Supremacy, Pre-emption, and the Union Interest

1. Introduction

In this Chapter, I will discuss various duties of Member States that result from the adoption of a legislative act by the Union, or that flow from Union acts that have not yet reached the stage of becoming a formal act of secondary law or have not yet been concluded as an international agreement. I will argue that supremacy fails to provide the rationale for these restraints on Member State rights because with these constellations certain elements that are characteristic of a situation calling for the application of supremacy are absent. This will pick up our discussion of other loyalty-based principles such as ERTA and Opinion 1/76. Besides not fitting the supremacy paradigm, the effects of secondary law that I will discuss later have in common that they are all duties of abstention for the Member States, barring Member States from entering into commitments vis-à-vis third states and from taking national measures when this runs counter to the implementation obligation. I will discuss the concept of pre-emption, which plays an important role in the literature for explaining these effects of Union secondary law. I will show that there are no convincing reasons for considering pre-emption a distinct legal concept of EU law. Finally, I will examine the role of the Union interest in the present context.

2. Some Thoughts on the Nature of Supremacy

2.1 The Basic Operation of Supremacy

It is not my intention to give a full account of genesis and the nature of the principle of supremacy here.¹ Suffice it to recall that Costa v ENEL was the origin of the supremacy doctrine in Union law.² In subsequent cases, especially Internationale Handelsgesellschaft, this principle has been defined and further refined.³ Simmenthal II has clarified that the result of a conflict between national law and Union law is that the former is ‘automatically inapplicable’.⁴

Supremacy, it is proffered, is a very general prescription of what happens when national law clashes with Union law, which may be characterized by two basic features. The first is its rationale, which is to ensure the effective and uniform application of Union law in the internal legal orders of the Member States. The second is its effect, which is the

² See Chapter 3.
resolution of conflicts with national law by its disapplication instead of its invalidation. To resolve a conflict in such a manner logically presupposes the actual existence both of a national law that must not be applied, and of Union law mandating its disapplication. Thus, supremacy requires an actual conflict between two norms that are capable of being applied to the facts of a case.5 This, conversely, does not imply that there is a difference in the primacy of Union law depending on whether it concerns pre-existing or ‘supervening’ national law.6 Irrespective of whether a norm of national law has already been adopted before the entry into force of a Union law measure, or whether a Member State passes new laws in conflict with Union law in both cases, there is an actual conflict leading to the automatic suspension of the application of the national laws concerned.7

The different forms of exclusivity will be discussed in Chapter 7. Suffice it to note here that Article 2 (1) TFEU defines exclusive Union competence as a policy area where ‘only the Union may legislate and adopt legally binding acts . . . ’. This form of exclusivity will be referred to as a priori exclusivity.8 The Lisbon Treaty now provides an exhaustive list of policy areas falling under such a priori exclusivity in Article 3 (1) TFEU. By what I will refer to as exclusivity superveniens, the Union acquires exclusive competence through the passage of common rules by the Union legislator. The standard example for this is the exercise of shared competence as now defined in Article 2 (2) TFEU, leaving Member States the right to exercise their competence ‘to the extent that the Union has not exercised its competence’.9

For largely theoretical reasons, I would argue that it is possible to distinguish between supremacy and exclusivity superveniens as the result of the adoption of an act of Union law under shared competence for the following reasons. In Simmenthal II, the Court held that supremacy would ‘also preclude the valid adoption of new legislative measures to the extent to which they would be incompatible with Community provisions’.10 As discussed earlier, however, there is no difference in the effect of supremacy between existing national law and newly enacted national law.11 To be more precise, there is no difference as soon as such new national law is enacted, because from this point in time, an actual conflict exists and the provision of national law is set aside to the extent that it is required to resolve the conflict with Union law. However, already prior to the passing of such new national law, starting from the entry into force of the Union law measure, Member States are arguably required to abstain from enacting conflicting measures. We can therefore identify a separate duty of abstention triggered by the passage of an act of Union law such as a directive or a regulation that applies before supremacy sets in. From a practical perspective, this distinct duty of abstention will hardly ever be enforced.12 However,

8 It is also sometimes referred to as constitutional exclusivity as opposed to legislative exclusivity, however, this is a less appropriate term. See Chapter 7.
9 Directives or regulations, such as to approximate national laws for the functioning of the common market pursuant to Art. 114 TFEU, preclude Member States from passing laws when they purport to regulate the same matters already regulated by the Union.
12 Because as soon as it is breached, there is also a rule of national law to which supremacy can be applied.
this should not distract from the important fact that supremacy, when understood in
the manner suggested earlier as requiring an actual conflict, has its limitations even in
what can be considered its most exemplary constellation, viz. the direct conflict between
provisions of Union law and those of national law.

2.2 Two Qualifications on the Characteristics of Supremacy

We cannot really speak of a conflict of norms in connection with supremacy without
qualifying this statement both in terms of what is considered a ‘norm’ for the present
purpose, and in terms of the disapplication paradigm.

As to the definition of conflicts in Union law, I would argue that this must be
understood in a broad sense.¹³ It is not only about the clash between provisions of
primary or secondary law with a norm of national law; supremacy also applies to the
collision of regulatory objectives of Union provenance, which do not as such constitute
proper legal norms, if by this we refer to norms that can be applied to facts. This can
be illustrated by the example of Union directives.¹⁴ The classic model for a conflict of
norms requires a directive to be directly applicable in order to produce a disapplication
effect on national law. However, Article 288 TFEU arguably already vests directives with
the power of supremacy over national law with regard to their objectives. Supremacy
here determines the intensity of the obligation of consistent interpretation of national
law after the expiry of the term for the directive’s transposition. The objective of a direct-
itive takes priority over an interpretation of national law that would be required by the
rules of the respective national legal order. In other words, supremacy entails precedence
of consistent interpretation over all other national methods of construction. Supremacy,
in this case of indirect effect, thus operates in the absence of a legal norm fully applicable
in national law, but still sets aside Member State laws in the form of national methods
of construction.¹⁵

This means that supremacy can be the solution to both a conflict between directly
applicable Union law and substantive national law, as well as to a conflict between (the
concretization of Treaty objectives in the form of) objectives of directives and procedural
national law. Procedural law, in the broad sense, includes national methods of construc-
tion, which, in case of a conflict with the directive’s objective and ‘directive-enabling’
rules of construction, must be set aside.¹⁶ Thus, the Court constrained national courts in
their discretion in applying national methods of construction, such as in Wagner Miret
with regard to historical interpretation relying on travaux préparatoires.¹⁷ We should
however be careful to note that this does not say anything as to whether national courts

¹³ See E. Vranes, ‘The Definition of “Norm Conflict” in International Law and Legal Theory’, The
European Journal of International Law, 17:2 (2006), 395–418, for a discussion of the inadequacies of
traditional definitions of conflicts of norm and of competence.
¹⁴ See for the following argument, M. Klamert, ‘Judicial Implementation of Directives and
¹⁶ Similar C.-W. Canaris, ‘Die richtlinienkonforme Auslegung und Rechtsfortbildung im System der
juristischen Methodenlehre’, in H. Koziol and P. Rummel (eds), Im Dienste der Gerechtigkeit: Festschrift
and C-403/01 Pfeiffer [2004] ECR I-8835, para 112. See also Case C-371/02 Bjornekulla Fruktdistributier
[2004] ECR 5791. One might therefore argue that there are traces of a European methodological stand-
ard with respect to the obligation of consistent interpretation. See M. Klamert, ‘Richtlinienkonforme
Auslegung und unmittelbare Wirkung von EG-Richtlinien in der Rechtsprechung der österreichischen
must interpret contra legem or praeter legem, in view of the repeated statements that indirect effect must not lead to such a result. Hence, while the first effect can be called substantive supremacy, the second effect can be termed procedural supremacy.

The second qualification to the definition of supremacy relates to its effect of setting aside national law and we will again illustrate it by the example of Union directives. Directly effective provisions in directives not only entail the disapplication of conflicting national law, but may also replace provisions of national law as the source of enforceable rights of individuals. While the former is the exclusionary effect of directly effective provisions in directives, the latter implication is called the substitution effect and is thus more than disapplication. An analogous effect applies also with regard to the indirect effect of directives. When a Member State legal order does not avail itself of methods of interpretation enabling the national authorities to comply with the obligation to interpret their laws in light of a directive, they may nonetheless be required to apply all methods necessary to realize the supremacy of the directive’s objective, such as in the UK, as I have shown elsewhere. In this case, we can therefore speak of a substitution effect with regard to national procedural law, in addition to the exclusion effect that entails the setting aside of national methods of construction.

Note that we should be careful to insist on this distinction between substantive and procedural supremacy. In most of its case law, the Court has used the so-called Marleasing formula and ordered the national court to interpret their laws ‘as far as possible’. Predominantly, the prescriptions of the Court have remained abstract and formulative, and the Court has not forced the outcome of a consistent interpretation on national courts. An exception has been Marleasing itself, which has been criticized for producing a de facto horizontal direct effect since the Court seemed to deprive the national court

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18 See, to this effect, Case 80/86 Kolpinghuis Nijmegen [1987] ECR 3969, para 13; Case C-212/04 Adelener and Others [2006] ECR I-6057, para 110; Case C-12/08 Mono Car Styling [2009] ECR I-6653, para 61. See AG Mengozzi in Case C-439/08 Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladewerkers (VEBIC) VZ [2010] ECRI-12471, paras 98–99. See also Case C-268/06 Impact v Minister for Agriculture and Food [2008] ECR I-2483, where Irish law ruled out retrospective application of legislation unless there was a clear and unambiguous indication to the contrary. The Court held that it was for the national court to establish whether the relevant provision of national law contained any such indication, otherwise this would amount to interpreting the section contra legem.


21 See Klamert, ‘Judicial Implementation’, 1273, with references.

22 See also amongst many Case C-63/97 BMW [1999] ECR 905. In Joined cases C-397/01 and C-403/01 Pfeiffer [2004] ECR I-8835, the Court stated that a national court must do ‘whatever lies within its jurisdiction’ to achieve the result prescribed in a directive. Joined cases C-397/01 and C-403/01 Pfeiffer [2004] ECR I-8835, paras 118 and 119. I have argued elsewhere that this does not put indirect effect on a new norm-hierarchical footing, but only specifies the ‘as far as possible’ dictum without adding new flesh to the obligation. See Klamert, ‘Judicial Implementation’, 1253. Similar S. Prechal in her annotation to ‘Pfeiffer et al.’, Common Market Law Review, 42 (2005), 1445–1463, 1458.

of any discretion whatsoever. In *Pfeiffer* on Directive 93/104 on working time, AG Colomer argued in favour of an exclusionary horizontal effect of directives between private parties in spite of the lack of direct effect of the directive. In the AG’s opinion, this should have precluded a provision of German law on working time, which allowed for the extension of working hours beyond ten hours in the German Red Cross Collective Agreement. This has not been followed by the Court, albeit it alluded to conflicts of norms and their resolution by means of the German technique of *teleologische Reduktion* (the ‘reduction’ of the scope of application of a norm of national law for teleological purposes under strict conditions).

The case law on directives thus shows that supremacy requires the existence of a fully applicable Union law norm, which can set aside conflicting national law and in some cases also applies itself within the national legal order. In the following, I will discuss the ensuing limitations of supremacy in three constellations. Firstly, when there is no correlation between the ‘legal space’ occupied by Union measures and the scope of national law concerned. Secondly, when there is no measure of national law that could be set aside, and finally, when rights of the Member States to act are impaired albeit no provision of Union law exists that could be applied directly in national law.

3. Duties Unrelated to Supremacy Flowing from Secondary Law

3.1 The *ERTA* Effect

According to Article 3 (2) TFEU, the Union has exclusive competence for the conclusion of an international agreement when this would ‘affect common rules or alter their scope’. This codifies the principle introduced by the *ERTA* case discussed earlier. The rationale behind empowering the Union because of the passing of common rules internally is that Member States should not undermine and contradict these rules by entering into conflicting obligations with third states. This rule thus protects the integrity and uniformity of Union action.

As explained earlier, in the case of a direct conflict between Union law and national law, supremacy requires national authorities to set aside such national laws and regulations. This, in contrast, does not apply in the same manner when a Member State concludes an international agreement which affects or undermines common rules of the Union, thus violating the *ERTA* rule. The reason for this difference is that there is no direct conflict between an international external agreement of a Member State and ‘common rules’ of the Union, at least as far as the public international side is concerned. The reason is that a directive or regulation is not capable of directly disapplying a Member State treaty concluded with a third state under public international law.

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25 See the second opinion by AG Colomer in joined cases C-397/01 and C-403/01 *Pfeiffer* [2004] ECR I-8835, paras 25 *passim*. But see the rejection of this view by AG Trstenjak in Case C-282/10 *Maribel Dominguez v Centre Informatique du Centre Ouest Atlantique and Préfet de la Région Centre* [2012] ECR 00000.
26 See M. Klamert, ‘Richtlinienkonforme teleologische Reduktion bis zur Gegenstandlosigkeit: Methodologische Anmerkungen zur Zugabenverbot-Entscheidung des OGH 4 Ob 208/10g’, *Juristische Blätter*, 11 (2011), 738–742, on the way these references should be understood.
28 See Chapter 3.
29 See also Chapter 14.
In other words, common rules are not able directly to prevent a third state from claiming its rights under the agreement against the Member State that is party to the treaty in question. The safeguarding of Union interests in such a case depends entirely on the obligation incumbent on the Member State concerned to renegotiate or denounce their international obligations, as will be explained in Chapter 14. The ERTA effect, therefore, is comparable to exclusivity as regards the duty of abstention both rules contain. Unlike the implications of the passing of Union measures on the internal capacities of Member States, however, with ERTA this is not coupled with the same threat of the application of supremacy.³⁰

The ERTA principle thus shows that supremacy has its limits with explicating important processes in Union law. The constraints on Member States brought about by the ERTA doctrine cannot be explained by recourse to supremacy, since at the core of the ERTA effect is a duty of abstention cutting across from the internal to the external level. In contrast, supremacy only applies to the matters internal to the Union. Thus, whereas the laws a Member State enacts in honouring an international agreement with a third state may not be applied against other Member States, the agreement itself cannot be set aside. I will explain later how this crucial qualification contributes to the confusion in the literature on situating ERTA in its relation to supremacy and on an alleged principle of pre-emption.

3.2 The ILO Principle

In Opinion 2/91, the Court had to assess the authority of the Community to enter into Convention No 170 of the International Labour Organization (ILO) concerning safety in the use of chemicals at work.³¹ The Court found that the matters covered by Convention No 170 did not affect the minimum regulations contained in Community directives on social policy.³² Thus, there was no ERTA effect. Other directives, in contrast, conferred more extensive protection on workers than the Convention, as well as contained provisions that were narrower in scope. The Court then introduced what will be referred to here as the ILO principle or effect:

While there is no contradiction between these provisions of the Convention and those of the directives mentioned, it must nevertheless be accepted that Part III of Convention No 170 is concerned with an area which is already covered to a large extent by Community rules progressively adopted since 1967 with a view to achieving an ever greater degree of harmonization . . . ³³

In Opinion 2/91, the Court still held that the commitments arising from the Convention could ‘affect the Community rules laid down in those directives’³⁴ In that sense, this tenet might be seen merely as a subcategory of the ERTA principle.³⁵ In the Open Skies cases on the legality of bilateral ‘open skies’ agreements of certain Member States with

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³⁰ See also J. Temple Lang, ‘The ERTA Judgment and the Court’s Case-law on Competence and Conflict’, Yearbook of European Law, 6 (1986), 183–218, 197, 200, who notes that the duty of Member States to avoid conflicts is stronger in the external dimension since these conflicts are harder to resolve.
³¹ Opinion 2/91 ILO Convention 170 [1993] ECR I-1061. In Chapter 7, we will explore what has happened to this rule under the Lisbon Treaty.
³⁵ See, among others, A.G. Tizzano in his Opinion in Case C-467/98 Commission v Denmark (Open Skies) [2002] ECR I-9519, para 75, framing this as a rule preventing common rules from being affected by way of ‘contagion’.
the United States of America, however, the Court more clearly distinguished the ERTA effect from the ILO effect. In Opinion 1/03, the Court spoke of the application of the latter rule as a distinct ‘test’, for which it was necessary ‘to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis’. In Opinion 1/03, the Court mentioned that the rationale of the ILO principle was ‘to ensure a uniform and consistent application of the Community rules and the proper functioning of the system they establish . . .’. Indeed, while the rationale of ERTA is to safeguard the effectiveness of common rules, the ILO principle, by ensuring the effective and uniform application of (a ‘system’ of) common rules rather than the integrity of a specific rule, must be seen as predicated by notions of uniformity as much as of effectiveness. Thus, once Union legislative activity has passed a certain threshold of scope, national action in the respective field might undermine the underlying regulatory scheme.

The ILO effect cross-cuts from the internal to the external sphere in the same manner as the ERTA effect discussed earlier. It thus has consequences for treaty making (by the Member States) by virtue of lawmaking (by the Union). As with ERTA, for this reason alone it must be distinguished from supremacy. At the same time, as I have explained elsewhere, its prospective element and the lack of a strict requirement of correlation between the scope of EU and national measures clearly distinguish the ILO principle from the ERTA effect. With the ILO principle there is furthermore no correlation between the scope of the Union measure concerned and the reach of its constraining effect. In other words, it generates a duty of abstinence to some extent irrespective of whether there is an actual or potential conflict between the internal Union measure and Member State commitments. This effect has no parallel in internal Union lawmaking. As explained, a directive only precludes Member State laws and regulations to the extent it regulates a certain matter. This is another reason, therefore, why supremacy does not operate here. To the extent that there is preclusion of the Member States not corresponding to the scope of common rules passed, there is also no conflict susceptible to being resolved by supremacy as defined earlier.

3.3 The Anticipatory Effects of Directives

As stated in Article 288 TFEU, a directive is binding as to the result to be achieved, but leaves the choice of form and methods of implementing this objective to the national authorities. Member States are therefore commonly given a grace period of two years to make the necessary amendments in their national legal order. However, a directive is already part of Union law and hence part of national law from the time it enters into force, as already mentioned. From this time onwards, the obligation to attain conformity with the directive is binding on national authorities including Member

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36 Case C-467/98 Commission v Denmark (Open Skies) [2002] ECR I-9519, para 82: ‘According to the Court’s case-law, that is the case where the international commitments fall within the scope of the common rules (AETR judgment, paragraph 30), or in any event within an area which is already largely covered by such rules (Opinion 2/91, paragraph 25).’


40 See Chapter 4.
State courts. This produces some effects in the national legal order which are independent of a potential direct effect of a directive after the expiry of the deadline for implementation.

One important effect of this nature was introduced by the Court in the Inter-Environnement Wallonie ruling. Recall that according to this ruling, Member States must refrain from taking any measures that would seriously compromise a directive’s result even before the expiry of the deadline of transposition. In this case, the Court gave detailed instructions for the national courts on the factors they should consider in this process. Thus, ‘the national court must consider, in particular, whether the provisions in issue purport to constitute full transposition of the directive, as well as the effects in practice of applying those incompatible provisions and of their duration in time’. If the provisions in issue ‘are intended to constitute full and definitive transposition of the directive, their incompatibility with the directive might give rise to the presumption that the result prescribed by the directive will not be achieved within the period prescribed if it is impossible to amend them in time’. Conversely, if a Member State adopts transitional measures or implements a directive in stages, this for the Court would not necessarily compromise the result prescribed in a directive.

In the Adelener case, this ‘passive obligation’ imposed on the Member States was extended by the Court to apply also to interpretations of national law by Member State courts during that period:

It follows that, from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive. Neither in Inter-Environnement Wallonie nor in Adelener the Court alluded to direct effect in view of the fact that the period for implementing the pertinent directives had not yet expired. Consequently, because there was no directly effective Union law norm in Inter-Environnement Wallonie, there was thus no norm conflict in the traditional sense. If we consider supremacy as referring to the capacity of Union law to resolve conflicts with national law by ordering its disapplication or substitution, a directive cannot partake in this before the implementation period has expired for the Member States. Before that time, a directive cannot require (substantive or procedural) provisions of national law to be set aside or to be substituted by those of the directive. The same distinction is also expressed in other case law, where the Court held that national courts must give direct effect and ‘refrain from applying pre-existing national rules contrary to the directive’ only post-term.

41 Klamert, ‘Judicial Implementation’, 1271. AG Jacobs in his opinion (para 30) stresses that the obligation to fulfil the objective of a directive is created with the entering into force of the directive pursuant to Art. 297 TFEU.
42 Case C-129/96 Inter-Environnement Wallonie [1997] ECR 7411.
43 Case C-129/96 Inter-Environnement Wallonie [1997] ECR 7411, para 47.
45 Case C-129/96 Inter-Environnement Wallonie [1997] ECR 7411, para 49.
47 Case C-212/04 Adelener [2006] ECR I-6057, para 123.
3.4 Conclusion

With directives, we must therefore distinguish two different stages with corresponding different effects on national law.

With its entry into force, until the expiry of the transposition deadline, a directive precludes the Member States following the *Inter-Environnement Wallonie* and *Adelener* jurisprudence. As I have explained in Chapter 4, at this stage moreover applies the obligation of the Member States to consider the binding objective of a Union directive when applying national law. Both duties are owed to Article 288 TFEU in conjunction with Article 4 (3) TEU. The ‘anticipatory’ duty of consideration incumbent on national courts is a precursor to the fully-fledged obligation of consistent interpretation.

The expiry of the transposition deadline of a directive enacted in an area of shared competence transfers the right to exercise competence from the Member States to the Union. Member States, therefore, are precluded from acting within the scope of the directive by exclusivity *superveniens*. Because of the *ERTA* effect, they are also precluded from entering into international agreements when these could affect the scope or effect of a directive. Both duties are essentially abstention duties; in the case of *ERTA* it was originally based on Article 4 (3) TEU and is now provided in Article 3 (2) TFEU. I would submit, for the sake of clarity, that these two effects are conditional on the ending of the deadline for transposition, because if they applied already before that time, there would be no need for the prohibition of frustration. Finally, with the expiry of the deadline for transposition, supremacy applies as substantive supremacy in the shape of direct effect, provided the directive satisfies the requirements of being sufficiently precise and unconditional. In addition, the obligation to interpret national law consistently with the objective of a directive imposes procedural supremacy, setting aside national rules of construction in order to enable the indirect effect of a directive.

The following figure (Figure 5.1) shows the diverse effects and duties depending on the stage of the ‘life cycle’ of a Union directive.

![Figure 5.1 Different Effects for Different Stages of the ‘Life’ of a Directive](image-url)
4. Duties Unrelated to Supremacy Flowing from Preparatory Legal Acts

4.1 The Effect of Commission Proposals

In an early case on the Common Fisheries Policy, the Court prescribed duties of abstention for the Member States after quoting ex Article 10 EC (now Article 4 (3) TEU) in the following terms:

This provision [ex Article 10 EC] imposes on Member States special duties of action and abstention in a situation in which the Commission, in order to meet urgent needs of conservation, has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action.49

The background of the case was the failure of the Council to pass measures relating to the conservation of the resources of the sea, which it was exclusively competent to do. The Court did not rule out the possibility for a Member State to adopt (limited) measures in this field on its own, but required the Member States ‘to seek the approval of the Commission, which must be consulted at all stages of the procedure’.50 It made clear, however, that, although the Council had not fully regulated in the pertinent field, it had done enough to express its ‘intention to reinforce the authority of the Commission’s proposals and, on the other hand, its intention to prevent the conservation measures in force from being amended by the Member States without any acknowledged need’.51

In this case, thus, a Commission proposal is deemed sufficient for precluding the Member States.52 Note, however, that this concerns a policy area where the Union has a priori exclusive competence. In such a policy field, Member States, as a rule, must obtain permission from the Union to act.53 The peculiarity of this case is that the Union had failed to act in urgent matters. Only in this constellation was there a legal need to prohibit the Member States from acting in place of the Union. It was decisive that the Council had at least expressed its interest in regulating and had expressed the objectives of its policy on the matter.

The assessment of the Member State rights in the face of a Commission proposal, consequently, is different in other constellations, and even more so when such a proposal is only being prepared. The Sea Fisheries case was thus distinguished by the Court in the Bulk Oil case, where it defined the circumstances justifying unilateral measures by a Member State in an area of exclusive competence in a very narrow manner:

An obligation on the part of the Council to adopt a policy on a fixed date; the Council’s inability to comply with that obligation; the existence of a Commission communication approved by the Council under which, in the absence of common rules, national measures can be taken only in so

50 Case 804/79 Commission v United Kingdom (Sea Fisheries) [1981] ECR 1045, para 27.
52 See Case 141/78 France v United Kingdom (Sea Fisheries) [1979] ECR 2923, para 8, where the Court held that duties of cooperation are ‘particularly necessary in a situation in which it has appeared impossible, by reason of divergences of interest which it has not yet been possible to resolve, to establish a common policy and in a field such as that of the conservation of the biological resources of the sea in which worthwhile results can only be attained thanks to the co-operation of all the member states’.
53 See Chapter 7.
far as they are strictly necessary in order to achieve the desired objective, they are not discriminatory, they comply with the Treaty and the Commission’s approval has been sought.\(^{54}\)

Note that the duty of abstention prescribed by the Court in the *Sea Fisheries* case was based on ex Article 10 EC, and did not merely flow from a priori exclusivity. Exclusivity here was apparently not deemed a sufficiently strong rationale for reining in the Member States. Note that a pronounced interest of the Union did not play a decisive role here.

The case discussed in the following section concerns the exercise of shared competence and a clearer concretization of the Union interest.

### 4.2 The Effect of Council Mandates to Negotiate

The Commission had brought two infringement cases against Luxembourg and Germany in the field of transport policy.\(^{55}\) The two Member States had negotiated and concluded bilateral agreements with some central European states, which at that time were not yet European Union members. These agreements concerned the transport of passengers and goods between the parties by inland waterways, and the reciprocal use of their inland waterways in general. After the start of negotiations on these bilateral agreements, but prior to their ratification, the Commission was mandated by a Council decision to negotiate a corresponding Community agreement with the same states. Consequently, the Commission called on the Member States ‘to abstain from any initiative likely to compromise the proper conduct of the negotiations initiated at Community level and, in particular, to abandon ratification of agreements already initialled or signed, and to forgo the opening of further negotiations with the countries of Central and Eastern Europe relating to inland waterway transport’.\(^{56}\)

The Court, in its judgment, after repeating the finding in the *Sea Fisheries* case, agreed with the Commission and imposed a duty of abstention or ‘at the very least a duty of close cooperation’ on the Member States concerned.\(^{57}\) In the full wording of the Court:

> The adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires, for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation.\(^{58}\)

The Court thus drew an analogy between the Commission proposal in the *Sea Fisheries* case and the negotiating mandate in the present *Waterway* cases. Both are, thus, a ‘point of departure for concerted Community action’. Recall, however, that the *Sea Fisheries* case was based on ex Article 10 EC, and did not merely flow from a priori exclusivity. Exclusivity here was apparently not deemed a sufficiently strong rationale for reining in the Member States. Note that a pronounced interest of the Union did not play a decisive role here.

### Footnotes


56 Case C-266/03 *Inland Waterway* [2005] ECR I-4805, para 18.


58 Case C-266/03 *Inland Waterway* [2005] ECR I-4805, para 60.
case concerned a measure under a priori exclusivity, while in the Waterway cases the competence allocation was not exclusive but shared. Union legislation existing at the time of the Waterway cases, in the opinion of the Court, only regulated market access for Union carriers but not the matters dealt with under the agreements at issue.

While the manifest intention of the Union to exercise its shared competence by means of a negotiating mandate for the conclusion of a Union agreement, in the pertinent cases, restrained the Member States, the Court stopped short of ordering a full duty of abstention. It is argued that this would have been difficult to reconcile with the finding by the Court that there was no exclusive competence in the present case. It could also not have been justified by referring to the Sea Fisheries case alone, for reasons of its specific background mentioned earlier. Instead, the emphasis here is on a duty of cooperation and consultation. This is also reflected in the part of the Sea Fisheries case on the requirement ‘to seek the approval of the Commission, which must be consulted at all stages of the procedure’. Reinforcing the requirement for consultation in the case against Germany was the existence of a gentlemen’s agreement annexed to the negotiating mandate providing for close coordination between the Commission and the Member States. The Court held that the Member States’ failure to cooperate or consult with the Commission after the Council Decision and, thus, before implementing and ratifying their own agreements ‘compromised the achievement of the Community’s task’. Respectively, it ‘jeopardised the implementation of the Council Decision and, consequently, the accomplishment of the Community’s task and the attainment of the objectives of the Treaty’. Thus, the Court found a violation of ex Article 10 EC (now Article 4 (3) TEU) on the part of both Germany and Luxembourg.

It has been argued that to impose a duty of abstention in this situation would amount ‘to an AETR effect by anticipation’. At the same time, however, it has been claimed that ‘all “duties of action and abstention” do not seem to be ruled out’, and that the Court has implicitly imposed ‘duties other than those of information and consultation’. In support of this claim, it has been mentioned that it did not sway the Court that Luxembourg and Germany had offered to terminate their own bilateral agreements eventually once the Union agreement had entered into force. Indeed, it is difficult to see what the two Member States should have done other than abstaining from ratification of their bilateral agreements. At the least, they would have had to let the Commission dictate the conditions for concluding the agreements. This would have meant re-negotiation, which, as explained in Chapter 14, is the ‘normal’ consequence of a conflict between new external treaties of Member States and Union law. However, there was no ‘Union law’ adopted in these cases yet, there was ‘only’ a mandate to negotiate for the Commission. Thus, it is indeed fair to say that what the Court prescribed in the Waterway cases was a de facto duty of abstention for Germany and Luxembourg.

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59 This difference is also emphasized by C. Hillion, ‘Mixity and Coherence in EU External Relations: The Significance of the “Duty of Cooperation”’, CLEER Working Papers, 2 (2009), 15.
62 But see Kuijper, ‘Re-reading’, 299.
63 Case 804/79 Commission v United Kingdom (Sea Fisheries) [1981] ECR 1045, para 27.
68 Hillion, ‘Mixity’, 15.
70 Hillion, ‘Mixity’, 15.
The Waterway cases are another example of how loyalty steps in as the rationale for constraints on Member States’ action, when supremacy or exclusivity do not apply. ERTA would only have applied here if the Union had already concluded its own international agreement or had passed internal common rules. Supremacy does not work with regard to external agreements of the Member States, as explained earlier. In addition, the conflict was only imminent here, since Germany and Luxembourg had themselves also not yet concluded their bilateral external agreements. The Court, thus, again resorted to loyalty to resolve the pertinent issue. While this is not expressly stated in the judgment, it can be inferred from its reference to the Sea Fisheries case as authority. The prescribed ‘duty of loyal abstention’ in the Court’s quotation cited earlier is linked to the ‘Community tasks’, on the one hand, and the ‘coherence and consistency of the action and its international representation’ on the other.7¹ The former can be seen as a reference to the Union objectives mentioned in Article 4 (3) TEU last sentence. The latter element of coherence and consistency can be seen as a more general restatement of the Union interest in the unity of international representation, which plays an important role with mixed agreements, and is discussed in Chapter 10.

4.3 The Effect of a Union Strategy in International Conventions

The Stockholm Convention case7² shows that Member States are not only bound by a formal Council decision, but also by other acts on the Union level providing the starting point for concerted action, such as a certain strategy for Union action.

In the case at issue, both the European Union and, among other Member States, Sweden were parties to the Stockholm Convention on Persistent Organic Pollutants (POPs), a multilateral agreement regulating substances harmful to the environment. The Convention required parties to reduce or eliminate the release of POPs listed in its Annexes. As a matter of principle, any party to the Convention may propose a substance to be added to these Annexes, on which a decision is then taken by a conference of the parties. The issue at hand was whether Sweden could unilaterally propose to add a new group of substances, perfluorooctane sulfonates (PFOS), to the agreement. Sweden had threatened to do so if an agreement on a common proposal was not reached in the Council, which was indeed not the case. At the time of Sweden’s proposal under the Stockholm Convention, a Union regulatory framework was in place, which however did then not yet include PFOS.7³ Thus, it was assumed that the proposal concerned a matter for which the Union was not exclusively competent.7⁴

In this case, AG Poiares Maduro had proposed to prohibit Member States from taking individual action as long as there was a process ongoing at the EU level, and irrespective of whether Sweden ‘felt that its efforts to achieve a common proposal on the addition of PFOs to the Convention were as doomed as lemmings heading towards the edge of a cliff’.7⁵

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7¹ See Case C-433/03 Inland Waterway [2005] ECR I-6985, para 60.
7² Case C-246/07 Commission v Sweden (PFOS) [2005] ECR I-6985.
7³ The question of exclusive competence was not raised in the case. AG Poiares Maduro in his opinion in Case C-246/07 PFOS [2005] ECR I-6985, paras 28–30, qualifies the Community rules as minimum regulation, which prevented the application of the pre-emptive effect.
In a similar vein, the Court recalled the *Sea Fisheries* and the *Inland Waterway* case law. On this basis, it proceeded to ‘examine whether, as the Commission maintains, there was at the time a Community strategy in that regard which was not to propose the listing of PFOS immediately in the context of that convention, inter alia for economic reasons’. Indeed, the Court found that PFOS would have been nominated under another agreement, the Aarhus Protocol, ‘as soon as the Commission had submitted a proposal for Community legislation on control measures in respect of that substance’, and that a number of events showed that that was in fact under way. The Court did not adopt the view adumbrated by the Advocate General by ruling out that there might have been ‘a “decision-making vacuum” or even a waiting period equivalent to the absence of a decision’. Instead, it held that ‘in 2005, there was a common strategy not to propose, at that time, to list PFOS in Annex A to the Stockholm Convention’, but to propose it instead to the Aarhus Protocol.

It has been correctly posited that the line drawn here by the Court is a fine one, the argument being based on working party minutes and Council conclusions. Moreover, the general implications of this finding are difficult to assess, since the Stockholm Convention provides for specific rules on proposals by Member States of regional economic integration organizations such as the Union. The voting rights in the Persistent Organic Pollutants Review Committee, which makes obligatory recommendations for listing substances in Annex A to the Convention, are mutually exclusive. Thus, the Union and its Member States are not entitled to exercise rights under the Convention concurrently. A vote by Sweden would therefore have undermined the position of the Union, or at least caused ‘legal uncertainty for the Member States, the Secretariat of the Stockholm Convention and non-member countries which are parties to that convention’.

Thus, the Court extended the precluding effect of preparatory legislative acts to include also a ‘concerted common strategy within the Council’, adding however that such proposal ‘was submitted within an institutional and procedural framework such as that of the Stockholm Convention’. The claim for infringement in this case was based on ex Article 10 EC in combination with ‘the principle of unity in the international representation of the Union and its Member States’. This therefore is another example of obligations of Member States which cannot be rationalized either by competence or by supremacy. Accordingly, the Court responded to concerns of some intervening Member States over a ‘competence creep’ based on ex Article 10 EC, by recalling that loyalty was of a ‘general application’. What is not entirely clear from this case is whether the obligation that Sweden had violated by making the unilateral proposal constituted a duty of abstention or only of standstill. In other words, could Sweden have acted within the framework of the Stockholm Convention if the common strategy within the Council had eventually failed? The general answer to this is given in the part on loyalty and mixed agreements in Chapter 10. The pertinent judgment, it is

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76 Case C-246/07 *PFOS* [2005] ECR I-6985, para 76.
77 Case C-246/07 *PFOS* [2005] ECR I-6985, para 85.
78 Case C-246/07 *PFOS* [2005] ECR I-6985, para 87.
79 Case C-246/07 *PFOS* [2005] ECR I-6985, paras 89–90.
80 Cremona, ‘External Relations’, 258.
81 See Case C-246/07 *PFOS* [2005] ECR I-6985, para 93.
82 Case C-246/07 *PFOS* [2005] ECR I-6985, paras 93–100.
83 Case C-246/07 *PFOS* [2005] ECR I-6985, para 99.
84 Case C-246/07 *PFOS* [2005] ECR I-6985, para 103.
85 See Case C-246/07 *PFOS* [2005] ECR I-6985, para 104.
86 See Case C-246/07 *PFOS* [2005] ECR I-6985, para 65.
87 Case C-246/07 *PFOS* [2005] ECR I-6985, para 71.
suggested, only permits the conclusion that the prescription for Sweden hinged on the existence of the common strategy, which would rather argue for a standstill obligation in this case.

4.4 Conclusion

The above figure (Figure 5.2) depicts the decisive elements of the Sea Fisheries case, the Waterway decisions and the Stockholm Convention judgment. It shows that they differ on all accounts including the precise nature of the obligations prescribed. The only commonality is that the precepts are all based on loyalty, coupled with a pronounced Union interest in the latter two instances.

The decisive element mandating a constraint for the Member States is that, in all cases, there was the outline of a ‘concerted action’ or a ‘common strategy’ of the Union and that this provided the rationale for the duties imposed on the Member States. Such action or strategy appears to require some involvement of the Council, by expressing its interest in regulating and the objectives of its policy in the Sea Fisheries case, by issuing a negotiating mandate in the Waterway cases, or by adopting a certain strategy for action within the Council. A Commission proposal alone, in either constellation, would arguably not have been sufficient.

While, as explained, these cases are not based on exclusivity or on supremacy, we need to explore in more depth which legal principle or rationale has been applied here. In the following, I will start by discussing the concept of pre-emption, which has not been invoked in relation to the case law discussed earlier as far as I can see. It does however play an important role in the literature for explaining the case law discussed earlier on the effects of Union secondary law. After that, I will look more closely at the merits of loyalty in the present context.

5. Do We Need a Concept of Pre-emption in Union Law?

5.1 Introduction

Pre-emption has a reputation for being ‘one of the most obscure areas of Community law’, 88 and has received a considerable amount of attention over the years by scholars

trying to define its role in Union law. Moreover, in many texts on European Union law, especially on competences, it is used as if it were on a level with supremacy or direct effect in terms of importance and the certainty of its existence as a distinct principle of Union law. Indeed, some have not distinguished between supremacy and pre-emption at all, considering them to be ‘two sides of the same coin’. Others have likened pre-emption to exclusivity *superveniens*. Supremacy and exclusivity are clearly very different on various accounts. While the former can be qualified as an instrument of conflict resolution, exclusivity delimits the spheres of responsibility of the Member States from those of the Union and is thus rather about the prevention of conflicts. Despite the seemingly clear-cut distinction between supremacy and exclusivity and the consensus that these are different kinds of rules in Union law, the literature on pre-emption displays both a discourse in terms of supremacy and a discourse in terms of exclusivity. It thereby probably provides the only example of a discussion of these two principles of Union law in the same context. The mystery of pre-emption is thus not surprising.

In this section, I will argue that it is not apposite to conjure up a legal principle of pre-emption with regard to matters for which Union law has supremacy and exclusivity as established and sufficiently precise concepts. The statement of the Court in the *Simmenthal II* case, which gave rise to some discussion in respect of the scope of supremacy, has been invoked as proof of the existence of a principle of pre-emption different from supremacy. The former has been claimed to apply to new legislative measures, while supremacy is supposed to apply to pre-existing national laws. As a distinct legal principle this view already shows the futility of pre-emption, when the case to which it should apply (i.e., supervening national law) in fact also comes under the scope of supremacy, as explained earlier. It is important to distinguish in theory the constraints imposed on the Member States prior to the entry into force of such new national law as being separate from supremacy, as explained earlier. However, similar to other theories on pre-emption discussed in the following section that display a delimitation that is more refined, it is submitted, this hardly justifies pre-emption as a legal concept in Union law.

5.2 No Clear Delimitation of Pre-emption from Competence

There is also a strong link between the discussion in the literature on pre-emption and on exclusivity *superveniens*, with pre-emption being used to refer to exclusivity *superveniens*.

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89 See, most recently, Schütze, ‘Supremacy Without Pre-emption?’.
93 Case 106/77 *Simmenthal II* [1978] ECR 629, para 14, where it is stated that the precedence of Community law would ‘also preclude the valid adoption of new legislative measures to the extent to which they would be incompatible with Community provisions’. See *supra* note 10.
95 See note 10.
as defined earlier. In other words, the exercise of a shared competence is often considered the cause for the ‘pre-emption’ of the Member States. We gain nothing, it is submitted, if we call this pre-emption, unless we reduce the import of pre-emption to its ordinary meaning expressing that one actor (here: the Member State) is forestalled by another actor (here: the EU). Then, however, this would not constitute a legal principle of Union law, but merely be a description of exclusivity superveniens in other terms.

More complex is the theory by Krislov, Ehlermann, and Weiler, who have distinguished pre-emption from supremacy, which is defined as a principle that renders inapplicable a national legal norm conflicting with a ‘positive Community measure’. Weiler, writing individually, in a similar fashion has argued that with supremacy, ‘Member States would be precluded from making only those international agreements which were in direct conflict with the Community obligation’. He has argued that pre-emption, in contrast, ‘precedes this situation in the temporal and (legal) spatial sense’. In a spatial sense this would concern a situation ‘where there may not exist a specific Community measure, but where the entire policy area—the legal space—has become “occupied”, or even potentially occupied, by the Community in the sense that it is the duty of the Community to fill and regulate that area’. Pre-emption in a temporal sense is deemed to occur ‘even in the absence of, or before the adoption of, a specific Community rule’. Weiler, again individually, writes that under pre-emption, ‘Member States would be precluded from any international agreement in the area in question’.

This spatial dimension of pre-emption submitted by Krislov, Ehlermann, and Weiler brings to mind the a priori exclusive competence discussed earlier. With such exclusive competence, it is apposite to speak of a ‘duty’ on the side of the Union to regulate a specific policy area. The same can be said with regard to Weiler’s view. The Common Commercial Policy precludes Member States from entering into international agreements on all matters covered by Article 207 TFEU. The temporal perspective on pre-emption referred to earlier, on the other hand, seems to deny any relevance for exclusivity superveniens. Instead, it suggests that pre-emption applies without a Union measure but does not explain in which case exactly.

In my opinion, it does not make much sense to create another term for a priori exclusivity, just as it is not advisable to use pre-emption as a synonym for exclusivity

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96 See the references in note 91.
97 According to the Oxford Online Dictionary, ‘to pre-empt’ is defined as ‘[T]o render invalid or ineffective; to preclude; to prevent (an anticipated occurrence), esp. by taking particular action; to take such action in advance of (another person), to forestall’. ‘Pre-emption’ is defined in the context of US law as ‘[T]he overriding of one piece of legislation by another, typically of a state law by a federal one’.
100 Krislov, Ehlermann, and Weiler, ‘The Political Organs’, 90.
103 See also Schütze, ‘Supremacy Without Pre-emption’, 1035. Cross, ‘Pre-emption’, 453, refutes this distinction between supremacy and pre-emption since it limits the definition of pre-emption to what Cross calls ‘occupation of the field pre-emption’, ignoring the fact that ‘many conflicts between Community legislation and Member State law involve areas of regulation that will continue to be subject to dual regulation by both the Member States and the Community’. I am not entirely clear what Cross means by areas subject to dual legislation unless it refers to areas of shared competences as opposed to areas of a priori exclusivity.
Supremacy, Pre-emption, and the Union Interest

5.3 No Clear Delimitation of Pre-emption from Supremacy

Cross was the first to submit a typology of different forms of pre-emption in Union law.\(^{105}\) The definition of pre-emption proposed by Cross is broad and purports to ‘include all instances of actual or potential conflict between Member State law and Community legislation’.\(^{106}\) Cross has divided this further into the categories of ‘express saving’, ‘express pre-emption’, ‘occupation of the field pre-emption’ and ‘conflict pre-emption’.\(^{107}\)

The first two types of pre-emption refer to provisions in Union legislation that either explicitly allow Member States some room to enact national laws within the scope of the Union measure (express saving), or explicitly bar them from doing so (express pre-emption).\(^{108}\) Occupation of the field pre-emption is described as the result of de facto exhaustive rules of secondary law.\(^{109}\) The last category of conflict pre-emption has been defined by Cross as either constituting a conflict between national implementing law and secondary law (direct conflict pre-emption), or when ‘national law, although not in direct conflict with Union legislation, “interferes with the proper functioning of the common organization of the market”’ (obstacle conflict pre-emption).\(^{110}\)

Cross has repeatedly referred to measures enacted under the Common Agricultural Policy to explicate his theory, while the remainder of the cases he discusses concern product harmonization. Cross, thus, has essentially presented a theory on how to classify the different effects secondary law has on the regulatory autonomy of Member States. This is useful as far as it goes, but completely ignores the effects of internal Union measures on the external powers of the Member States. It is submitted that any theory on pre-emption would have to take account also of the external relations side of the relationship between Union and national powers. The same can be said of the most elaborate, German-language study on the subject of pre-emption, which has explicitly acknowledged Cross’s influence.\(^{111}\) In spite of its comprehensive title, it is also confined to the implications of secondary law on Member State regulatory powers.\(^{112}\)

The most recent study on pre-emption has been offered by Schütze.\(^{113}\) While implying that he reframes the discussion on pre-emption from scratch, Schütze has largely adopted the categories of Cross by distinguishing ‘field pre-emption’ (which Cross calls occupation of the field pre-emption), ‘rule pre-emption’ (direct conflict pre-emption in Cross’s parlance), and ‘obstacle pre-emption’ (termed obstacle conflict pre-emption by Cross). Field pre-emption arises, according to Schütze, when the Union

where the Member States are precluded from legislating, not because legislation would conflict with Community law, but because the competence in question is an exclusively Community competence.’

\(^{105}\) Cross, ‘Pre-emption’.
\(^{106}\) Cross, ‘Pre-emption’, 471.
\(^{107}\) Cross, ‘Pre-emption’, 456.
\(^{109}\) Cross, ‘Pre-emption’, 456.
\(^{110}\) Cross, ‘Pre-emption’, 456.
\(^{112}\) See also the otherwise magisterial analysis by Weatherill, ‘Beyond Preemption?’, who does not claim to define preemption as a legal concept, however, but rather argues in favour of shared competence and minimum harmonization, at 21 *passim*.
\(^{113}\) Schütze, ‘Supremacy Without Pre-emption’, 1033.
lawmaker has exhaustively legislated in a specific field of law.\textsuperscript{114} As a result, ‘any national legislation within the occupied field is prohibited’.\textsuperscript{115} This has been claimed to ‘reproduce the effects of a “real” exclusive competence within the occupied field’.\textsuperscript{116} Obstacle pre-emption, in contrast, presupposes ‘the finding that national law somehow interferes with the proper functioning or impedes the objectives of the Community legislation’.\textsuperscript{117} Rule pre-emption, finally, has been suggested to denote the ‘most concrete form of conflict’ between national legislation and ‘a specific Community rule’.\textsuperscript{118}

Schütze has expanded Cross’s theory by presenting an explanation for the relationship between pre-emption and supremacy, which has been conspicuously absent in the work of Cross. For him, supremacy ‘denotes the superior hierarchical status of the Community legal order over the national legal orders and thus gives Community law the capacity to pre-empt national law’.\textsuperscript{119} Pre-emption shall define ‘the actual degree to which national law will be set aside by Community legislation’.\textsuperscript{120} Thus, according to Schütze, ‘the pre-emption doctrine determines what constitutes a conflict, whereas the supremacy clause decides how that conflict is to be resolved’.\textsuperscript{121} This approach expressly draws on the pre-emption doctrine in US constitutional law.\textsuperscript{122} While the US Constitution also refers to the notion of supremacy, it does not distinguish it from pre-emption.\textsuperscript{123} Pre-emption in US constitutional law is a general title for any sort of conflict of norms,\textsuperscript{124} which is resolved by invalidating conflicting (state) laws, in contrast to Union law.\textsuperscript{125} This arguably explains the fact that the principle of Union law primacy loses any specific role with both mentioned authors.

Consequently, both authors have also qualified the direct conflict between provisions of national law and provisions of Union law as a case of pre-emption. According to Schütze, such conflict, like any other, is resolved by invoking the principle of supremacy and results in the disapplication of national law. This shows how artificial it is in Union law to divide this process by invoking two presumably distinct legal principles, pre-emption as defining the nature of conflict and supremacy for resolving it. While it is certainly useful to emphasize when a conflict between Union law and national law arises, pre-emption is an ambiguous term in this respect when it is meant to adopt a US law concept. Both by its ordinary meaning mentioned earlier, as well as its meaning in US law, pre-emption already comprises the solution to a conflict.

Moreover, Schütze’s theory reduces the relationship between supremacy and pre-emption to mere cause-and-effect. As I have already explained, things are more
complex, especially when taking the external dimension and the effects of Union directives into account. A concept of pre-emption, which is contingent on supremacy or even analogous to it as suggested by Schütze and Cross, fails as an analytical frame for the effects of Union law not coming under supremacy. In other words, I would submit that a concept of pre-emption that cannot capture the full variety of constellations where duties of abstention for the Member States arise has very limited value. If however we were to assign these effects to the mentioned pre-emption categories, this would arguably create more confusion than it actually purports to resolve, as I will demonstrate in the following section.

5.4 No Clear Categorization

Neither Cross nor Schütze deal with the Inter-Environnement case law on the abstention duties of Member States during the transposition period for Union directives discussed earlier. Would this come under obstacle pre-emption or under rule pre-emption? Member States are certainly barred from impeding the objectives of Union legislation, *viz.* of a directive in this case. Does this make it an example of obstacle pre-emption? On the other hand, the directive already constitutes a specific Union rule, which would call for the category of rule pre-emption. In any case, what would we gain if we came to any conclusion on this? We would still need to resort to the specifics of these effects of not implemented directives.

The ERTA effect presents us with similar problems in this context. According to Weiler, the non-affection standard prescribed by the Court in ERTA stands midway between supremacy as a principle of conflict resolution and pre-emption as a concept describing the occupation of a certain policy field by the Union, being ‘more than supremacy but less than pre-emption’.¹²⁶ With the ERTA case law, Weiler has remarked, the Court has moved the concept of exclusivity in a ‘gray area between supremacy and pre-emption’.¹²⁷ He has suggested however that more recent case law on ERTA has shown that the Court indeed requires something coming very close to conflict to exist between an internal Union measure and an international agreement by a Member State to trigger this effect.¹²⁸

Weiler’s problem with locating ERTA in this respect is understandable when we recall that the conflict underlying ERTA is not a conflict that can be resolved by means of supremacy alone. Thus, if Schütze were serious about the relation between supremacy and pre-emption he has suggested, ERTA could not be qualified as a case of pre-emption, since it does not fully apply supremacy. Irrespective of this problem, would ERTA fall under the mentioned categories of obstacle pre-emption or under field pre-emption? Schütze has qualified the ERTA effect as a case of field pre-emption.¹²⁹ Recall that field pre-emption arises when the Union lawmaker has exhaustively legislated for a specific field of law.¹³⁰ This, however, is not the case with the ERTA doctrine, at least not with the kind now codified in Article 3 (2) TFEU. Schütze himself has rightly emphasized how

¹³⁰ Schütze, ‘Supremacy Without Pre-emption’, 1040.
the Court has proceeded in its case law painstakingly comparing the scope of the international agreement envisaged for conclusion by Member States, on the one hand, with the scope of the internal Union measure (the ‘common rule’) on the other. Member States are not barred from external action in a ‘field’ of law in the sense of a certain policy area. The existence of a conflict, in contrast, must be carefully assessed against the scope of the common rule and the envisaged agreement at issue. To subsume the ERTA effect under field pre-emption as defined by Schütze, at any rate, insinuates implications for Member State regulatory powers greater than actually mandated by this principle. ERTA, therefore, rather seems to correspond if at all to the category of rule pre-emption. Again, the question remains what we would gain from such a finding, when it would not free us from considering the specifics of ERTA to fully comprehend its nature.

The ILO principle might be called a case of field pre-emption, since it grants exclusive external power when the Union has regulated ‘in a field largely covered by Union measures’. In this case, as explained, there is indeed a preclusion of the Member States’ right to enter into international agreements for more than the scope of a specific rule. As will be discussed, however, the exact relation of the ILO principle to the core ERTA doctrine after Lisbon is all but opaque. Again, to assign this principle to a pre-emption category would not really convey any additional information on its application.

Thus, a legal concept of pre-emption, should it have any distinct meaning in Union law, would need to accommodate these effects, as well as the effects of preparatory legal acts of Union rules discussed earlier. The Sea Fisheries case and the Inland Waterway cases equally preclude Member State rights and would therefore have to be accounted for as well. This wide range of effects of Union law on national regulatory and treaty-making authority, it is submitted, makes any meaningful categorization impossible.

5.5 Conclusion

I therefore suggest that there is no reason to conceive of pre-emption as a distinct legal principle in Union law. As mentioned already at the beginning of this section, pre-emption is not a concept referred to in case law either. Effects of Union law as diverse as ERTA or those prescribed by the Inter-Environnement Wallonie case law do not gain in transparency when they are forced into categories adopted from US law.

This, on the other hand, should not discourage the use of pre-emption by its ordinary meaning as preventing one party from acting because of a measure taken by another actor. This implies a use for this term especially in the context of the various duties of abstentions unrelated to supremacy and exclusivity explained earlier. In a widely quoted comparative study on US and EU constitutional law, pre-emption in the EU has therefore also been seen as ‘going beyond the principle of supremacy’, even though this apparently does consider pre-emption to be a distinct legal principle. It is arguably not necessary to strenuously define a distinct legal concept which is neither used in case law nor mentioned in the Treaty, which cannot provide a useful categorization of the effects of Union law, and which, finally, has in the past caused more confusion about its nature than it has helped us in understanding the mechanism of Union law.

This rejection of pre-emption is underpinned when we realize that there is a principle of Union law which is provided in the Treaty, is invoked by the Court especially when it cannot refer to supremacy or competence, as explained earlier, and of which pre-emption itself has been considered a derivation. This of course is loyalty, to which, for the present purpose, we turn now.

6. The Union Interest

When neither exclusivity, nor supremacy, nor a concept of pre-emption built on supremacy, can explain important legal consequences of the passing of Union measures and the acts preceding their adoption, there must be another rationale at work here. In all the constellations examined in this section, the Union lawmaker has concretized the objectives of the Treaty, either by passing legally binding measures including international agreements or by engaging in the decision-making process by at least a strategy on action in the Council.

In the present context, the Union interest has been offered as a model of explanation by Cremona. It has been suggested that it operates prior to the passing of Union legislation or the conclusion of international agreements by the Union as a rule to ‘prevent conflict rather than preclude Member State action’. Different from pre-emption, the Union interest, as an expression of the duty of cooperation, has been conceived ‘as a restraint on but not a denial of Member State competence’. If we look at the effects connected with secondary law or preparatory measures of the Union discussed throughout this chapter, it is noteworthy that they all prescribe duties of abstention. Supremacy, in contrast, mandates disapplication and/or substitution and, as explained, is about conflict resolution by precluding Member States, to paraphrase Cremona. This would make the Union interest an instrument of conflict prevention by the definition referred to earlier. If we consider case law such as the Inland Waterway cases or the Stockholm Convention, I am not sure whether this does not underestimate the effects prescribed there. As to the second definition quoted earlier, I would only qualify a priori exclusivity as an outright denial of competence, which the Union interest is claimed not to produce. Exclusivity superveniens, in contrast, denies the Member States the right to exercise their shared competence, but it does not deny this competence per se, as will be explained in the Part on Cooperation. Thus, when Cremona argues that the Union interest is about a restraint of competence, this definition would also seem to fit exclusivity superveniens.

I suggest that especially the case law on the constraining effect of concerted actions and strategies within the Council shows that it is not a principle of Union interest alone which is the legal basis of the prescriptions in these cases. The concept of Union interest can be understood as the broadest possible point of reference for the duty of compliance with or the duty of consideration for certain objectives of Union law. The Union interest itself however does not impose duties of abstention on the Member States. It does not serve yet as another self-sufficient principle for policing the border between the exercise of Union and national powers. I will come back to these limits of loyalty in Chapter 14 on Amplification.

I would argue instead that the legal basis for the obligations we have discussed is loyalty. The third sentence of Article 4 (3) TEU contains the general duty of abstention linked to Union law objectives. Recall its wording:

The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives.

Cremona, ‘Defending the Community Interest’, 130.
Cremona, ‘Defending the Community Interest’, 130.
See also Case 44/84 Hurd [1986] ECR 29, discussed in Chapter 14.
Conclusion

I submit that this provision is the basis for binding obligations of abstention of the Member States to protect the Union interest. The Union interest thus provides a point of reference for locating the objectives protected by Article 4 (3) TEU. As such, the Union interest is safeguarded only if it is expressed in a sufficiently concrete form, which will have to involve at the least the mentioned concerted regulatory action or common strategy within the Council. However, we do not need to stop here.

The Union interest in the Inland Waterway and Stockholm Convention cases was the unity of international representation, or, more generally, the consistency and coherence of Union action. This is a very specific interest relevant in the context of the external relations of the Union. However, since every action of the Union must serve a certain Union interest, it is also involved when the Union passes a directive or other measure. The more concrete and mature in a legal sense the expression of Union interest is, the stricter the obligations flowing from Union law will become. This explains why we must also see the case law on anticipatory effects of directives in this perspective. A directive can be conceived as a concretization of the Union interest by realizing a certain objective of the Treaty. Because of the implementation period of directives, there is a sequence of steps in effecting this interest.

This ‘process of interest graduation’ starts with a Commission proposal for a legal act. The proposal alone will normally not have any precluding effect on the Member States. However, a Commission proposal might impose restraints when it provides for the point of departure for concerted Union action following the case law discussed. This would be based on Article 4 (3) TEU as a means of protecting the Union interest, since there is no reason why we should not assume that also in a constellation not related to external relations there could be a Union interest precluding the Member States from acting unilaterally. This could be the case when adoption has to be postponed, but this is only because of a certain strategy within the Council.

7. Conclusion

Supremacy, it has been suggested, has its limits. An increasing number of cases decided by the ECJ invoke loyalty or a duty of cooperation and refer to Union interests as arguments for imposing mainly duties of abstention on the Member States. Pre-emption is, for several reasons, not a suitable concept for denoting these operations of Union law. Firstly, no theory on pre-emption has so far accounted for both the internal and the external effects of Union law measures, or has justified its raison d’être in Union law, apart from categorization and showing analogies to US law. Secondly, it seems pointless to propose a further principle for referring to supremacy or exclusivity superveniens, when there are other effects of Union measures curtailing the autonomy of the Member States that are not accounted for.

I have proposed instead to see loyalty as the basis for effects extending the import of directives on national regulatory autonomy, or constraining Member States in areas of shared competence. Thus, loyalty would apply across the board in all instances that neither apply supremacy nor are a matter of competence, making it a principle of conflict

In 1994, Weatherill remarked that loyalty ‘bridges the State/Community gap by stressing the Community context in which national action occurs’. See Weatherill, ‘Beyond Preemption?’, 31.

But see Chapter 8 on the exercise of regular shared competences.
resolution on a par with supremacy and exclusivity, and adding substantially to its many other roles discussed in previous chapters of this book. This development may also be owed to the increasing complexity of external relations law, especially where supremacy, as explained, has a particularly weak role and where the competence issue is often shrouded in ambiguity. It thus comes as no surprise that loyalty plays a pivotal role for mixed agreements as the culmination of the competence calamity, as discussed in further detail later.

The Union interest I have suggested to provide the direction for the application of the duty of abstention is provided in a general manner in Article 4 (3) TEU. The reference to a general interest in coherence and consistency of Union action in the *Inland Waterway* cases suggests that loyalty might also create obligations to safeguard the Union interest outside the realm of external relations. If we want to remain alert to these developments, it is advisable to recognize the potentials of supremacy and exclusivity as well as their inadequacies.