


# A Doctrine of Pre-emption *for the European Union*



Amedeo Arena • University of Naples “Federico II”  
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A decorative L-shaped frame in a light cream color, consisting of a vertical bar on the left and a horizontal bar at the top, with another vertical bar on the right and a horizontal bar at the bottom, forming a rectangular border around the central text.

# I. EU PRE-EMPTION: NOTION AND RATIONALE

# What is pre-emption?



- A Theory of Normative Conflict
  - Determines **when** EU law is in conflict with MS law
  - So that primacy can solve the conflict
  - Indicator of the residual law-making and treaty-making power of MS
- Never explicitly endorsed by the ECJ
  - But mentioned since 2009 by AGs Colomer, Jääskinen, Mengozzi, Sharpston, Szpunar, & Bobek

# Why do we need pre-emption?



- **Other federal systems** have a normative conflict theory (e.g. USA, Canada, Australia, Andean Com.)
- Lack of an equivalent theory in the EU:
  - makes application of **primacy unpredictable**
  - makes national residual powers **difficult to determine** on the basis of the current conceptual framework

# Normative conflicts in other federal systems



## United States of America

- Supremacy Clause (Article VI, Clause 2)
- Doctrine of Federal Pre-emption
- Classic version: latent exclusivity (*Winfield*, 1917; *S. Railway*, 1905)
- Modern version (*Gade*, 1992):
  - Presumption against (*Rice*, 1947)
  - Express / Implied Pre-emption
    - Field Pre-emption
    - Conflict Pre-emption (*Pacific Gas*, 1983)
      - *Rule (direct conflict) pre-emption*
      - *Obstacle (purposes) pre-emption*



# Normative conflicts in other federal systems



## Canada

- Paramountcy Doctrine
- (Occupying the field) (Privy Council, *Grand Trunk*, 1906)
- Two-branch test (SCC, *Paramountcy Trilogy*, 2015):
  - Operational conflict
  - Frustration of purpose

# Normative conflicts in other federal systems



## Australia

- § 109 Const. (Supremacy)
- Covering the field test (HCA, *General motors*, 1977)
- Conferred rights test (HCA, *Colvin*, 1943)
- Simultaneous obedience test (HCA, *Brisbane*, 1920)

# Normative conflicts in other federal systems



## Andean Community

- *Preeminencia* doctrine (1-IP-87)
- *Preemption Andina* (ATJ, 2-IP-88)
  - *Complemento indispensable*
  - *Desarrollo legislativo ulterior*



# Primacy's Unpredictability: *Wilson*



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# Aporias of the current framework

- How should *Wilson* be accounted for?
  - Is it the consequence of the primacy of Dir. 98/5?
  - Is it the effect of shared competence under Art. 2(2) TFEU (cf. exclusivity by exercise)?
    - But what about Protocol no. 25? (Cf. *Melloni*, *Plus*, etc.)
    - Do Art. 2(5) TFEU and Art. 3(3)-(4) TFEU really matter?
  - Is it the negative aspect of loyalty under Art. 4(3) TEU?

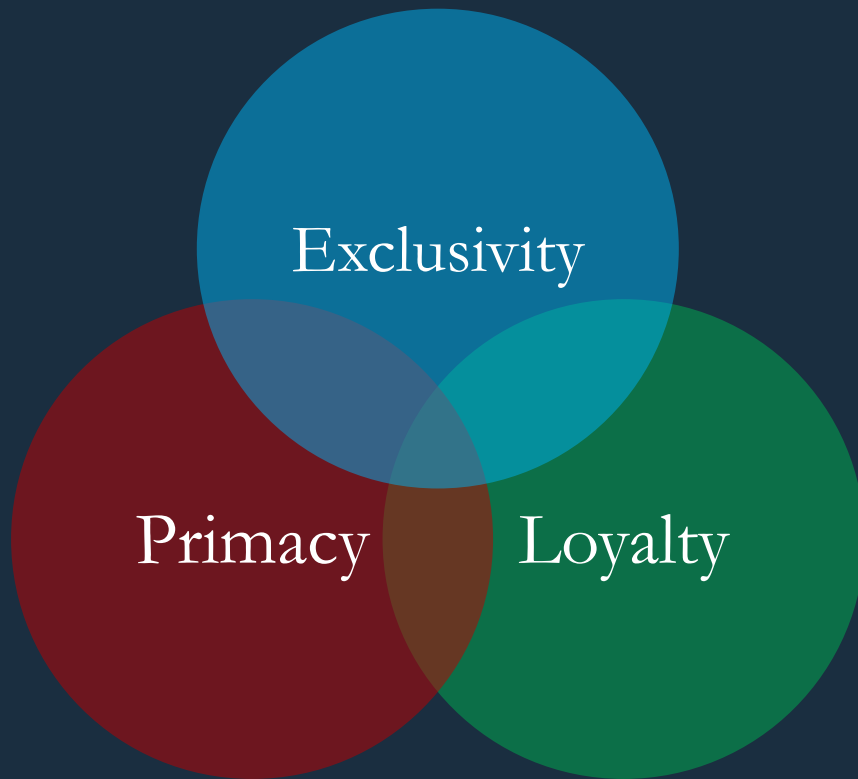
# Aporias of the current framework

- How should *a priori exclusivity* be accounted for?
  - If encroachment on a given subject-matter is sufficient to trigger exclusivity, why does the ECJ look at conflicts with EU legislation adopted that area?
  - How come a (legislative) «specific authorisation» can rule out (constitutional) «exclusivity»?
  - Is it the consequence of the primacy of Art. 2(1) TFEU in conjunction with Art. 3(1) TFEU ?
  - Is the negative aspect of loyalty under Art. 4(3) TEU?

# Aporias of the current framework

- How should *ERTA* be accounted for?
  - Is it the (reversible) effect of the primacy of the «affected» common rules?
  - Is it the (irreversible) effect of subsequent exclusivity under Art. 3(2) TFEU?
  - Is it the negative aspect of loyalty under Art. 4(3) TEU?

# Pre-emption as EU's Grand Unification Theory?



- Accounts for the three main forms of preclusion
- Inferred from ECJ case-law
- Enables comparisons and shows common patterns between preclusion in various domains

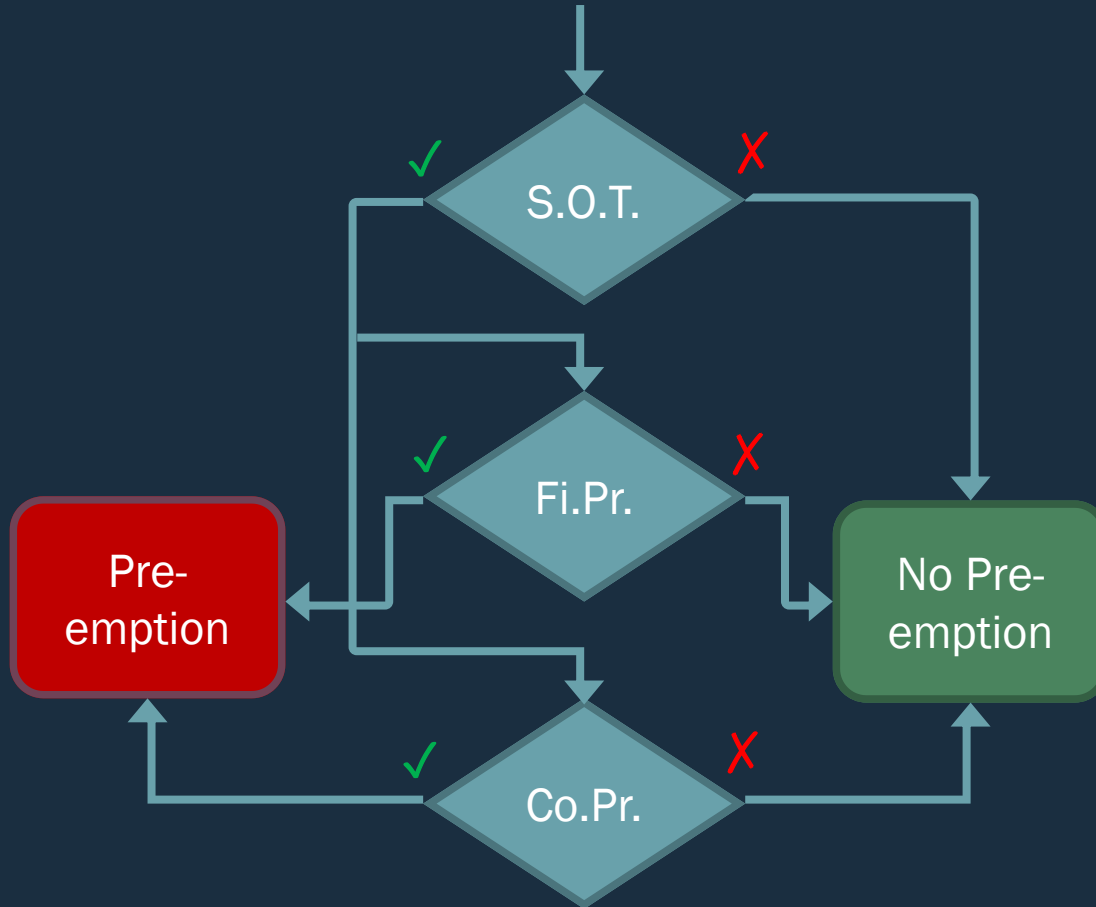


# Sources of EU Pre-emption



- Constitutional Pre-emption
  - EU Primary law and MS internal & external acts (inc. *inter se* agreements)
- ERTA Pre-emption
  - EU internal acts and MS external acts (inc. *inter se* agreements)
- Legislative Pre-emption
  - EU internal & external acts v. MS internal acts

# Types of EU Pre-emption



- Scope Overlap Test
  - Comparison between the scope of the EU and the national norm
- Field pre-emption
  - Duty of abstention arises from a feature of the area occupied by the EU norm
- Conflict pre-emption
  - Duty of abstention arises from a conflict with EU provisions

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## II. LEGISLATIVE PRE-EMPTION

# Legislative Pre-emption: Overview

In Case 75/63

Reference to the Court under Article 177 of the EEC Treaty by the Centrale Raad van Beroep, the Netherlands court of last instance in social security matters, for a preliminary ruling in the action pending before that court between

MRS M. K. H. UNGER, THE WIFE OF R. HOEKSTRA, both residing at Woustraat 5, III Amsterdam, assisted by W. de Valk, Utrecht,

appellant,

and

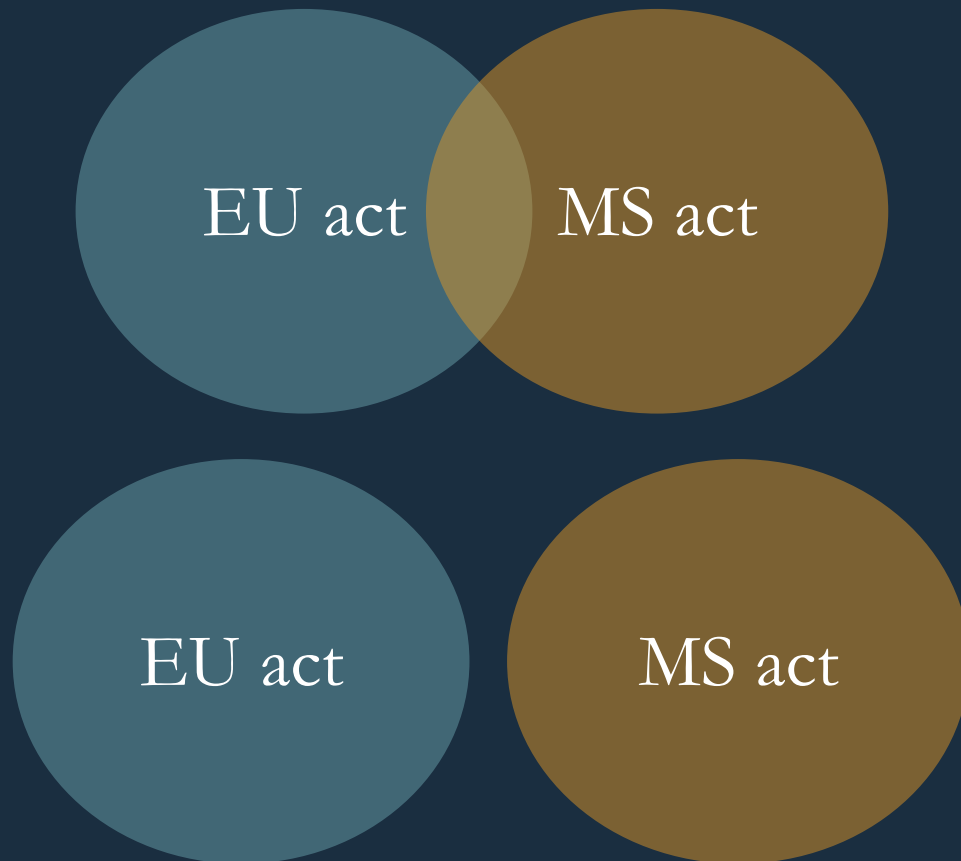
BESTUUR DER BEDRIJFSVERENIGING VOOR DETAILHANDEL EN AMBACHTEN of Nijenoord 1 a, Utrecht, represented by its Legal Adviser, R. H. Van der Meer, Utrecht,

respondent,

- Scope overlap test
  - + *Positive*
  - *Negative*
- Field pre-emption
  - + *Exhaustiveness*
  - *Minimum Harmonisation*
  - *Partial Harmonisation*
- Conflict pre-emption
  - Rule pre-emption
  - Obstacle pre-emption



# Legislative Pre-emption: Scope overlap test



- Usually ECJ only reports negative outcomes
- Very important in legislative field pre-emption cases
- Positive
  - e.g. *Cindu Chemicals*: chemicals are subject to Dir. 76/769
- Negative
  - E.g. *Amsterdam Bulb*: products lie outside flowers CMO

# Legislative Pre-emption

## Field Preemption → Exhaustiveness

- E.g. *Wilson*
  - Dir. 98/5 completely harmonised entry requirements
  - Absence of prior tests is accompanied by arrangements to protect consumers and the proper administration of justice
- E.g. *Melloni*
  - The EAW FD carried out a(n exhaustive) 'harmonisation of the conditions of execution of an EAW in the event of a conviction rendered in absentia'
  - Making surrender conditional upon further requirements would undermine the EU FR protection standard that reflects the consensus of all the MS

# Legislative Pre-emption Field Preemption → Minimum harmonisation



E.g. *Hans Hoening*

- Dir. 88/166 set the minimum size of hen cages
- MS could require bigger cages
- E.g. *Sky Italia*
  - *Dir. 2010/13* set minimum rules on TV advertising
  - MS could impose stricter limits on Pay-TV

# Legislative Pre-emption

## Field Preemption → Partial harmonisation



- E.g. *De Agostini*
  - Dir. 89/552 partially harmonised TV advertising
  - MS could regulate deceptive advertising
- E.g. *Amatori*
  - Dir. 2001/23 protected workers in the event of transfers of undertakings
  - MS could lay down rules to protect workers in the event of transfers of parts of undertakings



# Legislative Pre-emption

## Field Preemption → Type of act?

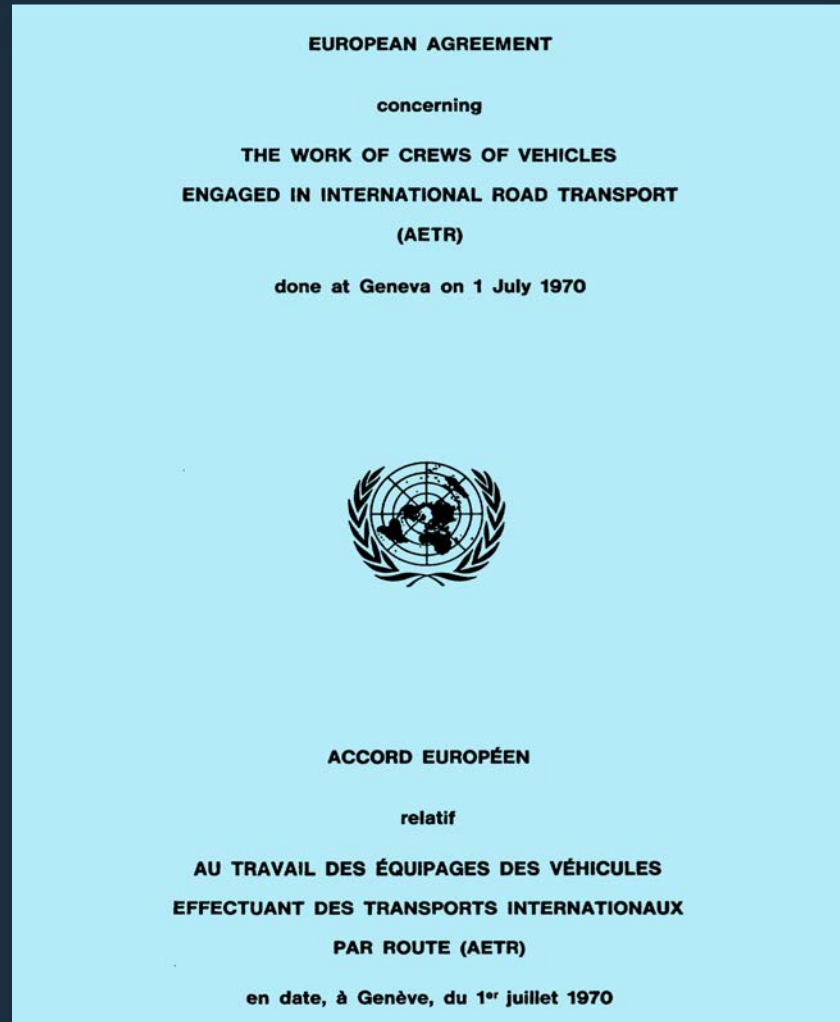


- Article 288 TFEU suggests that regulations have broader pre-emptive effects than directives
- Yet complete harmonisation directives (e.g. 98/5) have broader pre-emptive effects than minimum harmonisation regulations (e.g. for common wheat)

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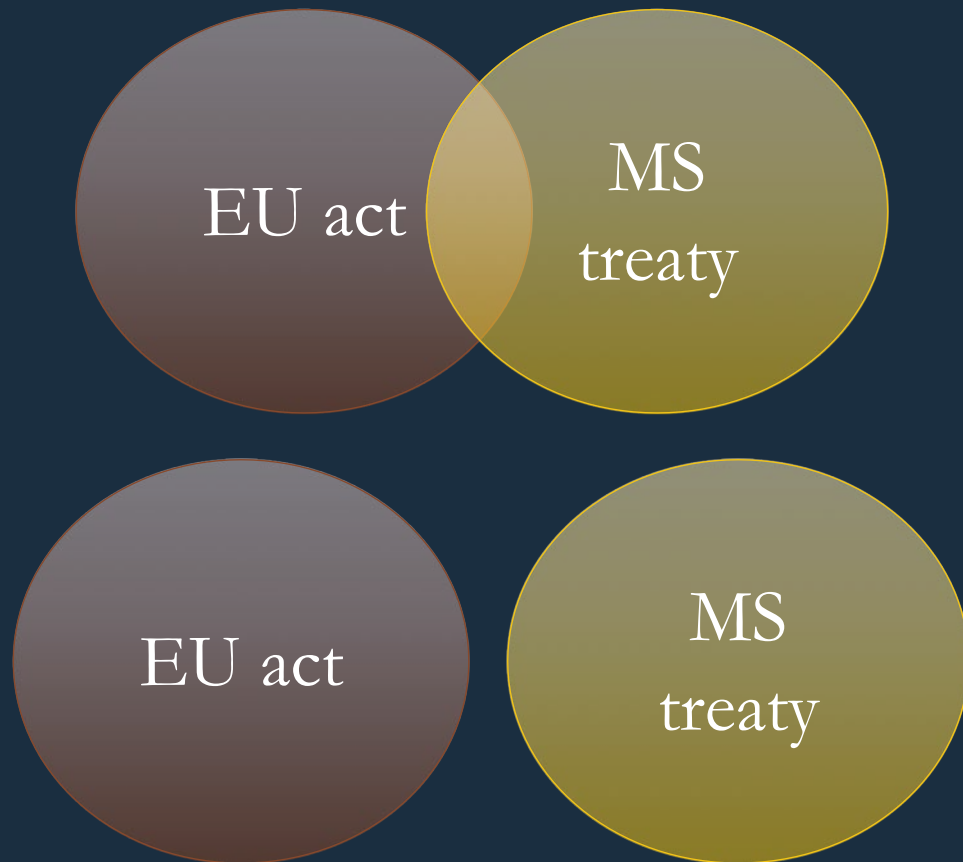
# III. *ERTA* PRE-EMPTION

# ERTA Pre-emption: Overview



- Scope overlap test
  - + *(Quasi) Positive*
  - *(Quasi) Negative*
- Field pre-emption
  - + *NMC Provisions*
  - + *Scope Alteration*
  - + *Exhaustiveness*
  - *Minimum Harmonisation*
  - *Partial Harmonisation*
- Conflict pre-emption
  - Rule pre-emption
  - Obstacle pre-emption

# ERTA Pre-emption: Scope overlap test



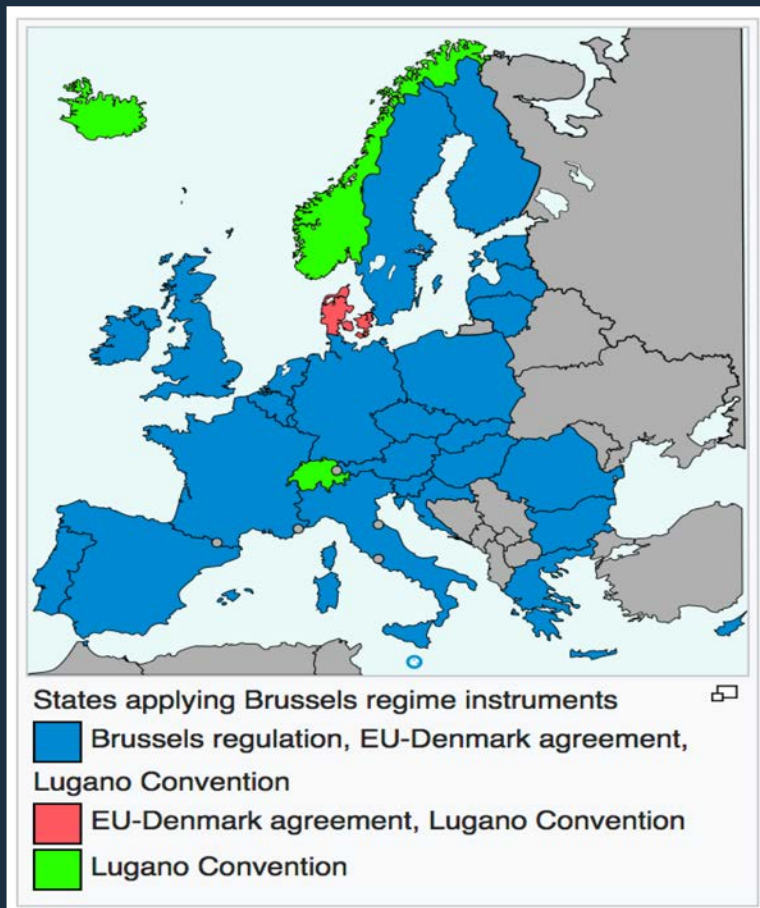
- Prospective assessment
  - of EU law (Op. 1/13 *Child Abduction*)
  - of MS act (*Green Network*)
- Positive: «falls within the scope» (*ERTA*)
- Quasi Positive: is «largely covered» (Op. 1/03 *Lugano*)
- Negative: doesn't «fall in an area covered» (*Open skies*)
- Quasi-Negative: covers only «a very small part» (Op. 2/00 *Cartagena*)

# *ERTA* Pre-emption: Field Pre-emption → NMC Provisions



- Art. 3(2) TFEU, 1st part (*WTO* doctrine Op. 1/94). MS external action is preempted when EU act empowers EU institutions to enter agreements with NMC
- E.g. *ERTA*: reg. 543/69 empowered Council to negotiate agreements with NMC concerning road safety

# ERTA Pre-emption: Field Pre-emption → Scope alteration



- Art. 3(2) TFEU, agreement may «alter the scope» of the common rules
- E.g. *Opinion 1/03*
  - The Lugano Convention would «enlarge the scope of recognition of judicial decisions without any special procedure, thus increasing the number of cases in which judgments delivered by NMC courts can be recognised.

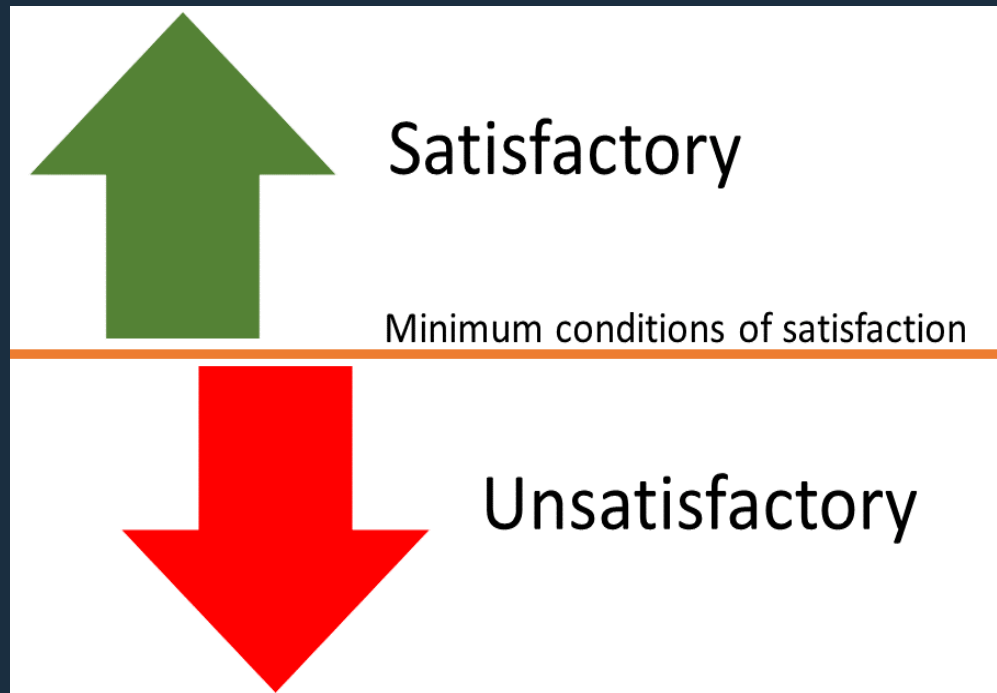


# ERTA Pre-emption Field Preemption → Exhaustiveness



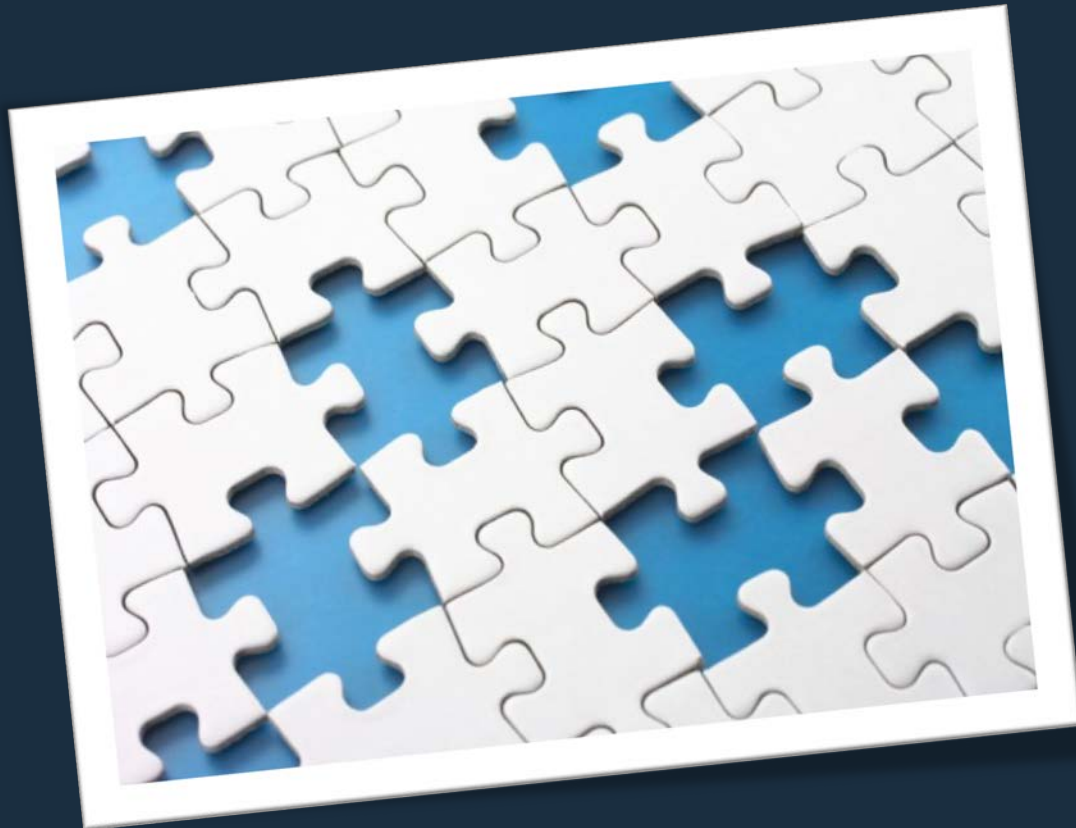
- Art. 3(2) TFEU, agreement «may affect common rules»
- E.g. *Opinion 2/91*
  - the legislature adopted directives laying down «very detailed» rules on the labelling of dangerous substances and preparations, pursuing «an ever greater degree of harmonization» of MS laws.

# ERTA Pre-emption Field Preemption → Minimum Harmonisation



- *Opinion 2/91*: ILO convention imposed minimum standards for workers' protection in an area where directives also imposed minimum standards
- *Mox Plant*: external competence in the field of the protection of marine environment is «in principle shared between the Community and the Member States» (Art. 193 TFEU).

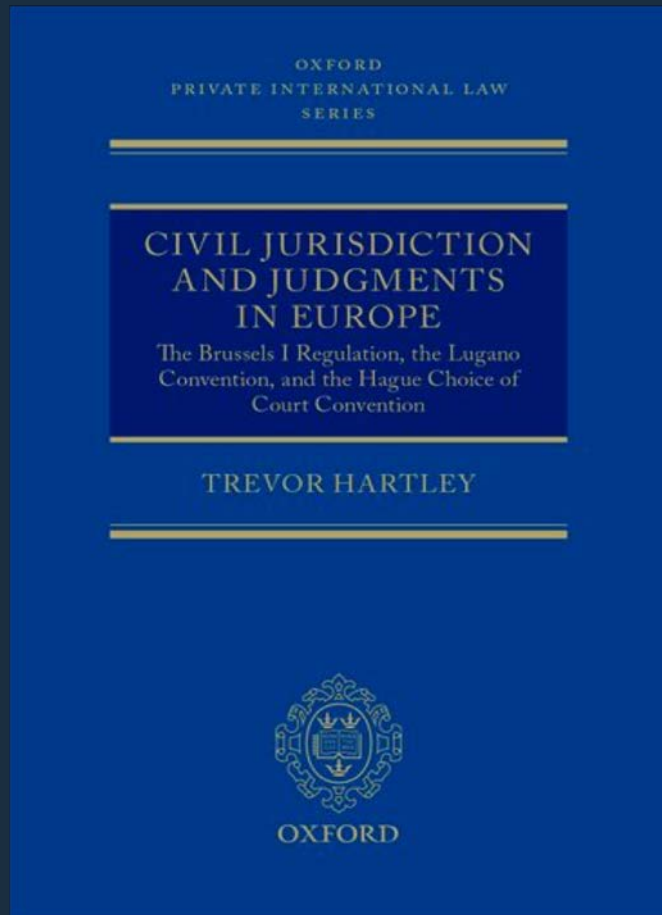
# *ERTA* Pre-emption Field Preemption: → Partial Harmonisation



- *Opinion 1/94*: Community legislature had achieved «only [a] partial harmonization» in the sectors falling within the scope of TRIPs
- *Open skies*: Community legislation on air transport was «not complete in character»

# ERTA Pre-emption

## Conflict Preemption → Rule Pre-emption



- E.g. *Opinion 1/03*
  - Lugano Convention relies on «domicile of the defendant» criterion
  - This could «conflict with the provisions» of Regulation 44/2001 that establish a different jurisdiction if the defendant is domiciled in a NMC but has establishment in a MS.

# ERTA Pre-emption: Conflict Preemption → Obstacle Pre-emption



- E.g. *Green Network*
  - Under IT-CH agreement, energy imported from Swiss to Italy could be certified as green
  - This «could interfere ... with the objectives of Directive 2001/77» i.e. to increase MS production of green energy.

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# IV. CONSTITUTIONAL PRE-EMPTION



# Constitutional Pre-emption: Overview



- Scope overlap test
  - + *Positive*
  - *Negative*
- Field pre-emption
  - + *Exclusive power*
  - *Delegation*
  - *Implementation*
- Conflict pre-emption
  - Rule pre-emption
  - Obstacle pre-emption

# Constitutional Pre-emption: Scope overlap test



- Broad provisions / no definitions
- Unwillingness to rely on preparatory work
- Derogations can be broad too (*Com. v. Latvia – Notaries*)
- Do FR have an autonomous scope?
- Various methodologies in defining, for instance, CCP:
  - *Evolutionary approach (Op. 1/78: liberalization & regulation of trade)*
  - *Systemic understanding (Op. 1/94: only mode 1 is CCP)*
  - *Primary objective (Op. 3/15 Marrakesh Treaty)*

# Constitutional Pre-emption: Field Pre-emption



- Exclusive power
  - Exhaustive list in Art. 3(1) TFEU (*a priori* exclusivity)
  - But also other provisions (e.g. Art. 344 TFEU *juncto* Art. 276 TFEU in *Achmea*)
  - Non-retroactive & presupposes some EU exercise (e.g. *Fisheries*)
  - ECJ prefers conflict pre-emption (e.g. *AG2R*: Art. 101&102 TFEU; *Vebic*: Reg. 1/03)
  - CFR: Presumption against pre-emption in non-harmonised (*MAS*) or partially harmonised (*Fransson*) areas?

# Constitutional Pre-emption: Field Pre-emption



## ■ Delegation

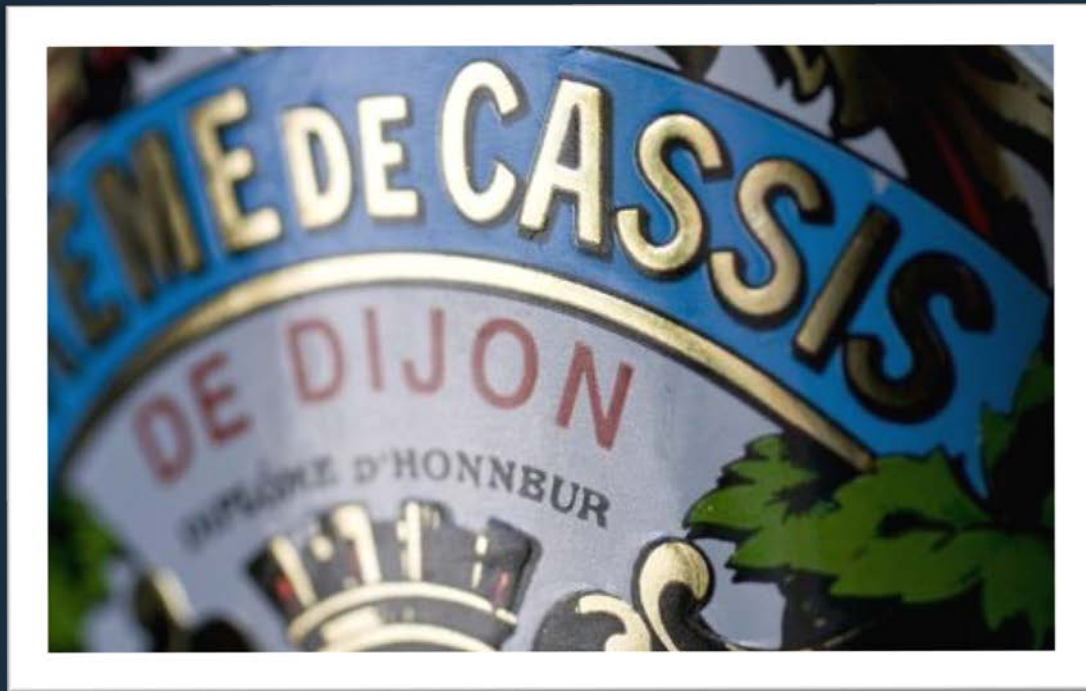
- Requires a «specific authorization» (*Donckerwolcke*)
- E.g. stricter competition rules on unilateral conduct under Art. 3(2) of Reg 1/03
- It can be implied (*Bulk Oil, Pansard*)

## ■ Implementation

- In line with Art. 291(1), MS have a general implementation power
- Notion of implementation can be broad (like *Fransson?*)



# Constitutional Pre-emption: Conflict Pre-emption



- Rule pre-emption
  - Quite common, as primary law provisions have a broad scope (e.g. *Dassonville*, *Kraus*)
- Obstacle pre-emption
  - Often used to prevent circumvention (*effet utile*) (e.g. *GB-Inno*, *Luisi & Carbone*)

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# VI. CONCLUSIONS



# Advantages of an EU Pre-emption Doctrine

- Increased predictability of ECJ case-law
- Increased transparency in the EU legislative process
- Increased confidence in implementation of EU law
- More constructive debate on MS regulatory autonomy



# Suggestions for an EU Pre-emption Doctrine

- Establish a presumption against pre-emption:
  - For directives
  - For certain competence types
- Establish a clear statement (or form) requirement



# If you liked the show, you'll love the book:



A. Arena, *A Doctrine of Pre-emption for the European Union: How EU Law constrains Member States' Law-making and Treaty-making powers*

(Forthcoming, OUP, 2021)

Thanks for your attention! *a.arena@unina.it*

