## European Law II
### Nature – Supremacy/Pre-emption

<table>
<thead>
<tr>
<th>Contents</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Introduction</strong></td>
</tr>
<tr>
<td>1. <strong>The European Perspective: Absolute Supremacy</strong></td>
</tr>
<tr>
<td>a. <strong>The Absolute Scope of the Supremacy Principle</strong></td>
</tr>
<tr>
<td>aa. Supremacy over Internal Laws of the Member States</td>
</tr>
<tr>
<td>bb. Supremacy over International Treaties of the Member States</td>
</tr>
<tr>
<td>b. <strong>The 'Executive' Nature of Supremacy: Disappopition, Not Invalidation</strong></td>
</tr>
<tr>
<td>2. <strong>The National Perspective: Relative Supremacy</strong></td>
</tr>
<tr>
<td>a. <strong>Fundamental Rights Limits: The 'So-long' Jurisprudence</strong></td>
</tr>
<tr>
<td>b. <strong>Competences Limits: From 'Maastricht' to 'Mangold'</strong></td>
</tr>
<tr>
<td>3. <strong>Legislative Pre-emption: Nature and Effect</strong></td>
</tr>
<tr>
<td>a. <strong>Pre-emption Categories: The Relative Effects of Pre-emption</strong></td>
</tr>
<tr>
<td>aa. Field Pre-emption</td>
</tr>
<tr>
<td>bb. Obstacle Pre-emption</td>
</tr>
<tr>
<td>cc. Rule Pre-emption</td>
</tr>
<tr>
<td>b. <strong>Modes of Pre-emption: Express and implied Pre-emption</strong></td>
</tr>
<tr>
<td>4. <strong>Constitutional Limits to Legislative Pre-emption</strong></td>
</tr>
<tr>
<td>a. <strong>Union Instruments and their Pre-emptive Capacity</strong></td>
</tr>
<tr>
<td>aa. The Pre-emptive Capacity of Regulations</td>
</tr>
<tr>
<td>bb. The Pre-emptive Capacity of Directives</td>
</tr>
<tr>
<td>cc. The Pre-emptive Capacity of International Agreements</td>
</tr>
<tr>
<td>b. <strong>Excursus: Competence Limits to Pre-emption</strong></td>
</tr>
</tbody>
</table>

### Introduction

Since European law is directly applicable in the Member States, it must be recognised alongside national law by national authorities. And since European law can have direct effect, it might come into conflict with national law in a specific situation.¹

---

¹ For the two main theories on the relationship between direct effect and supremacy, see M. Dingjan, 'When Worlds Collide? Competing Visions of the Relationship between Direct Effect and Supremacy' (2007) 44 CML Rev 931. The article is partly a response to K. Lennartsson and T. Corthout, 'Of Birds and Hedges: The Role of Primacy in Invoking Nuisance of EU Law' (2006) 31 IL Rev 287, which has caused a lively debate. Nonetheless, why the 'German quarrel' – ironically not fought by Germans – has become so prominent is
And where two legislative wills come into conflict, each legal order must determine when conflicts arise and how these conflicts are to be resolved.

For the Union legal order, these two dimensions have indeed been developed for the relationship between European and national law. In Europe’s constitutionalism, they have been described as, respectively, the principle of pre-emption and the principle of supremacy. The problem of pre-emption consists in determining whether there exists a conflict between a national measure and a rule of [European law]. The problem of [supremacy] concerns the manner in which such a conflict, if it is found to exist, will be resolved. Pre-emption and supremacy thus represent 'two sides of the same coin.' They are like Siamese twins: different though inseparable. There is no supremacy without pre-emption.

This chapter begins with an analysis of the supremacy doctrine. How supreme is European law? Will European law prevail over all national law? And what is the effect of the supremacy principle on national law? We shall see that there are two perspectives on the supremacy question. According to the European perspective, all Union law prevails over all national law. This 'absolute' view is not shared by the Member States. Indeed, according to the national perspective, the supremacy of European law is relative: some national law is considered to be beyond the supremacy of European law.

A third section then moves to the doctrine of pre-emption. This tells us what extent European law 'displaces' national law; or, to put it another way, how much legislative space a European law still leaves to the Member States. The Union legislator is generally free to choose to what extent it wishes to pre-empt national law. However, there are two potential constitutional limits to this freedom. First, the type of instrument used – regulation, directive or international agreement – might limit the pre-emptive effect of Union law. And, secondly, the type of competence on which the Union act is based might determine the capacity of the Union legislator to pre-empt the Member States.

1. The European Perspective: Absolute Supremacy

The resolution of legal conflicts requires a hierarchy of norms. Modern federal States typically resolve conflicts between federal and state legislation in surprising, for it seems to have very few, if any, consequences on the relationship between European and national law. This chapter, as well as the two chapters that follow, favours the view that supremacy requires a concrete conflict between different norms. Where a European norm lacks direct effect, it cannot be applied in a specific case and for that reason cannot clash with a national norm. The supremacy principle is an 'executive' or 'judicial' principle.


European law will not affect the validity of national norms. This 'executive' nature of supremacy will be discussed in a second step.

a. The Absolute Scope of the Supremacy Principle

The dualist traditions within two of the Member States in 1958 posed a serious legal threat to the unity of the Union legal order. Within dualist States, the status of European law is seen as depending on the national act 'transposing' the European Treaties. Where this was a parliamentary act, any subsequent parliamentary acts could—expressly or implicitly—repeal the transposition law. Within the British tradition, this follows from the classic doctrine of parliamentary sovereignty: an 'old' Parliament cannot bind a 'new' one. Any 'newer' parliamentary act will thus theoretically prevail over the 'older' 1972 European Union Act. But the supremacy of European law may even be threatened in monist States. For the supremacy of European law can here find a limit in the State's constitutional structures.

Would the European legal order insist that its law was to prevail over all national law, including national constitutions? The Court of Justice did just that in a series of foundational cases. But while the establishment of the supremacy over internal national law was swift, its extension over the international treaties of the Member States was much slower.

aa. Supremacy over Internal Laws of the Member States

Frightened by the decentralized solution to the supremacy issue, the Court centralised the question of supremacy by turning it into a principle of Union law. In Costa v. ENEL,10 the European judiciary was asked whether national legislation adopted after 1958 could prevail over the Treaties. The litigation involved an unsettled energy bill owed by Costa to the Italian 'National Electricity Board'. The latter had been created by the 1962 Electricity Nationalisation Act, which was challenged by the plaintiff as a violation of the European Treaties. The Italian dualist tradition responded that the European Treaties—like ordinary international law—had been transposed by national legislation in 1957 that could—following international law logic—be derogated by subsequent national legislation.

Could the Member States thus unilaterally determine the status of European law in their national legal orders? The Court rejected this reading and distanced itself from the international law thesis:

By contrast with ordinary international treaties, the EU Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply... The

10 Case 6/64, Costa v. ENEL (1964) ECR 585.

11 Ibid., 593–4 (emphasis added).
12 Some legal scholars refer to the 'supremacy' of international law vis-à-vis national law (see F. Morgenstern, 'Judicial Practice and the Supremacy of International Law' (1950) 27 BYIL 42). However, the concept of supremacy is here used in an imprecise way. Legal supremacy cannot derive from the superiority of one norm over another. For this, two norms must conflict and, therefore, form part of the same legal order. However, classic international law is based on the sovereignty of States and that implied a dualist relation with national law. The dualist viewpoint protected national laws from being overridden by norms adopted by such 'supranational' authorities as the Catholic Church or the Holy Roman Empire. (When a State opens up to international law, the 'monistic' stance is a national choice. International law as such has never imposed monism on a State. On the contrary, in clearly distinguishing between international and national law, it is based on a dualist philosophy.) Reference to the international law doctrine para sunt servanda will hardly help. The fact that a State cannot invoke its internal law to justify a breach of international obligations is not supremacy. Behind the doctrine of para sunt servanda stands the concept of legal responsibility: a State cannot — without legal responsibility — escape its international obligations. The duality of internal and international law is thereby maintained: the forum cannot affect the latter (as the latter cannot affect the former).
constitutions, including human rights, beyond the scope of federal supremacy? The Court disagreed:

Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the [Union] would have an adverse effect on the uniformity and efficiency of [European] law. The validity of such measures cannot be judged in the light of [European] law.14

The validity of European laws could not be affected — even by the most fundamental norms within the Member States. The Court’s vision of the supremacy of European law over national law was an absolute one: ‘The whole of [European] law prevails over the whole of national law.’15

bb. Supremacy over International Treaties of the Member States

While the Union doctrine of supremacy had quickly emerged with regard to national legislation,16 its extension to international agreements of the Member States was much slower. From the very beginning, the Treaties here recognized an express exception to the supremacy of European law. According to Article 351 TFEU,

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one side, and one or more third countries on the other, shall not be affected by the provisions of the Treaties.17

Article 351 codified the ‘supremacy’ of prior international agreements of the Member States over conflicting European law. In the event of a conflict between the two, it was European law that could be disregarded within the national legal order. Indeed, Article 351 ‘would not achieve its purpose if it did not imply a stay on the part of the institutions of the [Union] not to impede the performance of the

14 Ibid., para. 3.
17 Para. 1. The provision continues (para. 2): ‘To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.’ On the scope of this obligation, see J. Klibben, ‘Marchand on the Points of July? The Court of Justice on Prior Agreements of the Member States’ [2001] 26 EL Rev 187, as well as B. Schütze, ‘The “Succession Doctrine” and the European Union’ in Foreign Affairs and the EU Constitution (Cambridge University Press, 2014), 91.
18 Case 812/79, Attorney General v. Juan C. Bungue [1980] ECR 2787, para. 9 (emphasis added). This was confirmed in Case C-158/91, Criminal Proceedings against Jean-Claude Lay [1993] ECR I–2487, para. 22: ‘In view of the foregoing considerations, the answer to the question submitted for a preliminary ruling must be that the national court is under an obligation to ensure [that the relevant European legislation]... is fully complied with by restricting from applying any conflicting provision of national legislation, under the application of such a provision is necessary in order to ensure the performance by the Member State concerned of obligations arising under an agreement concluded with non-member countries prior to the entry into force of the EEC Treaty.’
20 Case 10/61, Commission v. Italy [1962] ECR 1, 10–11: ‘[T]he terms “rights and obligations” in Article 351 refer, as regards the “rights”, to the rights of third countries and, as regards the “obligations”, to the obligations of Member States and that, by virtue of the principles of international law, by assuming a new obligation which is incompatible with rights held under a prior treaty, a State ipso facto gives up the exercise of these rights to the extent necessary for the performance of its new obligation... In fact, in matters governed by the [European] Treaties, the latter Treaties take precedence over agreements concluded between Member States before [their] entry into force.’
22 Ibid., para. 303.
23 Case C-402/03SP, Kadi (n. 21 above), para. 304.
powers of the Member States. For: ‘otherwise the Member States could not conclude any international treaty without running the risk of a subsequent conflict with [European] law’ 26 This idea has been criticised: there would be no reason why the normal constitutional principles characterising the relationship between European law and unilateral national acts should not also apply to subsequently concluded international agreements. 26 A middle position has proposed limiting the analogous application of Article 351 to situations where the conflict between post-accession international treaties of Member States and subsequently adopted European legislation was ‘objectively unforeseeable’ and could therefore not be expected. 27

None of the proposals to extend Article 351 by analogy has however been mirrored in the jurisprudence of the European Court of Justice. 28 The Court has unconditionally upheld the supremacy of European law over international agreements concluded by the Member States after 1958 (or their date of accession).

In light of the potential international responsibility of the Member States, is the fair constitutional solution? Should it indeed make a difference whether a rule is adopted by means of a unilateral national measure or by means of an international agreement with a third State? Constitutional solutions still need to be found to solve the Member States’ dilemma of choosing between the Scylla of liability under the European Treaties and the Charybdis of international responsibility for breach of contract. Should the Union legal order, therefore, be given an ex ante authorisation mechanism for Member States’ international agreements? Or should the Union share financial responsibility for breach of contract with the Member State concerned? These are difficult constitutional questions. They await future constitutional answers. 29

b. The ‘Executive’ Nature of Supremacy: Disapplication, Not Invalidation

What are the legal consequences of the supremacy of European law over conflicting national law? Must a national court ‘hold such provisions inapplicable to the extent to which they are incompatible with [European] law’, or must it declare them void? 30 This question concerns the constitutional effect of the supremacy doctrine in the Member States.

The classic answer to these questions is found in Simmenuth II. 31 The issue raised in the national proceedings was this: ‘what consequences flow from the direct applicability of a provision of [Union] law in the event of incompatibility with a subsequent legislative provision of a Member State’? 32 Within the Italian constitutional order, national legislation could be repealed solely by Parliament or the Supreme Court. Would lower national courts thus have to wait until this happened and, in the meantime, apply national laws that violate Union laws?

Unsurprisingly, the European Court rejected such a reading. Appealing to the ‘very foundations of the [Union]’, the European Court stated that national courts were under a direct obligation to give immediate effect to European law. The supremacy of European law meant that ‘rules of [European] law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force’. 33 But did this mean that the national court had to repeal the national law? According to one view, supremacy did indeed mean that national courts must declare conflicting national laws void. European law would ‘break’ national law. 34 Yet the Court preferred a milder – second – view:

[In accordance with the principle of precedence of [European] law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but, in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also preclude the valid adoption of any new legislative measures to the extent to which they would be incompatible with [European] provisions. 35

Where national measures conflict with European law, the supremacy of European law would thus not render them void, but only ‘inapplicable’. 36 Not


27 For the time being, one legislative answer can be seen in the inclusion of ‘express saving’ clauses in the relevant Union legislation. A good illustration of this technique is Art. 26 of Regulation 864/2007 on the law applicable to non-contractual obligations (Rinne III [2007] OF L 199/40). This clause constitutes a legislative extension of Art. 351 TFEU: the Union legislation will not affect international agreements of the Member States with third States concluded after 1958 but before the time when the Regulation was adopted.


29 This very question was raised in Case 34/67, Fienna Gebihrer Lohk v. Hauptzollamt Köln-Rheinbel [1968] ECR 249.


31 Case 106/77, Simmenuth (n. 31 above), para. 10. 32 Ibid., para. 14.

32 This is the very title of a German monograph by E. Grubert, Gemeinschaftsrecht in der Entscheidung Recht (D. Appel, 1966). This position was shared by Hallstein: '[T]he supremacy of [European] law means essentially two things: its rules take precedence irrespective of the level of the two orders at which the conflict occurs, and further, [European] law not only invalidates previous national law but also limits subsequent national legislation' (W. Hallstein quoted in Case 700/70, The Common Market (n. 9 above) at 717 (emphasis added)).

33 Case 106/77, Simmenuth (n. 31 above), para. 17 (emphasis added).

34 The Court's reference to 'directly applicable measures' was not designed to limit the supremacy of European law to regulations. The Union acts at issue in Simmenuth were,
invalidation' but 'disapplication' was required of national courts, where European laws came into conflict with pre-existing national laws. Yet, in the above passage, the effect of the supremacy doctrine appeared stronger in relation to subsequent national legislation. Here, the Court said that the supremacy of European law would 'preclude the valid adoption of new legislative measures to the extent to which they would be incompatible with [European] provisions'. Was this to imply that national legislators were not even competent to adopt national laws that would run counter to existing European laws? Were these national laws void ab initio?

In Ministero delle Finanze v. IN.CO.GE. '90, the Commission picked up this second prong of the Simmenthal ruling and argued that 'a Member State has no power whatever to subsequently adopt a fiscal provision that is incompatible with [European] law, with the result that such a provision... must be treated as non-existent'. But the European Court of Justice disagreed with this interpretation. Pointing out that Simmenthal II 'did not draw any distinction between pre-existing and subsequently adopted national law', the incompatibility of subsequently adopted rules of national law with European law did not have the effect of rendering these rules non-existent. National courts were thus only under an obligation to disapply a conflicting provision of national law -- be it prior or subsequent to the Union law.

What will this tell us about the nature of the supremacy principle? It tells us that the supremacy doctrine is about the 'executive force' of European law. The Union legal order, while integrated with the national legal orders, is not a

after all, directives. This point was clarified in subsequent jurisprudence: see Case: 48/78, Rami v. CEC (1979) ECR, 1629; and Case 152/84, Marshall v. Southampton and South-West Hampshire Area Health Authority [1986] ECR 723.

37 Case 106/77, Simmenthal (n. 31 above) para. 17 (emphasis added).


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

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

42 Joined Cases C-10-22/97, IN.CO.GE. (n. 39 above), paras. 20-1.

43 The non-application of national laws in these cases is but a mandatory 'minimum requirement' set by the Union legal order. A national legal order can, if it so wishes, offer stricter consequences to protect the full effectiveness of European law: Case 34/67, Firma Catholique Lux v. Hauptstaatsrat Kolo-Rhinen [1968] ECR 245, n 251. 'Although European law has the effect of excluding the application of any national measure incompatible with it, the article does not restrict the powers of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for the purpose of protecting the individual rights conferred by [European] law.'

'unitary' legal order. European law leaves the 'validity' of national norms untouched; and will not negate the underlying legislative competence of the Member States. The supremacy principle is thus not addressed to the State legislators, but to the national executive and judicial branches. (And while the national legislator will be required to amend or repeal national provisions that give rise to legal uncertainty, this secondary obligation is not a direct result of the supremacy doctrine but derives from Article 4(3) TEU.) The executive force of European law thus generally leaves the normative validity of national law intact. National courts are not obliged to 'break' national law. They must only not apply it when in conflict with European law in a specific case. Supremacy may then be best characterised as a 'remedy'. Indeed, 'it is the most general remedy which individuals whose rights have been infringed may institute before a national court of law.' This remedial supremacy doctrine has a number of advantages. First, some national legal orders may not grant their (lower) courts the power to invalidate parliamentary laws. The question of who may invalidate national laws is thus left to the national legal order. Secondly, comprehensive national laws must only be disappplied to the extent to which they conflict with European law. They will remain operable in purely internal situations. Thirdly, once the Union act is repealed, national legislation may become fully operational again.

2. The National Perspective: Relative Supremacy

The European Union is not a Federal State in which the sovereignty problem is solved. The legal unity of the European Union is a legal unity of States. Each federal union is
characterised by a political dualism in which each citizen is a member of two political bodies. These two political bodies will compete for loyalty—and sometimes, the ‘national’ view on a political question may not correspond with the ‘European’ view on the matter. What happens when the political views of a Member State clash with those of the federal Union? Controversies over the supremacy of federal law are as old as the (modern) idea of federalism.\textsuperscript{50} And while the previous section exposed the European answer to the supremacy doctrine, this absolute vision is—unsurprisingly—not shared by the Member States.

There indeed exists a competing national view—or better: national views—on the supremacy issue. The extreme version of such a national view can be found in the (British) 2011 European Union Act. The latter unambiguously states as follows:

Directly applicable or directly effective EU law that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2(1) of the European Communities Act 1972 falls to be recognised and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognised and available in law by virtue of any other Act.\textsuperscript{51}

A milder national perspective, on the other hand, accepts the supremacy of European law over national legislation, yet the supremacy of European law is still relative, since it is granted and limited by national constitutional law.

The national viewpoint on the supremacy of European law have traditionally been expressed in two contexts.\textsuperscript{52} First, some Member States—particularly the Supreme Courts—have fought a battle over human rights within the Union legal order. It was claimed that European law could not violate national fundamental rights. The most famous battle over the supremacy of European law in this context is the conflict between the European Court of Justice and the German Constitutional Court. The German Constitutional Court here insisted that it had the power to ‘disapply’ European law. The same power has been claimed in a second context: ultra vires control. This constitutional battleground became prominent in light of the expansive exercise of legislative and judicial competences by the Union. And again, while the Member States generally accept the supremacy of European law within limited fields, they contest that the European Union can exclusively delimit these fields. In denying the Union’s Kompetenz-Kompetenz,\textsuperscript{53} these States here insist on the last word with regard to the competences of the Union.

a. Fundamental Rights Limits: The ‘So-long’ Jurisprudence

A strong national view on supremacy crystallised around Internationale Handelsgesellschaft.\textsuperscript{54} For after the European Court of Justice had espoused its view on the absolute supremacy of European law, the case moved back to the German Constitutional Court.\textsuperscript{55} The German Court now defined in perspective the question. Could national constitutional law, especially national fundamental rights, affect the application of European law in the domestic legal order? Famously, the German Constitutional Court rejected the European Court’s absolute vision and replaced it with the counter-theory of the relative supremacy of European law. The reasoning of the German Court was as follows: while the German Constitution expressly allowed for the transfer of sovereign powers to the European Union in its Article 24,\textsuperscript{56} such a transfer was itself limited by the ‘constitutional identity’ of the German State. Fundamental constitutional structures were thus beyond the supremacy of European law:

The part of the Constitution dealing with fundamental rights is an inalienable essential feature of the valid Constitution of the Federal Republic of Germany and one which forms part of the constitutional structure of the Constitution. Article 24 of the Constitution does not without reservation allow it to be subjected to qualifications. In this, the present state of integration of the [Union] is of crucial importance. The [Union] still lacks ... in particular a codified catalogue of fundamental rights, the substance of which is reliably and unambiguously fixed for the future in the same way as the substance of the Constitution ...


\textsuperscript{51} 2011 European Union Act, s. 18. For the text of s. 2(1) of the 1972 European Communities Acts, see Chapter 3 above, n. 3. For a discussion of the complex relationship between European Union law and the doctrine of parliamentary sovereignty, see e.g. C. Twiss and A. Tsembelis, British Government and the Constitution: Text and Materials (Cambridge University Press, 2011), 335 et seq.; as well as A. Le Suer et al., Public Law: Text, Cases, and Materials (Oxford University Press, 2013), 814 et seq.

\textsuperscript{52} The following section concentrates on the jurisprudence of the German Constitutional Court. This court has long been the most pressing and—perhaps—prestigious national court in the Union legal order. For the reaction of the French Supreme Courts, see R. Mihal, ‘French Supreme Courts and European Union Law: Between Historical Corporate and Accepted Loyalty’ (2011) 48 CML Rev 439. For the views of the Central European Constitutional Courts, see W. Sadowski, ‘Solange, Chapter 3’; Constitutional Courts in Central Europe – Democracy – European Union’ (2008) 14 ELJ 1; and, more recently and with regard to the Czech Constitutional Court, see M. Běbek, ‘Lanžová, Houber, and the Problem of an Uncooperative Court: Implications for the Preliminary Reference Procedure’ (2014) 30 European Constitutional Law Review 54.

\textsuperscript{53} On this strange (German) notion, see Chapter 2, section 2(a) above.


\textsuperscript{55} BVerfGE 37, 271 (Solange I, ‘Re Internationale Handelsgesellschaft’). For an English translation, see [1974] 2 CMLR 540.

\textsuperscript{56} Art. 24(1) of the German Constitution states: ‘The Federation may by a law transfer sovereign powers to international organisations.’ Prior to the Maastricht Treaty, a new article was inserted into the German Constitution expressly dealing with the European Union (see Art. 23 German Constitution).
Constitutional Foundations

So long as this legal certainty, which is not guaranteed merely by the decisions of the European Court of Justice, favourable though these have been to fundamental rights; is not achieved in the course of the further integration of the Union, the reservation derived from Article 24 of the Constitution applies. ... Provisionally, therefore, in the hypothetical case of a conflict between [European] law and a part of national constitutional law or, more precisely, of the guarantees of fundamental rights in the Constitution, there arises the question of which system of law takes precedence, that is, wins the other. In this conflict of norms, the guarantee of fundamental rights in the Constitution prevails as long as the competent organs of the Union have not removed the conflict of norms in accordance with the Treaty mechanism.

Thus, 'so long' as the European legal order had not developed an adequate standard of fundamental rights, the German Constitutional Court would ‘disapply’ European law that conflicted with the fundamental rights guaranteed in the German legal order. There were consequently national limits to the supremacy of European law. However, these national limits were also relative, as they depended on the evolution and nature of European law. This was the very essence of the 'so long' formula. For once the Union legal order had developed equivalent human rights guarantees, the German Constitutional Court would no longer challenge the supremacy of European law.

The Union legal order did indeed subsequently develop extensive human rights bill(s), and the dispute over the supremacy doctrine was significantly softened in the aftermath of a second famous European case with a national code. In Wünsche Handelsgesellschaft, the German Constitutional Court not only recognised the creation of 'substantially similar' fundamental right guarantees, it drew a remarkably self-efficacious conclusion from this:

In view of those developments it must be held that, so long as the European Union, and in particular the case law of the European Court, generally ensure an effective protection of fundamental rights against the sovereign powers of the Union as well, it is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the [German] Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary [Union] legislation cited as the legal basis for any acts of German courts or authorities.

58 The German Constitutional Court here adopted the doctrine that the supremacy of the German Constitution could only lead to a ‘disapplication’ and not an ‘invalidation’ of European law. The German Court thus ‘never rules on the validity or invalidity of a rule of [European] law’; but '[a]t most, it can come to the conclusion that such a rule cannot be applied by the authorities or courts of the Federal Republic of Germany as far as it conflicts with a rule of the Constitution relating to fundamental rights’ (ibid., 552).
59 On this point, see Chapter 12 below.
60 BVerfGE 73, 339 (Solange II (Re Wünsche Handelsgesellschaft)). For an English translation, see [1987] 3 CMLR 225.
61 This judgment became known as ‘So-Long II’, for the German Constitutional Court again had recourse to this famous formulation in determining its relationship with European law. But importantly, this time the ‘so-long’ condition was inverted. The German Court promised not to question the supremacy of European law ‘so long’ as the latter guaranteed substantially similar fundamental rights to those recognised by the German Constitution. This was not an absolute promise to respect the absolute supremacy of European law, but a result of the Court’s own relative supremacy doctrine having been fulfilled. ‘So-Long II’ thus only refined the national perspective on the limited supremacy of European law in ‘So-Long I’.

b. Competences Limits: From ‘Maastricht’ to ‘Mangold’

With the constitutional conflict over fundamental rights settled, a second concern emerged: the ever-growing competences of the European Union. Who was to control and limit the scope of European law? Was it enough to have the European legislator centrally controlled by the European Court of Justice? Or should the national constitutional courts be entitled to a decentralised ultra vires review?

The European view on this is crystal clear: national courts cannot disapply – let alone invalidate – European law. Yet unsurprisingly, this absolute view has not been shared by all Member States. And it was again the German Constitutional Court that set the tone and the vocabulary of the constitutional debate. The ultra vires question was at the heart of its famous Maasricht decision that would subsequently be refined in Honeckel – the German reaction to the European Court’s (in)famous decision in Mangold.

The German Court set out its ultra vires review doctrine in Maastricht. Starting from the premise that the Union only had limited powers, the Court found that the Union ought not to be able to extend its own competences. While the Treaties allowed for teleological interpretation, there existed a clear dividing line between a legal development within the terms of the Treaties and a making of legal rules which breaks through its boundaries and is not covered by valid Treaty law. This led to the following conclusion:

Thus, if European institutions or agencies were to treat or develop the Union Treaty in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession, the resultant legislative instruments would not be legally binding within the
The German Constitutional Court thus threatened to disapprove European law to the extent that it appeared to have been adopted via ultra vires.

This national review power was subsequently confirmed. Yet, the doctrine was limited and refined in *Honeywell*. The case resulted from a constitutional complaint that targeted the European Court’s ruling in *Mingold*. The plaintiff argued that the European Court’s ‘discovery’ of a European principle that prohibited discrimination on grounds of age was ultra vires as it read something into the Treaties that was not there. In its decision, the German Constitutional Court confirmed its relative supremacy doctrine. It claimed the power to disapprove European law that it considered not to be covered by the text of the Treaties. The principle of supremacy was thus not unlimited. However, reminiscent of its judicial deference in *So-Long II*, the Court accepted a presumption that the Union would generally act within the scope of its competences:

65 Ibid., 105 (pars. 99).
66 BVerfGE 123, 267 (Liber Dialoag). For an English translation, see [2010] 3 CMLR 276. The Court here added a third sequel to its *So-Long* jurisprudence (ibid., 343): As long as, insofar as, the principle of conferral is adhered to in an association of sovereign states with clear elements of executive and governmental cooperation, the legislation provided by national parliaments and governments complemented and sustained by the directly elected European Parliament is sufficient in principle.
68 For an extensive discussion of the case, see Chapter 3, section 3(b) above.
69 *Honeywell* [2011] 1 CMLR 1067 at 1084 (pars. 39): ‘Unlike the primary of application of federal law, as provided for by Article 31 of the Basic Law for the German legal system, the primary of application of Union law cannot be comprehensive.’ (It is ironic that this is said by a German federal court.)

92 In its *Liber Dialoag* (n. 66 above), the German Constitutional Court even added a third constitutional limit to European integration: the ‘state identity limit’. Claiming that European unification could not be achieved in such a way that ‘not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions’, the Court identified this essential area of democratic autonomy action as ‘Particularly sensitive for the ability of a constitutional state to democratically shape itself: state decisions on substantive and formal criminal law (1), on the disposition of the monopoly on the use of force by the police within the state and by the military towards the exterior (2), fundamental fiscal decisions on public revenue and public expenditure, the latter being particularly motivated, *inter alia*, by social policy considerations (3), decisions on the shaping...

This limits the national review of European law to specific and ‘manifest’ violations of the principle of conferral. There was thus a presumption that the Union institutions would generally act intra vires; and only for clear and exceptional violations would the German Constitutional Court challenge the supremacy of European law. This was – so far – never happened. But even if the German court’s behaviour was again ‘all bark and no bite’, the very act of articulating national limits to the supremacy of European law was an expression of the continued existence of a dual or plural perspective on the locus of sovereignty in the European Union. It proves the continued existence of two political levels that compete for the loyalty of their citizens. Sovereignty thus continues to be contested.
3. Legislative Pre-emption: Nature and Effect

The contrast between the academic presence of the supremacy doctrine and the shadowy existence of the doctrine of pre-emption in the European law literature is arresting. The assimilation of pre-emption problems to supremacy questions has been the cardinal cause for the under-theorized nature of the pre-emption phenomenon. But though related, the two doctrines ought to be kept apart. Supremacy denotes the superior hierarchical status of the Union legal order over the national legal orders and thus gives European law the capacity to pre-empt national law. The doctrine of pre-emption, on the other hand, denotes the actual degree to which national law will be set aside by European law. The supremacy clause thus does not determine "what constitutes a conflict between state and federal law; it merely serves as a traffic cop, mandating a federal law's survival instead of a state law's." Pre-emption, on the other hand, specifies when such conflicts have arisen, that is, to what extent Union law "displaces" national law. The important question behind the doctrine of pre-emption is this: to what degree will European law displace national law on the same matter? The pre-emption doctrine is thus a 'relative' doctrine: not all European law pre-empts all national law.

a. Pre-emption Categories: The Relative Effects of Pre-emption

The doctrine of pre-emption is essentially a doctrine of normative conflict. Conflicts arise where there is friction between two legal norms. The spectrum of conflict is open-ended and ranges from purely hypothetical friction to literal contradictions between norms. There is no easy way to measure normative conflicts, and, in an attempt to classify degrees of normative conflict, pre-emption categories have been developed. Most pre-emption typologies will, to a great extent, be arbitrary classifications. They will only try to reflect the various judicial reasons and arguments created to explain why national law conflicts with European law. Sadlly, unlike the American Supreme Court, the European Court of Justice has not set out a clear classification of pre-emption categories.

Field Pre-emption
Obstacle Pre-emption
Rule Pre-emption

Figure 4.1 Pre-emption Types: Field, Obstacle, Rule Pre-emption

The Court has yet to define and name a pre-emption typology for its legal order. In linguistic alliance with US American constitutionalism, we shall, therefore, analyse European Court's jurisdiction through the lens of the three pre-emption categories developed in that Union, that is: field pre-emption, obstacle pre-emption, and rule pre-emption.

aa. Field Pre-emption

Field pre-emption refers to those situations where the Court does not investigate any material normative conflict, but simply excludes the Member States on the ground that the Union has exhaustively legislated for the field. This is the most powerful format of federal pre-emption: any national legislation within the occupied field is prohibited. The reason for the total exclusion lies in the perceived fear that any supplementary national action may endanger or interfere with the strict uniformity of Union law. Underlying the idea of field pre-emption is a purely abstract conflict criterion: national legislation conflicts with the jurisdictional objective of the Union legislator to establish an absolutely uniform legal standard.

intention to supercede state law altogether may be found from a scheme of the federal regulations so as to make reasonable the inference 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 precluded 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 . . . where state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. The three identified pre-emption types are, respectively, field pre-emption, rule pre-emption, and obstacle pre-emption.

Unfortunately, the European Court has not (yet) committed itself to a principled pre-emption statement like Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission (n. 76 above), it came close in Case 218/85, Association conseils économiques spéciaux régionaux fruitiers et légumiers de Bretagne v. A. Le Campion (CERAFEL) [1986] ECR 3213. However, the Court has never extrapolated this pre-emption statement from its specific agricultural policy context. Moreover, not even in the agricultural context has CERAFEL become a standard point of reference in subsequent cases.

The total prohibition for rational legislators will thus to a certain extent reproduce the effects of a 'real' exclusive competence within the occupied field. On this point, see Chapter 7, section 2(a) below.
In order to illustrate the arguementative structure of field pre-emption, let us take a closer look at the jurisprudence of the European Court. In Ratti, the CJEU found that Directive 73/173 pre-empted any national measures falling within its scope. Member States were therefore ‘not entitled to maintain, parallel with the rules laid down by the Directive for imports, different rules for the domestic market’. It was a consequence of the Union system that ‘a Member State may not introduce into its national legislation conditions which are more restrictive than those laid down in the directive in question, or which are even more detailed than any event different’. The Union act represented an exhaustive set of rules and, thus, totally pre-empted national legislatures.

bb. Obstacle Pre-emption

In contrast to field pre-emption, obstacle pre-emption – our second pre-emption category – requires some material conflict between European and national law. Unlike rule pre-emption, however, it refers to a form of argumentative reasoning that does not base the exclusionary effect of European law on the normative friction between a national law and a particular European rule. The Court will not go into the details of the legislative scheme, but will be content in finding that the national law somehow interferes with the proper functioning or impedes the objectives of the Union legislation. The burden of proof for finding a legislative conflict is, therefore, still relatively light. Obstacle pre-emption reasoning can be found in Bassone. In the ‘absence of express provisions on the compatibility with the organisation of the market established by [the] Regulation . . . it is necessary to seek the solution to the question asked in the light of the aims and objectives of the regulations [as such]’. The Court noted that the Regulation did not seek to establish uniform prices, but that the organisation was ‘based on freedom of commercial transactions under fair competitive conditions’. [Such a scheme precludes the adoption of any national rules which may hinder, directly or indirectly, actually or potentially, trade within the [Union].]

The Court here employed a functional conflict criterion to outstnd supplementary national legislation: those national measures that limit the scope, impede the functioning or jeopardise the aims of the European scheme will conflict with the latter. While not as abstract and potent as field pre-emption, the virility of this functional conflict criterion is nonetheless remarkable. The Court selects the ‘affect’ or ‘obstacle’ criterion, European law will widely pre-empt national legislation. Any obstacle that reduces the effectiveness of the Union system may be seen to be in conflict with European law.

c. Rule Pre-emption

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

We can find an illustration of this third type of pre-emption in Gallaher. Article 3(3) of Directive 89/622 concerned the labelling of tobacco products and required that health warnings should cover ‘at least 4% of the corresponding surface’. Reading the ‘at least’ qualification as a provision allowing for stricter national standards, the British government tightened the obligation on manufacturers by stipulating that the specific warning ought to cover 6% of the surfaces on which they are printed.

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

b. Modes of Pre-emption: Express and Implied Pre-emption

It is important to distinguish between the categories of pre-emption, and the ways in which the European Union chooses one category over another. This second question concerns the modes of pre-emption; and one can here distinguish between express and implied pre-emption.

What are the modes in which a particular pre-emption category may be nationalised? The fundamental starting point should be whether or not the Union legislation has spoken its mind. Where the Union has done so, ‘express pre-emption’ represents the most straightforward mode in doctrinal terms. The Union legislation may itself define to what extent State law will be pre-empted.

82 Ibid, para. 20.
83 For an example of express pre-emption, see Art. 8 of Directive 73/173 on the classification, packaging and labelling of dangerous preparations (solvents) [1973] OJ L 189/7 (discussed in Ratti (n. 79 above)) which prohibited Member States from ‘restricting or impeding on the grounds of classification, packaging or labelling, the placing on the market of dangerous preparations which satisfy the requirements of the Directive’. See also Art. 2(1) of Directive 76/765, as amended by Directive 83/276 [1985] OJ L 151/47 (discussed in Case 60/86, Commission v. United Kingdom (Dow-琼)) [1988] ECR 3021): ‘No Member State may refuse, in respect of a type of vehicle, to grant [EU] type-approval or national type-approval, or refuse or prohibit the sale, registration, entry into service or use of vehicles,
Conversely, the Union legislator may explicitly allow for the continued application of State law in certain areas in spite of some interference with the federal legislation. This form is called 'express saving' and constitutes the logical flip side of express pre-emption.86

Absent express legislative intent, when will Union legislation pre-empt State laws? Here it is the Union judiciary that must apply the type of pre-emption intended by the Union legislator. Implied pre-emption may involve controversial interpretative questions. It is best seen as a federal theory of statutory interpretation. For in federal unions, the interpretation of legislative acts will always involve a separation-of-powers and federal dimension.87 In federal orders, statutory interpretation must thus be seen from the perspective of the horizontal as well as the vertical separation of powers. The pre-emption doctrine thereby provides the analytical framework within which the historical sensitivities of a particular federal order are imputed in the interpretative process. For example, the US Supreme Court has developed a set of constitutional presumptions for or against implied pre-emption depending on the subject matter involved.88 The pre-emption doctrine may, consequently, be conceived of as a federal theory of interpretation. It assembles those federal values that will influence and guide the federal judiciary in addition to the 'ordinary' canons of statutory interpretation.

on grounds relating to the installation of the lighting and light-signalling devices.89

A typical express saving clause can be found in Art. 8 of Directive 85/577 EC on the protection of consumers in respect of contracts negotiated away from business premises (discussed in Doe) [1985] OJ L 372/31: ‘This Directive shall not prevent Member States from adopting or maintaining more favourable provisions to protect consumers in the field which it covers.’ See also Art. 14(2)(a) of Directive 73/241 [1973] OJ L 228/23: ‘The directive shall not affect the provisions of national laws (a) or present authorising or prohibiting the addition of vegetable fats other than cocoa butter to the chocolate product defined in Annex I.’

87 On a substantive policy level, each [federal] court will have to calibrate the desirable balance between the competing social values at play in the federal legislation; while, at the same time, it will impart its global views on what it sees as the appropriate federal equilibrium.’ See W. Cohen, ‘Congressional Power to Define State Power to Regular Commerce: Consent and Preemption’ in T. Sandalow and E. Stein (eds), Counter and First Markets: Perspectives from the United States and Europe (Oxford University Press, 1982), 541.

88 In Boyle v. United Technologies, 487 US 500 (1988), the Supreme Court ruled that field pre-emption is easily inferred where the subject matter concerns an ‘uniquely federal interest’, but for all other areas the ‘clear statement rule’ would apply. Advocates of federal pre-emption frequently argue that there is a ‘dominant federal interest’ in interstate or international activities — an argument based on a dictum in Rice v. Santa Fe Elevator Corp., 331 US 218 (1947). In Hillsborough County Fla. v. Automated Medical Laboratories, 471 US 707 (1985), the Supreme Court gave a sobering definition by limiting ‘dominant federal interests’ to matters whose ‘special features’ would be of such an order as the responsibility of the national government for foreign affairs.

4. Constitutional Limits to Legislative Pre-emption

When exercising a legislative competence, the Union legislator is generally free to determine to what extent it wishes to pre-empt national law. However, that constitutional freedom could — theoretically — be restricted in two ways. First, it could make a difference if the Union legislator used a regulation instead of a directive as a Union act. For a long time, it was indeed thought that a regulation would automatically lead to field pre-emption, while a directive could never do so. We shall examine the pre-emptive capacity of the Union’s various legal instruments and see that this view is — presently — mistaken.90 However, a second constitutional limit to the pre-emptive effect of Union legislation might be found in the type of competence given to the Union.

Let us look at both (potential) limitations in turn.

a. Union Instruments and their Pre-emptive Capacity

When the Union was born, its various legal instruments were seen to structure the federal division of power between the European and the national level. Some early commentators thus argued that for each policy area the Treaty had fixed a specific format of legislative or regulatory intervention.91 This reading of the various legal instruments has occasionally been expressed by the European Court of Justice.92 Will this mean that the use of a particular instrument limits the Union legislator from pre-empting the Member States?

This section investigates the pre-emptive quality of the Union’s three ‘regulatory’ instruments: regulations, directives and international agreements.

b. The Pre-emptive Capacity of Regulations

Regulations are binding in their entirety, and have been characterised as the ‘most integrated form’ of European legislation.93 Typically considered to be the instrument of uniformity, will regulations automatically field pre-empt national law within their scope of application?

The early jurisprudence of the European Court of Justice indeed emphasised their field pre-emptive nature. In order to protect their ‘direct applicability’ within the national legal orders, the Court thus employed a strong pre-emption


criterion. This initial approach is best illustrated in Bellmann.63 Discussing the effect of a regulation on the legislative powers of the Member States, the ECJ found that since a regulation is directly applicable in all Member States, the latter, unless otherwise expressly provided, are precluded from taking steps, for the purposes of applying the regulation, which are intended to alter its scope or supplement its provisions.64 Early jurisprudence thus suggested that all national rules that fell within the scope of a regulation were automatically pre-empted.65 Any supplementary national action would be prohibited.

It was this early jurisprudence that created the myth that regulations would automatically field pre-empt national law. Their direct applicability was wrongly associated with field pre-emption.66 But subsequent jurisprudence quickly disapproved of the simplistic correlation. In Busato v. Rijksdienst voor Wonenmersonissen,67 the Court clarified that this incompatibility could sometimes require a material conflict as a regulation would only preclude ‘the application of any provisions of national law to a different or contrary effect’.68 Regulations thus do not automatically field pre-empt. They will not always achieve ‘exhaustive’ legislation. On the contrary, a regulation may confine itself to laying down minimum standards.69 It is thus misleading to classify regulations as instruments of strict uniformity.70 While Member States are precluded from unilateral ‘amendment’ or ‘selective application’,71 these constitutional obligations apply to all Union acts and do not specifically characterise the format of regulations.

64 Ibid., para. 4.
66 ‘This capacity to pre-empt or preclude national measures can be regarded as anachronistic peculiar to a Regulation (as opposed to any other form of (Community) legislation) and may shed some light on the nature of direct application under Article 296 of the Treaty’ (M. Blumenthal, ‘Implementing the Common Agricultural Policy: Aspects of the Limitations on the Powers of the Member States’ (1984) 35 Northern Ireland Legal Quarterly 29–51 at 39).
69 Ibid., paras. 17–18 (emphasis added).
70 Council Regulation No. 259/93 on the supervision and control of shipments of waste within, into and out of the European Community [1993] OJ L 30, p. 1 provides such an example of a ‘minimum harmonisation’ regulation. The regulation has been described as ‘far from providing for a complete harmonisation of the rules governing the transfer of waste, and might in part even be regarded (in the words of one commentator) as an „organised rationalisation” of the subject’ (Advocate General F. Jacobs, Case C-187/90, Parliament v. Council [1994] ECR I-2857, para. 29).
71 Council v. A. Uscher, ECJ Judgments and Legislation (Longman, 1998), 136: “In effect Regulations could be said simply, if inelegantly, to amount to a “keep out” sign to national legislation.”

72 The Pre-emptive Capacity of Directives

Directives shall be binding, ‘as to the result to be achieved and leave to the national authorities the choice of form and methods’.72 Binding as to the result to be achieved, the instrument promised to respect the Member States’ freedom to select a national path to a European end. The very term ‘directive’ suggested an act that would confine itself to ‘directions’, and the instrument’s principal use for the harmonisation of national law reinforced that vision. Do directives thus represent broad-brush ‘directions’ that guarantee a degree of national autonomy? An early academic school indeed argued such a view.73 These early views championed a constitutional frame limiting the directive’s pre-emptive effect. To be a ‘true’ directive, it would need to leave a degree of legislative freedom, and as such could never field pre-empt national legislation within its scope of application.74 This position thus interpreted the directive in competence terms: the Union legislator would act ultra vires, if it went beyond the constitutional frame set by a directive. But when precisely the pre-emptive Rubicon was crossed remained shrouded in linguistic mist.

In any event, past constitutional practice within the Union legal order has never endorsed a constitutional limit to the pre-emptive effect of directives. On the contrary, in Enka the Court of Justice expressly recognised a directive’s ability to be ‘exhaustive’ or ‘complete’ harmonisation, wherever strict legislative uniformity was necessary.75 Directives can – and often do – occupy a regulatory field.76 Their pre-emptive opacity therefore equals that of regulations. The

72 Art. 288(3) TFEU.
73 See R. W. Lauwars, ‘Laufstellen and Legal Force of Community Decisions’ (A. W. Sjohoff, 1973) 30–1 (emphasis added): ‘But can this be carried so far that no freedom at all is left to the member States? In my opinion it follows from Article 288 that the directive as a whole must allow member States the possibility of carrying out the rules embodied in the directive in their own way. A directive that constitutes a uniform law is not compatible with this requirement because, by definition, it places a duty on the member States to take over the uniform norm and does not allow any freedom as an exercise of its said method’; as well as Gaju, Hay and Rosenzweig, ‘Instruments for Legal Integration’ (p. 92 above), 133 (emphasis added): ‘The detailed character of many provisions may be inconsistent with the concept of directive as defined in the [FEU] Treaty’; and P. E. Herzog, ‘Article 189’ in D. Campbell et al. (eds.), The Law of the European Community: A Commentary on the EEC Treaty (Matthew Baurer, 1990), 613: ‘The view that the definition of a directive given in Article 288(3) TFEU, has a limiting effect on the various grants of powers in substantive Treaty provisions authorising the issuance of directives seems correct.’
75 Case 30/77, Enka BV v. Inverbeter van Middenland [1977] ECR 2203, para. 11–12: ‘It emerges from the third paragraph of Article 288 of the Treaty that the choice left to the Member States as regards the form of the measures and the methods used in their adoption by the national authorities depends upon the result which the Council or the Commission wishes to see achieved. As regards the harmonisation 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 these provisions’ (ibid., paras. 11–12).
national choice, referred to in Article 288(3) TFEU thereby only guarantees the power of Member States to implement the European context into national form. [7] The choice is limited to the kind of measures to be taken; their context is entirely determined by the directive at issue. Thus the discretion as far as form and methods are concerned does not mean that Member States necessarily have a margin in terms of policy making.108

cc. The Pre-emptive Capacity of International Agreements

The pre-emptive effect of Union agreements may be felt in two ways. First, directly effective Union agreements will pre-empt inconsistent national law.109 But secondly, self-executing international obligations of the Union will also pre-empt inconsistent European secondary law. The pre-emptive potential of international agreements over internal European law follows from the 'primary' of the former over the latter.110 For the Court considers international agreements of the Union hierarchically above ordinary Union secondary law.

The first dimension of the pre-emptive ability of Union agreements relates to national law. Will the pre-emptive effect of an international norm be the same as that of an identically worded provision within a regulation or a directive? The Court has responded to this question in an indirect manner. In Polydyson,111 it was asked to rule on the compatibility of the 1956 British Copyright Act with the agreement between the European Union and Portugal. The bilateral free trade agreement envisaged that quantitative restrictions on imports and all measures having an equivalent effect to quantitative restriction should be abolished, but exempted all those restrictions justified on the grounds of the protection of intellectual property. Two importers of pop music had been charged with infringement of Polydor's copyrights and had invoked the directly effective provisions of the Union agreement as a sword against the British law.

Would the Union agreement pre-empt the national measure? If the Court had projected the 'internal' Union standard established by its jurisprudence in relation to Articles 34 TFEU et seq., the national measure would have been pre-empted. But the Court did not. It chose to interpret the identical wording provision in the Union agreement more restrictively.112 Identical text will, therefore, not guarantee identical interpretation:

108 S. Prechtl, Directives in EC Law (Oxford University Press, 2006), 73.
109 E.g. Case C-61/94, Commission v. Germany (IDA) [1996] ECR I-3989, where the European Court did find a national measure pre-empted by an international agreement. The agreement at stake was the international dairy agreement and the Court found that Article 6 of the annexes provided the Federal Republic of Germany from authorising imports of dairy products, including those effected under inward processing, relief arrangements, at prices lower than the minimum' (ibid., para. 39).
110 Ibid., para. 52.
112 Ibid., paras. 15, 18-19.

Context will thus prevail over text. The context or function of the international treaty will be decisive. Only where an international norm fulfils the 'same function' as the internal European norm, will the Court project the 'internal' pre-emptive effect to the international treaty.113 But while the Court may apply a milder form of pre-emption to international agreements, it has not announced any constitutional limits to the pre-emptive capacity of international agreements.

Let us turn to the second dimension of the pre-emptive effect of Union agreements. The capacity of international agreements to pre-empt inconsistent internal Union legislation follows from the primacy of the former over the latter. The contours of this second pre-emption analysis can be evidenced in The Netherlands v. Parliament and Council.114 The dispute concerned the amendment of Directive 98/44 EC on the legal protection of biotechnological inventions. The Netherlands had, inter alia, argued that the Union measure violated Article 27(3)(b) of the TRIPS Agreement. The directive prohibits Member States from granting patents for plants and animals other than microorganisms, while the international treaty provides for such a legal option. The Dutch government claimed that Article 27(3)(b) of the TRIPS agreement 'pre-empted' the higher European standard. The Court, while admitting that 'the Directives does deprive the Member States of the choice which the TRIPS Agreement offers to the parties to that agreement as regards the patentability of plants and animals', found

113 Opinion 1/91 (EEA Draft Agreement) [1991] ECR I-6079, para. 14. In relation to the EEA, the Court found that it was 'established on the basis of an international treaty which, essentially, merely gives rights and obligations as between the Contracting Parties and provides for the transfer of sovereign rights to the inter-governmental institutions which it sets up' (ibid., para. 20, emphasis added). The EUC Treaty, by way of contrast, constituted 'the constitutional charter of a Union based on the rule of law, one of whose particular characteristics would be the direct effect of a whole series of provisions which are applicable to their nationals' (ibid., para. 21).
114 An illustration can be found in Case T-81/81, Pohl & Rother v. Hauptamt Oldenburg [1982] ECR 1331, where the ECI was asked to compare Art. 53(1) of the association agreement between the Union and Greece with the relevant provision in the TEEU: That provision, the wording of which is similar to that of Article 110 of the Treaty, fulfils, within the framework of the association between the [Union] and Greece, the same function as that of Article 110. It accordingly follows from the wording of Article 53(1), cited above, and from the objective and nature of the association agreement of which it forms part that that provision precludes a national system of relief from providing more favourable tax treatment for domestic spirit than for those imported from Greece' (ibid., paras. 26-7). While the ECI had still found that the European Treaties and EEA had different purposes and functions, the General Court seemed now to favour a parallel interpretation of the EEA Agreement with identically worded provisions of the European Treaties and secondary law in Case T-115/94, Cypar Asmaca Holding v. Council [1997] ECR II-39.
that the directive was ‘in itself compatible with the Agreement’. The ECJ applied a conflict pre-emption criterion to determine whether a legislative conflict between the international treaty and the Union directive existed.

In sum, Union agreements have the capacity of double pre-emption: they can pre-empt inconsistent national law and conflicting internal Union legislation. The pre-emptive potential of international agreements appears to be rather than equivalently worded internal legislation. Only where the agreement has the same function as an internal European norm will the Court accept the same pre-emptive effect that would be triggered by identically worded European law. However, as regards their pre-emptive capacity, there are no constitutional limits that would restrict the choice of the Union to pre-empt the Member States.

b. Excursus: Competence Limits to Pre-emption

When legislating, the Union legislator is typically free to decide what pre-emption category to choose. Union discretion determines the degree to which national legislators are pre-empted by European legislation. However, there are competences that seem to restrict this liberty. For certain policy areas, the Union is not to action on the same basis as national legislation, even when there is no other reason to restrict the Union’s powers. This is where the concept of ‘complementary competences’ comes into play. These competences are those that are exclusive to the Union and not shared with other institutions.

The constitutional question for both types of competence is this: how much legislative space will the European Union need to leave to the national level? Do minimum harmonisation competences prevent the Union from ever laying down exhaustive standards with regard to a specific legislative measure? And can ‘incentive measures’ pre-empt national laws – even though a complementary competence excludes all harmonisation within the field? We shall explore these questions in Chapter 7 when looking specifically at the competence categories of the Union.

Conclusion

The doctrine of direct effect demands that a national court applies European law. And the doctrine of supremacy demands that a national court disregards national law that conflicts with European law. Direct effect and supremacy are nonetheless not twin doctrines. There can be direct effect without supremacy (or, admittedly, there can be no supremacy without direct effect). By contrast, supremacy and pre-emption are twin doctrines. For the doctrine of pre-emption determines to what extent national law must be displaced or dispossessed. There is thus no supremacy without pre-emption. The doctrine of pre-emption is a theory of legislative conflict. The doctrine of supremacy is a theory of conflict resolution. The two doctrines are vital for any federal legal order with overlapping legislative spheres.

For the European legal order, the absolute supremacy of European law means that all Union law prevails over all national law. The absolute nature of the supremacy doctrine is, however, contested by the Member States. While they generally acknowledge the supremacy of European law, they have insist on national constitutional limits. Is this relative nature of supremacy a novelty or ‘heresies’? This view has been introduced and held to be the constitutional experiences of the United States. Indeed, the normative ambiguity surrounding the supremacy principle in the European Union is part and parcel of Europe’s federal nature.

In contrast, the concept of pre-emption is a relative concept – even from the European perspective. The question is not whether European law pre-empts national law, but to what degree. Not all European law will thus displace all national law. So, when will a conflict between European and national law arise? There is no absolute answer to this question. The Union legislator and the European Court of Justice will not always attach the same weight to different criteria. Sometimes a purely ‘jurisdictional’ conflict will be enough to pre-empt national law. In other cases, some material conflict with the European legislative scheme is necessary. Finally, the Court may insist on a direct conflict with a specific Union rule. In parallel to American constitutionalism we consequently distinguished three pre-emption categories within the Union legal order: field pre-emption, obstacle pre-emption and rule pre-emption.

The constitutional nature of the pre-emption phenomenon was described as a theory of federal interpretation. The pre-emption doctrine acknowledges the federal character of constitutional interpretation. In federal orders, the interpretative activity will not only affect the horizontal separation of powers – the judiciary acting as a quasi-legislator – but also the vertical separation of powers. Viewing the interpretation of European legislation as the ‘objective’ application of the supremacy principle de-federalises the interpretative process. This, in turn, has been responsible for the very slow emergence of a European doctrine of pre-emption.

116 On this development, see R. Schütze, From Dual to Cooperative Federalism: The Changing Structure of European Law (Oxford University Press, 2009), 265 et seq.
117 On this point, see Chapter 7, section 2(d) above.

118 See N. Walker, 'The Idea of Constitutional Pluralism' (2002) 65 MLR 317 at 338. This feature narrow-minded – Eurocentric – view strikingly ignores the American experience, in which the Union and the States were seen to have ‘constitutional’ claims and in which the 'Union' was – traditionally – not (yet) conceived in statutory terms (see E. Zoete, 'Aspects Internationaux du droit constitutionnel. Contribution à la théorie de la fédération d'état' (2002) 194 Revue des Courses de l'Académie de la Haie 43).
119 Schütze, 'Federalism as Constitutional Pluralism' (n. 50 above).
120 On this point, see Chapter 2 above.
FURTHER READING

Books
B. Davies, Resisting the European Court of Justice: West Germany’s Confrontation with European Law 1949–1979 (Cambridge University Press, 2014)

Articles (and Chapters)
M. Payoladel, ‘Constitutional Review of EU Law after Honeywell: Confronting the Relationship between the German Constitutional Court and the EU Court of Justice’ (2011) 49 CML Rev 9

Cases on the Website
Case 6/64, Costa v. ENEL; Case 40/69, Bellmans; Case 31/70, International Handelsgeellschaft; Case 38/77, Enke; Case 55/77, Matis; Case 106/77, Simmerfeld; Case 31/78, Buzan; Case 148/78, Ratti; Case 370/80, Polyhier; Case C-115/82 Gallaher; Case C-350/92, Spain v. Council; Cases C-19-22/97, INCG/CE/90, Case C-318/98, Fernier; Case C-877/98, Netherlands v. Parliament and Council; Case C-402/95, Kadi; IVertG Cases: Wünsche Handelsgesellschaft, Maastricht, Honeywell