁵ incidental horizontal effect,²²⁶ and State liability.²²⁷ Lured by the prospect of damages awards, or by the mere desire to assert one’s rights, private parties contribute a great deal to expose cases of incorrect implementation, to remedy them by invoking the application of the unimplemented EU rules, and to penalize the offending Member State.²²⁸ As von Jhering put it, each one’s struggle for his or her rights contributes to the improvement of the legal system as a whole.²²⁹ Also the centralized power to impose sanctions within the

²²⁰ See, generally Darren HAWKINS et al., ‘Delegation Under Anarchy: States, international organizations, and principal-agent theory’, in Darren HAWKINS et al. (eds.) *Delegation and agency in international organizations* (Cambridge, UK: Cambridge University Press, 2006), 26-31.

²²¹ See, e.g., European Commission, *Internal Market Scoreboard: Member States post best-ever result but action still needed on practical application of rules* (1 March 2010). For the scoreboards for the years 1997-2010 see: http://ec.europa.eu/internal_market/score/index_en.htm

²²² See, e.g., Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ L 95, 15.4.2010, p. 1–24, Articles 32 and 33 (requiring, respectively, to communicate to the Commission the text of the main national implementing measures and to submit every three years to the European Parliament, to the Council and to the ECOSOC a report on the application of the Directive).

²²³ See, e.g., id., Article 30 (requiring Member States to provide each other and the Commission with the information necessary for the application of the directive in particular through their competent independent regulatory bodies).

²²⁴ Cf. Mark POLLACK, ‘Delegation, Agency, and Agenda-setting in the European Community’, 51 *International Organization* 99-134 (1997) (discussing the action of annulment under Article 263 TFEU as a “fire alarm” to monitor conduct by the Commission that may cause harm to private parties).

²²⁵ See Judgment of the Court of 4 December 1974, *Yvonne van Duyn v Home Office*, Case 41-74, 1974 ECR 01337.

²²⁶ See Judgment of the Court of 30 April 1996, *CIA Security International SA v Signalson SA and Securitel SPRL*, Case C-194/94, 1996 ECR I-02201, para 45 (holding that failure to comply with a notification requirement set out in a directive render non-notified technical regulations inapplicable and unenforceable against individuals); Judgment of the Court of 26 September 2000, *Unilever Italia SpA v Central Food SpA*, Case C-443/98, 200 ECR I-07535. See also PAUL CRAIG & GRÁINNE DE BÚRCA, *EU law: text, cases, and materials* (Oxford; Oxford University Press, 2008) 297 (discussing the single market enforcement rationale distinguishing *CIA Security* from *Lemmens*).

²²⁷ Judgment of the Court of 19 November 1991, *Andrea Francovich and Danila Bonifaci and others v Italian Republic*, Joined cases C-6/90 and C-9/90, 1991 ECR I-05357; Judgment of the Court of 5 March 1996, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others*, Joined cases C-46/93 and C-48/93, 1996 ECR I-01029.

²²⁸ This concept was recently clearly expressed by MARIO MONTI, *A new strategy for the single market at the service of Europe’s economy and society*, Report to the President of the European Commission (9 May 2010), 102 (“The EU legal system empowers citizens and business to stand up for their rights, through litigation before national courts. Thus, private enforcement is a key tool to contribute towards reduction of the compliance deficit and to ensure the effectiveness of the Single Market.”)

²²⁹ RUDOLPH VON JHERING, *The Struggle for Law* (translation by John J. Lalor, Chicago, 1915).

framework of the infringement procedure under Article 258 TFUE can be triggered following reports by the affected parties.

Upon closer scrutiny, also the regulatory failure argument must be qualified. While non-economic values may in fact constitute a disguised restriction on intra-EU trade, this is not always the case. Turning back to the *Wilson* case, the language tests imposed on European lawyers wishing to practice in Luxembourg may as well be imposed for legitimate reasons, as lawyers whose language proficiency is not established could actually be unable to effectively advise and represent their clients. It is indeed no wonder that the ECJ discussed at length the alternative mechanisms set out in Directive 98/5 to ensure the protection of consumers and the proper administration of justice.²³⁰

Furthermore, just like national authorities and regulators, also EU institutions are exposed to agency slack and regulatory capture. As to the former, there is a non-negligible risk that the current shortcomings in terms of transparency and accountability in the EU governance may create an environment in which European bureaucrats may over-regulate or over-harmonize the internal market to increase their personal power and prestige.²³¹ As to regulatory capture, it is telling that even the recent Monti Report on the single market (May 2010) urged the development of institutional arrangements designed to safeguard EU institutions from undue influences and to increase the transparency of public consultations.²³²

4.2.2 Centripetal competence creep in an evolving constitutional context

It is well-established in academic literature that whenever field preemption takes place, what follows is the transformation of a shared competence into an EU exclusive competence.²³³ It is

²³⁰ Judgment of the Court (Grand Chamber) of 19 September 2006, *Graham J. Wilson v Ordre des avocats du barreau de Luxembourg*, Case C-506/04, 2006 ECR I-08613, paras 71-76.

²³¹ See R. VAUBEL, 'The political economy of centralization and the European Community', 3 *Journal des Economistes et del Etudes Humaines*, 11-48 (1992).

²³² MARIO MONTI, *A new strategy for the single market at the service of Europe's economy and society*, Report to the President of the European Commission (9 May 2010), 94 ("One of the positive features of the EU system is that it remains more resistant to regulatory capture than many national political systems. This advantage should be safeguarded. The register for lobbies is a step forward. Furthermore, the Commission should ensure that all organisations of interests have access to its working groups and committees, notably those representing diffuse interests, such as environmental NGOs or consumer organisations. All committees and working groups should be registered in an openly accessible roster. If necessary, the Commission should place a check on their number.")

²³³ See GOUCHA SOARES, at 137; SCHÜTZE, 'Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption', at 1040; STEPHEN WEATHERILL, 'Beyond preemption? Shared competence and constitutional change in the European Community', in D. O'Keefe & P. Twomey (eds), *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law, 1994), 13-33, 14 ("Once the Community has acted, if it acts, it then

submitted that, from an initial forbearance or benign neglect, the EU constitutional architecture²³⁴ has arguably become increasingly hostile to such a centripetal competence creep – without having been able to stop it yet.²³⁵

Union Preemption, being inextricably linked to the principle of primacy, made its first appearance along with that doctrine in 1964.²³⁶ Having regard to the original design of the Treaty of Rome as altered by the Luxembourg Accord, it was neither unsettling nor inconsistent with the aims of the Community that the latter’s legislation could create new Community exclusive competences. Describing the competences of the Community in terms of goals rather than of subject-matters, expressly allowing the Community legislature to take action beyond the powers set out in the Treaty to achieve those goals, and failing to limit centripetal competence creep by way of an express statement of the principle of conferral all seem to imply an initial dynamic conception of the vertical division of powers with which field preemption was entirely consistent. Moreover, the ubiquity of the unanimity voting as a requirement for passing Community legislation imposed by the Luxembourg Accord, to a degree, legitimized field preemption: the ensuing creation of new exclusive competences, after all, occurred with the consent of all Member States under the shadow of the veto and could be seen as a sort of informal Treaty amendment, as in the case of an act adopted under Article 235 of the EEC

assumes exclusive competence in the field which it has occupied, thereby *transforming concurrent State/Community competence into exclusive Community competence* – the doctrine of preemption.” Emphasis added.); *but see* K. Lenaerts, ‘Les repercussions des competences de la Communauté européenne sur les competences externes des Etats membres et la question de “preemption”’ in Paul Demaret (ed.), *Relations extérieures de la Communauté européenne et marché intérieur: aspects juridiques et fonctionnels* (Bruxelles, Story Scientia, 1986) 43 (arguing that the exhaustive exercise of shared competence areas does not imply their transformation into areas of constitutionally exclusive competence, as the latter notion implies an immediate and irrevocable forfeiture by Member State of their prerogatives in the areas concerned).

²³⁴ See Judgment of the Court of 23 April 1986, *Parti écologiste “Les Verts” v European Parliament*, Case 294/83, 1986 ECR 1339, para 23 (referring to the Treaty of Rome as the “basic constitutional charter”); Opinion of the Court of 14 December 1991, no. 1/91, 1991 ECR I-6079.

²³⁵ See, generally, PAUL CRAIG, ‘Competence: Clarity, Conferral, Containment and Consideration’, (2004) 29 *European Law Review* 232; STEPHEN WEATHERILL, ‘Competence Creep and Competence Control’, (2004) 23 *Yearbook of European Law* 1; ALAN DASHWOOD, ‘The Limits of European Community Powers’, (1996) 21 *European Law Review* 113; ANTONIO TIZZANO, ‘Lo sviluppo delle competenze materiali delle Comunità Europee’, (1981) 2 *Rivista di diritto europeo* 139.

²³⁶ Judgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L.*, Case 6/64, ECR (English special edition) 585 para 3. According to EUGENE DANIEL CROSS, ‘Pre-emption of Member State law in the European Economic Community: A framework for analysis’, (1992) 29 *Common Market Law Review*, 447-472, at 449 one of the ECJ’s first expressions of Union Preemption was made in Judgment of the Court of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Case 106/77, 1978 ECR 629, para 3 (“In accordance with the principle of the precedence of Community law . . . those provisions and measures not only . . . render automatically inapplicable any conflicting provision of current national law but . . . also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions”).

Treaty.²³⁷ Possibly, the main limit to field preemption was the actual ability of Community institutions to exhaustively regulate certain fields without the assistance of Member States: this is why the ECJ, occasionally, espoused what Waelbroeck and Weiler referred to as a “pragmatic approach” to preemption.²³⁸

The Single European Act, by introducing majority voting in key areas of European integration, marked a profound change in preemption’s legal and institutional context: for a Member State, one thing is being outvoted in Council and have to implement and enforce EU legislation desired by other States, quite another is being unwillingly deprived of the power to regulate a certain subject-matter. It is thus no wonder that this reform was accompanied by a “rupture in the constitutional orthodoxy of preemption”:²³⁹ under Article 100(a)(4) of the EEC Treaty Member States were expressly empowered, subject to notification to and approval by the Commission, to depart from harmonization measures in the name of non-economic values.

Also the changes brought about by the Treaty of Maastricht can be seen as a response to the troubling prospects arising from the Single European Act. The introduction of the principle of conferral should have precluded preemptive legislation from entrusting the Community with powers other than those attributed to it by the Treaty. It is interesting to note that the drafters did not deem it necessary to expressly state the principle of attributed powers in the Second and Third Pillar, as unanimity alone was possibly deemed appropriate to prevent centripetal competence creep. The principle of subsidiarity,²⁴⁰ especially if understood in terms of federal proportionality,²⁴¹ should have induced the Community legislature to opt for legislation having

²³⁷ See GIROLAMO STROZZI, *Diritto dell’Unione Europea – Parte Istituzionale* (Giappichelli, Torino, 2005), 184-185 (regarding the procedure under Article 235 of the EEC Treaty as a form of spurious Treaty amendment)

²³⁸ J.H.H. WEILER, ‘Community system: The dual character of supranationalism’, (1981) 1 *Yearbook of European Law*, 267-306, at 278.

²³⁹ See STEPHEN WEATHERILL, ‘Beyond preemption? Shared competence and constitutional change in the European Community’, in D. O’KEEFE & P. TWOMEY (eds), *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law, 1994), 13-33, at 22.

²⁴⁰ Although the first general formulation of the principle of subsidiarity in Article 5(2) EC is attributable to the Treaty of Maastricht, a sector-specific version of that principle had been previously introduced by the Single European Act in Article 130(r)(4) EEC, restricting Community environmental legislation to those actions whose objectives could “be attained better at Community level than at the level of the individual Member States”.

²⁴¹ ROBERT SCHÜTZE, ‘Subsidiarity after Lisbon: reinforcing the safeguards of federalism?’ 68(3) *Cambridge Law Journal*, 525–536, at 533 (“The principle of subsidiarity will thus ask whether the European legislator has unnecessarily restricted national autonomy. A subsidiarity analysis that will not question the federal proportionality of a European law is bound to remain an empty formalism. Subsidiarity properly understood is federal proportionality.”)

the least preemptive effects:²⁴² as subsequently clarified by the Amsterdam Protocol, “directives should be preferred to regulations and framework directives to detailed measures” and “Community measures should leave as much scope for national decision as possible”.²⁴³

None of those changes, however, eradicated field preemption. The principle of conferral proved of little use, due *inter alia* to the lack of a clear competence catalogue.²⁴⁴ The ECJ’s lax approach to the issue of the choice of legal basis,²⁴⁵ with the relevant exceptions of the *Tobacco Advertising* and the *Passenger Data Transfer* rulings,²⁴⁶ further watered down the principle of conferral. Subsidiarity proved even less effective:²⁴⁷ its justiciability was only recognized with

²⁴² See ANTÓNIO GOUCHA SOARES, ‘Pre-emption, Conflicts of Powers and Subsidiarity’, (1998) 23 *European Law Review*, 132-145, 139-145 (discussing the “evident antagonism” between the principle of subsidiarity and the idea of preemption and advocating a general preference for rule preemption as opposed to obstacle and field preemption). *But see* STEPHEN WEATHERILL, ‘Beyond preemption? Shared competence and constitutional change in the European Community’, in D. O’KEEFE & P. TWOMEY (eds), *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law, 1994), 13-33, 27-28 (objecting that subsidiarity “cuts both ways”, in that it can be used both to justify the expansion and the and the contraction of Community competences, and that its elevation to a significant legal rule is unfeasible).

²⁴³ Protocol on the application of the principles of subsidiarity and proportionality attached to the Treaty of Amsterdam, paras 6 and 7.

²⁴⁴ See BARBARA GUASTAFERRO, ‘The Endorsement of the Principle of Conferral by the Treaty of Lisbon’, in MARTIN TRYBUS and LUCA RUBINI (eds.), *After Lisbon. The Impact of the New Treaty on European Union and the Treaty on the Functioning of the European Union* (Edward Elgar Publishing, forthcoming)

²⁴⁵ Judgment of the Court of 10 December 2002, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, Case C-491/01, 2002 ECR I-11453 (holding that Directive 2001/37 harmonizing the rules concerning the manufacture, presentation and sale of tobacco products genuinely has as its object the improvement of the conditions for the functioning of the single market and it was, therefore, validly adopted on the basis of Article 95 EC); Judgment of the Court (Grand Chamber) of 12 July 2005, *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health (C-154/04) and The Queen, on the application of National Association of Health Stores and Health Food Manufacturers Ltd v Secretary of State for Health and National Assembly for Wales (C-155/04)*, Joined cases C-154/04 and C-155/04, 2005 ECR I-6451 (holding that Article 95 EC constitutes the only appropriate legal basis for Directive 2002/46 relating to food supplements, owing to the preexisting difference in national rules and the inherent risk of free movement being impeded).

²⁴⁶ Judgment of the Court of 5 October 2000, *Federal Republic of Germany v European Parliament and Council of the European Union*, Case C-376/98, 2000 ECR I-08419 (annulling Directive 98/43 on harmonizing advertising and sponsorship of tobacco products because it was adopted relying upon an inappropriate legal basis); Judgment of the Court of 30 May 2006, *European Parliament v Council of the European Union (C-317/04) and Commission of the European Communities (C-318/04)*, Joined cases C-317/04 and C-318/04, 2006 ECR I-04721 (annulling Decision 2004/496 on the conclusion of an Agreement between the EC and the US on the processing and transfer of passenger name record data because it could not be validly adopted on the basis of Article 95 EC read in conjunction with Article 25 of Directive 95/46 on the protection of personal data).

²⁴⁷ A. VAN AAKEN, ‘Supremacy and Preemption: a View from Europe’, in R. EPSTEIN & M. GREVE (eds.) *Federal preemption: States’ Powers, National Interests* (AEI Press, 2007), 277-307, at 294 (“In any case, the control of an appropriate legal basis has unquestionably proved a more effective tool to safeguard the member states’ competences than the subsidiary principle”).

the Amsterdam Protocol²⁴⁸ and, at any rate, the ECJ often construed the principle as a mere procedural requirement,²⁴⁹ rejected to review compliance therewith,²⁵⁰ or ignored it altogether.²⁵¹ The same holds true for the derogation mechanism set out under Article 100(a)(4) EC, which, in spite of the initial attention it drew from scholarly commentators,²⁵² has been seldom invoked by Member States²⁵³ and has been even more rarely the subject of litigation before the ECJ.²⁵⁴

The Treaty of Lisbon, by introducing a competence catalogue and expressly defining competence types, seems to reject even the theoretical possibility of adopting legislation capable of occupying an entire field in the area of single market. Indeed, the latter appears in Article 4(2)(a) TFEU as one of the areas in which competence is shared between the Union and the Member States. As per Article 2(2) TFEU, in those areas, “Member States shall exercise their competence to the extent that the Union has not exercised its competence.” The last element of that provision is clarified in Protocol no. 25: “the scope of this exercise of competence [by the

²⁴⁸ Protocol on the application of the principles of subsidiarity and proportionality attached to the Treaty of Amsterdam, para 13 (“Compliance with the principle of subsidiarity shall be reviewed in accordance with the rules laid down by the Treaty”).

²⁴⁹ See Judgment of the Court of 9 October 2001, *Kingdom of the Netherlands v European Parliament and Council of the European Union*, Case C-377/98, 2001 ECR I-07079, para 33 (“Compliance with the principle of subsidiarity is necessarily implicit in the fifth, sixth and seventh recitals of the preamble to the Directive, which state that, in the absence of action at Community level, the development of the laws and practices of the different Member States impedes the proper functioning of the internal market. It thus appears that the Directive states sufficient reasons on that point.”)

²⁵⁰ See Judgment of the Court of 12 November 1996, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, Case C-84/94, 1996 ECR I-05755, para 23 (“[I]t is not the function of the Court to review the expediency of measures adopted by the legislature. The review exercised under Article 173 must be limited to the legality of the disputed measure.”). See also N. BERNARD, ‘The Principle of Subsidiarity in the Maastricht Treaty’, 29 *Common Market Law Review* 1079 (1992).

²⁵¹ See Judgment of the Court of 5 October 2000, *Federal Republic of Germany v European Parliament and Council of the European Union*, Case C-376/98, 2000 ECR I-08419, para 9 (reporting, but failing to address the plea put forward by the German government concerning the breach of the principle of subsidiarity)

²⁵² See, e.g., Pierre PESCATORE ‘Some Critical Remarks on the “Single European Act”,’ 24 *Common Market Law Review* 9-18 (1987); C.D. EHLERMANN, ‘The Internal Market Following the Single European Act’ 24 *Common Market Law Review* 361-409 (1987).

²⁵³ See Ludwig KRÄMER, ‘Environmental Protection and Article 30 EEC Treaty’ (1993) 30 *Common Market Law Review* 111-143 (discussing the infrequent use of the derogation mechanism under Article 100(a)(4)).

²⁵⁴ See, e.g., Judgment of the Court of First Instance of 27 June 2007, *Kingdom of the Netherlands v Commission of the European Communities*, Case T-182/06, 2007 ECR Page II-01983; Some recent judgments focusing more closely on substantive aspects of the derogation mechanism than previously include Case T-182/06 *Netherlands v. Commission* [2007] ECR II-1983; Judgment of the Court (Third Chamber) of 13 September 2007, *Land Oberösterreich and Republic of Austria v Commission of the European Communities*, Joined cases C-439/05 P and C-454/05 P, 2007 ECR I-7141; Judgment of the Court of First Instance of 8 November 2007, *Kingdom of the Netherlands v Commission of the European Communities*, Case T-234/04, 2007 ECR Page II-04589. See also the insightful comment by ISIDORA MALETIĆ, ‘Toxic Substances and a Dangerous Procedure: An Analysis of Case T-234/04 *Kingdom of the Netherlands v. Commission* Case T-234/04 *Kingdom of the Netherlands v. Commission*, Judgment of the European Court of First Instance of 8 November 2007’, 36 *Legal Issues of Economic Integration*, 75-82 (2009).

Union] only covers those elements governed by the Union act in question and *therefore does not cover the whole area.*”

In spite of all that, once again field preemption seems to be alive and kicking: in two Post-Lisbon judgments, the ECJ expressly relied upon the exhaustiveness of the item of EU legislation to oust national lawmaking in the whole field.²⁵⁵ Both cases, however, involved items of legislation adopted prior to the Treaty of Lisbon,²⁵⁶ so it is still too early to make an accurate assessment.²⁵⁷

4.3. Preemption as an (anti)catalyst of EU consensus-building

Finally it is worth considering the impact of preemption on the EU decision-making process. The precedent subsection, indeed, leaves one question hauntingly unanswered: if Member States are so hostile to preemption when amending the Treaties, why do they pass legislation having preemptive effects when they vote in the Council?

In its 1982 article on the relevance of law in the framework of the European integration process, Weiler argued that the existence of preemption can facilitate consensus-building, even in politically controversial areas such as the Common Agricultural Policy.²⁵⁸ It is worth considering whether that proposition can be extended to the current institutional dynamics of EU decision-making.

²⁵⁵ Judgment of the Court (First Chamber) of 14 January 2010, *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandelsgesellschaft mbH*, Case C-304/08, nyr, para 45 (“Annex I to Directive 2005/29 establishes an *exhaustive* list of 31 commercial practices which . . . are regarded as unfair ‘in all circumstances’ Consequently . . . those commercial practices alone can be deemed to be unfair without a case-by-case assessment.”); Judgment of the Court of 4 February 2010, *Hava Genc v Land Berlin*, Case C-14/09, nyr, para 43 (“The *exhaustive* nature of the restrictions set out in the preceding paragraph would be undermined if the national authorities were able to make the interested person’s right of residence subject to additional conditions as to the existence of interests capable of justifying residence or as to the nature of the employment”).

²⁵⁶ Respectively, Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ 2005 L 149, p. 22, and Decision No 1/80 of the Association Council of 19 September 1980 on the development of the EEC-Turkey Association.

²⁵⁷ For a most insightful analysis of the solutions implemented in the Treaty of Lisbon to the centripetal competence drift, see BARBARA GUASTAFERRO, ‘The Endorsement of the Principle of Conferral by the Treaty of Lisbon’, in MARTIN TRYBUS and LUCA RUBINI (eds.), *After Lisbon. The Impact of the New Treaty on European Union and the Treaty on the Functioning of the European Union* (Edward Elgar Publishing, forthcoming).

²⁵⁸ J.H.H. WEILER, ‘Community, Member States and European Integration: Is the Law Relevant?’, (1982) 21 *Journal of Common Market Studies*, 39-55, at 47-50.

Weiler's analysis encompasses three elements: i) *factual preemption*, i.e. the material need of an EU to govern a certain matter;²⁵⁹ ii) *legal preemption*, viz. the legal preclusion for Member States to unilaterally regulate the field in the absence of EU rules;²⁶⁰ iii) *unanimity voting*, also known as voting "under the shadow of the veto", implying that each Member State can block the passing of EU legislation.²⁶¹ Weiler's conclusion could be summarized as follows: in the case of unanimity voting, if factual preemption and legal preemption are present, consensus-reaching is easier than in their absence.

Arguably, the previous statement holds true *a fortiori* in the case of qualified majority voting, which acts as a further catalyst for consensus-reaching, insofar as the possibility of breaking deadlocks by voting (i.e. under the shadow of the vote) drives negotiators to reach consensus even without resorting to vote.²⁶² The impact of qualified majority on decision-making, however, does not entirely outshine the role of preemption: also under the shadow of the vote, a recalcitrant Member State is less likely to support a proposal when there are viable national alternatives and it is allowed to pursue them (no legal and factual preemption) than when that option is legally and factually precluded (legal and factual preemption). It can thus be concluded that, both under unanimity and qualified majority voting, factual and legal preemption facilitate consensus-reaching.

In the previous model, however, legal preemption is coupled with factual preemption and is regarded as a condition that precedes decision-making. The role of legal preemption changes significantly if it is decoupled from factual preemption and is regarded as an outcome of decision-making. Leaving factual preemption aside for moment, the relevant query is the following: is consensus-reaching easier when a legislative proposal involves broad legal preemptive effects relative to when it entails little or no preemption? Both under unanimity and

²⁵⁹ Id., at 49 (noting that in the field of consumer protection "the level of market integration in the Community has not reached the stage where the 'regulatory gap' factor, evidenced in, say, the USA, provides a strong economic-political incentive to create factual preemption: namely there is no situation wherein the national policy option is not a factually viable alternative in the absence of agreement at the Community level.")

²⁶⁰ It is worth reminding that, according to the concept of preemption employed in that article, the occupation of a field can arise either from a Treaty provision (i.e. exclusive competences) or from the actual adoption of EU legislation. *See id.*, at 48.

²⁶¹ *See, generally*, HELEN WALLACE & WILLIAM WALLACE, *Policy-making in the European Union* (Oxford; Oxford University Press, 2000) at 39-64.

²⁶² J.H.H. WEILER, *The constitution of Europe: "Do the new clothes have an emperor?" and other essays on European integration* (Cambridge; CUP 1999) at 72.

majority voting the answer is, at first sight, obvious: Member States value their autonomy, so broad preemptive effects raise transaction costs making consensus-reaching more difficult.

The experience with the harmonization of professional qualifications provides an excellent example. In its first wave of harmonization legislation, the Council adopted exhaustive harmonization directives that set, for each profession, uniform training standards, so that recognition of professional qualifications in the host State would be automatic. In spite of the clear advantages offered by this approach, its preemptive effects severely delayed the negotiation process, which in one case took as long as seventeen years to be completed.²⁶³ In contrast, second-generation directives carrying out a minimum harmonization, such as Directive 89/48, Directive 98/51, and Directive 99/42, were adopted without substantial delays, thus suggesting that the preemptive effects associated with exhaustive harmonization had acted as an anti-catalyst for consensus-building.

The latter proposition, however, must be qualified having regard to factual preemption: if there is a strong need for uniformity, so that a plurality of national standards is unfeasible or undesirable, Member States may very well prefer a watertight EU framework to a loose set of rules prone to national implementation leaks. This is what occurred in the field of unfair commercial practices: Directive 84/450/EEC established minimum requirements that did not prevent the Member States from retaining or adopting measures which provide more extensive protection for consumers.²⁶⁴ This resulted in disparities that created barriers to the exercise of single market freedoms and undermined consumers' awareness of their rights. To eliminate those

²⁶³ See A. COCKFIELD, *The European Union: creating the single market* (Chicester, Wiley Cancery, 1994), 79 (discussing the lengthy negotiation process of the Architects and the Pharmacists Directives).

²⁶⁴ Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, OJ L 250, 19.9.1984, p. 17–20. The interpretation of that directive gave rise to substantial litigation before the ECJ. See, e.g., Judgment of the Court (First Chamber) of 18 June 2009, *L'Oréal SA, Lancôme parfums et beauté & Cie SNC and Laboratoire Garnier & Cie v Bellure NV, Malaika Investments Ltd and Starion International Ltd*, Case C-487/07, 2009 ECR 05185 (dealing with conditions under which comparative advertising is permitted, with specific reference to taking unfair advantage of the reputation of a trade mark of a competitor); Judgment of the Court (First Chamber) of 12 June 2008, *O2 Holdings Limited and O2 (UK) Limited v Hutchison 3G UK Limited*, Case C-533/06, 2008 ECR I-04231 (discussing the permissible use of a competitor's trade mark or of a sign similar to that mark); Judgment of the Court (First Chamber) of 19 April 2007, *De Landtsheer Emmanuel SA v Comité Interprofessionnel du Vin de Champagne and Veuve Clicquot Ponsardin SA*, Case C-381/05, 2007 ECR I-03115 (identifying a competitor or the goods or services offered by a competitor in the case of goods or services satisfying the same needs or with the same purpose bearing references to designations of origin).

obstacles, the EU legislature adopted Directive 2005/29/EC, laying down uniform rules in the area of consumer protection.²⁶⁵

To sum up, if decision-making occurs in a sector that is already legally and factually preempted, consensus-reaching is easier relative to an area where no such preemption exists. Conversely, if decision-making concerns the preemptive effects of legislation, consensus-reaching is hindered by broad legal preemption, unless a significant factual preemption is present. Both propositions hold true either under unanimity or under majority voting, even though the latter is more conducive than the former to consensus-reaching.

Admittedly, both propositions are, at this stage, largely conjectural, as they have not been tested against empirical evidence. Nonetheless, if validated, they could account for the remarkable resilience of Union Preemption to an increasingly inhospitable EU constitutional architecture.

5. A Descriptive Theory of Union Preemption in the EU Single Market

From the analysis of Union Preemption types in Section 3, it is apparent that Union Preemption as an *effect* of EU legislation is in fact threefold, insofar as a given EU act can have the effect to i) displace all national law in the field concerned (field preemption), ii) oust such national rules as constitute an obstacle to the attainment of the aims it pursues (obstacle preemption), or iii) preclude only those rules that are in actual conflict with its provisions, fairly interpreted (rule preemption).

While the tripartite nature of Union Preemption as an effect of EU legislation is not conceptually problematic, it leaves the question open as to under what circumstances each of those preemption types applies. Preemption as a *doctrine* can thus be defined as the descriptive theory linking each preemption *type* to certain preemption *markers*, so that the existence (or the absence) of the latter can be relied upon to determine the scope of national lawmaking powers displaced by a given item of EU legislation.

²⁶⁵ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149, 11.6.2005, p. 22–39, recitals 3–5 (accounting for the shortcomings of Directive 84/450/EEC and the need for uniform rules).

In this connection, it is worth drawing a parallel with direct effect: as an *effect* of EU legislation, it can be defined as the ability of individuals to invoke certain provisions set out in EU acts before national courts and administrations regardless of their implementation by the national legislature.²⁶⁶ Direct effect as a *doctrine*, in turn, links the effect described above to certain characteristics of the EU provision in question, such as its clarity, precision, and unconditional character.²⁶⁷

While it is possible to define the three types of Union Preemption with a reasonable degree of accuracy and to identify a number of ECJ decisions embodying each of them, no consensus exists in academic literature as to what factors trigger the application of those types. This section will therefore attempt a stocktaking of the most relevant preemption markers and of their correlation with the three Union Preemption types in the area of the EU single market.

5.1. The Single Market as a Shared Competence: Clue or Red Herring?

As mentioned in the previous section, some guidance as to the preemptive effects of EU legislation in the field of the single market can be gleaned from the Treaty of Lisbon, which introduced a competence catalogue and expressly defined competence types.

As per Article 4(2)(a) TFEU, the “internal market” is one of the areas in which competence is shared between the Union and the Member States. That characterization is in itself controversial: in respect to the corresponding provision of the Constitutional Treaty, Mastroianni opined that

²⁶⁶ For an in-depth discussion as to the notion of direct effect, see S. PRECHAL, “Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union”, in C. BARNARD (Ed.), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate?* (Oxford University Press, 2007) 37-38. On the distinction between “direct applicability” and “direct effect”, see T. WINTER, ‘Direct Applicability and Direct Effects’ 9 *Common Market Law Review* 425 (1972).

²⁶⁷ Those requirements apply, in spite of some language differences, to EU and TFEU Treaties, to international agreements between the EU and non-member countries, and to EU legislation: see, respectively, Judgment of the Court of 5 February 1963, *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, Case 26-62, ECR (English special edition) 1, para 12 (The wording of Article 12 [of the Treaty of Rome] contains a clear and unconditional prohibition which is not a positive but a negative obligation . . . not qualified by any reservation . . . which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between member states and their subjects.); Judgment of the Court of 30 September 1987, *Meryem Demirel v Stadt Schwäbisch Gmünd*, Case 12/86, 1987 ECR 3719, para 14 (“A provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when . . . contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure”); Judgment of the Court of 17 May 1972, *Orsolina Leonesio v Ministero dell’agricoltura e foreste*, Case 93-71, 1972 ECR 287 para 5 (holding that regulations have direct effect and are capable of creating individual rights which arise when “it is not possible at a national level to render the exercise of them subject to implementing provisions other than those which might be required by the regulation itself”).

the “internal market” is neither a sector nor a subject-matter, but rather an objective that can be pursued only by EU legislation (typically, by way of harmonization measures), rather than by national measures – as the classification as a shared competence seems to imply. Accordingly, the reference to the “internal market” should be read as a sort of synecdoche, referring to the several subject-matters that can constitute the subject of harmonization measures.²⁶⁸

That remark, indeed, points to the actual degree of interaction between EU law and national law that can take place in areas of shared competence. As per Article 2(2) TFEU, in those areas “Member States shall exercise their competence to the extent that the Union has not exercised its competence.” This provision prompted some commentators to infer a constitutional shift from “shared” to “concurrent” competences, on the German or American federal model, implying mutual exclusivity between EU and Member States’ action in those areas.²⁶⁹

Schütze, in particular, fears that the language of Article 2(2) TFEU may substantially affect Union Preemption by constitutionalizing field preemption as the only preemption type, abolishing the weaker ones. This concern appears, however, misplaced. First, as Schütze himself noted, such a *reductio ad unum* would be hard to reconcile with the express recognition of minimum harmonization elsewhere in the Treaty, such as the general minimum harmonization clauses in Articles 82(2), 83, and 153(2)(b) TFEU. Second, the risk of such an “automatic preemption of Member State action where the Union has exercised its power”²⁷⁰ is in stark contrast with the language of Protocol no. 25:

²⁶⁸ ROBERTO MASTROIANNI, ‘Article I-14’, in LAURENCE BURGORGUE-LARSEN, ANNE LEVADE, FABRICE PICOD (eds.), *Traité établissant une Constitution pour l’Europe, Parties I et IV, «Architecture constitutionnelle», Commentaire article par article*, Tome I, Bruxelles, Bruylant, 2007, at 232 (“Il est évident que le ‘marché intérieur’ n’est ni une matière ni un domaine, mais la représentation d’un des objectifs à atteindre à travers l’adoption de mesures (en premier lieu de rapprochement des législations nationales) en application de la définition des compétences de l’Union . . . Son introduction dans l’article I-14, paragraphe 2, est alors plutôt à interpréter comme concernant la réglementation des matières qui peuvent être l’objet de mesures finalisées à l’instauration ou au fonctionnement du marché”); *but see* ROBERT SCHÜTZE, ‘Lisbon and the Federal Order of Competences: a Prospective Analysis’, (2008) 33 *European Law Review*, 709-722, at 712 (noting, with reference to Article 3(1)(b), that “the category of ‘rules necessary for the functioning of the internal market’ will not, by definition, require the exclusion of all national action within their scope.”)

²⁶⁹ H. BRIBOSIA, ‘La répartition des compétences entre l’Union et ses Etats membres’, in M. DONY, E. BRIBOSIA (eds.), *Commentaire de la Constitution de l’Union européenne* (Bruxelles, Bruylant, 2005) 47-82, at 59 (“Cette définition s’inspire du concept des compétences concurrentes dans certains systèmes fédéraux, et notamment dans le système fédéral allemand . . . Cette notion est également connue du système américain qui a développé la théorie de la « préemption » qui se réfère en quelque sorte à « l’occupation du terrain » par le législateur fédéral . . .”);

²⁷⁰ PAUL CRAIG, ‘Competence: clarity, conferral, containment and consideration’ (2004) 29 *European Law Review*. 323, 334.

With reference to Article 2(2) of the Treaty on the Functioning of the European Union on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore *does not cover the whole area*.

The wording of the Protocol, arguably, reverses Schütze's perspective:²⁷¹ rule and obstacle preemption are not abolished, if anything that is the case of field preemption. Admittedly, the mutual exclusivity language of Article 2(2) TFEU appears inspired by a Dual Federalism rather than a Cooperative Federalism ethos. The displacement of national lawmaking powers caused by the action of the EU, however, is *expressis verbis* confined to "the elements governed by the Union act in question" and does not extend "to the whole area". The intent of the Reform Treaty, therefore, was not to "get rid of all weaker types of pre-emption",²⁷² but possibly to curtail the preemptive effect of EU legislation by outlawing field preemption. That reading would be entirely consistent with the trend of past Treaty amendments designed to circumscribe and better define EU competences, as advocated by the Laeken Declaration,²⁷³ but is at odds with the TFEU provisions allowing for the adoption of uniform rules in areas of shared competence,²⁷⁴ as well as with the latest ECJ jurisprudence.²⁷⁵

²⁷¹ Remarkably enough, the Author acknowledges the existence of that provision, but does not seem to attach any importance to it. See ROBERT SCHÜTZE, 'Lisbon and the Federal Order of Competences: a Prospective Analysis', (2008) 33 *European Law Review*, 709-722 ("True, the Reform Treaty clarifies that such field preemption would 'only' be in relation to the legislative act. But was it its intention to get rid of all weaker types of pre-emption?")

²⁷² ROBERT SCHÜTZE, 'Lisbon and the Federal Order of Competences: a Prospective Analysis', (2008) 33 *European Law Review*, 709-722, at 715.

²⁷³ Presidency Conclusions of the Laeken European Council (14 and 15 December 2001): Annex I: *Laeken Declaration on the future of the European Union*, in Bulletin of the European Union. 2001, No 12, 19-23.

²⁷⁴ That is the case of Article 118 TFEU: ("*In the context of the establishment and functioning of the internal market, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements.*"). See also Judgment of the Court (Grand Chamber) of 8 September 2009, *Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH*, Case C-478/07, 2009 ECR I-07721, para 129 ("the Community system of protection laid down by Regulation No 510/2006 is exhaustive in nature, with the result that that regulation precludes the application of a system of protection laid down by agreements between two Member States . . . which confers on a designation, recognised under the law of a Member State as constituting a designation of origin, protection in another Member State where that protection is actually claimed despite the fact that no application for registration of that designation of origin has been made in accordance with that regulation.")

²⁷⁵ Judgment of the Court of 14 January 2010, *Zentrale zur Bekämpfung unlauteren Wettbewerbs eV v Plus Warenhandels-gesellschaft mbH*, Case C-304/08, nyr, para 45 ("Annex I to Directive 2005/29 establishes an *exhaustive* list of 31 commercial practices which . . . are regarded as unfair 'in all circumstances' Consequently . . . those commercial practices alone can be deemed to be unfair without a case-by-case assessment.); Judgment of the Court of 4 February 2010, *Hava Genc v Land Berlin*, Case C-14/09, nyr, para 43 ("The *exhaustive* nature of the restrictions set out in the preceding paragraph would be undermined if the national authorities were able to make the interested person's right of residence subject to additional conditions as to the existence of interests capable of

In sum, it is hard to extrapolate clear indications on the status of Union Preemption from the TFEU provisions on shared competences. It seems possible, nonetheless, to infer an increased constitutional disfavor *vis-à-vis* field preemption, relative to obstacle and to rule preemption, in the field of the single market, as well as in the other shared competence areas. This view is supported by the emphasis on the principle of subsidiarity in Protocol no. 2, especially if understood as federal proportionality, requiring the EU legislature not to *disproportionally restrict* national autonomy.²⁷⁶

5.2. EU legislative instruments and their preemptive effects

In the field of the single market the EU legislature can adopt different legislative instruments. To the extent that Union Preemption has been defined as a legislative phenomenon, it is necessary to investigate whether a correlation can be established between types of legal instrument and types of preemptive effects, so that the former could act as markers allowing the inference of the latter.

As a preliminary matter, it is worth defining the material scope of the present survey. First, since the subject of this work is confined to the single market, types of legal acts employed in other areas will not be considered. That is the case, in particular, of the former Second and Third Pillar legislation.²⁷⁷ Second, to the extent that preemption is a feature of binding legal acts only, typical non-binding acts (such as recommendations and opinions), as well as other atypical soft-law instruments (e.g. notices, communications, working papers, etc.) will not be addressed. Third, since preemption concerns the effects of EU legislation on national lawmaking powers, this survey will not deal with internal acts having no effects on third-parties (e.g. rules of procedure, inter-institutional agreements, legislative proposals, positions, etc.), including, most notably, EU decisions addressed to individuals (decisions addressed to one or more Member States will instead be considered). Fourth, preemption in the area of external relations follows

justifying residence or as to the nature of the employment”). Please note that both decisions involved items of legislation adopted prior to the the entry into force of the Treaty of Lisbon.

²⁷⁶ See ROBERT SCHÜTZE, ‘Subsidiarity after Lisbon: reinforcing the safeguards of federalism?’ 68(3) *Cambridge Law Journal*, 525–536, at 533-535

²⁷⁷ For a preliminary account of the potential preemption issues in the Area of Freedom, Security and Justice, see AMEDEO ARENA, ‘Le Fonti Della Cooperazione di Polizia e Giudiziaria in Materia Penale e la Loro Efficacia Negli Ordinamenti Nazionali Prima e Dopo il Trattato di Lisbona’, in PATRIZIA DE PASQUALE and FABIO FERRARO (eds.) *Il terzo pilastro dell’UE tra cooperazione intergovernativa e prospettive future di comunitarizzazione*, 13-48, at 23-24 and 48 (Editoriale Scientifica: Naples, 2009) (Available at: <http://ssrn.com/abstract=1542123>)

substantially different patterns, whose analysis is beyond the scope of this work, so international agreements, also those having repercussions on the single market, will not be taken into account.

In sum, the analysis of preemptive effects of EU legislation will be limited to regulations, directives and State-addressed decisions both in their capacity as legislative acts (Article 289(3) TFEU) and as delegated (Article 290 TFEU) or implementing acts (Article 291(2) TFEU).

5.2.1. Regulations

As per Article 288(2) regulations have general application, are binding in their entirety, and are directly applicable in all Member States. As the ECJ clarified in its controversial jurisprudence on *locus standi* of non-privileged applicants, it is the general applicability of regulations, understood as the ability to apply to an open class of individuals, that distinguishes them from a bundle of individual decisions.²⁷⁸ Regulations' direct applicability, i.e. the *potential* to have legal effects within national legal orders in the absence of internal transposition measures,²⁷⁹ does not entail that all their provisions have direct effects, *viz.* the *actual* conferral of individual enforceable rights²⁸⁰ or the *actual* invocability before courts²⁸¹ and administrative authorities.²⁸² Thus, regulations can contain provisions that, either expressly or impliedly, require implementation measures to produce their effects.²⁸³ Conversely, self-executing provisions contained in a regulation produce both vertical and horizontal direct effects: as the ECJ put it in *Simmmenthal*, regulations are “a direct source of rights and duties for all those affected thereby,

²⁷⁸ Judgment of the Court of 13 May 1971, *NV International Fruit Company and others v Commission of the European Communities*, Joined cases 41 to 44/70, 1971 ECR 411, paras 17 and 21 (“[W]hen the said regulation was adopted, the number of applications which could be affected by it was fixed. . . . consequently, Article 1 of Regulation no 983/70 is not a provision of general application . . . but must be regarded as a conglomeration of individual decisions taken by the Commission under the guise of a regulation”).

²⁷⁹ G. WINTER, ‘Direct Applicability and Direct Effect. Two distinct and different concepts in Community Law’, 1972 *Common Market Law Review* 425-438, at 436.

²⁸⁰ Thus is sometimes referred to as “subjective” direct effect. See PAUL CRAIG & GRÁINNE DE BÚRCA, *EU law: text, cases, and materials* (Oxford; Oxford University Press, 2008), 270.

²⁸¹ This is the so-called “objective” direct effect. See W. VAN GERVEN, ‘Of rights, remedies and procedures’ (2000) 37 *Common Market Law Review* 501; D. EDWARD, ‘Direct Effect, the Separation of Powers and the Judicial enforcement of obligations’, in *Scritti in Onore di Giuseppe Federico Mancini* (Milan: Giuffrè, 1998), 423.

²⁸² Judgment of the Court of 22 June 1989, *Fratelli Costanzo SpA v Comune di Milano*, Case 103/88, 1989 ECR 1839, paras 29-32.

²⁸³ Judgment of the Court of 11 January 2001, *Azienda Agricola Monte Arcosu Srl v Regione Autonoma della Sardegna, Organismo Comprensoriale n° 24 della Sardegna and Ente Regionale per l’Assistenza Tecnica in Agricoltura (ERSAT)*, Case C-403/98, 2001 ECR I-00103, para 26 (“[A]lthough, by virtue of the very nature of regulations and of their function in the system of sources of Community law, the provisions of those regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt measures of application, some of their provisions may none the less necessitate, for their implementation, the adoption of measures of application by the Member States.”)

whether Member States or individuals, who are parties to legal relationships under Community law”.²⁸⁴

Turning to the preemptive effect of regulations, the ECJ in its early case-law insisted on automatic field preemption, so that Member States were precluded from taking any measure that could possibly alter the scope or supplement the provisions of a regulation.²⁸⁵ Preemption and the exclusionary effects of regulations appeared inextricably intertwined, as Waelbroeck noted in its seminal article on Union Preemption.²⁸⁶

Subsequent ECJ decisions, however, broke the link between regulations and field preemption.²⁸⁷ In *Bussone* the Court squarely held that regulations precluded national legislative measures “incompatible with the provisions of [a] regulation”, thus applying a rule preemption reasoning.²⁸⁸ In *Maris* the ECJ possibly applied an obstacle preemption reasoning in finding that a regulation only outlawed national provisions “to a different or contrary effect”.²⁸⁹

While regulations are clearly the most effective weapon in the EU legislature’s arsenal to lay down uniform rules, they are not invariably associated with exhaustive harmonization. Regulations can carry out minimum harmonization of a certain matter *ex nihilo*. Moreover, they can replace directives laying down minimum standards preserving the minimum harmonization clauses set out therein.²⁹⁰

²⁸⁴ Judgment of the Court of 9 March 1978, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, Case 106/77, 1978 ECR 629, para 15.

²⁸⁵ Judgment of the Court of 30 November 1972, *NV Granaria Graaninkoopmaatschappij v Produktschap voor Veevoeder*, Case 18/72, 1972 ECR 1163, para 12; Judgment of the Court of 18 February 1970, *Hauptzollamt Hamburg-Oberelbe v Firma Paul G. Bollmann*, Case 40/69, 1970 ECR 69, para 4.

²⁸⁶ M. WAELBROECK, ‘The emergent doctrine of Community pre-emption - Consent and redelegation’, in SANDALOW & STEIN (eds.), *Courts and Free Markets: Perspectives from the United States and Europe* (Vol. II, OUP, 1982), 548–580, at 555-556.

²⁸⁷ ROBERT SCHÜTZE, ‘The morphology of legislative power in the European Community: legal instruments and the federal division of powers’, (2007) 25 Yearbook of European Law 2006, 91-151, 117.

²⁸⁸ Judgment of the Court of 30 November 1978, *Francesco Bussone v Ministro dell’agricoltura e foreste*, Case 31/78, 1978 ECR 2429, para 31.

²⁸⁹ Judgment of the Court of 6 December 1977, *Marguerite Maris, wife of Roger Reboulet v Rijksdienst voor Werknemerspensionen*, Case 55/77, 1977 ECR 2327, para 18.

²⁹⁰ C. BLUMANN, *Politique Agricole Commune* (Litec, 1996) at 81 evidenced the congruencies between Council Directive 72/160/EEC of 17 April 1972 concerning measures to encourage the cessation of farming and the reallocation of utilized agricultural area for the purposes of structural improvement, OJ L 96, 23.4.1972, p. 9–14, Article 14 (“This Directive shall not affect the power of Member States to take . . . additional measures of aid the terms or conditions of which differ from those laid down herein”) and Council Regulation (EEC) No 1096/88 of 25 April 1988 establishing a Community scheme to encourage the cessation of farming, OJ L 110, 29.4.1988, p. 1–6, Article 2(2) (This Regulation shall not restrict the freedom of Member States to adopt . . . additional aid measures the conditions or terms of which differ from those laid down herein”).

Having regard to the present state of the ECJ jurisprudence and of the legislative practice, it is possible to conclude that the inclusion of a given provision in an EU regulation is no indication of a specific preemption type, nor of a unique harmonization model.

5.2.2. Directives

The definition of directives in Article 288(3) TFEU as binding on the addressed Member State(s) as to the result to be achieved, but leaving “to the national authorities the choice of form and methods”, characterizes directives as acts of general application and, most importantly, as instruments of *indirect* EU legislation, *viz.* lacking direct applicability and requiring national transposition measures to produce effects on individuals.²⁹¹

The indirect legislation character of directives, along with the absence of effective enforcement procedures in the original architecture of the Treaty,²⁹² contributed to a substantial compliance deficit. That prompted the ECJ to gradually redefine directives as an instrument of *direct* EU legislation. The first step was the *Van Duyn* judgment, where the Court first held that provisions contained in a directive could be directly effective.²⁹³ The transformation of directives into direct instruments of EU legislation, however, was only partial, insofar as the ECJ recognized that provisions of a directive cannot as such impose obligations on individuals and cannot be relied against private parties.²⁹⁴

As to the effect of directives on national lawmaking powers, their original character of “two-stage legislation” prompted several commentators to argue for a *domaine réservé* of national legislative autonomy: directives, in short, could never field preempt national lawmaking

²⁹¹ ROBERT SCHÜTZE, ‘The morphology of legislative power in the European Community: legal instruments and the federal division of powers’, (2007) 25 Yearbook of European Law 2006, 91-151, 118-119.

²⁹² Article 171 of the Treaty of Rome only provided for that “If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice”. It was not the Treaty of Maastricht that a second paragraph was added, expressly empowering the ECJ to impose lump sum or penalty payments on Member States failing to comply with a previous judgment establishing an infringement of Community law.

²⁹³ Judgment of the Court of 4 December 1974, *Yvonne van Duyn v Home Office*, Case 41/74, 1974 ECR 1337, para 12 (“It would be incompatible with the binding effect attributed to a directive . . . to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the community authorities have, by directive, imposed on member states the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law.”)

²⁹⁴ Judgment of the Court of 26 February 1986, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, Case 152/84, 1986 ECR 723, para 48.

powers.²⁹⁵ This proposition, however, was refuted both by legislative practice and by the ECJ jurisprudence. In *Enka* the latter first expressly recognized the legitimacy of exhaustive harmonization directives in cases where strict uniformity is required.²⁹⁶ Successive cases confirmed that directives can provide exhaustively for the harmonization of national rules (*Dim-dip*,²⁹⁷ *Provide*,²⁹⁸ *Ex parte BAT*,²⁹⁹), but may just as well lay down minimum requirements (*Gourmetteria van den Burg*,³⁰⁰ *Compassion in World Farming*,³⁰¹ *Pippig Augenoptik*³⁰²).

As in the case of regulations, it must be concluded that the mere circumstance that a provision is included in a directive cannot be correlated with a specific preemption type.

5.2.3. Decisions addressed to Member States

According to Article 288(4) TFEU, decisions are binding in their entirety, but only on those to whom they are addressed.³⁰³ If they are addressed to a Member State, they are binding on all the

²⁹⁵ For an overview of the Authors supporting this view, see ROBERT SCHÜTZE, ‘The morphology of legislative power in the European Community: legal instruments and the federal division of powers’, (2007) 25 Yearbook of European Law 2006, 91-151, 127-128.

²⁹⁶ Judgment of the Court of 23 November 1977, *Enka BV v Inspecteur der Invoerrechten en Accijnzen Arnhem*, Case 38/77, 1977 ECR 2203, para 12 (“[A]s regards the harmonization of the provisions relating to customs matters laid down in the member states by law, regulation or administrative action, in order to bring about the uniform application of the common customs tariff it may prove necessary to ensure the absolute identity of those provisions which govern the treatment of goods imported into the Community, whatever the Member State across whose frontier they are imported.”) See also Judgment of the Court of 14 July 1994, *Paola Faccini Dori v Recreb Srl*, Case C-91/92, 1994 ECR I-03325, para 24 (rejecting to extend horizontal direct effect to directives because doing so “would be to recognize a power in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.”)

²⁹⁷ Judgment of the Court of 12 July 1988, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, Case 60/86, 1988 ECR 3921, paras 9-11.

²⁹⁸ Judgment of the Court (Sixth Chamber) of 23 November 1989, *Kommanditgesellschaft in Firma Eau de Cologne & Parfümerie-Fabrik, Glockengasse n. 4711 v Provide Srl*, Case C-150/88, para 28, 1989 ECR 3891, para 28.

²⁹⁹ Judgment of the Court of 10 December 2002, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, Case C-491/01, 2002 ECR I-11453, para 77 (“The fact is that since the Community legislature made exhaustive provision in Directive 90/239 over the question of fixing the maximum tar yield of cigarettes, the Member States no longer had the power to enact individual rules in that area”).

³⁰⁰ Judgment of the Court (Sixth Chamber) of 23 May 1990, *Criminal proceedings against Gourmetteria Van den Burg*, Case C-169/89, 1990 ECR I-02143, para 9.

³⁰¹ Judgment of the Court of 19 March 1998, *The Queen v Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd*, Case C-1/96, 1998 ECR I-01251, para 50;

³⁰² Judgment of the Court of 8 April 2003, *Pippig Augenoptik GmbH & Co. KG v Hartlauer Handelsgesellschaft mbH and Verlassenschaft nach dem verstorbenen Franz Josef Hartlauer*, Case C-44/01, 2003 ECR I-03095, para 40.

³⁰³ On the subject of “addresseeless decisions” as atypical acts, see A. VON BOGDANDY, F. ARNDT & J. BAST, ‘Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis’, 2004 23 Yearbook of European Law 91-136, at 104 (opining that those *sui generis* decisions are binding only on EU institutions and public servants).

organs of that State, including courts.³⁰⁴ State-addressed decisions, however, can also contain directly effective provisions conferring rights that individuals may invoke before national courts.³⁰⁵

There is no consensus in academic literature as to whether State-addressed decisions can produce the full spectrum of direct effects as for regulations,³⁰⁶ or their effects are subject to restrictions as in the case of directives:³⁰⁷ the latter opinion, however, appears more persuasive, not only because the formal addressee of those decisions is a Member State rather than a private party, but also because the production of effects on third-parties is neither an essential nor an intended feature of those instruments, but rather a solution devised by the ECJ to bolster their *effet utile*.

State-addressed decisions, therefore, constitute, along with directives, instruments of indirect EU legislation.³⁰⁸ This begs the question whether there are some criteria for the choice between those two instruments. The ECJ gave some clear guidelines in *Portugal v. Commission*: directives must be preferred “to specify in general terms the obligations arising under the Treaty”; whereas decisions are the most suitable instrument “to assess a specific situation” and to “determine the consequences” arising therefrom for one or more Member States.³⁰⁹

The decisions’ vocation to address specific situations *de facto* curtails their preemptive effects on national lawmaking: even if they occupy a whole “field”, the latter’s size will be limited to

³⁰⁴ Judgment of the Court of 21 May 1987, *Albako Margarinefabrik Maria von der Linde GmbH & Co. KG v Bundesanstalt für landwirtschaftliche Marktordnung*, Case 249/85, 1987 ECR 2345, para 17.

³⁰⁵ Judgment of the Court of 6 October 1970, *Franz Grad v Finanzamt Traunstein*, Case 9-70, 1970 ECR 825, para 5 (“it would be incompatible with the binding effect attributed to decisions by Article [288(4) TFEU] to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision. Particularly in cases where, for example, the Community authorities by means of a decision have imposed an obligation on a Member State or all the Member States to act in a certain way, the effectiveness (‘l’effet utile’) of such a measure would be weakened if the nationals of that State could not invoke it in the courts and the national courts could not take it into consideration as part of Community law”)

³⁰⁶ See A. VON BOGDANDY, F. ARNDT & J. BAST, ‘Handlungsformen im Unionsrecht: Empirische Analysen und dogmatische Strukturen in einem vermeintlichen Dschungel’, 2002 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 77-161, at 98-99 (cited in ROBERT SCHÜTZE, ‘The morphology of legislative power in the European Community: legal instruments and the federal division of powers’, (2007) 25 *Yearbook of European Law* 2006, 91-151, at 130).

³⁰⁷ See ROBERT SCHÜTZE, ‘The morphology of legislative power in the European Community: legal instruments and the federal division of powers’, (2007) 25 *Yearbook of European Law* 2006, 91-151, at 131; T.C. HARTLEY, *The foundations of European Community Law: an introduction to the constitutional and administrative law of the European Community* (OUP, 2003) 224.

³⁰⁸ See ROBERT SCHÜTZE, ‘The morphology of legislative power in the European Community: legal instruments and the federal division of powers’, (2007) 25 *Yearbook of European Law* 2006, 91-151, at 131.

³⁰⁹ Judgment of the Court of 29 March 2001, *Portuguese Republic v Commission of the European Communities*, Case C-163/99, 2001 ECR I-02613, para 28.

the specific *Tatbestand* and thus will not appreciably encroach on national legislative autonomy. Nonetheless, while formally addressing a specific situation, a decision may affect a rather large generality of third-parties, as in the (in)famous *Plaumann* case.³¹⁰

Moreover, some State-addressed decisions are designed to make inroads into the preemptive scope of *other* EU legislative acts, such as directives and regulations, by authorizing a Member States to derogate from uniform rules laid down therein.³¹¹ That is the case, most notably, of the decisions adopted by the Commission in the context of the general safeguard mechanism under Article 114(4) TFEU.³¹²

5.2.4. Implementing and delegated acts

One of the distinguishing features of the EU executive federalism is that, except for subject-matters falling within EU exclusive competences and items of EU legislation that do not require implementation, the implementation of EU legislation rests with Member States. This general rule, an expression of the principle of sincere cooperation as per Article 4(3) TEU,³¹³ is now expressly codified in Article 291(1) TFEU, introduced by Treaty of Lisbon. Nonetheless, since the Single European Act inserted the third indent to Article 202 EC, the existence of Community implementing powers is beyond serious doubt, as attested by the development of the tortuous Comitology procedures.³¹⁴

The Reform Treaty dealt with the issue and introduced a distinction between implementing and delegated acts. As to the former, according to Article 291(2) TFEU, when “uniform conditions for implementing legally binding Union acts are needed”, those acts can confer implementing powers on the Commission, or, in some cases, on the Council. The express

³¹⁰ Judgment of the Court of 15 July 1963, *Plaumann & Co. v Commission of the European Economic Community*, Case 25-62, ECR (English special edition) 95 (noting that a clementine importer “is affected” by a Commission decision concerning the custom duties on clementines)

³¹¹ See, e.g., Commission Decision of 2 March 2005 authorising Estonia, Latvia, Lithuania and Malta to adopt stricter requirements concerning the presence of *Avena fatua* in cereal seed (notified under document number C(2005) 462), OJ L 70, 16.3.2005, p. 19–20.

³¹² See, e.g. Commission Decision of 7 June 2007 concerning national provisions on the use of short-chain chlorinated paraffins notified by the Kingdom of the Netherlands under Article 95(4) of the EC Treaty (notified under document number C(2007) 2361), OJ L 148, 9.6.2007, p. 17–23.

³¹³ Article 4(3), second paragraph. (“The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.”)

³¹⁴ ROBERT SCHÜTZE, ‘Sharpening the Separation of Powers through a Hierarchy of Norms? Reflections on the Draft Constitutional Treaty’s Regime for legislative and executive Law-Making’, EIPA Working Paper no. 1/2005, 12-13 (available at: <http://www.eipa.nl/Publications/Summaries/05/FC0501e.pdf>)

reference to “uniform” implementation conditions in Article 291(2), seems to suggest: i) that legislative acts conferring implementation powers as per Article 291(2) have strong preemptive effects; ii) that implementing acts themselves have broad preemptive effects. Ideally, the legislative act sets out the EU legislature’s intent to lay down uniform requirements, while the implementing act specifies those requirements. A random survey of implementing acts adopted since the entry into force of the Treaty of Lisbon supports that proposition, but constitutes too limited a sample to formally validate it.³¹⁵

With reference to delegated acts, Article 290(1) TFEU provides for that legislative acts may delegate to the Commission the power to adopt “non-legislative acts of *general application* to supplement or amend certain *non-essential elements* of the legislative act” (emphasis added). The first difference between these acts and implementing acts is that the latter can both be of specific (decisions) and generic (regulations, directives), while delegated acts can only be generic. The second difference is that the content of delegated acts is expressly limited to “non-essential elements”, a wording that seems to prevent delegated acts from affecting relevant aspects of the legislative act such as its preemptive scope or its harmonization model. Accordingly, if the Commission were to amend, on the basis of Article 290, a legislative act by replacing a minimum requirement with a uniform one, it would arguably be acting *ultra vires*. Although to date no delegated acts have been adopted yet to either validate or falsify that assumption, the legislative proposals and other preparatory acts empowering the Commission to adopt delegated acts under Article 290 seem to confine that power to aspects that have no bearing on the preemptive effects of the prospective legislative act.³¹⁶

³¹⁵ See, e.g. Implementing Regulation of the Council (EU) No 210/2010 of 25 February 2010 amending the lists of insolvency proceedings, winding-up proceedings and liquidators in Annexes A, B and C to Regulation (EC) No 1346/2000 on insolvency proceedings and codifying Annexes A, B and C to that Regulation, OJ L 65, 13.3.2010, p. 1–13; Council Implementing Decision of 16 February 2010 authorising the Republic of Lithuania to extend the application of a measure derogating from Article 193 of Directive 2006/112/EC on the common system of value added tax, OJ L 45, 20.2.2010, p. 10–11. To date, no implementing directives have been adopted after the entry into force of the Treaty of Lisbon.

³¹⁶ See, e.g., Proposal for a Regulation of the European Parliament and of the Council concerning European statistics on permanent crops (COM/2010/0249 final - COD 2010/0133, 21 May 2010), Recital no. 12 (“The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty on the Functioning of the European Union for the purposes of modifying the Annexes.”); Position (EU) No 10/2010 of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on the energy performance of buildings Adopted by the Council on 14 April 2010, OJ C 123E , 12.5.2010, p. 32–58, recital no. 32 (“The Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty in respect of the adaptation to technical progress of certain parts of the general framework set out in Annex I, and in

5.3. Harmonization Models (and Clauses) as Markers of Preemption Types

A substantial body of EU single market legislation is designed to carry out the harmonization of national legislations, a process that directly affects Member States lawmaking powers. It is thus necessary to investigate the correlation between different harmonization “models” and the three preemption types. That in turn postulates a brief overview of harmonization within the EU single market, its rationale, and its legal basis.

5.3.1. Harmonization: Rationale and Legal Basis

Harmonization (or positive integration) is usually regarded as remedy to the occasional failures of the TFEU rules on free movement (negative integration). It is well-established in the ECJ case-law that, in presence of legitimate public interest aims whose level of protection is too divergent in the Home and in the Host State, the latter is allowed to apply its own rules to, say, services³¹⁷ originating in the Home state provided that those rules meet the necessity and proportionality test set out by the ECJ in *Säger*.³¹⁸ It is plain to see that, if this occurs frequently enough, the functioning of the internal market would be seriously undermined, as non-trade barriers would be erected between national markets.³¹⁹

To overcome those regulatory failures, Article 114(1) TFEU empowers the EU legislature to adopt measures designed to approximate national legislations. Those measures have, as a rule, appreciable preemptive effects insofar as they preclude Member States from applying divergent

respect of the establishment of a methodology framework for calculating cost-optimal levels of minimum [sic] energy performance requirements.”)

³¹⁷ The discussion is limited to services for the sake of simplicity. Analogous considerations apply, *mutatis mutandis*, to the free movement of persons, capital, and goods.

³¹⁸ Judgment of the Court (Sixth Chamber) of 25 July 1991, *Manfred Säger v Dennemeyer & Co. Ltd*, Case C-76/90, 1991 ECR I-04221, para 15 (“the freedom to provide services may be limited only by rules which are justified by imperative reasons relating to the public interest and which apply to all persons or undertakings pursuing an activity in the State of destination, in so far as that interest is not protected by the rules to which the person providing the services is subject in the Member State in which he is established. In particular, those requirements must be objectively necessary in order to ensure compliance with professional rules and to guarantee the protection of the recipient of services and they must not exceed what is necessary to attain those objectives”)

³¹⁹ This is, by and large, the situation that characterized the single market in 1985. See White Paper from the Commission to the European Council *Completing the Internal Market* (COM(85) 310, June 1985), para 6 (“[D]uring the recession [non-tariff barriers] multiplies as each Member State endeavoured to protect what it thought was its short term interests – not only against third countries but against fellow Member States as well”)

rules on the basis of requirements in the public interest or express Treaty derogations.³²⁰ The underlying rationale is to prevent individual Member States from calling in question the uniform standard which is the outcome of a political compromise reached, sometimes with difficulty, at the supranational level, as well as to erect new non-trade barriers to free movement.

Article 114 TFEU, however, is not the only legal basis in the Treaty enabling the enactment of measures aimed at the approximation of national legislation. The Treaty contains both *general* legal bases, such as Articles 113 and 114 TFEU, which allow for the approximation of the provisions laid down by law, regulation or administrative action in Member States which “have as their object the establishment and functioning of the internal market”, and *sectorial* legal bases, that allow for the harmonization of national rules only in specified fields.

With specific reference to the single market, regard must be had to the following sectorial legal bases: Article 46 TFEU, concerning the free movement of workers, and Articles 50, 52(2) and 53 TFEU, regarding the right of establishment. Article 53, in particular, empowers the Council to adopt directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications. Pursuant to the reference set out in Article 62 TFEU, Articles 52(2) and 53 TFEU also apply in the context of the free movement of services, whose liberalization can be also carried out by way of directives adopted on the basis of Article 59 TFEU.

Each single market harmonization measure typically pursues more than one aim at the same time. Measures adopted on the basis of Article 114 TFEU, for instance, normally embody a compromise between, on the one hand, a mandatory requirement or express derogation and, on the other hand, the principle of free movement. In setting the uniform level of protection of the former public interest aim, the EU legislature, therefore, cannot simply iron out national divergences in the name of free movement, but must also take into account conflicting interests and ensure their protection at a level acceptable in the whole EU. This constraint on the EU legislature was spelled out expressly by the ECJ with reference to Directive 98/5/EC, governing the establishment of lawyers under their home title, in the *Luxembourg v. Parliament and*

³²⁰ Judgment of the Court of 10 December 1985, *Criminal proceedings against Léon Motte*, Case 247/84, 1985 ECR 3887, para 16 (“[W]hen Community directives make provision for the full harmonization of all the measures needed to ensure the protection of health and institute community procedures to monitor compliance therewith that recourse to article 36 ceases to be justified”)

Council case.³²¹ Further support can be found in Article 114(3) TFEU, which can be read as enabling the Commission, as well as the European Parliament and the Council, to take into account health, safety, environmental protection and consumer protection considerations in the context of harmonization measures adopted under Article 114(1) TFEU.³²² In its ruling in *Germany v. Parliament and Council (Tobacco Advertising)*,³²³ moreover, the Court apparently applied the same reasoning to sectorial legal bases, enabling the adoption of harmonization measures in the fields of establishment and services.³²⁴

5.3.2. Harmonization Models and Harmonization Clauses

Each single market harmonization legal basis empowers the EU legislature to adopt harmonization measures whose preemptive effects may vary considerably. Scholarly commentators have endeavored to classify harmonization measures under different *models* according to the scope and content of the residual powers left to Member States.³²⁵ These models will be analyzed seriatim: exhaustive harmonization, minimum harmonization, partial harmonization, and optional harmonization.

The real crux, however, is to determine when the EU legislature applies those models, as it can insert *clauses* corresponding to an ideal harmonization model (“harmonization clauses”) in the body of an item of legislation that, overall, belongs to a different harmonization *model*. This is

³²¹ Judgment *Luxembourg v. Parliament and Council (lawyers establishment directive I)*, para 32: ‘In that regard, the Court observes that, in the absence of coordination at Community level, the Member States may, subject to certain conditions, impose national measures pursuing a legitimate aim compatible with the Treaty and justified on overriding public interest grounds, which include the protection of consumers. They may thus, in certain circumstances, adopt or maintain measures constituting a barrier to freedom of movement. Article 57(2) of the Treaty authorises the Community to eliminate obstacles of that kind in order to make it easier for persons to take up and pursue activities as self-employed persons. When adopting measures to that end, *the Community legislature is to have regard to the public interest pursued by the various Member States and to adopt a level of protection for that interest which seems acceptable in the Community* [...]. It enjoys a measure of discretion for the purposes of its assessment of the acceptable level of protection.’ (emphasis added). A similar dictum can also be found in judgment of 13 May 1997, case C-233/94, *Germany v. Parliament and Council*, ECR p. I-2405, paras 16-17.

³²² See Article 114 (3) TFEU (“The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective.”)

³²³ See judgment of 5 October 2000, case C-376/98, *Germany v. Parliament and Council (tobacco advertising I)*, ECR p. I-8419.

³²⁴ See B. DE WITTE, *Non-market values in internal market legislation*, in N. N. SHUIBHNE (ed), *Regulating the internal market*, Cheltenham, 2006, p. 68.

³²⁵ See, generally, PIET JAN SLOT, ‘Harmonisation’, (1996) 21 *European Law Review*, 378-387; CATHERINE BARNARD, *The substantive law of the EU: The Four Freedoms* (OUP 2007), 591-604.

the case of the Audiovisual Media Services Directive,³²⁶ whose overall model can hardly be determined in that it contains partial, optional, and minimum harmonization clauses.³²⁷

5.3.3. Exhaustive Harmonization

From the conceptual point of view, the simplest harmonization model is exhaustive harmonization (also known as “total” or “complete” harmonization), which entails the substitution of different national sets of rules with a uniform standard that preempts the adoption of divergent rules by national legislatures (this is often expressly set out in a specific “exclusivity clause”).³²⁸ Moreover, the Host State is also deprived of the possibility of invoking both express derogations and mandatory requirements to refuse entry to goods, services, persons and capitals complying with the harmonized standard (“free movement clause”).³²⁹

More to the point, if the harmonization measure contains a free movement clause, the Host State must entirely rely upon the controls carried out by the Home State as to the compliance with the harmonized standards of goods, persons, services and capital originating therein. The ECJ has consistently held that a Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate a breach by another Member State of harmonized rules.³³⁰ In those circumstances, without prejudice to the right of private parties to obtain redress before the courts of the Host state, the ECJ clarified that the only option open to

³²⁶ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, p. 1–24.

³²⁷ See Judgment of the Court of 9 July 1997, *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB (C-35/95 and C-36/95)*, Joined cases C-34/95, C-35/95 and C-36/95, 1997 ECR I-03843 (holding that the Television Without Frontiers Directive precluded a Member State from taking unilateral measures on the protection of minors from television advertising but did not preclude the adoption of stricter national rules on misleading television advertising”)

³²⁸ On the issue, although favouring a different view of the notion of ‘exclusivity clause’, see C. BARNARD, *The substantive law of the EU: The Four Freedoms*, Oxford, 2007, pp. 861-863; See also R. MASTROIANNI, *Ravvicinamento delle legislazioni nel diritto comunitario*, in *Digesto delle discipline pubblicistiche*, vol. XII, Torino, 1996, p. 456 ff., p. 471.

³²⁹ See M. DOUGAN, *Minimum Harmonisation and the Internal Market*, in *Common market L. Rev.*, 2000, p. 866. See also R. PARDOLESI and A. PALMIERI, *Difetti del prodotto e del diritto privato europeo (Nota a Corte giust. 25 aprile 2002, causa C-183/00, 25 aprile 2002, causa C-154/00, e 25 aprile 2002, causa C-52/00)*, in *Foro it.*, 2002 IV, p. 298.

³³⁰ See judgments of 13 November 1964, joined cases 90/63 and 91/63, *Commission v. Luxembourg and Belgium*, ECR p. 1199; 25 September 1979, case 232/78, *Commission v. France*, ECR p. 2729, para 9, and 23 May 1996, case C-5/94, *Hedley/Lomas*, ECR p. I-2553, para 20.

the Host State is initiating an infringement procedure under Article 258 TFEU or requesting the Commission to take action against that Member State under Article 259 TFEU.³³¹

In sum, the combination of an exclusivity clause and a free movement clause – which Cross would call, if set out in express terms, a “pre-emption clause”³³² – completely ousts Member States lawmaking powers in the harmonized subject-matter: in short, exhaustive harmonization implies field preemption.³³³ However, it is not always easy to determine whether a given item of EU legislation does or does not exhaustively harmonize a certain matter: exclusivity clauses are seldom set out in express terms, usually the EC measure merely sets forth one or more requirements, leaving it to the stage of interpretation to determine whether, in so doing, the EU legislature intended to rule out the possibility for Member States to introduce further or different requirements.

A clear example of this last point is the ECJ ruling in *Wilson*,³³⁴ where a UK lawyer wished to practice in Luxembourg under his home-country professional title according to Directive 98/5/EC, which made it conditional on the registration with the Bar of the Host State. Article 3(2) of the Directive, in this connection, stipulates that ‘The competent authority in the host Member State shall register the lawyer upon presentation of a certificate attesting to his registration with the competent authority in the home Member State’. Nonetheless, Mr. Wilson was asked to pass a language test in order to determine his proficiency in French, German and Letzeburgesch. Was the Host state allowed to provide for a registration requirement that was not set forth in the directive? The Court’s answered to a preliminary question to that effect was in the negative, because ‘[g]iven the objective of Directive 98/5’ the EU legislature had ‘carried out a complete harmonization of the prior conditions for the exercise of the right it confers’.³³⁵

³³¹ Judgment of 10 September 1996, case C-11/95, *Commission v. Belgium*, ECR p. I-4115, para 36.

³³² EUGENE DANIEL CROSS, ‘Pre-emption of Member State law in the European Economic Community: A framework for analysis’, (1992) 29 *Common Market Law Review*, 447-472, at 458-459.

³³³ In this sense, see STEPHEN WEATHERILL, ‘Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market’, in CATHERINE BARNARD & JOANNE SCOTT (eds.), *The Law of the Single European Market* (Hart Publishing, 2002), 41-73, at 58-59; MICHAEL DOUGAN, ‘Minimum Harmonisation and the Internal Market’, (2000) 37 *Common Market Law Review*, 853-885, at 854.

³³⁴ For a more detailed account of the relationship between Union Preemption and harmonization models in the *Wilson* judgment, see AMEDEO ARENA, ‘La sentenza Wilson: il funzionamento del mercato comune tra armonizzazione, pre-emption e ricorsi giurisdizionali di diritto interno’, (2008) *Studi sulla integrazione europea* 147-179.

³³⁵ See the Court judgment in *Wilson*, para 66.

5.3.4. Minimum Harmonization

Unlike exhaustive harmonization, minimum harmonization allows Member States to introduce stricter measures above the harmonized “floor” to pursue independent domestic policy objectives, as long as those measures do not exceed the “ceiling” consisting in the Treaty rules on free movement.³³⁶ Just like exclusivity clauses, also minimum harmonization clauses – i.e. the provisions allowing the adoption of stricter national rules – are often implied, so that the determination of the harmonization model employed, and accordingly of the leeway left to national legislatures, often boils down to a matter of interpretation that may lead to several possible outcomes³³⁷.

Minimum harmonization is often associated with a free movement clause: as long as goods, services, persons and capitals comply with the harmonized minimum rules, the Host State cannot hinder or preclude their access in its own territory, even though that State has decided to apply stricter requirements to its own production and production factors.³³⁸ This, however, is not always the case: a major source of litigation before the European Courts is indeed the issue whether a Member State that has availed itself of the right to provide for stricter rules may refuse entry to those goods, services, persons and capitals that, whilst complying with the harmonized standards, are at variance with the stricter rules enacted by that State.

³³⁶ See Judgment of 16 May 1989, case 382/87, *R. Buet and Educational Business Services (EBS) SARL v. Public Prosecutor*, 1989 ECR 1235, para 16; Judgment 9 July 1997, Joined Cases C-34/95, C-35/95 and C-36/95, *Konsumentombudsmannen v. De Agostini Förlag AB and TV-Shop i Sverige AB*, ECR p. I-3843, para 3 and 28; Judgment of 1 December 1998, case C-410/96, *Criminal Proceedings against André Ambry*, 1998 ECR I-7875, para 23; Judgment 19 March 1998, Case C-1/96, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd*, 1998 ECR I-1251, para 63. For scholarly comments, see P. ROTT, *Minimum Harmonisation for the completion of the Internal Market? The example of consumer sales law*, in (2003) *Common Market Law Review* 1107; F. DE CECCO, *Room to move? Minimum Harmonization and Fundamental Rights*, (2006) *Common Market Law Review* 9; M. DOUGAN, *Minimum Harmonisation and the Internal Market*, above, at 853.

³³⁷ See R. MASTROIANNI, *Ravvicinamento delle legislazioni nel diritto comunitario*, above, at 472. For instance, in *Hans Hoenig* (judgment of 19 October 1995, case 128/94, *Hans Hoenig v. Stockach*, ECR p. I-3389) the main issue was the interpretation of a provision of Directive 88/166/EEC that specified, in centimeters, the size of hen cages. Should it be construed as an exclusive harmonisation provision, so that all cages of a different size were outlawed, or rather as a minimum harmonisation provisions, thus allowing for wider cages? In its judgment the Court took the view that, in the light of the aims pursued by Directive 88/166/EEC, the vexed provisions had to be interpreted as merely laying down minimum requirements.

³³⁸ See STEPHEN WEATHERILL, *Law and intergration in the European Union* (Oxford, Clarendon Press, 1995) (arguing that Member States are constitutionally preempted from applying stricter rules against goods originating in other Member States).

In *Aher-Waggon*,³³⁹ for instance, Article 3(1) of Directive 80/51/EEC required Member States to ensure that certain categories of airplanes newly registered in their territory complied with noise standards “at least equal to” the harmonized standards set out in the directive. Under German Law, conversely, the registration *also* of airplanes already registered in another Member State was made conditional upon compliance with *stricter standards* than those set forth in the harmonization Directive. The Court took the view that the wording of the Directive implied that the latter only laid down minimum requirements: Member States were thus allowed to impose stricter noise limits provided that they were compatible with the Treaty provisions on free movement.

In another line of case law, including the judgment in *Gourmetterie Van den Burg*, the Court, however, reached the opposite conclusion, i.e. that the Host State cannot hinder or prohibit the entry of goods, services, persons and capitals complying with the harmonized standards but not with the stricter rules enacted by that State.³⁴⁰ Moreover, in the landmark ruling *Germany v. Parliament and Council (Tobacco Advertising)*, one of the reasons that led the Court to annul Directive 98/43/EC concerning the advertising and sponsorship of tobacco products was that the said instrument, unlike other minimum harmonization directives, “contain[ed] no provision ensuring the free movement of products which conform to its provisions”.³⁴¹ Put differently, that Directive did set forth a minimum harmonization clause, but not a free movement clause ensuring that products complying with the minimum requirements set out therein could be marketed without restriction even in Member States that had enacted stricter rules.

Categorizing the effects of minimum harmonization under the taxonomy of preemption types is somewhat problematic. On the one hand, unlike exhaustive harmonization, measures setting out minimum rules cannot be regarded as occupying an entire field, insofar as they allow for national rules above the harmonized minimum. On the other, however, this model significantly limits the content of permissible national measures, which can only constitute *stricter* standards and, if a free movement clause is present, can only be applied to national goods, persons, services, and capitals. Therefore, depending upon the accuracy of legislative drafting, the

³³⁹ Judgment of the Court of 14 July 1998, *Aher-Waggon GmbH v Bundesrepublik Deutschland*, case C-389/96, ECR 1998 Page I-04473.

³⁴⁰ Judgment of the Court of 23 May 1990, *Criminal proceedings against Gourmetterie Van den Burg*, Case C-169/89, 1990 ECR I-02143.

³⁴¹ Judgment of the Court of 5 October 2000, *Federal Republic of Germany v European Parliament and Council of the European Union*, case C-376/98, 2000 ECR I-08419, para 104.

preemptive potential of minimum harmonization measures can be placed somewhere between rule and obstacle preemption.

5.3.5. Partial Harmonization

Partial harmonization is somewhat similar to minimum harmonization in that it does not entirely preempt action by the national legislature in the harmonized subject-matter. In the case of partial harmonization, however, the permissible legislation must be aimed at regulating aspects of the harmonized matter *other than* those covered by the EU instruments, rather than, as in the case of minimum harmonization, at replacing EU standards with *stricter* ones.

Differentiating partial from minimum harmonization can, even at the conceptual level, be rather Gordian: if national legislation, for instance, makes a given authorization conditional upon an additional requirement that is not laid down in the EU instrument, is it setting a stricter standard or regulating an aspect of the harmonized matter that is not expressly addressed by the said instrument? Moreover, also in the context of partial harmonization measures there can be implied free movement clauses: if a Member State availed itself of its right to regulate certain aspects not covered by the harmonization measure, can it refuse entry to goods, services, persons and capitals not complying with those additional, non-harmonized requirements?

To further complicate the picture, the ECJ's characterization of a regulatory scheme as "partial harmonization" can be triggered by the Court's desire to protect the *effet utile* of a minimum harmonization clause set out in *another* item of EU legislation. In its judgment in *De Agostini*, for instance, the ECJ held that the (then) Television Without Frontiers Directive harmonized national laws on television advertising "only partially" and hence did not preclude application of national rules aimed at protecting consumers, as minimum harmonization Directive 84/450/EEC on misleading advertising would have been robbed of its substance if Member States were deprived of all possibility of adopting stricter measures against foreign advertisers.³⁴²

By good fortune, partial harmonization is usually signaled by what Cross would call "express saving" clauses – but should be rather defined "subordination" or "deference" clauses – which

³⁴² See Judgment of the Court of 9 July 1997, *Konsumentombudsmannen (KO) v De Agostini (Svenska) Förlag AB (C-34/95) and TV-Shop i Sverige AB (C-35/95 and C-36/95)*, Joined cases C-34/95, C-35/95 and C-36/95, 1997 ECR I-03843, para 37. See also EFTA Court, judgment of 16 June 1995, Joined Cases E-8/94 and E-9/94 *Forbrukerombudet v Mattel Scandinavia and Lego Norge*, Report of the EFTA Court, 1 January 1994 - 30 June 1995, 113, paras 54-56 and 58.

clarify the relationship of the instrument they are inserted in with other EU law acts and with national law.³⁴³ The Services Directive provides several examples of both types of subordination clauses: Article 1 sets out a number of matters to which the directive “does not deal” thus leaving national lawmaking powers in those areas intact;³⁴⁴ Article 3, instead, deals with the relationship of the directive with other provisions of EU law.³⁴⁵

Therefore, partial harmonization does not occupy a whole field and, compared to minimum harmonization, leaves Member States relatively free to regulate aspects not covered by the harmonization measure, so long as they are not coordinated by another EU act. Therefore, on an imaginary segment whose endpoints are rule preemption and obstacle preemption, partial harmonization can be placed closer to the former.

5.3.6. Optional Harmonization

Another common harmonization technique is optional harmonization: like exhaustive harmonization, it includes a free-movement clause, but, unlike the former, it does not contain an exclusivity clause. More to the point, optional harmonization allows for two sets of rules to be in force: one, laid down in the EU measure, designed to regulate cross-border transactions, another, set by each Member State (and usually more lenient), for purely internal situations.

The term “optional” is commonly interpreted as granting a choice to domestic producers: if they wish to trade across the frontiers, then they must comply with the harmonized standard; if they intend to operate exclusively on the domestic market, then they have an option whether to stick to the harmonized rules or to the less restrictive national ones.³⁴⁶ It is submitted, however, that the true “option” is that granted to Member States, which can choose whether to subject

³⁴³ EUGENE DANIEL CROSS, ‘Pre-emption of Member State law in the European Economic Community: A framework for analysis’, (1992) 29 *Common Market Law Review*, 447-472, at 456-457 (providing a number of examples of subordination clauses drawn from EU items of legislation).

³⁴⁴ See, e.g., Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36–68, Article 1(2) (“This Directive does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services”); Article 1(3) (“This Directive does not affect the freedom of Member States to define, in conformity with Community law, what they consider to be services of general economic interest, how those services should be organised and financed, in compliance with the State aid rules, and what specific obligations they should be subject to”) etc.

³⁴⁵ Id., Article 3(1) (“If the provisions of this Directive conflict with a provision of another Community act governing specific aspects of access to or exercise of a service activity in specific sectors or for specific professions, the provision of the other Community act shall prevail and shall apply to those specific sectors or professions. These include: (a) Directive 96/71/EC; (b) Regulation (EEC) No 1408/71;” etc.)

³⁴⁶ C. BARNARD, *The Substantive Law of the EU*, above, p. 599.

certain situations, typically purely internal ones, to less demanding requirements than those set out in the harmonization measure.³⁴⁷

Optional harmonization therefore can take two forms: either as a *clause*, inserted in another harmonization instrument, allowing Member States to subject purely internal situations to more lenient provisions (thus, essentially, a “reverse” minimum harmonization clause) or as an *instrument*, laying a comprehensive set of rules applying exclusively to cross-border situations (sometimes called a “28th regime”).³⁴⁸ As an example of the former, Article 20 of the Audiovisual Media Services Directive provides for that in respect of television broadcasts “intended solely for the national territory” Member States may lay down more lenient conditions than those set out in the directive as to, for instance, the number of advertising breaks allowed in the course of broadcasts.³⁴⁹ A successful example of 28th regime is, in turn, the Statute of the “Societas Europaea”, a company of European dimension, “free from the obstacles arising from the disparity and the limited territorial application of national company law.”³⁵⁰

Turning to the relationship between optional harmonization and the three preemption types, a clear distinction must be drawn between optional harmonization clauses and 28th regime instruments. The former lies outside the region of field preemption, insofar as it allows for national rules more lenient (but, theoretically, also more burdensome) than those of the harmonization instrument in which that clause is inserted. Insofar as those rules will usually cover only purely internal situations, with which EU single market law is normally not concerned, Member States will usually enjoy a broad discretion, possibly extending as far as the rule preemption limit.

Conversely, 28th regime instruments are designed to lay down uniform rules, thus suggesting a substantial displacement of national lawmaking powers, close to the field preemption standard. Even 28th regime instruments, however, can contain deference clauses trimming down their

³⁴⁷ The assumption that optional harmonisation measures grant manufacturers a right to choose between a harmonised standard and a more lenient national one is tantamount to stating that raspberry cupcakes cost 5 dollars, plain cupcakes cost 3 dollars, but customers “have an option” to pay either 3 or 5 dollars.

³⁴⁸ See MARIO MONTI, *A new strategy for the single market at the service of Europe’s economy and society*, Report to the President of the European Commission (9 May 2010), at 93 (advocating the use of 28th regime harmonization along with exhaustive harmonization carried out by means of regulations).

³⁴⁹ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ L 95, 15.4.2010, p. 1–24.

³⁵⁰ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ L 294, 10.11.2001, p. 1–21, recital no. 7.

broad preemptive effects: recital no. 27 of the European Company Statute, for instance, expressly clarifies that the choice of the “real seat” criterion for the European Company does not affect national laws or other EU provisions on company law.³⁵¹

6. Toward a Normative Theory of Union Preemption in the EU Single Market

In his seminal work *Freedom and the Law*,³⁵² the political philosopher Bruno Leoni suggested that each legislative proposal should be subjected to a trial, such as the one held before the *Nomotetai* in Athens, with advocates speaking in defense of the existing laws, and others speaking in favor of the new proposal. The same holds true also for theoretical models. Before turning to the formulation of a new (normative) model, it is thus appropriate to first examine the shortcomings of the existing (descriptive) one.

6.1. The shortcomings of the existing descriptive theory

6.1.1. Formulation of the descriptive model

The aim of Section 5 of the present work was to investigate the existence of preemption markers and their correlation to the three preemption types, in an attempt to build upon the notion of Union Preemption as a mere effect to develop a comprehensive descriptive theory that would illustrate its functioning.

First, guidance was sought in the competence catalogue introduced by the Treaty of Lisbon and the description of “shared” competences contained in Article 2(2) TFEU and in Protocol no. 25. Those provisions pointed in opposite directions, but could be rationalized as a *general disfavor, but not a constitutional ban, against field preemption* in areas of shared competence, such as the single market.

Second, this work examined the preemptive effects of the different types of legislative instruments employed in the context of the single market. Albeit in the original design of the Treaty of Rome field preemption was inherent in regulations and appeared alien to directives, subsequent ECJ jurisprudence and legislative practice refuted both assumptions. The current status of the law is that an EU provision set out in a regulation or in a directive can produce any

³⁵¹ Id., recital no. 27 (“the ‘real seat’ arrangement adopted by this Regulation in respect of SEs is without prejudice to Member States’ laws and does not pre-empt any choices to be made for other Community texts on company law).

³⁵² BRUNO LEONI, *Freedom and the law* 67 (Van Nostrand 1961).

of the three preemptive effects; regulations and directives, moreover, can embody all harmonization types. The preemptive effects of decisions proved of minor relevance insofar as that instrument should be employed to deal only with “specific situations”. Possibly, the only clear correlation that could be established was that between field preemption and acts adopted by the EU executive to ensure the “uniform” implementation of legislative acts. That assumption, however, could not be validated due to the insufficient sample of implementing acts adopted since the entry into force of the Treaty of Lisbon.

The most productive analysis was that concerning the relationship between preemption types and harmonization models and clauses. The findings can be graphically depicted as an intensity scale of preemption, ranging from rule preemption at the bottom to field preemption at the top, with obstacle preemption in the middle. In the lower half of the scale (between rule and obstacle preemption) there are, in upward order: optional harmonization clauses, partial harmonization and minimum harmonization. In the upper half of the scale, again in upward order, there are: 28th regime and exhaustive harmonization, which virtually coincides with field preemption. Deference clauses usually decrease the preemptive effect of the harmonization instrument in which they are inserted, while free movement clauses increase it. The implied nature of some of those harmonization clauses and their occasional coexistence within the same harmonization measure, however, significantly undermines the descriptive potential of this model.

6.1.2. Application of the descriptive model: the ECJ ruling in *Wilson* as a case-study

In the absence of an express harmonization clause, establishing the harmonization model employed by the EU legislature in a measure can prove a daunting task. The ECJ ruling in *Wilson* provides a convenient illustration of these difficulties. According to Directive 98/5, to practice under their home title in another Member State, European lawyers must register with the competent authority of the Host State. Article 3 of Directive 98/5 provides for that the competent authority in the Host State must register a European lawyer “upon presentation of a certificate attesting to his registration with the competent authority in the home Member State”. The Luxembourg Bar Council, however, required Mr. Wilson, a UK barrister, to take a language test. Was the Host State authority preempted from imposing registration requirements in addition to those set out in the Directive?

The application of the descriptive model above hardly provides any guidance in answering that question. Directive 98/5 was adopted in a field of shared competence which might suggest a slight disfavor against field preemption, but does not rule it out. The choice of the legal instrument provides no indication whatsoever, as directives can have all sorts of preemption effects and embody every harmonization model. As to the latter, the directive set out no express harmonization clause, nor could the harmonization model be univocally inferred from the provision concerned, other provisions of Directive 98/5, or its preamble.

Nonetheless, the ECJ squarely held that Article 3 of that directive carried out a “complete harmonization” of the prior conditions for the exercise of the right it confers. The court reached that conclusion having regard, essentially, to “the objective of Directive 98/5”, which was “to put an end to the differences in national rules on the conditions for registration”. The ECJ determined the objective of the directive on the basis of recital no. 6 of the latter, which however does not mention “conditions for registration” and only sets out the need of a directive “laying down the conditions governing the *practice* of the profession”, not *access* thereto. Possibly aware of the fallacies in this line of argument, the ECJ set out other arguments to support its conclusion, such as the *travaux préparatoires* and the existence of other provisions in the directive designed to ensure the protection of consumers and the proper administration of justice in the absence of a system of prior testing of the knowledge, particularly of languages, for European lawyers. The latter, visibly, is an *argumentum ad consequentiam*: showing that an exhaustive harmonization of registration requirements is desirable (or, more correctly, is not overly undesirable) does not prove that such a conclusion is true.

Moreover, the ECJ discussed at length the “purpose” of the directive but eventually concluded that it carried out an “exhaustive” harmonization, thus precluding the national measure at issue. In fact, it could have reached the same conclusion simply by stating that a requirement requiring applicants to show proficiency in three languages was so burdensome as to preclude the objective of the directive, i.e. the facilitation of the practice of the profession under the home title in other Member States. The exhaustive harmonization holding, indeed, is clearly overbroad, insofar as it rules out *every and all* registration requirements other than those set out in the directive. This leads to the rather absurd conclusion that Host state authorities are preempted even from requiring the applicants to produce a passport-size photo for their badges. Conversely, an obstacle preemption reasoning would have distinguished between innocuous requirements, such

as that of a photo, and real burdens, such as an exorbitant registration fee or an unreasonable language test.

6.1.3. Outcome

The descriptive model developed in Section 5 hardly provides any guidance in determining the preemptive effects of single market legislation. The analysis of the ECJ reasoning in *Wilson*, an exhaustive harmonization case, shows that the Court in fact relies on a panoply of arguments, some of a political more than of a legal nature, and essentially conducts a case-by-case assessment. Other judgments confirm this trend (*Budweiser*).³⁵³ While this sort of full-blown rule of reason assessment allows the ECJ to take into account a wide range of conflicting interests, it seriously undermines legal certainty, insofar as the outcome of what is, ultimately, a balancing exercise is almost impossible to foresee.

The unpredictability of the preemptive effects of single market legislation hinders the functioning of the single market in its multilevel dimension in several ways. First, Member States, when passing a legislative proposal, are unable to determine its future effects on their lawmaking powers: the fear of preemptive effects can significantly hamper the lawmaking process, as the vexed adoption of the Services Directive clearly shows. Second, national authorities cannot accurately assess their residual margin autonomy and can overstep their limits even when acting in good faith. Third, economic actors cannot confidently rely on national implementation measures – which can be set aside at any time if preemption is established – thus facing higher transaction costs when operating across the borders. Fourth, consumers and European citizens cannot be sure of the validity of national provisions granting rights and obligations, which substantially undermines their confidence in the EU single market construct.

³⁵³ Judgment of the Court of 8 September 2009, *Budějovický Budvar, národní podnik v Rudolf Ammersin GmbH*, Case C-478/07, 2009 ECR I-07721.

6.2. A Normative Model of Union Preemption

6.2.1. Normative Models Proposed by Other Authors

Some of the authors that wrote on the topic of Union Preemption also made normative remarks as to how to improve the existing doctrine. Cross, in his 1992 work,³⁵⁴ advocated a generalized use of the obstacle preemption framework by the ECJ, as that preemption type “is significant for the preservation of Member State law” in two ways: first, it is less restrictive than field preemption in that it preserves a margin of national legislative autonomy; second, it can be developed in a way that allows national measures to survive judicial scrutiny depending on the “level of obstruction” of EU goals. The ECJ apparently applied a similar framework in *Salson*,³⁵⁵ where the holding that a three-year statutory limitation period was not preempted by an EU regulation³⁵⁶ was, in the Author’s view, underpinned by the assumption that “the level of obstruction with Community objectives was not enough to pre-empt”. Moreover, by holding in *Motte* that “only” exhaustive harmonization precludes recourse to Article 36,³⁵⁷ the ECJ implicitly left the door open for the development of a presumption in favor of the validity of national laws based on those non-economic values, at least in areas not expressly subject to field preemption. Subsidiarity can also be relied upon to form a presumption in the favor of the validity of national measures. When national measures conflict with EU provisions or constitute an obstacle to the attainment of the aims pursued by the EU legislature, subsidiarity should govern the judicial balancing exercise between, on the one hand, uniform application of the EU law and, on the other, the advantages of regulation at the national level, which include i) increased political accountability and legitimacy ii) greater flexibility and responsiveness and iii) increased experimentation and creativity with regulatory solutions.

³⁵⁴ EUGENE DANIEL CROSS, ‘Pre-emption of Member State law in the European Economic Community: A framework for analysis’, (1992) 29 *Common Market Law Review*, 447-472.

³⁵⁵ Judgment of the Court of 9 November 1989, *Bessin et Salson v Administration des douanes et droits indirects*, Case 386/87, 1989 ECR 3551

³⁵⁶ *Id.*, para 18.

³⁵⁷ Judgment of the Court of 10 December 1985, *Criminal proceedings against Léon Motte*, Case 247/84, 1985 ECR 3887, para 16 (“[T]he Court has consistently held that, on the one hand, the existence of harmonizing directives does not exclude the operation of Article [34 TFEU] and that, on the other, it is only when Community directives make provision for the full harmonization of all the measures needed to ensure the protection of health and institute community procedures to monitor compliance therewith that recourse to Article 36 [TFEU] ceases to be justified”).

Goucha Soares, in his 1998 article,³⁵⁸ criticized the obstacle preemption model advocated by Cross, due to its uncontrollable *vis expansiva*, determined by the ECJ's propensity to construe EU provisions broadly and teleologically. According to Goucha Soares, the principle of subsidiarity was introduced in the Treaty to limit the preemptive effects of EU legislation. In the Author's opinion, the only preemption type in keeping with the Treaty architecture as innovated by the recognition of the principle of subsidiarity is rule preemption. That preemption framework is less affected than obstacle preemption by the ECJ's liberal interpretation of EU legislation. The Author, therefore, advocates generalized recourse to rule preemption, except in (unspecified) exceptional cases which call for stronger preemption frameworks.

Schütze addressed the topic of Union Preemption in several works, but his normative propositions are mainly set out in his recent article on the principle of subsidiarity.³⁵⁹ The latter, according to the Author, should be understood as principle of “federal proportionality”, dealing with the issue whether the EU legislature “disproportionally restricts national autonomy”.³⁶⁰ The principle of subsidiarity can affect the ECJ's scrutiny of EU legislative acts in two ways. First, the Court could embrace, just like its American counterpart, a “soft” constitutional solution: it could insist on express preemption before concluding that EU law has occupied a field and could develop a judicial presumption against preemption in certain (unspecified) policy areas. Second, the ECJ could espouse a “hard” constitutional solution, allowing it to strike down EU legislation, including that expressly occupying a field, if it constitutes a “disproportionate interference into national legislative autonomy”. The Author argues in favor of the latter solution.

6.2.2. Adaptability as an Essential Feature of a Normative Model

Previous normative theories on Union Preemption tend to provide a one-size-fits-all solution that fails to account for the diversity of situations where Union Preemption applies and for the changes in the legal, political and economic context that have occurred in the EU since 1957. On the contrary, it is submitted that a normative theory of Union Preemption should be able to adapt

³⁵⁸ ANTÓNIO GOUCHA SOARES, ‘Pre-emption, Conflicts of Powers and Subsidiarity’, (1998) 23 *European Law Review*, 132-145

³⁵⁹ ROBERT SCHÜTZE, ‘Subsidiarity after Lisbon: reinforcing the safeguards of federalism?’ 68(3) *Cambridge Law Journal*, 525–536.

³⁶⁰ *Id.*, at 533.

to the changing needs of uniformity as well as to the present state of development of the EU single market.

The lack of adaptability to different needs of uniformity is quite evident in Cross and Goucha Soares' models, which advocate, respectively, obstacle preemption and rule preemption as general judicial paradigms. Admittedly, Goucha Soares briefly mentioned that, in extreme but unidentified cases, rule preemption is too weak a solution. Equally, Cross calls for the development of obstacle preemption into a flexible and subsidiarity-inspired balancing exercise based on the "level of obstruction". Both, however, seem to imply that field preemption is (almost) always undesirable. But what about instruments laying down a 28th regime? By definition, that regime lays down uniform rules precluding national deviations unless expressly authorized: a European Company would not be "European" if, say, it had legal personality only in some Member States. 28th regime instruments, therefore, require a level of uniformity that only field preemption can ensure. Moreover, they do not affect the other 27 national regimes, thus constituting no threat to national lawmaking powers. Conversely, Schütze seems to be aware of the necessity of a versatile model when he suggested a judicial presumption against preemption in certain policy areas and endorsed a case-by-case judicial scrutiny based on federal proportionality.

Equally important is the evolutionary character of preemption models. The US federal experience shows that the doctrine of federal preemption evolved from the times of the *Lochner* Court to the *Rice* presumption against preemption as a response to the expansion of the federal powers under the Commerce Clause. Also Union Preemption appears to be in a state of flux. In 1982, Weiler illustrated a process of *approfondissement* of Union Preemption in some areas from a "conceptualist-federalist approach" to a "pragmatic approach";³⁶¹ the Single European Act was accompanied, as Weatherill put it, by a "rupture in the constitutional orthodoxy of preemption".³⁶² A possible account for this transition is that prior to the Single European Act, with a Council paralyzed by the Luxembourg Accord, Union Preemption served the purpose of expanding the initially narrow competences of the Community and to ensure compliance with

³⁶¹ J.H.H. WEILER, 'Community system: The dual character of supranationalism', (1981) 1 Yearbook of European Law, 267-306

³⁶² See STEPHEN WEATHERILL, 'Beyond preemption? Shared competence and constitutional change in the European Community', in D. O'KEEFE & P. TWOMEY (eds.), *Legal Issues of the Maastricht Treaty* (Wiley Chancery Law, 1994), 13-33, at 22.

existing legislation (notably directives) even in the absence of an effective enforcement procedure; as the restraints on decisional supranationalism were lifted by the Single European Act, it was necessary to ensure that preemption did not constitute an obstacle to decision-making, so milder types of preemption were introduced even in the case of regulations (which originally were associated with automatic field preemption). Field preemption's Janus-like nature of legislative anti-catalyst and implementation-facilitator caused it to apparently submerge, but to promptly resurface when needed to obviate, *ex post*, to implementation deficiencies or to lay down, *ex ante*, uniform rules. The conceptual difficulty in distinguishing field preemption from EU exclusive competences, due to the lack of a competence catalogue, further contributed to the unpredictability of the preemptive effects of EU legislation. The most recent trend, however, is arguably toward the clarification of this doctrine. The inclusion of an express competence catalogue in the body of the TFEU permits to distinguish exclusive competences from field preemption in non-exclusive areas. The development of the principle of subsidiarity as a principle of federal proportionality is a further indication of the will of controlling the intensity of EU lawmaking, including its preemptive effects.

6.2.3. Suggestions for a Versatile and Evolutionary Normative Theory of Union Preemption

Suggestion no. 1: a structured presumption against implied field preemption. The starting point of this normative model is a structured presumption against field preemption, which can be rebutted by an express statement of preemption contained in a regulation, subject to procedural and substantive subsidiarity (understood as federal proportionality) control.

There are three reasons why that presumption should be selectively targeted *against field preemption*. First, the latter, by transforming shared competences into exclusive ones, is a deviation from the standard division of powers between Member States and the EU resulting from the TFEU competence catalogue. Second, field preemption is expressly ruled out by the wording of Protocol No. 25, which clarifies that the exercise of a shared competence by the EU “does not cover the whole area”. Third, if the principle of subsidiarity is understood as federal proportionality, so that EU action must not “disproportionately restrict national autonomy”, EU legislation that totally ousts that autonomy should be regarded as *prima facie* disproportionate.

The choice of a negative *presumption*, as opposed to an outright ban on field preemption, rests on the assumption that disallowing field preemption not only would contradict past ECJ jurisprudence and legislative practice, but most importantly would deprive the EU of the ability to establish uniform rules, which on some circumstances are a valuable regulatory instrument, as in the case of acts setting out a 28th regime.

The main advantage of a *structured presumption* is the possibility to obviate for the complex and unpredictable rule of reason-style analysis that the ECJ currently carries out in order to apply field preemption. Bright line rules, in other words, would enhance legal certainty.

The *structured* nature of that presumption means that it can only be rebutted in the presence of two factors: i) an express statement of preemption and ii) recourse to a regulation. First, an *express statement of preemption* (i.e. an express preemption clause or a statement setting out the intention to subject the regulated area to exhaustive harmonization or to 28th regime regulation) would operationalize the subsidiarity and proportionality provisions in Protocol no. 2 attached to the Treaty of Lisbon. Since field preemption has a direct impact on the principles of subsidiarity and proportionality, its express statement follows from the legal drafting requirements in Article 5 of Protocol no. 2.³⁶³ The “detailed statement” that legislative drafts must contain, in turn, would permit *procedural control* by National Parliaments and *substantive review* by the ECJ. The latter, in so doing, would not be usurping a political prerogative, but would rather be preventing the majority of Member States from depriving the minority of their lawmaking powers through unnecessary field preemption, thus carrying out an essential task to safeguard the rule of law at the EU level.

Second, the use of regulations as vehicles for uniform legislation, as opposed to directives, would restore the rationality of EU legislative instruments lost as a consequence of the original cleavage between decisional supranationalism and normative supranationalism. As those conditions no longer exist and the single market has reached a certain degree of maturity,

³⁶³ Protocol No. 2 on the application of the principles of subsidiarity and proportionality, Article 5 (“Draft legislative acts shall be justified with regard to the principles of subsidiarity and proportionality. Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal’s financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved.”)

directives should regain their original role as indirect instruments of legislation, while exhaustive harmonization should be carried out by regulations. Besides, if uniformity is the foremost concern for the EU legislature, it makes no sense to require Member States to verbatim replicate the text of directives into national measures. Moreover, regulations also produce horizontal direct effects: this maximizes the potential for private enforcement³⁶⁴ and avoids the discriminatory effects inherent in the limited direct effects of directives.

Suggestion no. 2: a structured presumption against implied free movement clauses. The uncertainty arising from implied free movement clauses has so far given rise to a substantial amount of litigation. That can be avoided by introducing a presumption against implied free movement clauses, rebuttable by an express statement. As free movement clauses can be associated with several harmonization models other than exhaustive harmonization, their inclusion in a regulation is not required.

Suggestion no. 3: a twofold federal proportionality control. Subsidiarity should be understood in terms of federal proportionality, so that all EU legislation in the field of the single market – not only exhaustive harmonization regulations – should be prevented from disproportionately restricting national autonomy.

Compliance with this federal proportionality principle should be monitored *ex ante* by national parliaments and *ex post* by the ECJ, in the context of its jurisdiction to review the legality of EU acts. Reviewing the federal proportionality of EU legislation would be, in essence, an assessment of the *intensity* of the EU intervention, whose impact on national legislative autonomy (preemption) is clearly a paramount factor. That perspective is entirely consistent with the indications of the Amsterdam Protocol on the application of the principles of subsidiarity and proportionality:

The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Directives as provided for in Article [249(3) TFEU] of the Treaty, while

³⁶⁴ MARIO MONTI, *A new strategy for the single market at the service of Europe's economy and society*, Report to the President of the European Commission (9 May 2010), at 96-97.

binding upon each Member State to which they are addressed as to the result to be achieved, shall leave to the national authorities the choice of form and methods.³⁶⁵

In this connection, the 5th Working Group of the European Convention laid down a “scale of intervention” according to intensity of EU action as a further elaboration of the principles of subsidiarity and proportionality:

- Uniform regulation (e.g. common customs tariff)
- Harmonisation (e.g. company law)
- Minimum harmonisation (e.g. consumer protection)
- Mutual recognition and “interconnection” of the national legal systems (e.g. mutual recognition of qualifications; social security of migrant workers)³⁶⁶

While field preemption would be forced to surface as a consequence of the express statement rule, the case-law generated by the application of the federal proportionality principle as a constraint on the intensity of EU legislation should lead to the gradual emergence of the remaining part of Union Preemption, *viz.* rule preemption and obstacle preemption.

³⁶⁵ Protocol on the application of the principles of subsidiarity and proportionality, attached to the Treaty of Amsterdam, OJ C 340, 10.9.1997, para 6.

³⁶⁶ European Convention, Final report of Working Group V “Complementary Competencies” (CONV 375/1/02, 4 November 2002) at 12.

Conclusion

In 1982, Waelbroeck entitled his article “The emergent doctrine of Community pre-emption”. More than a quarter of century later, Schütze adopted the following heading “The very slowly emergent doctrine of Community pre-emption”. The present work suggests, instead, the doctrine of Union Preemption in the field of the single market is just about to reach the surface – the deliberate use of the word “preemption” for the first time in 2009 by an Advocate General is no coincidence.

The introduction of a competence catalogue in the TFEU by the Treaty of Lisbon eliminated a significant source of conceptual ambiguity: the overlap of legislative preemption and exclusive competences. Union Preemption can thus clearly be defined as an effect of EU legislation (in areas of non-exclusive EU competence): that of restricting the scope of applicable national law. The examination of preemption types showed that the preemptive effects of EU legislation can have three degrees of intensity: field preemption, ousting national lawmaking authority in the whole field; obstacle preemption, displacing only national rules that hinder the attainment of the aims pursued by EU legislation; and rule preemption, rendering inapplicable only national rules in conflict with a specific EU provision.

Union Preemption was found to have far-reaching effects on the overall architecture of European federalism. Field preemption, for instance, not only can eliminate beneficial regulatory competition, but also permanently transforms areas of shared competence into exclusive EU competence, thus substantially affecting the vertical division of powers between Member States and the EU. By introducing qualified majority voting in several areas, the Single European Act allowed this centripetal competence transfer to occur even against the will of some Member States. That caused field preemption to submerge and weaker preemption types to come to the fore, as shown by the diversification of harmonization models. Field preemption, however, occasionally resurfaced to remedy to incorrect implementation of EU legislation or to lay down uniform rules.

The observation of the trends in the EU constitutional architecture revealed an increased hostility *vis-à-vis* field preemption, as substantiated by the mechanism under Article 114(4) TFEU enabling derogation from harmonization measures, the express statement of the principle of conferral, the development of the principle of subsidiarity, and the incorporation of a competence catalogue. Nonetheless, applying a “reverse international delegation model”, it was

shown that field and obstacle preemption, acting as anti-circumvention devices, play an important role in preventing agency slack by Member States in context of the implementation of EU legislation. Uniform rules, in sum, are on some occasions necessary to ensure the proper functioning of the EU single market.

The assessment of the impact of field preemption on consensus-building within the Council acting by a qualified majority produced differentiated results. In particular, it was established that if decision-making occurs in a sector that is already legally and factually preempted, consensus-reaching is easier relative to an area where no such preemption exists – preemption thus acts as a consensus-catalyst. Conversely, if the subject of decision-making is the preemptive effect of a given legislative proposal, consensus-reaching is hindered by broad preemptive effects, unless a significant degree of factual preemption exists.

The descriptive analysis of the current status of the doctrine of Union Preemption revealed that it is still obscure and that the scope of preemptive effects of EU legislation are difficult to determine in advance. The definition of shared competences in Article 2(2) TFEU and in Protocol no. 25 only showed a constitutional disfavor against field preemption. The study of the categories of EU acts did not establish a clear correlation between preemption types and legislation instruments. Even though directives were initially intended not to field preempt national lawmaking and regulations were automatically associated with field preemption, the expansion of normative supranationalism as a response to the shortcomings in decisional supranationalism upset the original balance. Currently, regulations and directives can have preemptive effects of any type and can embody any harmonization model. Only the recently introduced “implementing acts” under Article 291(2) appeared invariably associated with field preemption effects, insofar as they are designed to secure “uniform conditions for implementing legally binding Union acts”.

The analysis of the relationship between preemption types and harmonization models (and clauses) established several correlations between the latter and the former. The findings can be graphically depicted on an intensity scale of preemption, ranging from rule preemption at the bottom to field preemption at the top, with obstacle preemption in the middle. In the lower half of the scale (between rule and obstacle preemption) there are, in upward order: optional harmonization clauses, partial harmonization and minimum harmonization. In the upper half of the scale, again in upward order, there are: 28th regime and exhaustive harmonization, which

virtually coincides with field preemption. Deference clauses usually decrease the preemptive effect of the harmonization instrument in which they are inserted, while free movement clauses increase it. The implied nature of some of those harmonization clauses and their occasional coexistence within the same harmonization measure, however, significantly undermines the descriptive potential of this model.

The formulation of a normative model was premised upon two essential features: the adaptability of the model to variable uniformity needs and its consistency with the present stage of evolution of the single market. In particular, it was observed that the latter has reached a stage where the legal certainty arising from a clear application of the doctrine of preemption is essential to consolidate the integration achieved in the past (also through an ambiguous use of that doctrine). Several suggestions were made for a doctrine of Union Preemption tailored to the current needs of the EU and of Member States. First, a structured presumption against implied field preemption should be established. That presumption should only be rebuttable by an express statement of exhaustive harmonization set out in an EU regulation. Express field preemption, however, should be subject to a federal proportionality (subsidiarity) requirement, implying the illegality of EU legislation that disproportionately restricts national lawmaking powers. Compliance with that requirement should be monitored *ex ante* by national parliaments and *ex post* by the ECJ in the framework of its review of legality jurisdiction. Second, also free movement clauses should be presumed inexistent unless expressly stated. Third, all remaining EU legislation in the field of the single market should be subject to the said federal proportionality limit, which should be construed as dealing with the intensity of the EU measure. The application of that standard to EU legislation should generate a sufficient body of case-law to clarify the application also of rule and obstacle preemption, as well as their correlation with harmonization models and clauses, thus enhancing legal certainty.

Finally, this work opens up several avenues for prospective research. Union Preemption, as an effect of EU legislation, is not confined to the single market, but applies to all fields where the EU is empowered to adopt legally binding instruments. Of paramount importance would be the investigation of the preemptive effects of EU legislation in the area of freedom, security and justice, which prior to the abolition of the pillar structure by the Treaty of Lisbon was regarded as an instance of intergovernmental cooperation characterized by nearly ubiquitous recourse to unanimity, the inapplicability of the enforcement procedure, and specific categories of legal

instruments. Even in the contest of the former Third Pillar, however, the shortcomings in decision-making process were matched by an *approfondissement* in its normative structure, as shown by the ECJ judgment in *Pupino*. Did the recognition of indirect effects also imply the broadening of the preemptive scope of framework decisions? Currently, former First Pillar instruments can be adopted in the area of freedom, security and justice. Can directives and regulations enacted in that area have the same preemptive effects as their single market counterparts? Union Preemption as a *general* theory of the effects of EU legislation on national lawmaking powers, apparently, is on its way to the surface.