SOME THOUGHTS ABOUT THE PRINCIPLE OF PRE-EMPTION IN THE LAW OF THE EUROPEAN UNION

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Dear Dr. Latsis, Dear Mrs. Latsis
Dear Prof. Thorens
Ladies and Gentlemen

1. Introduction

During the program of this evening I have the pleasure to be the first presenting the results of my own scientific research. I want to take this opportunity to express my thanks to Dr. Latsis. As a scientist and leader of an important multinational company, he proves with the creation of the generous foundation his close relationship to science and acknowledges in the meantime the value of scientific research in all different sectors for the national as well as international economy. I would like to thank you Dr. Latsis for your initiative and I am sure that with the help of your foundation, generations of young scientists will be encouraged to work on in the scientific field in future.

In my view, scientific research is the basis of a prosperous and sound economy. The correctness of this maxim is proved by the example of Switzerland; having almost no natural resources, its broad educational system combined with an effective support of scientific research by the Swiss National Foundation form together a broad base for successful scientific research. New generations of scientists are working in the field of university research. Business, trade and industries can profit from a platform of well-educated specialists. This national support improves the competitiveness of the Swiss economy without creating any problems in view of international competition law, be it the law of the European Union or the GATT.

2. The principle of pre-emption

This statement leads to the field of my own research. I tried to describe the possibilities of Member-States of the European Union realising their own political aims within the framework of European Union law. Each Member-State tries to find a balance between different national aims: on the one hand there is the necessity to form a sound and competitive national economy; on the other hand, national governments should feel responsible to protect the environment and/or create and finance a social network implying e.g. social insurance or security measures for industrial and consumer products. The European Union tries to harmonise those national standards. Since the creation of the European Community in 1958 a large number of new Community laws have narrowed down the scope for national legislation. The Union's regulations or directives – which can be summarised under the term "secondary legislation" – pre-empt national law. In other words: if a national law conflicts with a regulation or directive of the European Union this national rule does not have any legal effect.

I have examined the framework of Member-States' ability to enact their own legal standards in spite of the existence of Union standards. But this question is also relevant for an individual opposing the legality of a national law: he can argue that the national law has no effect because a specific directive or regulation pre-empts this national law and that therefore he can rely on (e.g. lower) Union standards.

This principle of pre-emption in the law of the European Union may be summarised through the following principles:

a) First, the pre-emption principle is one cornerstone of the European Union. As a general rule it is acknowledged that Union law hinders the application of national (even constitutional) law.

b) Secondly, the ECT and the EUT – as part of the primary law system of the EU – impose restrictions in different provisions[1] on the scope of Member-States' ability to enact their own legislation.

c) Thirdly, most secondary legislation (be it a regulation or directive) contains provisions dealing with specific options for Member-States to implement legislative aims in different ways. It is obvious that such secondary legislation has no pre-emptive effect as long as the Member-State enacts it within one of those options.

d) Fourthly, the European Court of the EU has developed an extensive jurisprudence to determine the legality of a Member-State's transposition of secondary legislation into its national law.

In the course of this talk I would like to present some arguments for the thesis of my research, that a restriction of the pre-emption principle will not endanger the creation of the Internal Market. In contrast, it will be a contribution to the implementation of the principle of subsidiarity, will facilitate the enforcement of (national) fundamental laws, will help the acceptance and enforcement of secondary legislation at national level, will reduce national opposition to the Union and help to find a solid outcome of the decisional procedures for future secondary legislation.

3. The jurisprudence of the European Court of Justice

There is not enough space to present the detailed results of my broad analysis of the Court's jurisprudence. Because the Court has focused its interests mainly on the specific cases to be decided it is quite

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1 E.g. Article 36, 48 III, 56 I and 66, 100a IV, 118 III, 130t, 129a III ECT.

difficult to see the Court's guiding line in its jurisprudence. But the European Court refers to a limited number of criteria in almost every case dealing with pre-emption problems[2]. In my research I have picked out five criteria of the European Court and analysed them in the perspective and framework of the policies of European Integration.

To summarise this jurisprudence, the European Court has very rarely used all these five criteria in one decision. It has, rather, based its judgements on one or two criteria. In fact it seems almost impossible to find an inherent logical system to the question of in which cases the Court will apply particular criteria. In my view, some of these criteria can only be justified within a political perspective of the Union. The answer depends on a particular view of the political dimension to European integration. I have tried to develop out of the constitutional legal conception of the Union a concept which addresses this question of pre-emption in a more legalistic manner. I am aware that my conclusions are based on my own political perspective of the Union. But I consider it important to disclose this

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2 See also: Waelbroeck, The Emergent Doctrine of Community Pre-emption – Consent and Re-Regulation, in: Sandalow-Stein (EDS): Courts and Free Markets: Perspectives from the United States and Europe vol. II 1982, p. 548 ff.; *Weiler*, The Community System: The dual corrector of supranationalism in: JEL 1981, p. 267 ff.; *Jacobs / Karst*: The Federal Legal Order, The USA and Europe compared: A juridical perspective, in: *Cappalletti, Secombe, Weiler* (eds.) Integration through law vol. I, book 1, 1986, p. 169 ff.; *Chrislov / Ehlermann / Weiler*, Political Organs and the Decision-making process, in: *Cappalletti, Secombe, Weiler* (eds.): op.cit., p. 2 ff.; *Cappalletti / Golay*, The Judicial Branch in the Federal and Transnational Union: its impact on integration, in *Cappalletti, Secombe, Weiler* (eds.): op.cit., p. 261 ff.; *Neuwahl*, Joint Participation in International Treaties and the Exercise of Power by the EEC and its Member-States: mixed agreements in CMLRev 1991, p. 719 ff.; *Cross*: Pre-emption of Member State Law in the European Economic Community: a framework for analyses, in CMLRev 1992, p. 447 ff.; *Zuleeg*: Das Recht der Europäischen Gemeinschaften im innerstaatlichen Bereich, in: Kölner Schriften zum Europarecht, Band 9, 1969; *Hutmacher*: Der Vorrang des Gemeinschaftsrechts bei indirekten Kollisionen – eine Studie zum Verhältnis von EG-Recht zu nationalem Vollzugsrecht, dargestellt am Beispiel des Konflikts zwischen materiellem EG-Recht und nationalen Rechtsmittelfristen, 1985; Furrer, op.cit.

perspective, and that my view can be based on the constitutional system of the European Union. It seems to me very important for the further development of Union law that legal commentators be aware of their own integrational concepts and their effects. This has decisive influence on their legal argumentation.

4. The integrational concept of the European Union and its impact on the principle of pre-emption

4.1. The Internal Market

On the one hand some commentators like Prof. Petersmann[3] have shown that the four freedoms implemented by the EUT have a decisive deregulative effect on national law. As one consequence of this deregulation process there is a growing regulatory competition between the Member-States. Many commentators fear that this development leads to a "race to the bottom" of national standards. On the other hand we have discovered that Union secondary legislation has some regulative effect on the national legal systems.

It is a matter of fact that on the one hand primary Union law has some deregulative effect on national law and that on the other hand the Union secondary legislation has some regulative effect on the national legal systems. This raises the question whether the function of the secondary legislation of the Union is to eliminate the regulatory competition between the Member-States. Both above mentioned views are argued on the basis of the term "Internal Market" – an integrational concept – but the term is used in different ways. For

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3 *Petersmann*, Constitutional Functions and Constitutional Problems of International Economic Law – International and Domestic Foreign Trade Law and Foreign Trade Policy in The United States, the European Community and Switzerland, in: Progress and Undercurrents in Public Internalional Law (PUPIL), Book 3, 1991.

this reason I suggest taking one step back and examining the constitutional system of the Union and the Member-States to take a view on the conclusions arrived at by legal commentators and the ECJ.

4.2. Minimum harmonisation?

Steindorff[4] has introduced the theory of differentiation between "active" and "reactive" harmonisation. He argues that reactive harmonisation is the reaction to a hindrance to the creation or functioning of the Internal Market. Where the Union establishes a Union-wide standard to eliminate the negative impact of uneven national standards on the functioning of the Internal Market, he refers to this as "reactive harmonisation" as opposed to "active harmonisation". *Steindorff* argues, together with many other commentators, that the Union should limit its legislation to reactive harmonisation. This argumentation is weakened, as we know that the Union has enacted a long list of active harmonisation legislation like the directive to protect wild living birds[5]. The European Court has upheld all this legislation without taking into account the question of active or reactive harmonisation.

In my book I combined these two views: I argued that it is a matter of fact that the Union accepts the active harmonisation of law. But such standards can only be accepted as minimum standards. The function of active harmonisation is therefore to limit the "race to the bottom" through competition between national legal systems. This

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4 Steindorff, Quo vadis Europa? – Freiheiten, Regulierung und soziale Grundrechte nach den erweiterten Zielen der EWG-Verfassung, in: Weiterentwicklung der Europäischen Gemeinschaften und der Marktwirtschaft – Referate des XXV. FIW-Symposions, in: FIW-Schriftenreihe, Forschungsinstitut für Wirtschaftsverfassung und Wettbewerb E.V. Köln, 1993, p. 11 ff.

5 Cf. 79/409.

argument complies with the principle of subsidiarity in article 3 b of the Treaty of Maastricht[6].

So, I suggest tackling the question of pre-emption in a different way:

- As long as the application of a national standard differing from a Union standard would have a negative effect on the central aim of the Union – the implementation of the Internal Market – the pre-emption effect of secondary legislation should apply. This will hinder a competition amongst the national legal systems.

- But as long as such a national rule can be upheld without hindering the functioning of the Internal Market, we can argue that competition amongst the national legal systems can be helpful to find the most efficient regulative system which can safeguard a high or even stricter standard of protection that on Community level. So it might show us e.g. if a product can still be produced under stricter national law restrictions.

The differentiation between law that has some effect on the functioning of the Internal Market and the other rules mentioned is not new under Union law. We have encountered this differentiation e.g. in the conflict over the correct legal bases for a directive. In the Titandioxydcase[7] the Court argued that the directive has to be based on article 100a and not on article 130s because this directive has some legal effect on the Internal Market.

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6 "The Union shall take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member-States and can therefore, by reason of the scale or effect of the proposed action, be better achieved by the Union. Any action by the Union shall not go beyond what is necessary to achieve the objectives of this treaty."

7 ECJ C-300/89, ECJR 1991-I-2867ff.

4.3. Ten arguments to restrict the principle of pre-emption

The restriction of the pre-emptive effect of secondary legislation on national legal systems I have presented above can be based on different arguments:

1. As a general rule it seems very important that legal standards comply with scientific development. If the negative effect of an additive is discovered it might be very important to withdraw this additive from the market as soon as possible. At national level a legal standard can be changed to meet new scientific developments more easily than at Union level. As long as a stricter standard at national level does not hinder the functioning of the Internal Market there is no reason why a Member-State should not follow the new scientific standard. We can see that most regulations or directives - especially if they have an influence on the Internal Market – allow each Member-State to take emergency action on safety or health grounds if the Union standard does not conform to the newest scientific knowledge. But in my view, a national rule can – under restricted condition[8] – be upheld even if such a derogation is not permitted in the secondary legislation[9].

2. We can argue that at Union level there exists a democratic deficit. At national level the political ideology of a government is shown mainly by its regulative policy. Therefore we can avoid the well-known political problem at national level, the "Brussels-Argument" of national governments: this argument may be stated

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8 There is not enough space to discuss these restrictions.

9 In the author's view this would comply with the jurisprudence of the Court in ECJ C-106/77, ECJR. 1978. p. 629ff. and C-213/89, ECJR. 1990-I-2433ff. because this is a fundamental principle constituting the EUT.

as either we cannot do anything because of Brussels or we will do it in spite of Brussels. The limitation of the pre-emptive effect will also limit this conflict with national governments and will therefore contribute to the political acceptance of the Union in the national political systems. As we have seen before, the Union legislates in very different areas and therefore Union laws have a wide influence on national legal systems. As a limitation of the broad competencies of the Union in the sphere of reactive harmonisation is not accepted by the Union Organs we should limit the effect of these Union laws on national legal systems to maintain the political balance between Union and national law.

3. The Union legal system has problems of legitimacy. "A *Single European* market is a concept which still has the power to stir. But it is also a single European *market*. The Single Market is not simply a technocratic program to remove the remaining obstacles to the free movement of all factors of production. It is at the same time a highly politicized choice of ethos, of ideology and of political culture: The culture of the Market. [...] Likewise the indispensable need for the success of the Single Market to engage in wide-spread harmonization of standards of consumer and environmental protection as well as the social (and hence ideological) choice which prizes market efficiency and European wide neutrality of competition above other competing values. It is not impossible that consensus may be found on these issues and indeed that this choice enjoys broad legitimacy."[10] The limitation of the pre-emptive effect on national laws can be a contribution to upholding the legitimacy of Union secondary

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10 Problems of Legitimacy in Post 1992 Europe, in: Petersmann / Hauser (ed.): Constitutional Problems of European Integration – EC 92 and Beyond (Aussenwirtschaft), 1991. p. 198f.

legislation security. Due to the fact that this concept is bound to restricted conditions[11] it allows Member States to realise their aims without endangering the concept of European integration. So, the legitimacy of European secondary law can be based on both European and national constitutional law.

4. A closer look at the existing secondary legislation shows that Member-States quite often obtain specific derogations to rules in secondary legislation. Initially many commentators feared that this would prove to be a barrier to the creation of the Internal Market. In the meantime it is clear that those differences are on the contrary necessary for a successful implementation of the Union rules in the law of Member-States. This development has been accepted by the Court and by most Union commentators. These old arguments and legal reasoning are brought up against this development and discussed again as a means of limiting the principle of pre-emption, without adding new arguments in support. In my view, the implementation of a restricted principle of pre-emption does not endanger the creation of the Internal Market more than allowing derogations in secondary legislation. In contrast the European Court has to take into account objective criteria; but this is not guaranteed by the Member-State during the negotiation process for new secondary legislation.

5. We know that there are many differences between the Member-States of the European Union in the economic, social, environmental and ideological sense. We know that the EU does not tend to harmonise those differences, but to "respect the national identities of its Member-States, whose systems of government are

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[11] See note 8.

founded on the principle of democracy"[12]. So if the situations in the different Member-States are not the same, there is very often no reason to enact the same measures at national level. To limit the pre-emptive effect of secondary legislation on national law will help the national governments to find their own standard which is necessary to fulfil the aim set out by the Union but also to limit the "race to the bottom".

6. It is acknowledged that the Member-States of the European Union are very different in culture and their national identity. The consequence of this fact is that each Member-State has its specific "national sensibilities". We know that some Member-States of the Union are much more sensitive to environmental problems than others which leads to the fact that for instance the French have to use the German term "Waldsterben". Another example of national sensibilities (and its correlation with national industry) can be found in the PCP-case[13] where France tried to abandon the stricter German law in spite of the acknowledged danger of PCP. The Irish Abortion-Case[14] also illustrates national sensibility on one specific issue. These examples demonstrate that in future it will be of increasing importance to allow the Member-States to defend their national sensibilities against the European Union. For this reason it will be of great importance to limit the principle of pre-emption and create a structure to the possibilities of upholding those specific national rules against the secondary legislation of the Union.

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12 Article F EUT.

13 C-41/93, decided on 17th May 1994, not yet reported.

14 Cf. ECJ C-159/90, ECJR 1991-I-4685ff.

7. History has shown that during the preparation process for secondary legislation the Member-States are aware of the danger that they cannot – because of political problems in each Member-State – fulfil the obligations improved by this specific Union legislation. This argument is often used as a bargaining chip so as to negotiate opt-outs in specific harmonisation legislation. It has been clear that this bargaining process does not lead to a consistent legislative aim. The result of these legislative procedures is a type of patchwork of views which does not fulfil the ideal of harmonised national legislation. If the Member-States are aware of the possibilities to promote their national interests in certain limited ways, they will be more willing to accept a particular (i.e. lower) standard in secondary legislation.

8. The limitation of the pre-emptive principle will encourage other Member-States to implement stricter standards which at least one Member-State has demonstrated a willingness to uphold in spite of lower standards in other Member-States. After all there will be strong reasons to apply this stricter standard in other Member-States and/or as a Union-wide law. Some commentators fear that no Member-State would introduce or maintain a stronger national law. This argument does not take account of political reality nor leading economic theories. As we can see in the PCP-case[15] or in questions of social security, Member-States of the Community tend to respect in their national decision making process – out of national political circumstances – not only the argument of national competitiveness. And even if they do so, some economic theories have stressed the argument, that e.g. a high level of ecological and social security eases the recruitment

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15 C-41/93, decided on 17th May 1994, not yet reported.

of highly qualified and motivated individuals[16]. It should be up to the Member-State to estimate the positive economic effect of stringent measures, as long as the restricted conditions of the application of the pre-emption effect are fulfilled[17].

9. We have already stated that the limitation of the pre-emption principle will be an important and enforceable legal element to the principle of subsidiarity.

10. Last but not least, the European Court itself has accepted that the Member-States can act as "trustees of the common interests"[18] under certain circumstances. The Court has held that if the Union is not able to fulfil the obligations of the treaty, Member-States can – even if the Union has exclusive competence in this field – enact their own legislation e.g. to safeguard the environment. In fact the European Court has accepted the argument that Member-States are still responsible[19] for maintaining the protection of the health and life of humans, animals or plants, which may be referred to as "ordre public". So if a Union law does aim to protect human beings, animals and/or plants from some kind of danger and this objective cannot be fulfilled by the Union standard, there are strong arguments for applying this argument of the Court and respecting the measures taken by the Member-State to fulfil the

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16 See *Hauser / Hösli*, Harmonization or Regulatory Competition in the EC (and the EEA), in: Consitutional Problems of European Integration – EC 92 and Beyond, Aussenwirtschaft 1991, p. 497ff.

17 See note 8.

18 ECJ 804/79, ECJR 1981, p. 1045ff., N. 30.

19 ECJ 247/84, ECJR 1985, p. 3887ff., N. 20.

objective set out by the Union secondary legislation. Certainly the Member-States, the Union and the other Member-State should try to harmonise this law at Union level again by altering the standard in a directive or regulation. But this can take months or even years. During this time, the Member-State(s) can uphold its stricter national law as long as restricted conditions are fulfilled[20].

5. Conclusion

In my research I have shown that there are many reasons for limiting the pre-emption principle of secondary legislation over national law to gain a balance between sensitive national interests and the Union aims of creating and maintaining the Internal Market. We have to remind ourselves that the aim of the Union is also to safeguard national identities. Without respecting this aspect of European Integration we would endanger the whole integration process in the future. Consequently in my view, it is very important to afford Member-States the possibility of maintaining their own national priorities in some limited areas. If Member-States know about the rights for, and methods of, protecting their interests more precisely we will gain broader acceptance in each Member-State for Union legal legislation. A minimum harmonisation in a number of policies like the quality of sea-water or the protection of birds can be very important in protecting the Member-States from a "race to the bottom".

In my book I developed, on the basis of the European Courts' criteria and the above mentioned integrational concept of the European Union, a "checklist" which enables a Member-State – or an individual

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[20] See note 8.

– to check, if a national law can be upheld because the pre-emption principle is not applicable in a specific case.

In my opinion, a Member-State of the European Union has many possibilities to create a sound environment for its national economy which is compatible with the Union law restrictions. It can also, under certain criteria, enact measures so as to protect the environment or a security standard. This decisive aspect has not yet found its place in the discussion of the integration of Switzerland in Europe. During this discussion, emotional arguments still overlap with a substantiated analysis of the European integrational policy.

As I mentioned above, one possibility to improve the competitiveness of a national economy is the effective support of scientific research. In my view, Dr. Latsis has proved with the creation of the Latsis-Foundation, that he acknowledges this important relationship between research and practice. Thank you, Dr. Latsis again and thank you for your attention.