

## Flóra Fazekas<sup>1</sup>: The Principle of Pre-Emption in Community Law

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### *Introduction*

The subject matter of this paper is the principle of pre-emption in Community law. The essence of this principle is that – in the sphere of non-exclusive Community competences – it makes national legislation created in a certain field void, even if it is not literally contrary to Community law, and for Member States also creates an obligation of giving up national legislative competences in pre-empted areas. The main reasons for raising the question of pre-emption at all are that the division of competences between the EC and its Member States is very uncertain and the intensity of Community regulation differs in certain areas. I argue that the clarification of the precise conditions of Community law pre-emption will get us closer to settling the constant battle between national and Community competences, one of the basic issues of Community law.

In the theory of Community law, the concept of the principle of pre-emption is less elaborated, especially in comparison with the doctrines of supremacy or direct effect, yet the European Court of Justice tends to apply this concept. When examining the pre-emption situations in Community law, apart from the jurisprudence of the Court of Justice, we can also rely on some significant Community law commentators who have dealt with this topic since the early 1980s.

In the following, I will attempt to describe Community law pre-emption in a nutshell. In the first part of my paper I wish to deal with the concept of the pre-emption doctrine and present different ideas in this regard. Afterwards, I intend to outline some pre-emption typologies based on the jurisprudence of the Court and Community law literature.

### *I. The concept of pre-emption*

There exists no uniform opinion concerning the definition of pre-emption in Community law. Neither Community law commentators nor the Court of Justice succeeded in elaborating a generally accepted definition. Indeed, the Court does not even use the term "pre-emption" in its judgments. The principle of pre-emption also exists in the federative system of the United States of America, but obviously the doctrine elaborated by American scholars and applied by the American Supreme Court shows some differences as compared to its equivalent in Community law. So the American definition cannot be properly used in relation to Community law matters.<sup>2</sup>

Community law commentators dealing with the principle of pre-emption agree that it is closely linked to the principle of supremacy of Community law, but is different from it. Since the concept of pre-emption is not well elaborated in Community law, we do not know the precise conditions of the situations where pre-emption arises. Indeed, in some cases both a supremacy and a pre-emption analysis are available. According to the general opinion, the first expression of pre-emption by the Court of Justice was made in the famous *Simmmenthal* case<sup>3</sup>, which is also known as a significant judgment concerning the principle of supremacy. In *Simmmenthal* the Court stated that in case of conflict between national and Community dispositions, Community law on one hand renders inapplicable the national provision, and on the other hand "precludes the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions."<sup>4</sup> We have to note that in some authors' opinion<sup>5</sup> the first case where the pre-emption question arose was *Walt Wilhelm*<sup>6</sup>, when the European Court stated that national authorities cannot apply their

domestic legislation to agreements falling within the scope of Art. 85 EC (now Art. 81), if it conflicts with a Commission decision granting an exemption.

If we look at the different definitions of pre-emption used by Community law commentators, we can see that they approach the question from two basic directions: the legislative competences of the EC and Member States on one hand, and the conflict of Community and Member State laws on the other. In other words, we can consider pre-emption situations as conflicts of competences and also as conflicts of norms.

In certain authors' opinion the concept of pre-emption is a means of determining legislative competence while the principle of supremacy serves for solving a conflict between Community and Member State legislation.<sup>7</sup> So in this opinion pre-emption settles conflicts of competences between the Community and its Member States, which conflict must be settled by giving precedence to the Community competence (i.e. Community law), if the conditions of the pre-emptive effect are fulfilled. This way by applying a pre-emption analysis a norm conflict analysis (i.e. supremacy) does not have to be applied. Looking at the jurisprudence of the Court of Justice we can see that in some cases the Court uses a pre-emption analysis instead of applying the supremacy principle without differentiating between the two concepts. We can also meet definitions according to which pre-emption makes parallel or concurrent Community competences exclusive,<sup>8</sup> but this concept is not a general one since it refers solely to some pre-emption situations.

Other theoreticians in turn represent the viewpoint that both pre-emption and supremacy deal with exempting conflicts between Community law and national legislation.<sup>9</sup> Here the two concepts are linked more closely because the point of these ideas is that pre-emption determines whether there is a conflict between national and EC law, while supremacy concerns the manner in which such a conflict is to be resolved. So by applying a pre-emption analysis we can decide if a conflict exists at all, and if it does, we have to exempt it by giving precedence to Community law based on its supremacy. According to this idea it is pre-emption that sets supremacy into operation, pre-emption precedes supremacy in the temporal sense. The advantage of this concept might be that by applying supremacy the national legislation is not rendered void, so it remains operable in domestic legal situations.<sup>10</sup> At the same time, the acceptance of this concept does not help us tackle the difficulties of the division of powers within the EC legal system, which should be the main purpose of the principle of pre-emption.

No matter which approach we accept, we get to the point that if a Member State has no competence to legislate because Community law has already have (so the area is pre-empted), the given national legislation cannot be applied. We cannot say after all that there is no difference between the two concepts outlined above. There is a great difference between the non-application and the invalidation of national legislation based on its incompatibility with EC law. At the same time, if we accept the „conflict of rules” idea and apply supremacy to the resolution of conflicts of powers, national powers may be shifted to the Community of an unnecessary degree, which makes this concept less favorable than the concept of ”competence conflict”.<sup>11</sup> We can say that the price of the retention of national competences from the EC is the possibility of the invalidation of national legislation in case it is found to be contrary to Community law.

## *II. Pre-emption situations in Community law*

The principle of pre-emption arises in different legal situations. Commentators of Community law set up different categories of these situations and the range of these types differs

depending on the applied concept of pre-emption. Recently, authors have specified a wider range of pre-emption situations than early commentators. These categories follow the degree of conflict between national and Community law (or national and Community competence if you will), which ranges from hypothetical frictions to literal contradictions. These categories may differ also on the basis, namely, that some situations derive from a certain disposition of secondary Community law while in other cases the pre-emptive effect of Community legislation is based on judicial interpretation where the final word is said by the Court of Justice.

We can take into consideration the pre-emption situations which are based on secondary Community law. These situations, however, are easy to settle, and some scholars do not even consider them as pre-emption situations.<sup>12</sup> This category of the so-called express pre-emption contains two subcategories. Some measures of secondary Community law include dispositions which expressly preserve certain Member State legislative authority – we can call it „express saving”.<sup>13</sup> Some measures in turn contain a prohibition of Member State legislation in the scope of the Community norm – it is called „express pre-emption”.<sup>14</sup> More interesting situations are the so-called implied pre-emption cases when secondary Community law does not indicate expressly, if it intends to have a pre-emptive effect or not, so this effect can be stated solely by interpretation. From the jurisprudence of the Court of Justice three basic implied pre-emption situations can be outlined. In its significant judgment *CERAFEL*<sup>15</sup> (without using the term „pre-emption”) the Court stated that certain national measures are inapplicable, if one of the following three conditions is fulfilled: (1) if the national law affects a matter with which Community law has dealt exhaustively; (2) if the national rules are contrary to provisions of Community law; or (3) if the national law interferes with the proper functioning of Community law. These three types of situations are the basic instances where the Court of Justice may consider that Community law pre-empts national law. However, the Court did not determine the conditions by which it would decide which pre-emption analysis would be applied.

The first situation is called *field pre-emption* in Community law terminology. The Court of Justice has not adopted explicit standards on the application of this analysis but looking at the jurisprudence we can point it out that when Community legislation is found to be „exhaustive”<sup>16</sup> or to constitute „a complete system”<sup>17</sup>, the Court might conclude pre-emption. It is not settled though which conditions must be fulfilled so that it could be stated that Community legislation is exhaustive, so it would be quite uncertain to tell in advance in relation to a certain field of regulation if it is exhaustive.

The Court tends to state field pre-emption in many cases regarding the Common Agricultural Policy considering that this area is largely regulated. The first case where such an analysis was applied was that of the *Apple and Pear Development Council*. This Council was established by the British Minister for Agriculture and was authorized to make recommendations concerning the size of the fruit marketed by growers, which recommendations went beyond what was required by the Community quality standards. Related to this issue, the Court ruled that „the rules on the common organization of the market in fruit and vegetables provide for an exhaustive system of quality standards”<sup>18</sup>, so the Member States or its bodies were prevented from imposing unilateral provisions on the quality of fruit. In *Bulk Fruit*<sup>19</sup> the question was the interpretation of a Community Regulation requiring Belgian producers to indicate the minimum net weight and the number of units on bulk packages of certain vegetables. The Belgian legislation prescribed this obligation for all agricultural products. The Belgian rule was not in actual conflict with the Regulation, still the

Court stated that Belgium had no legislative power here since the common organization of the fruit and vegetable market is of an exhaustive nature.

In situations alike all Member State regulation of the given field is superseded and Member States lose their legislative competence in this field, although the Court does not certainly find any normative tension between national and Community law, which makes it the most powerful format of Community pre-emption. Apart from this, it is the most frequently applied pre-emption analysis out of the three.

The second situation indicated in the *CERAFEL* judgment is called *rule pre-emption* or direct conflict pre-emption. Here appears the most concrete level of normative conflict when a national rule is directly contrary to Community legislation. In each case Community law must prevail over the national rule, which makes this type very similar to a supremacy analysis. Actually, it is for the Court of Justice to choose the reasoning it wishes to apply for justifying the exclusion of national law. Theoretically though there should be a difference between these two types of reasoning, since applying a pre-emption analysis in case of a norm conflict means giving precedence to the regulatory authority of the Community, while applying supremacy equals to giving precedence to the Community norm. So the application of a pre-emption analysis instead of a supremacy reasoning in case of a norm conflict could allow a better arranged division of powers within the EC and the Member States. In a case of a non-exclusive Community competence this is the modality of pre-emption which assures the most the existence of the competition of the Community and national legal orders, since it invalidates national law only in case of its definitive incompatibility with Community law, which is in line with the principle of subsidiarity as well.<sup>20</sup>

Rule pre-emption tends to arise in cases where Member States – during the implementation of secondary Community law – add extra conditions which limit the Community law's impact and that is where conflict appears. For example, a *Commission v. Ireland* case<sup>21</sup> concerned directives which established certain advantages for international travellers. The Irish implementation legislation, however, added an extra disposition to these Community dispositions, namely that travellers had to stay in the country for at least 48 hours to gain the advantages. The Directives did not provide for this requirement, and the Court concluded that the Irish disposition limited the rights of travellers, so it was stated incompatible with Community law.

The Court of Justice mentioned a third pre-emption situation in the *CERAFEL* judgment, the so-called *obstacle pre-emption*. This kind of analysis comes into operation when a Member State measure poses some obstacle to certain Community objectives or interferes with the proper functioning of Community law, which leads to the voidance of the given national measure. An example of the application of this analysis can be found in the *Grosoli* judgment<sup>22</sup> which was again a case dealing with agricultural matters. The subject-matter of the case concerned the Italian legislation which fixed maximum retail prices for frozen beef and veal. The Court of Justice concluded that such a national disposition was "incompatible with the common organization of the market in beef and veal to the extent to which it endangers the objectives or the operation of that organization."<sup>23</sup> In *Danis*<sup>24</sup> a similar reasoning was applied in relation to the common organization of the market in cereals. The question arose in a criminal proceeding against producers and traders of animal feeding-stuffs, who were accused of increasing their prices several times in 8 months without notifying the competent minister about their action. The Court first concluded that such a national system of price control constituted a measure having an effect equivalent to a quantitative restriction, but it also stated that such a system was contrary to the common

organization of the market in cereals as well, if "in the opinion of the national court, (...) it jeopardizes the objectives and functioning of the common organization."<sup>25</sup>

In some authors' opinion it is the pre-emption analysis which is the most appropriate because it does not involve invalidating all the Member State legislation but only the specific national measure at issue. Consequently it is less restrictive than field pre-emption.<sup>26</sup> Moreover, it leaves the national authorities the opportunity to create law which meets the requirements of Community law. It is also true, though, that a wide range of national legislative measures can be rendered void by applying this analysis since any obstacle that limits the effectiveness of the Community legislation can create a conflict with EC law.

### Conclusion

This paper attempted to give a general overview of Community pre-emption which is considered to be a basic element of the constitution of the European Community, even though it is still "in an evolutionary stage"<sup>27</sup>. It is for the Court of Justice and Community law commentators in the future to make a uniform and well-elaborated doctrine out of the rather contingent jurisprudence of the Court of Justice. In my opinion the clear discernment of pre-emption from the supremacy principle would contribute to a more settled division of competences within the Community.

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<sup>1</sup> Dr. Flóra Fazekas, University of Debrecen, Faculty of Law, Department of European Law and International Private Law, PhD-Student, Supervisor: Prof. Dr. Ernő Várnay, University of Debrecen.

<sup>2</sup> For a description of the U.S. pre-emption concept, see for example A Framework for Preemption Analysis (Note), *The Yale Law Journal*, 88 (1978-1979), 363-389.; H.G. Maier: Preemption of State Law: A Recommended Analysis, *The American Journal of International Law*, 83 (1989) 832-839.; S.A. Gardbaum: The Nature of Preemption, *Cornell Law Review*, 79 (1993-1994) 767-815.

<sup>3</sup> Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [1978] ECR 629.

<sup>4</sup> *Ibid.*, para. 17.

<sup>5</sup> See M. Waelbroeck: The Emergent Doctrine of Community Pre-emption – Consent and Re-delegation in: *Courts and Free Markets. Perspectives from the United States and Europe. Vol. II* (eds.: T. Sandalow–E. Stein) Oxford, Clarendon, 1982, 548-580. at 552.

<sup>6</sup> Case 14/68, *Walt Wilhelm and others* [1969] ECR 001.

<sup>7</sup> See in particular S. Weatherill: *Law and Integration in the European Union*, Oxford, Clarendon, 1995, 135-183. and J. Weiler: The Community System: the Dual Character of Supranationalism, *Yearbook of European Law*, 1 (1981) 267-306.

<sup>8</sup> See, for instance, R. Bieber: On the Mutual Completion of Overlapping Legal Systems: The Case of the European Communities and the National Legal Orders, *European Law Review*, 13 (1988) 147-158. at 151. and F. Jacobs–K. Karst: The 'Federal' Legal Order, the U.S.A. and Europe Compared: A Juridical Perspective in: *Integration Through Law. Vol. I* (eds.: M. Cappelletti–M. Seccombe–J. Weiler) De Gruyter, 1986.

<sup>9</sup> For instance M. Waelbroeck, *op.cit.* (n.5.) and R. Schütze: Supremacy without Pre-emption? The very Slowly Emergent Doctrine of Community Pre-emption, *Common Market Law Review*, 43 (2006) 1023-1048.

<sup>10</sup> Schütze, *op.cit.* (n.9.) at 1032.

<sup>11</sup> On the distinction of the two concepts see further A. Goucha Soares: Pre-emption, Conflicts of Powers and Subsidiarity, *European Law Review*, 23 (1998) 132-145.

<sup>12</sup> For example Soares, *op.cit.* (n.11.)

<sup>13</sup> See, for example, Art. 20(1) of Council Regulation (EEC) No 171/83 which provides: „This regulation shall apply without prejudice to national technical measures, going beyond its minimum requirements...”

<sup>14</sup> As an example see Art. 8 of Council Directive 73/173/EEC: „Member States shall not prohibit, restrict or impede on the grounds of classification, packaging or labelling as defined in this Directive, the placing on the market of dangerous preparations which satisfy the requirements of this Directive and the Annex thereto.”

<sup>15</sup> Case 218/85, *Association comité économique agricole régional fruits et légumes de Bretagne (CERAFEL) v. Albert Le Campion* [1986] ECR 3513.

<sup>16</sup> Case 222/82, *Apple and Pear Development Council v. K.J. Lewis Ltd and others* [1983] ECR 4083. para. 23.

<sup>17</sup> Case 16/83, *Criminal proceedings against Karl Prantl* [1984] ECR 1299. para. 13.

<sup>18</sup> See n.16.

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<sup>19</sup> Case 255/86, *Commission v. Belgium (Bulk Fruit)* [1988] ECR 693.

<sup>20</sup> On the relationship between subsidiarity and pre-emption see Soares *op.cit.* (n.11.) at 136-143.

<sup>21</sup> Case 158/88, *Commission v. Ireland* [1990] ECR I-2367.

<sup>22</sup> Case 223/78, *Criminal proceedings against Adriano Grosoli* [1979] ECR 2621.

<sup>23</sup> *Ibid.*, para. 13.

<sup>24</sup> Case 16-20/79, *Criminal proceedings against Joseph Danis and others* [1979] ECR 3327.

<sup>25</sup> *Ibid.*, para. 9.

<sup>26</sup> On this opinion see E.D. Cross: Pre-emption of Member State Law in the European Economic Community: A Framework for Analysis, *Common Market Law Review*, 29 (1992) 447-472. at 467-471.

<sup>27</sup> Weiler, *op.cit.* (n.7.)