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**Reflections on the scope and pre-emptive effects of Community legislation - A case study on
Directive 2002/95/EC Restrictions on Hazardous Substances (RoHS)**

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Reflections on the scope and pre-emptive effects of Community legislation - A case study on Directive 2002/95/EC Restrictions on Hazardous Substances (RoHS)

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Abstract

This article studies the legal concepts “scope” and “pre-emptive effect” of Community law in the context of the EU RoHS Directive (2002/95/EC, Restriction on the use of certain hazardous substances in Electrical and Electronic Equipment). The scope and pre-emptive effects of Community law affect directly the vertical division of competences between the European Community and its Member States, and determine thus which of the legislatures is charged with social value choices in fields such as environmental protection. The case study illustrates how the scope and pre-emptive effects of Community law may nevertheless be difficult to define, even where a wide array of interpretative tools may be applied on a manifestly simple directive. Moreover, a rethinking of the Community doctrine on pre-emption is both predicted and recommended.

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1. INTRODUCTION

1.1 The scope and pre-emptive effect of EC legislation

Legislation is an embodiment of political choices, a carefully struck compromise between numerous diverging values. In federalistic systems such as the European Union, there is a constant tension between the vertical levels of government as to where the compromises on the values should be struck: are the state legislators the proper decision makers, or does the competence belong to the central lawmaker instead?

In the European Union, the Member States' and the Community's competences are in many policy fields concurrent, mixed. The powers are thus divided in a dynamic manner: as long as EC secondary legislation does not exist on a field, the Member States may enact laws that are compatible with the Community's primary legislation. If the Community on the other hand has chosen to harmonise the national legislations by enacting a secondary law of a particular scope, the Member States' competence to regulate is traditionally seen as pre-empted in accordance with the law in question.

The existence of exhaustive Community law precludes also the Member States' recourse to the justification grounds of Article 30² of the Treaty and of the "mandatory requirements" doctrine.³ This means in general terms that e.g. national environmental protection measures that restrict the free movement of goods may no longer be allowed, even if prior to harmonization the measures could have been considered justifiable as protecting national interests of overriding social interests⁴.

Hence, an important distinction is made between the Member States' competence before and after the Community's harmonising laws. In order to determine the exact location of this delicate "demarcation line of powers", the precise scope of Community's provisions must be known. Further, once the precise scope is defined, it is also possible to juxtapose national legislation

² Ex Article 36.

³ The European Court of Justice often quotes in this context paragraph 18 of the *Hedley Lomas* case: " - - recourse to Article 36 is not possible where Community directives provide for harmonisation of the measures necessary to achieve the specific objective which would be furthered by reliance upon that provision." Case C-5/94, *R. v. Ministry of Agriculture, Fisheries and Foods, ex parte Hedley Lomas*, [1996] E.C.R. I-2553.

⁴ The Member States do retain this right, however, to maintain or introduce national measures *after* Community legislation under certain conditions by virtue of e.g. the derogation clause in Articles 95(4-5) of the EC Treaty.

against the Community law in order to assess whether it has been pre-empted or not. The legislature charged with making a particular value choice is thus determined.

In order to determine the proper vertical level of law making in the EC, one is thus faced with two preliminary issues: the “scope” and “pre-emptive effect” of Community law. The EC Treaty is silent as regards both of these concepts. By scope, this analysis refers to the (mere) area of legal space that the Community occupies in a particular instance – usually as a consequence of Community secondary legislation. Pre-emption, on the other hand, defines the effects that such coverage of legal space by the Community will have on related Member State legislation. These concepts deal with harmonisation from separate, yet closely related angles. The distinction between the concepts is therefore admittedly somewhat vague; in fact, they are most probably partly overlapping. It also appears, that there has not been much focus by legal scholars on this distinction.

The purpose of this analysis is to explore the scope and pre-emptive effects of Community law. The analysis takes place in a specific normative context; the EU Directive on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (hereinafter “RoHS”)⁵. There are two principal reasons for this choice. On the one hand, the directive in question is intriguingly simple. It merely aims at regulating the material content of electrical and electronic equipment within the EU: some substances are prohibited, others not. It would therefore seem to set up a fitting theoretical framework for our scrutiny. On the other hand the question on the actual scope and pre-emptive effects of the RoHS Directive is also practically important, because it will regulate millions of units of electrical and electronic equipment (EEE) in the EU. Moreover, due the familiarity and indispensability of many such electronics devices to the reader, the question may raise interest also from more personal viewpoints.

The concept “scope of a directive” can be split further into e.g. the personal, territorial, temporal and material scope of the provisions. Parallel to this categorization, one should note the Court’s jurisprudence, whereby “in interpreting the provisions of Community law it is necessary to consider not only their wording, but also the context in which they occur and the objectives of the rules of which they are part”⁶. Here, the plan is indeed to analyse the statutory *material* scope of

⁵ Directive 2002/95/EC of the European Parliament and of the Council on the restriction of the use of certain hazardous substances in electrical and electronic equipment (“RoHS (Directive)”). See also Proposal for a Directive of the European Parliament and of the Council on the restriction of the use of certain hazardous substances in electrical and electronic equipment. COM(2000) 347, 13.6.2000. (“Commission Proposal”).

⁶ Case C-1/96, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming Ltd.* [1998] E.C.R. I-1251, (“*Compassion in World Farming*”), paragraph 49. The general principles of legal interpretation obviously also need to be taken into account. (See e.g. Aarnio (1989)

the RoHS Directive by assessing a number of criteria such as the wording, context and objectives of the law, including the legislative intent of the institutions. The findings of the analysis are then portrayed against a taxonomy of pre-emption introduced by Cross⁷.

In the absence of a clear European jurisprudence on pre-emption, Cross has argued that the Community may pre-empt a policy field in various different ways. He has proposed a taxonomy of pre-emption, which is based on the extensive jurisprudence and doctrine on the matter in the United States⁸. The Community may have either 1) expressly saved a particular field for national legislation, 2) expressly forbidden the Member States to enact in a particular field or 3) occupied a policy field by Community legislation so exhaustively, that it has left no room for national rules. In addition, the national law may become pre-empted, if it conflicts with the Community law. It is possible to distinguish between 4) direct conflicts between national and Community provisions, and 5) conflicts, which arise from a more indirect interference with the proper functioning of the internal market. These five types of pre-emption form also the framework for the analysis here on the pre-emptive effects of the RoHS Directive.

Tribe⁹ has noted, that in practice pre-emption analysis in the United States boils down to a meticulous scrutiny on the specific text and history of the statute in question. Due to the common origin, this approach seems to fit well together with Cross's taxonomy on Community pre-emption. It also resembles greatly the above-explained methodological approach regarding the scope of an act. A combined analysis on the scope and pre-emption of RoHS appears therefore quite logical also from a methodological perspective. Lastly, guidance in analysing the scope and pre-emptive effects will also be sought from other similar directives and the existing jurisprudence of the European Court of Justice.

Laintulkinnan teoria (The Theory of Legal Interpretation), WSOY:Porvoo, pp. 15 – 21, 160 – 162, 165 – 173, 218 – 249, 256 – 259).

⁷ Cross, E.D. (1992) Pre-emption of Member State Law in the European Economic Community: a Framework for Analysis. *Common Market Law Review*, Vol. 29, p. 447.

⁸ Cf. with Tribe, L. H. (2000) *American Constitutional Law*. Volume 1, Third Edition. Foundation Press: New York, pp. 1172-1212. Pre-emption related research in the Community law has been somewhat sporadic. Prior to Cross, the main contributors include: Waelbroeck, M. (1982) The Emergent Doctrine of Community Pre-emption – Consent and Re-delegation, p. 548, in: T. Sandalow and E. Stein (eds.) *Courts and Free Markets – Perspectives from the United States and Europe*. Volume II. Clarendon Press: Oxford; Bieber, R. (1988) On the Mutual Recognition of Overlapping Legal Systems: The Case of the European Communities and the National Legal Orders. *European Law Review*, Vol. 13, p. 147. After Cross, e.g. the following contributions may be listed: Weatherill, S. (1994) Beyond Preemption? Shared Competence and Constitutional Change in the European Community, p. 13, in: D.O'Keefe and P.M.Twomey (eds.): *Legal Issues of the Maastricht Treaty*. Chancery Law: London; Furrer, A. (1996) The Principle of Pre-emption in European Union Law, p. 534, in: G.Winter (ed.): *Sources and Categories of European Union Law. A Comparative and Reform Perspective*. Nomos: Baden-Baden; Goucha Soares, António (1998) Pre-emption, Conflicts of Powers and Subsidiarity. *European Law Review*, Vol. 23, p. 132.

⁹ 2000, pp. 1175 – 1176.

1.2 The scope and pre-emptive effect of the RoHS Directive

The EU Directive on Restrictions on Hazardous Substances aims at regulating hazardous substances in electrical and electronic equipment in order to harmonize the laws in the field with the Community and to protect the environment.¹⁰ The directive deals with substances in devices, which are described in the parallel WEEE directive¹¹ as “electrical and electronic equipment” or shortly “EEE”.¹² The directive bans the use of six substances in electrical and electronic equipment: lead, mercury, cadmium, hexavalent chromium and flame retardants PBB and PBDE¹³. Certain applications have been nevertheless excluded from the ban due to e.g. the critical nature of the devices in health services or data transmission infrastructure.¹⁴ In addition, the directive determines how it will be adapted to scientific and technical progress, as well as a review procedure regarding the regulated appliances and the prohibited substances¹⁵. The Council and the European Parliament reached a joint text on the RoHS Directive during the conciliation procedure of Article 251 on November 8 2002. The Directive was issued on January 27 2003 and published in the Official Journal on February 13 2003 as EU Directive 2002/95/EC.

Electrical and electronic equipment constitute an entire industry with vast economic and environmental effects. They are therefore an object of diverging, passionate opinions, which are bound to ignite sharp controversies amongst different interest groups and the Member States. It is therefore important to know, what the scope and pre-emptive effect of the RoHS Directive are, and hence to draw the limits to the discretion of the Member State value choices. Because the structure of the RoHS Directive is so simplistic, one aspect clearly raises above others in assessing the harmonizing scope and pre-emptive effect of the act: the substances dealt with in the Directive. And to turn this the other way around, the simple and “absolutist” nature of RoHS seems to make it an interesting test case for assessing the concepts scope and pre-emption.

A ban on the use of a particular substance means a *de facto* prohibition to the manufacture or importation of goods where that substance is present: it creates an obvious barrier to trade. In

¹⁰ Article 1.

¹¹ Proposal for a Directive of the European Parliament and of the Council on Waste Electrical and Electronic Equipment. COM(2000) 347, 13.6.2000. (“Commission Proposal on WEEE”) Note that the Commission proposals on WEEE and RoHS are integrated into a single document.

¹² Articles 2 and 3. “Electrical and electronic equipment” or “EEE” means equipment which is dependent on electric currents or electromagnetic fields in order to work properly and equipment for the generation, transfer and measurement of such currents and fields falling under the categories set out in Annex IA to Directive 2002/96/EC (WEEE) and designed for use with a voltage rating not exceeding 1000 Volt for alternating current and 1500 Volt for direct current” (Article 3(a)).

¹³ Article 4; polybrominated biphenyl and polybrominated diphenyl ether, respectively.

¹⁴ Annex to the Directive.

¹⁵ Articles 5 and 6.

this light it is surprising, that the Commission, the Council¹⁶ and the European Parliament have all failed to clearly and expressly state whether the RoHS Directive is intended to deal with some substances only, and to leave all other substances non-harmonized and hence to the discretion of the Member States. To give a practical example: the RoHS Directive will ban the use of flame retardants PBB and PBDA in EEE within the Community¹⁷, but will for instance Sweden remain free to impose a ban on EEE concerning the use of other flame retardants, such as TBBPA¹⁸?

Certain authors¹⁹ interpret this lack of an express statement to mean that the Directive grants to Member States the discretion to ban any (other) potentially hazardous substance, which is not expressly prohibited in the directive. It can nevertheless also be maintained, that the intention of the Directive is instead to harmonize all restrictions concerning the use of hazardous substances in EEE, even if the directive's *ban* only applies to some of the substances. These arguments embody a question both on the scope and the pre-emptive effects of a directive. This legal analysis attempts hence to survey the issue in more depth.

2. THE SCOPE OF THE ROHS DIRECTIVE

2.1 Textual analysis on the Objective(s) and Scope of the Directive

Article 1 ("Objective") of the original Commission proposal for RoHS Directive states:

"The purpose of this Directive is to approximate the laws of the Member States *on the restrictions of the use of hazardous substances* in electrical and electronic equipment and to contribute to the environmentally sound recovery and disposal of waste electrical and electronic equipment."²⁰

The objective of the Directive is further elaborated in Recital 1:

"The disparities between the laws or administrative measures adopted by the Member States as regards *the restriction of the use of hazardous substances in electrical and electronic equipment* could create barriers to trade and distort competition in the Community and may thereby have a direct impact on the

¹⁶ See e.g. Common Position adopted by the Council with a view to the adoption of Directive of the European Parliament and of the Council on the restriction of the use of certain hazardous substances in electrical and electronic equipment (RoHS), 14.11.2001, ("Council Common Position"); or Joint text approved by the Conciliation Committee on the Directive of the European Parliament and of the Council on the restriction of the use of certain hazardous substances in electrical and electronic equipment (RoHS), 8.11.2002. ("Joint text of Conciliation")

¹⁷ This ban will become effective on 1.7.2006. (Article 4, Joint text of Conciliation)

¹⁸ "Sweden goads EU on brominated flame retardants". Environment Daily, 6.6.2002.

¹⁹ See Garcia Molyneux 2001, p. 17. - - "the proposed RoHS Directive says nothing regarding other substances, and does nothing to include a free movement clause guaranteeing the free movement of EEE complying with the proposed directive's ban. Thus, member states would enjoy wide discretion to impose a non discriminatory ban on EEE containing hazardous substances, if they can argue that their ban is not disproportionate". In: Important Stage Reached in Drafting Controversial Electrical and Electronic Equipment Devices, EuroWatch, November 15 2001, Volume 13, Nr. 20, pp. 1, 10 - 19.

²⁰ Emphasis added.

establishment and functioning of the internal market; whereas it therefore appears necessary to approximate the laws in this field and to contribute to the protection of human health and the environmentally sound recovery and disposal of waste electrical and electronic equipment.”²¹

The wording selected by the Commission for these central provisions of the Directive may then be juxtaposed with the title of the Directive, namely

“Proposal for a Directive of the European Parliament and of the Council on the restriction of the use of *certain* hazardous substances in electrical and electronic equipment”.²²

As may be noted, the title and some parts²³ of the explanatory memorandum of the Commission proposal speak of a directive on restricting the use of “certain” hazardous substances, yet the word “certain” does *not* appear in the key provisions determining the objective of the act.²⁴ This contradiction creates considerable legal uncertainty regarding the scope of the RoHS Directive.

Pursuant to Article 250(2) of the EC Treaty, the Commission amended its original proposal²⁵ on the basis of the amendments that the Parliament suggested its first reading²⁶. The Commission accepted *in principle* the following amendment of the Parliament:

“The *scope* of the Directive should, in the future, be *expanded to include other hazardous substances* used in electrical and electronic equipment. Particular attention should therefore be paid at the review to the feasibility of substituting hydrofluorocarbons (HFCs) and other halogenated flame retardants in electrical and electronic equipment.”²⁷

While this amendment seemed to indicate that the scope of the proposed directive was limited to the prohibited substances, the Commission only agreed with the idea in principle, and subsequently the text was reworded as follows:

²¹ Emphasis added.

²² Emphasis added.

²³ See e.g. Explanatory Memorandum of the Commission Proposal, p. 6. (n. 10 *supra*)

²⁴ Sentences which refer to the title of the Directive may be particularly confusing as to which substances are included. See e.g. page 9 in the Explanatory Memorandum of the Commission proposal: “The proposed Directive on the restriction of the use of *certain* hazardous substances in electrical and electronic equipment will contribute to the same [environmental protection and internal market] objectives [as the WEEE directive] by ensuring that substances causing major problems during the waste management phase, *such as* lead, mercury, cadmium, hexavalent chromium and certain brominated flame retardants are substituted. (emphasis added)

²⁵ Amended proposal for a Directive of the European Parliament and of the Council on the restriction on the use of certain hazardous substances in electrical and electronic equipment, COM/2001/0316 final, 6.6.2001. (“Commission Amended Proposal”)

²⁶ The First Reading Opinion of the European Parliament on the proposal for a Directive of the European Parliament and of the Council on the restriction on the use of certain hazardous substances in electrical and electronic equipment, 15.5.2001. (Parliament First Reading Opinion)

²⁷ Amendment 9b.

“The technical development of electrical and electronic equipment without heavy metals, PBDE and PBB should be taken into account. As soon as scientific evidence is available and taking into account the precautionary principle, the prohibition of other hazardous substances and their substitution by more environmentally friendly alternatives which ensure at least the same level of protection of consumers should be examined²⁸.”

The relevance of scientific evidence is dealt with further below. However, the point to note here is that scope is again not mentioned at all in the actual amendment, only the prohibition on certain substances - and they are two separate issues. The only hint on the Commission's thinking regarding the scope is in the ensuing clarification, which states that “This rewording is necessary in order to link the widening *of the scope* of the Directive to the new chemicals strategy”. Another part of the amended proposal, which may be indicative of the Commission's views, is the following explanatory comment: “Amendment 5 replaces the terms PBB and PBDE with 'brominated flame retardants' and cannot be accepted since the *scope* of the Directive is limited to PBB and PBDE.” These explanatory statements may have some limited value for construing the legislative intent of the parties, yet the final text remains unsatisfactory from the viewpoint of legal certainty. Another example of the vagueness is the addition below. It was drafted during the final conciliation phase on the central Article 4(1), which defines the prohibitions:

“ - - National measures restricting or prohibiting the use of *these* substances in electrical and electronic equipment which were adopted in line with Community legislation before the adoption of this Directive may be maintained until 1 July 2006.”²⁹

On the one hand, one could interpret the text that only pre-existing national measures regarding *the six prohibited substances may remain* in force when the RoHS Directive is enacted, and that even they must be abolished by 1 July 2006. *E contrario*, restrictions on any other substances would hence be prohibited already from the outset. This would indicate that the scope of the Directive is wide. However, the entire Article 4 could also be seen as limited to dealing with the six substances to begin with, disputing thus any conclusions *e contrario*.

The texts proposed by the Commission, the Parliament as well as the Council are all roughly similar on Article 2, “Scope of the Directive”. For the purposes of this analysis, the similarity is unfortunate: it means that all three institutions have focused under “scope” on the types of appliances that the directive shall cover, and on the relationship between the directive and *Community* health, safety and waste legislation.

²⁸ Recital 10, (Joint text of Conciliation). (n. 15 *supra*)

²⁹ Emphasis added.

“This Directive shall cover electrical and electronic equipment falling under the categories set out in Annex I A of Directive - - on Waste Electrical and Electronic Equipment”

“This Directive shall apply without prejudice to Community legislation on safety and health requirements and specific Community waste management legislation.”³⁰

Regrettably, the texts are thus all silent on the scope of the directive as far as the substances are concerned.

2.2 Legal basis

In proposing the RoHS Directive and the accompanying WEEE³¹ directive, the Commission has in numerous occasions noted that there is a double purpose³²: on the one hand the directive contributes to the protection of human health and the environment, on the other hand it eliminates barriers to trade and the distortion of competition in the Community in order to establish a well functioning internal market³³. Such parallel purposes have been characteristic of Community environmental legislation since its inception. This has in turn lead to a varying usage of different Treaty Articles³⁴ as the legal basis for Community legislation. Indeed, the earlier Commission draft proposals on waste electrical and electronic equipment actually integrated the separately proposed WEEE and RoHS Directives into a single law with a dual legal basis (Articles 100a (now 95) and 130s (now 175)). Nevertheless, the Commission later decided to propose two separate directives with the difference in the legal bases presumably as the key motivation behind the separation – RoHS Directive (Article 95) and the WEEE directive (Article 175).³⁵

³⁰ Articles 2(1) and 2(3), respectively. There were some differences of opinion between the institutions on the appliances to be included. Perhaps the most significant difference was that the Parliament proposed to exclude from the scope of the RoHS Directive “the spare parts and consumables for, and for the repair of, equipment placed on the market before 1 January 2006”.

³¹ Commission Proposal (n. 4 *supra*)

³² See e.g. the Explanatory Memorandum of the Commission Proposal, pp. 5 – 7.

³³ See also e.g. the *Compassion in World Farming* case: “Finally, as regards the objective of the Directive, it is apparent from the fifth and sixth recitals in its preamble that it is guided by the need, first, to eliminate the differences which, by distorting conditions of competition, `interfere with the smooth running of the organisation of the common market in calves and calf products' and, second, `to establish common minimum standards for the protection of rearing calves or calves for fattening in order to ensure rational development of production'” (paragraph 52 of the judgement). (n. 5 *supra*)

³⁴ Through the evolution of the Treaties, Articles 100, 100a, 130s and 235 have been used separately or in certain combinations.

³⁵ It could also be claimed that in actuality the legal basis of the entire original WEEE directive was under dispute. Instead of changing that to Article 95, the concession was made by DG Environment to separate the RoHS part, and use Article 95 on that part only. In this scenario, the relevance of having Article 95 as the legal basis of RoHS would be more subdued against the background of the political pressures to find a compromise solution for the entire legislative package.

The choice of Article 95 – approximation of laws - rather than the Treaty’s environmental provision Article 175, or both of them³⁶, as the legal basis for RoHS seems to give guidance on the Commission’s overall legislative objectives. The distinction between full³⁷ and minimum harmonization inherent in these two legal bases is (only) a preliminary issue: it shows that the Commission clearly attempted to integrate the market beyond the creation of a minimum requirement. To turn this the other way around: in case of minimum harmonization (Article 175), the scope of the Directive had been a much less controversial issue, because the opportunities for the Member States to raise the Community standards of protection would have been ample, even if the scope of the directive had covered all substances. Under Article 175, any substance within the scope of the directive, whether under an express EU-wide prohibition to use it or not, had been left at the national legislators’ discretion.³⁸

Further, the choice of Article 95 would seem to bear little difference to the choice of Article 175, unless the intention is to harmonize the field for *all* substances. For substances, which have been banned in their entirety, there is nothing left to “make more stringent”. The relevance of the legal basis would thus be limited to less fundamental issues, such as the exemptions from the proposed ban, the point of time when the substance bans may start, or the categories of EEE included³⁹. Clearly, these issues are not trivial: the exemption regarding the usage of lead in servers⁴⁰, for instance, touches upon a part of the IT sector. If the exemption created minimum harmonization only, the Member States would have had the right to expand the protection by limiting the exemptions. But even so, the main thrust of RoHS from the primary internal market viewpoint is nevertheless on whether or not a substance is included in the scope of the Directive and prohibited by it. The effects of the restriction spread horizontally through *all* product categories and markets. Therefore the choice of Article 95 as the legal basis implies that the intended scope of the directive was to cover *all* substances. And in any event, this deliberation reveals the core problem of the directive: in order to interpret the law properly, one needs to resort to a comprehensive and complex assessment on the relative importance of the directive’s effects.

A counter-argument against a wide scope of the RoHS Directive could be, that despite the change of a legal basis to Article 95, RoHS still contains the parallel objective of protecting the environment. The directive manifestly deals with the prohibition of *environmentally hazardous*

³⁶ The use of a dual legal basis is in itself an issue of such complexity that a further elaboration is not possible here.

³⁷ There exists some exceptions to the general rule that Article 95 establishes full harmonization.

³⁸ Within the limits of Article 175 and the rest of the TEC, obviously.

³⁹ As for the categories of EEE, it should also be noted that they are actually only indirectly dealt with in the RoHS Directive, as that refers to Annex I of the WEEE Directive, which again *is* based on Article 175.

substances. In fact, the environmental protection objective was in the Parliament First Reading Opinion⁴¹ actually lifted up as the *primary* objective of RoHS:

“The purpose of this Directive is to minimise the risks to, and impacts on, the environment and human health associated with the production, use, treatment and disposal of waste electrical and electronic equipment.”⁴²

However, it seems quite problematic to combine the Parliament’s suggested primary objective with Article 95 as the legal basis. The Commission, for instance, did not subscribe to the Parliament’s suggestion^{43, 44}.

Either way, the question to be posed here is whether the secondary or parallel objective of environmental protection may affect the suggested relationship between the selected legal basis and the scope of harmonization. In other words, would the environmental purposes of the RoHS Directive suffer from an interpretation, whereby the scope of the directive would be to cover the field of all substance restrictions?

Arguably, if the Member States are deprived of their discretion to set e.g. a ban on TBBPA as in the example above, the level of environmental protection may not be maximized. This question will be discussed in more detail below. The following conclusion may nevertheless be drawn here: the environmental objectives of RoHS to some degree obscure, yet do not seriously challenge, the previous conclusion, whereby the choice of Article 95 implies an intention to cover the field of all substance bans.

To summarize, a key motivation behind the RoHS Directive is that the diverging requirements on the phasing-out of specific substances could have implications on trade in electrical and

⁴⁰ See the Annex of the Directive (Applications of lead, mercury, cadmium and hexavalent chromium, which are exempted from the requirements of Article 4).

⁴¹ N. 25 *supra*.

⁴² Article 1, Parliament First Reading Opinion. (n. 25 *supra*)

⁴³ “Amendment 8 deletes the reference to harmonization in the objectives of the Directive and cannot be accepted, since it is important to underline that the Directive has to be based on Article 95 of the Treaty.” (OJ C 240, 28.8.2001, p. 304)

⁴⁴ In the original Council Common Position (n. 15 *supra*), a more nuanced approach was proposed. Recital 1 stated: “The disparities between the laws or administrative measures adopted by the Member States as regards the restriction of the use of hazardous substances in electrical and electronic equipment could create barriers to trade and distort competition in the Community and may thereby have a direct impact on the establishment and functioning of the internal market. It therefore appears necessary to approximate the laws of the Member States in this field *in order to* contribute to the protection of human health and the environmentally sound recovery and disposal of waste electrical and electronic equipment.” (emphasis added) This text seemed to suggest a somewhat circular relationship between the free market and environmental protection objectives: because disparities in national substance bans could create barriers to trade, they should be harmonized so as to raise the level of environmental protection. Harmonization appeared in the Council’s reasoning to inevitably, automatically contribute to environmental protection. It is unclear whether the Council first saw the RoHS Directive in the wider context of waste electrical equipment in the sense that any disparities in substance bans would be a direct impediment to the achievement of the take-back and recovery objectives of the WEEE directive. The Council’s reasoning may also have been a manifestation of the “high level of

electronic equipment⁴⁵. Therefore, the Directive aims through Article 95 to prevent in the field of electrical and electronic equipment any⁴⁶ trade barriers, which could be based on substance bans. From the viewpoint of achieving the chosen internal market objective as effectively as possible, it appears that the Directive should cover all substances. There seem to be two components in doing that: on the one hand, a general, coercive *prohibition* should be set on the use all substances, which according to the current scientific knowledge are hazardous. This serves also the parallel environmental objective of the directive. On the other hand the use of any other substance may not be restricted nationally. The obvious consequence of leaving all but the six expressly prohibited substances for the discretion of the Member States would namely be that a large part of the product markets might not meet the primary internal market objective of the Directive.

Simultaneously, however, the environmental protection objective of the RoHS Directive is in an inherent conflict with the free trade objectives, if the free market objective prevents bans on any other substances than those prohibited by the directive.

Lastly, the analysis on the exact scope of the directive through the selected legal basis creates a systemic problem. A nuanced understanding on the value balance that the overarching federal law intends to strike becomes a pre-requisite for determining its scope, and hence the division of powers regarding that field of act. Yet it is the division of powers that should form the basis for striking the value choices on state and federal level. The directive should clearly state to what extent the federally agreed balance between values prevails.

2.3 Scientific analysis

One could attempt to draw some further conclusions on the scope of RoHS from the scientific data on which the directive is based. The key question would then seem to be whether the Commission has scientifically assessed the field of substances in its entirety. Has the Community, on the basis of such overall assessment thus determined that the hazardousness and environmental risks of certain substances in EEE justify a ban on some substances, while at the same time considered a ban on other hazardous and non-hazardous substances disproportionate?

protection” target or the “integration principle” which are embedded in the TEC. However, since this very point was changed by a corrigendum soon afterwards (on 3.12.2001), it may have been simply a technical error in drafting.

⁴⁵ Explanatory memorandum of the Commission proposal, point 6.2. (n. 10 *supra*)

⁴⁶ In accordance with Article 1 and recital 1 (see above).

It should be noted, that the level of protection achieved by the ban of (“only”) six substances cannot as such be seen as evidence of incomplete harmonisation⁴⁷. Complete harmonization may regulate a field unevenly. Furthermore, on an *Community level* value assessment, the proposals of the Commission must be based on a high level of environmental protection by virtue of Article 95(3) TEC. Individual Member States may naturally have diverging views on the actual level selected.

In general terms, the Commission has summarized the scientific basis on which the restrictions of Article 4 RoHS have been established in Annex 4 of the Proposal:

“The substances under consideration have been evaluated by a number of national authorities or competent international institutions, like the WHO, IARC, OECD, etc. The risk assessment of the Commission is based on the risk assessments as well as scientific evaluation carried out by the responsible national and/or international authorities or institutions, *adapted to the factual situation in the European Community and its Member States*. It also takes *into account the latest scientific information available on risks posed by these*⁴⁸ substances.”⁴⁹

The Commission further notes that the strategy of the RoHS Directive - to reduce environmental risk by the restriction and the consequent substitution of hazardous materials - is based on currently available scientific risk assessments, and will be reviewed on the basis of future scientific developments.⁵⁰ Other issues, such as technical and economic feasibility and the health and safety of users, have also been taken into account in determining the restrictions. As a matter of fact, recital 7 states:

“The substances *covered by this Directive* are scientifically well researched and evaluated and have been subject to different measures both at Community and national level.”⁵¹

This wording actually appears to indicate that the Commission may have intended the scope of the directive only to cover the substances, which are explicitly restricted by the directive. The selection of bibliographic and scientific material could then imply that the Commission has focused on certain substances only. However, this conclusion seems to be far fetched. The list on the scope of scientific tests does not have negative probative value, as it seems practically impossible to scientifically carve out a group of hazardous materials without any reference to materials other than those selected. Rather than implying this type of a restricted focus, it seems

⁴⁷ See also the opinion of Advocate General Léger in the *Compassion in World Farming* case, paragraph 56. (n. 5 *supra*)

⁴⁸ The term *these* here seems to point to a select group of substances, which could be either the six selected substances, or hazardous substances in general.

⁴⁹ Commission Proposal, Annex IV, Memorandum on scientific evaluation regarding the substitution requirement set out in Article 4 of the [RoHS] Proposal - . See also Recital 8 of the Commission Proposal. (n. 10 *supra*)

⁵⁰ See section 7 in Annex IV.

much more likely that the scientific reference material has afterwards been limited to the most important, banned materials, and also to the materials where there is any scientifically relevant data available. The explanatory memorandum and amended proposal of the Commission⁵², support a view that the Commission considered a wider array of substances, such as heavy metals, as e.g. the following extracts show:

“the most environmentally problematic substances contained in these components are heavy metals, *such as* mercury, lead, cadmium and chromium, halogenated substances, *such as chlorofluorocarbons (CFCs), polychlorinated biphenyls (PCBs), polyvinyl chloride (PVC)* and brominated flame retardants *as well as asbestos and arsenic*⁵³ (emphasis added on substances, which do not appear on the list of six banned substances in RoHS).

"On the basis of a proposal from the Commission, the European Parliament and the Council shall decide, *as soon as scientific evidence is available*, and in accordance with the principles set out in the Chemicals Strategy, on the prohibition of other hazardous substances and the substitution thereof by more environment-friendly alternatives which ensure at least the same level of protection for consumers."⁵⁴

A wide interpretation would be roughly analogous to that of the Court in the case *Commission v. United Kingdom* (“Dim-dip lighting devices”)⁵⁵. In that case, the Court tried to establish whether the intention of the directive 76/756 on the installation of car lighting devices had been to deal with a special type of “dim-dip” lighting arrangements required by UK regulations. The dim-dip lights were not explicitly mentioned in the Directive. However,

“It is clear from the documents before the Court that the reason for which dim-dip devices were not included in the provisions, even as optional devices, is that the technical committee of national experts did not consider them acceptable given the state of technical progress at the time. In addition, it was not considered appropriate to adapt Directive 76/756/EEC, after its entry into force, so as to take account of technical progress - - by bringing dim-dip devices within the scope of the latter directive.”⁵⁶

Thus, in the Court’s opinion the dim-dip devices had been scientifically assessed during the legislative process; the institutions had simply considered them inappropriate for Community level protection and thus purposefully left them out of the directive. In other words, the devices were within scope of the directive, although in the (negative) sense of *not* appearing in the Annex, and thus not being allowed. The Court also concluded that the deliberate exclusion was well commensurate with the free movement objective of the directive.

⁵¹ Commission Proposal and Joint text of Conciliation, emphasis added. (n. 10 and 15 *supra*)

⁵² This amended text was to subsequently constitute Article 4(3) of the Directive in a slightly altered form. The text is further discussed in section 2.5.

⁵³ Explanatory memorandum of the Commission proposal, p. 8 (Section 4). (n. 10 *supra*)

⁵⁴ Proposed amendments 10 and 22 in the First Reading of the European Parliament. (Emphases added)

⁵⁵ Case 60/86, *Commission v. United Kingdom*, [1988] E.C.R. 3921, (“Dim-dip lighting devices”).

⁵⁶ Paragraph 10 of the judgment.

“Such an interpretation of the exhaustive nature of the list of lighting and light-signaling devices set out in Annex I to the directive is consistent with the purpose of Directive 70/156/EEC which is to reduce, and even eliminate, hindrances to trade within the Community resulting from the fact that mandatory technical requirements differ from one Member State to another - - .”⁵⁷

To sum up, assessing the scientific material on an environmental basis, the Commission has compared the scientific justifications of a substance ban with other environmental protection measures, such as the extensive take-back and recovery obligations. These latter regulatory tools are the core of the parallel WEEE directive. In simple terms it appears, that for less hazardous substances the WEEE takeback is sufficient, and for those substances *the WEEE* directive is the level of protection that is required - not a ban. In addition, the Commission has considered the general proportionality of the bans, as well as the availability of substitute materials for the banned substances.

2.4 The precautionary principle

The Community policy on the environment shall be based on the precautionary principle⁵⁸. Consequently the Institutions must consider the scientific evidence on the hazardous substances from a precautionary angle. Recital 10 of the Joint text of Conciliation states:

“The technical development of electrical and electronic equipment without heavy metals, PBDE and PBB should be taken into account. As soon as scientific evidence is available and *taking into account the precautionary principle*, the prohibition of other hazardous substances and their substitution by more environmentally friendly alternatives which ensure at least the same level of protection of consumers should be examined.”⁵⁹

The application of the precautionary principle will reduce the likelihood that harmonization has overlooked or will overlook any substances that are likely to be hazardous in EEE. That in turn would seem to support the opinion that the RoHS Directive covers the field of all other substances: the Community considered a ban for those substances unnecessary and/or disproportionate – even from a cautious standpoint. In the absence of the precautionary principle, the Community might not have acted until it had absolute scientific proof of an environmental risk⁶⁰. This would have left the grey area of “potential risks” larger, hence

⁵⁷ Paragraph 11 of the judgment.

⁵⁸ Communication from the Commission on the Precautionary principle (COM (2000) 1) states: “The precautionary principle is not defined in the Treaty, which prescribes it only once [Article 174(2), *HK*]- to protect the environment. But in practice, its scope is much wider, and specifically where preliminary objective scientific evaluation, indicates that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the high level of protection chosen for the Community.” (Paragraph 3, Summary)

⁵⁹ Emphasis added.

⁶⁰ See Article 174(3) TEC, which states: “In preparing its policy on the environment, the Community shall take account of: - - available scientific and technical data - - ”

supporting more discretion for the individual states, who do apply the precautionary principle and whose view of a “high level of protection” might differ from that of the Community.

The Parliament went even a step further. It suggested a reversed burden of proof in assessing the ban on brominated flame retardants. This approach seems already quite far-fetched.

"In its review, the Commission shall consider to propose substituting brominated flame retardants when effective fire prevention alternatives are available, unless it *can be demonstrated* that brominated flame retardants *do not* give rise to concern in accordance with the principles set out in the Chemicals Strategy."⁶¹

At the same time the Member States retain naturally their right to apply the precautionary principle. Their understanding of the level of protection that a precautionary approach requires may naturally differ from that of the Community. However, the fact that *the Community* is required to follow the principle, will only limit the scope of Member States actions, and hence increase the scope of the RoHS.

2.5 Amending the list of restricted substances and the exemptions

Some observations regarding the scope of the RoHS Directive may also be made on the basis of the processes that are foreseen for altering the list of prohibited substances and the exemptions of the Directive. Article 5(1) of the Commission proposal states that

Any amendments which are necessary in order to adapt *the Annex* to scientific and technical progress for the following purposes shall be adopted in accordance with the procedure referred to in Article 7(2): - -

This paragraph indicates that the Annex of the RoHS Directive, which determines the exemptions to the set restrictions⁶², may be updated through the comitology procedure. In other words, the lighter, Commission-lead implementation procedure is used for adjusting the few exceptional cases, where the general substance ban should not be applied. The exceptions apply “where substitution is not feasible or the potential negative environmental and/or health impacts caused by substitution outweigh the environmental benefits of the substitution”⁶³.

Other amendments, including those regarding the prohibited substances (Article 4(1)), are dealt with in Article 4(3):

“On the basis of a proposal from the Commission, the European Parliament and the Council shall decide, as soon as scientific evidence is available, and in accordance with the principles on chemicals policy as laid down in the 6th Environment Action Programme, on the prohibition of other hazardous substances

⁶¹ See also Environment Daily, 4.3.2002, “Pronk imposes precautionary flame retardant ban”.

⁶² For example, despite the general prohibition to use lead in EEE, it may be used for radiation protection.

⁶³ Explanatory memorandum of the Commission proposal, p. 55. (n. 10 *supra*)

and the substitution thereof by more environment-friendly alternatives which ensure at least the same level of protection for consumers.”

The text requires the Commission to review the restrictions, and in that context to monitor the latest scientific developments. By reference to the co-deciding Council and the Parliament, the Article therefore implicitly determines an ordinary amendment to the directive is needed in accordance with the full procedure of Article 251 in order to then *actually change* the list of banned substances on the basis of Commission’s proposal.

However, the European Parliament had actually proposed in the first reading the following text for Articles 4(2) and 5(1):

“Paragraph 1 [i.e. the ban] shall not apply to the applications of lead, mercury, cadmium and hexavalent chromium listed in the Annex. The European *Parliament and the Council shall decide, as soon as the necessary scientific data and the findings of risk analyses are available*, and without prejudice to the powers of the Commission, *on the prohibition of other hazardous substances* and the substitution thereof by more environment-friendly alternatives which ensure at least the same level of protection for consumers (emphasis added).”⁶⁴

“Any amendments which are necessary in order *to add substances to Article 4(1)* or adapt the Annex to scientific and technical progress for the following purposes *shall be adopted in accordance with the procedure referred to in Article 7(2)* (emphasis added).”⁶⁵

The first thing to note here is that the Parliament’s suggested text appears to support the conclusion drawn earlier: the text today restricts all substances, on which the necessary scientific data and risk analyses are available. New substances may be added only once there will be *new* scientific evidence to support such inclusions. This implies, that the RoHS Directive today restricts anything that there is scientifically proven to be worth restricting.

Taking into account the (primary) free movement objective of the directive, a wide scope of the directive seems therefore logical. But what is the procedure foreseen for amending the restrictions? The Parliament’s suggestion for Article 4(2) speaks broadly of the Council and the Parliament, but the amendment for Article 5(1) is explicit: amendments to the restricted substances should be executed through the comitology procedure. This is a clear expansion to the Commission’s original text, which suggested that only the *exemptions* to the restrictions should be decided in the relevant committee. Taking into account the central importance of the list of restrictions, the use of comitology procedure appears open to criticism. The general lack of transparency and openness⁶⁶ as well as the limited accessibility to other institutions and judicial

⁶⁴ Article 4(2) as amended by the Parliament First Reading opinion. (n. 25 *supra*)

⁶⁵ Article 5(1), *ibid.*

⁶⁶ The Commission as well as the Parliament have indeed tried to address this problem to some degree. The Commission has included a requirement to the comitology procedure, whereby the producers of EEE

review, seem ill-suited for amending such a key provision.⁶⁷ It is besides the point here to further elaborate on these shortcomings, or on the Parliament's rationale in *limiting* its own powers to control the amendments by expanding the applicability of the comitology system⁶⁸. The point worth noting is that the proposed comitology system has implications in assessing the scope of the RoHS Directive.

It seems namely clear, that the comitology system can only be exercised within the scope of the proposed basic instrument. The role of the Regulatory Committee is limited to the *implementation* of the Directive. In fact, the Parliament's (sole) role in the Regulatory Committee is to supervise that the measures proposed by the Commission do *not* exceed its implementing powers⁶⁹. Since the Commission would have been, by virtue of the Parliament's suggested Articles 4(2) and 5(1), entitled to expand the list of restricted substances through the Regulatory Committee, the scope of the RoHS Directive would also cover *all* substances. With the entire field harmonised, the actual restrictions may hence be adjusted through a lighter procedure in accordance with new scientific evidence. Otherwise the Parliament would be shooting itself in the foot by including text, which *expands* the powers of the Commission beyond what the procedure allows.

This conclusion seems well supported by recital 7 of the Comitology Decision⁷⁰, which elaborates the Regulatory procedure⁷¹ in the following manner:

(7) The regulatory procedure should be followed as regards measures of general scope designed to *apply essential provisions* of basic instruments, including measures concerning the protection of the health or safety of humans, animals or plants, as well as measures *designed to adapt or update certain non-essential*

shall be consulted before the committee decides to amend the *exemptions*. The Parliament has expanded the list of parties to be consulted to recyclers, treatment operators, environmental organisations and employee and consumer associations. However, the consultation process does not take into account the fact that the Parliament has expanded the comitology procedure to amending the actual list of prohibitions, too: consultation is only required when the *exemptions* are reviewed. This seems illogical, and may simply be an unintended blunder from the Parliament's part.

⁶⁷ See e.g. de Búrca, G. (1999) *The Institutional Development of the EU: a Constitutional Analysis*, pp. 69-75, in: P.Craig and G. de Búrca (eds.) *The Evolution of EU Law*. Oxford University Press: Oxford.

⁶⁸ The role of the Parliament in the Regulatory Committee – despite the amendments that have recently been made to the comitology system - is very limited in comparison with its role as the “parallel legislator” under the co-decision procedure of Article 251.

⁶⁹ Recital 9 of the Comitology Decision states: “The second purpose of this Decision - - is to Parliament an opportunity to have its views taken into consideration by, respectively, the Commission or the Council in cases where it considers that, respectively, a draft measure submitted to a committee or a proposal submitted to the Council under the regulatory procedure exceeds the implementing powers provided for in the basic instrument

⁷⁰ Council Decision (1999/468/EC) laying down the procedures for the exercise of implementing powers conferred on the Commission.

⁷¹ The Comitology Decision has three different procedures: the advisory procedure, the management procedure and the regulatory procedure. In the regulatory procedure, the involvement of the Council and the Parliament is the greatest. This implies that the decisions taken in the Regulatory procedure may be characterised as the most influential ones.

provisions of a basic instrument; such implementing measures should be adopted by an effective procedure which complies in full with the Commission's right of initiative in legislative matters;

It does not seem entirely clear in which role the Parliament has introduced the regulatory process for amending the restrictions. One can hardly categorize an amendment of the restricted substances list as “a non-essential provision”, as it is likely to affect hundreds of EEE producers, recyclers etc. worldwide. At the same time the amendment is not an “application” of a provision, either. The categorization as a “non-essential provision” would clearly support a broad scope of the RoHS Directive, whereas the application approach would not. It should nevertheless be noted that the Parliament’s opinion does not support entirely consistently a wide scope for RoHS. The Opinion has namely parts, which are more obscure on the scope of the substances covered.⁷²

Finally, moving back from the Parliament’s proposals to the Joint text of Conciliation, reflections on one further aspect are at place. It may namely be claimed, that the *inapplicability* of the comitology procedure to review the prohibition of Article 4 implies, that the field of all other substances is *not* harmonized. The comitology procedure does not apply to prohibiting other substances, because they are not in the scope of the Directive. In this thinking, the Community legislation exists only where the law explicitly so determines. The counter-argument to this is, however, that the extent of the comitology system has only positive probative value; it can only confirm the scope of harmonization, but does not explain why it has *not* been applied to something. The reason on the inapplicability of comitology may namely also lie on matters other than the scope of the law.

2.6 Comparative views and case law

The question on the precise scope of Community harmonisation is in principle in-built in all Community acts. It seems therefore useful to analyse how the scope of Community law is defined in acts, which resemble the RoHS Directive. In addition, the Court of Justice has had a few occasions to pronounce its view on the matter.

⁷² The following paragraph could imply, that only the currently restricted substances have been (carefully) considered so far: “Article 5(4): “By 31 December 2003 at the latest, the Commission shall review the measures provided for in this Directive to take into account, as necessary, new scientific evidence. In its review, the Commission shall propose substituting brominated flame retardants when effective fire prevention alternatives are available, unless it can be demonstrated that brominated flame retardants do not give rise to concern in accordance with the principles set out in the chemicals strategy. Particular attention shall be paid during the review to the impact on the environment and on human health of other hazardous substances and materials used in electrical and electronic equipment, in particular hydrofluorocarbons (HFCs), PVC and other halogenated flame retardants. The Commission shall examine the feasibility of substituting such substances and materials and shall come forward with proposals to the European Parliament and the Council to extend the requirements laid down in Article 4, as appropriate.”

2.6.1 Plant Protection Directive⁷³ and case *Nijman*⁷⁴

This directive provides a particularly interesting point of comparison for the discussion on RoHS. It not only deals with the prohibition of a product group on the basis that they contain certain dangerous substances as does RoHS, but it has also been scrutinized by the Court of Justice in the case “*Nijman*⁷⁵”. The judgment of the Court stated:

[- -]he prohibition imposed by Directive 79/117/EEC of marketing and using plant-protection products containing certain active substances applies only, *by virtue of Article 3* thereof, to the substances listed in the annex . Directive 79/117/EEC does not *therefore* pursue complete harmonization of national rules concerning the marketing and use of plant-protection products⁷⁶.

Article 3 of the Directive states:

Member States shall ensure that plant protection products containing *one or more of the active substances listed in the Annex* may be neither placed on the market nor used .

Looking at the Directive as a whole, it seems indeed correct to say that it does not pursue complete harmonization of all marketing and use of plant protection products. It is still a bit surprising that the Court has reclined in its conclusion on Article 3, instead of Article 1 and the related recitals. The latter read:

1. This directive concerns prohibition of the placing on the market and use of plant protection products containing *certain* active substances.

Whereas the member states have therefore not only controlled the marketing of *plant protection products* but have also introduced, for *certain* plant protection products, restrictions or prohibitions of use covering also their marketing (emphasis added);

Whereas it is therefore desirable to eliminate these obstacles by aligning the *relevant* provisions laid down in the member states by law, regulation or administrative provision (emphasis added);

Article 1 and the recitals imply clearly that the objective⁷⁷ of the Directive is not to strive for complete harmonization in the field. The role of Article 3 in the plant protection directive appears on the other hand to be to determine the specific legal obligation for the Member States *in order to achieve* the set objective. As has been explained above in the context of the RoHS Directive,

⁷³ Council Directive (79/117/EEC) prohibiting the placing on the market and use of plant protection products containing certain active substances. (“Plant Protection Directive”)

⁷⁴ Case 125/88, *Criminal proceedings against H. F. M. Nijman* [1989] E.C.R. 3533.

⁷⁵ *Ibid.*

⁷⁶ Paragraph 7 of the judgement.

⁷⁷ The reason why the Plant Protection Directive (n. 71 *supra*) (or the Marketing of Certain Dangerous Substances Directive described further below) does not specifically refer to ‘approximation of laws’ as its objective is probably a question of legislative techniques. These two acts were passed in the late 1970s, and at that time the structure of the directives was customarily somewhat different from that of the more

it appears contestable to assume that since the *prohibition* is limited to products with some substances only, the directive itself could not *therefore*⁷⁸ aim at full harmonisation. The point of full harmonization as *such* is – as long as one does not prohibit products with any substances, including the perfectly safe ones – to determine that there are no restrictions to the free movement of hazardous *or* non-hazardous products. The Court seems to imply that full harmonization in the field could only happen by including all substances in the (prohibition) Annex.

In any event, the difference to the RoHS - including its Article 1 - is apparent. Therefore the conclusions of the Court as to the scope of the Plant Protection Directive do *not* give determining guidance as to the scope of the RoHS Directive.

2.6.2 The EC waste directive⁷⁹ and case *Cinisello Balsamo*⁸⁰

The Court's judgement in the *Cinisello Balsamo* case dealt with the scope of one of EC's earliest environmental laws: Waste Directive, which regulates waste management in the Member States with broad brushstrokes. The case concerned an Italian municipality Cinisello Balsamo, whose mayor had prohibited the selling of non-biodegradable plastic bags in the area. The producers of such plastic products challenged the prohibition as contrary to the EC Waste Directive. They claimed that the Waste directive granted EEC nationals a right – a right which national courts must uphold even against Member State legislation - under the Community law to sell or use the plastic bags. The Court, however, remained unwavering:

“[Directive 75/442/EEC] does not prohibit the sale or use of any product whatsoever, but nor can it be inferred that it prevents Member States from imposing such prohibitions in order to protect the environment.”⁸¹

At first sight, this case seems to offer a benchmark in determining the limits of the RoHS Directive. Even though the Waste directive's material scope was wide enough to cover the product in question (non-biodegradable plastic bag), the Court drew limits as to how the obligations of the directive could and could not be interpreted. It was not possible to infer *contrario* from the text of the act, that anything not specifically regulated (prohibited) within the general scope of the directive could not be regulated (prohibited) by the Member States, either. In other words, the judgment refused to extend the pre-emptive scope of the directive beyond the positive norms set therein.

modern directives. The approximation of laws –aim is, however, mentioned in the preambles of the both directives.

⁷⁸ See paragraph 7 of the Court's judgement *supra*.

⁷⁹ Council Directive 75/442/EEC on Waste.

⁸⁰ Case 380/87, *Enichem Base and others v Comune di Cinisello Balsamo*, [1989] E.C.R. 2491.

⁸¹ Paragraph 7 of the judgment. (Ibid.)

The problem with this analogy, however, lies in the generality of the Waste directive. The Waste Directive as a general framework directive had laid out a wide array of principles on waste management in the EC. As the Court pointed out, it did not for instance prohibit anything. In these respects the Waste Directive is clearly different from the RoHS Directive, which *is* very specific, and which *does* define a clear prohibition on six substances. This improves the plausibility of an *e contrario* inference regarding RoHS considerably: a directive, which is set out to regulate all hazardous substances, but prohibits only some of them, could be interpreted to restrict such prohibitions on all other substances. As was seen earlier, this argument is further enforced by the fact that a primary objective of RoHS is to improve the functioning of the internal market. It has Article 95 as the legal basis, whereas the Waste Directive has a dual legal basis of Articles ex-100 and ex-235⁸². Therefore the environmental objectives in RoHS appear secondary. This conclusion regarding the role of environmental objectives may be contrasted with the Court's reasoning in *Cinisello Balsamo*:

As is apparent from Article 3, the directive is intended *inter alia* to encourage national measures likely to prevent the production of waste. Limitation or prohibition of the sale or use of products such as non-biodegradable containers is conducive to the attainment of that objective.⁸³

Would it thus be considered “conducive of environmental protection” to prohibit the sales of, say, EEE containing a TBBPA? Even if environmental protection is probably “only” a secondary objective of the RoHS Directive, it might still be sufficient to justify a national ban.

2.6.3 Pesticide Residues Directive⁸⁴ and case *Cacchiarelli and Stanghellini*⁸⁵

The Pesticide Residues Directive is yet another directive, which deals with prohibitions of substances in certain products. Its scope has also been under the scrutiny of the Court. As a preliminary remark it can be noted that this directive is quite explicit about its scope. The title of the Directive, as well as certain key provisions are as follows:

“Council Directive - - on the fixing of maximum levels for pesticide residues in and on *certain* products of plant origin, including fruit and vegetables.”⁸⁶

“ - - possibility for Member States to authorize higher levels [of residues] should be withdrawn and maximum levels mandatory in all Member States should be fixed for *certain* active substances - - “. ⁸⁷

⁸² In the absence of environmental Treaty provisions, recourse to provision 235 (“implied powers”) was common.

⁸³ Paragraph 8 of the judgement. (n. 78 *supra*)

⁸⁴ Council Directive 90/642/EEC on the fixing of maximum levels for pesticide residues in and on certain products of plant origin, including fruit and vegetables. (“Pesticide residues Directive”)

⁸⁵ Joined cases C-54/94 and C-74/94, *Criminal proceedings against Ulderico Cacchiarelli and Gino Stanghellini*, [1995] E.C.R. I-391.

⁸⁶ The title of the directive.

“This Directive shall apply to products within *the groups specified in column 1 of the Annex*.
The list of pesticide residues concerned and their maximum levels shall be established by the Council.”⁸⁸

The Court of Justice found the scope rather straightforward to determine. In the case *Cacchiarelli and Stanghellini*⁸⁹ - which dealt with the maximum levels of Chloropham and Propham in potatoes in Italy - the Court observed that although potatoes are mentioned as products in the Annex of the Pesticide residues Directive, the two substances do *not* appear on the Council’s list⁹⁰. Therefore, there is no Community legislation on the matter, and “it is for the national legislature to set the maximum permissible levels for the residues of the products in question - -”⁹¹. Again, however, the Pesticide Residues Directive is explicit about the scope of the law *both* as regards the products and the substances⁹² in them. Therefore it does not provide further guidance on interpreting the vague scope of the RoHS Directive. It does, however, offer a good example on how the scope of a directive may be determined in precise terms.

One further observation. The Pesticide Residues Directive namely contains – *unlike* the RoHS Directive – a “free movement clause” in Article 5⁹³. The relevance of such clauses will be dealt with in section 3.1 on express pre-emption.

2.6.4 Battery Directive⁹⁴

The EC Battery directive may be seen in many ways as a predecessor of the WEEE and RoHS Directives. It deals with prohibitions on and take-back of batteries and accumulators. For the purposes of this analysis, it is worthwhile to note how the battery directive, is limited in scope. It applies to “batteries and accumulators containing *certain dangerous substances*”.⁹⁵

The Battery Directive, too, appears to be therefore more precisely defined than the RoHS. Annex 1 determines the “batteries and accumulators covered by the directive”. In simplified terms, they include batteries, which surpass the set limit values of lead, cadmium and mercury

⁸⁷ Recital 9.

⁸⁸ Article 1(1).

⁸⁹ N. 83 *supra*.

⁹⁰ Paragraph 12 of the judgment.

⁹¹ Paragraph 14 of the judgment.

⁹² The residues are set separately, but expressly.

⁹³ Member States may not prohibit or impede the putting into circulation within their territories of the products referred to in Article 1 *on the grounds that they contain pesticide residues*, if the quantity of such residues in and on the products or parts of products concerned does not exceed the maximum levels specified in the list referred to in Article 1.

⁹⁴ Council Directive 91/157/EEC on batteries and accumulators containing certain dangerous substances, as amended by Commission Directive 98/101/EC adapting to technical progress Directive 91/157/EEC. (“Battery Directive”)

⁹⁵ The RoHS Directive and the Battery Directive also share the internal market legal basis (Article 95, ex 100a).

content⁹⁶. The directive *prohibits* altogether the marketing of alkaline manganese batteries that contain mercury⁹⁷. Other batteries that contain mercury or the other substances (i.e. lead and/or cadmium), may be marketed, but must be e.g. collected separately and marked properly.

The prohibition clause of the Battery directive is therefore similar to the Article 4 of RoHS, even if the RoHS Directive does not determine any limit values, but rather prohibits the listed substances altogether⁹⁸. However, in the Battery directive the set *prohibition* fits better together with the directive's objective, which is defined in Article 1 and the recitals, respectively:

“The aim of this Directive is to approximate the laws of the Member States on the recovery and controlled disposal of *those* spent batteries and accumulators *containing dangerous substances in accordance with Annex 1.*”

“Whereas, the objectives and principles of the Community's environment policy, as set out in the European Community action programmes on the environment on the basis of the principles enshrined in Article 130r (1) and (2) of the EEC Treaty, aim in particular at *preventing, reducing and as far as possible eliminating pollution* and ensuring sound management of raw materials resources, on the basis of the 'polluter pays' principle; Whereas, in order to achieve these objectives, the marketing of *certain batteries and accumulators should be prohibited*, in view of the amount of dangerous substances they contain;”

This construction, too, has some ambiguities⁹⁹. However, together with Article 2 it becomes clearer that the Battery directive only approximates the laws of the Member States on lead, mercury and cadmium batteries in accordance with Article 1. Similarly, the above quoted recital becomes logical. Only *certain* – i.e. alkaline manganese batteries containing mercury – will be *prohibited*. The scope of the Directive as a whole is different from the prohibition it sets, as could be the case with the RoHS Directive.

⁹⁶ The limit values are more than 25 mg mercury per cell (except alkaline manganese batteries); more than 0,025 % cadmium per weight, more than 0,4 % lead per weight and alkaline manganese batteries containing more than 0.025 % mercury per weight.

⁹⁷ All alkaline manganese batteries which fall under the directive's scope by containing more than 0.025 % mercury per weight are prohibited, except some alkaline manganese batteries which are meant for extreme conditions. The latter have a higher absolute limit of mercury (0,05%).

⁹⁸ The practical applicability of such a 0 % ban – taking into account the background – may be contested, but is besides the point here. Background values will be defined by the Commission later.

⁹⁹ Article 2 namely creates a “joint” definition ‘battery or accumulator’, rather than defining a ‘battery’ and an ‘accumulator’ separately. This may seem trivial, but if one tries to make a distinction between the batteries and accumulators that are covered in the scope of the directive, it may be important. I assume here that any word ‘battery’ mentioned in the directive means a battery in the sense of Article 2 (i.e. a source of electrical energy - - as listed in Annex 1), even if one speaks of e.g. ‘battery *and* accumulator’ or ‘battery’ separately⁹⁹. This makes the above noted objective of the directive (Article 1) somewhat tautophonous: “the directive approximates laws - - of those spent [sources of electrical energy - - listed in Annex 1] containing dangerous substances in accordance with Annex 1”.

Despite some further unclarity¹⁰⁰, the Battery directive is still constructed in a clearer way than the RoHS Directive, which aims at approximating the laws on the restrictions on any or some substances in EEE in general, and then defines some substances as specifically prohibited. The construction in the Battery directive clearly shows how the scope and prohibition are two separate issues.

Another difference between the RoHS and Battery directives is that there is no “free movement clause” in RoHS. The relevance of the ‘free movement clause’ will be discussed later in section 3.1. In any event, Article 9 of the Battery Directive states:

“Member States may not impede, prohibit or restrict the marketing of batteries and accumulators covered by this Directive and conforming to the provisions laid down herein.”

2.6.5 Marketing of Dangerous Substances Directive¹⁰¹, cases *Burstein*¹⁰² and *Toolex*¹⁰³

This horizontal directive has been enacted with a dual objective, which resembles that of RoHS. On the one hand the marketing of dangerous substances should be dealt with in order to protect the environment. On the other hand such protective measures on Member State level could distort the functioning of the internal market.

As far as the scope of the Marketing of Dangerous Substances Directive is concerned, Article 1 once again is crucial:

“[this directive,] without prejudice to the application of other relevant Community provisions, [- -] is concerned with restricting the marketing and use in the Member States of the Community, of the dangerous substances and preparations *listed in the Annex*.”

As may be noted, the Directive specifically delimits itself here to a list of substances and preparations. It is also noteworthy that the approximation of laws is *not* as such noted in the objective¹⁰⁴.

¹⁰⁰ The confusing part in the Battery Directive is Article 6 on the recovery programmes. Member States shall e.g. reduce the heavy-metal content of batteries and accumulators. In accordance with above, this refers to the batteries and accumulators of Annex 1. However, the Directive then states that a gradual reduction in household waste and a separate disposal is required of “batteries and accumulators covered by Annex 1”. Why is there a need to mention Annex 1 separately here? Do the other requirements, such as the reduction of heavy-metal content, refer to *any* batteries, after all?

¹⁰¹ Council Directive (76/769/EEC) on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations. (Marketing of Dangerous Substances Directive)

¹⁰² Case C-127/97, *Willi Burstein v Freistaat Bayern* [1998] E.C.R. I-6005. (“Burstein”)

¹⁰³ Case C-473/98, *Kemikalieinspektionen v Toolex Alpha AB* [2000] E.C.R. I-5681 (“Toolex”)

¹⁰⁴ See Plant protection directive, n. 71 *supra*.

The recitals are nevertheless wider. The problem to the internal market is indeed noted and linked to the fact that the Member States address *all* dangerous substances through national laws. Consequently, the solution sought for is also laid out in these broad terms:

“Whereas [any rules concerning the placing on the market of *dangerous substances*] should contribute to the protection of the environment from *all substances and preparations which have characteristics of ecotoxicity* or which could pollute the environment;”

“Whereas *dangerous substances* and preparations are governed by rules in the Member States; whereas these rules differ as to the conditions of their marketing and use; whereas these differences constitute an obstacle to trade and directly affect the establishment and functioning of the common market;”

“Whereas *this obstacle should therefore be removed; whereas this entails approximating the laws* governing the matter in the Member States;”

Thus, in the Marketing of Dangerous Substances Directive the approach is one of setting a precise scope against a broader set of presuppositions. Article 2 is in line with this, requiring the Member States to take all necessary measures to ensure that the substances *listed in the Annex* are subject to the conditions specified therein. The scope of the Directive on the Marketing of Dangerous Substances appears therefore quite clearly defined in comparison with the RoHS Directive.

This conclusion seems to be affirmed by the Court’s judgment in the *Burstein*¹⁰⁵ and *Toolex*¹⁰⁶ cases, although the cases bring forth other interesting unclaritys. The Court concludes in *Toolex*, closely following Advocate General Mischo’s opinion, that the disputed trichloroethylene is not among the dangerous, restricted substances and preparations listed in the Annex to the marketing directive. Both the Court and the Advocate General also make the conclusion that the marketing directive does no more than state certain minimum requirements:

“Given that the marketing directive, in itself, does no more than *state certain minimum requirements*, - - it clearly presents no obstacle to the regulation by the Member States of the marketing of *substances that do not fall within its scope*, such as trichloroethylene.”

However, that in itself does not seem sufficient to conclude that the Member States are free to regulate on the substance. Indeed, it is not clear how the Court sees the relationship between the minimum requirements and the scope of the directive. Do the “minimum requirements” here refer to the level of protection *within* the scope of the directive, or do they somehow (also) determine the scope? Or does the Court imply that if the Member States are free to regulate

¹⁰⁵ N. 100, *supra*.

¹⁰⁶ N. 101, *supra*.

within the scope of the (minimum harmonising) directive, they may automatically do so outside the scope of the act?

At this point it is worth noting that the Directive on Marketing of Dangerous Substances is based on Article 100¹⁰⁷, which prevalently creates total harmonisation. This fact became apparent in the *Burstein* case, which dealt with a German restriction on PCP. The maintenance of the German provisions, which set a level of environmental protection on PCP that was more stringent than that of the (amended¹⁰⁸) Directive, required Commission's confirmation pursuant to the safe-guard clause of Article 100a(4). Hence, it seems difficult to perceive why the Court in *Toolex* stated that the marketing directive "does no more than *state certain minimum requirements*", and base that reasoning on *Burstein*.

The *Burstein* judgment concluded namely merely, that the scope of the Restrictions on Marketing Directive is limited to preparations *produced from* the listed substances, and does not therefore harmonize the rules regarding products which are *treated with* these substances. Thus, "the Member States remain in principle free to fix limit values for *such* products independently"¹⁰⁹. The Court thus distinguished two types of products, and decided that the Directive, including the entire list of substances therein, applied to one type (those *made from* certain substances), but generally not¹¹⁰ to the other (those *treated with* certain substances).

It seems difficult to infer from this, that the Directive only sets a minimum requirement, just as it seems difficult to combine that conclusion with the used legal basis (100 and 100a) and Germany's reliance¹¹¹ on the safeguard clauses. It perhaps could have been possible to perceive "treatment" as a phase which followed "production" in a preparation's lifecycle in a way, that a rule on the treatment of the product would mean a more stringent requirement on marketing than a rule on the mere production. However, it seems more plausible to argue that "marketing and use" as defined in the directive was simply confined to production, and excluded subsequent treatment. The rules on treatment would therefore fall *outside the scope* of the directive, rather than constitute a tightening of the set minimum requirements.

¹⁰⁷ The subsequent amendment of the law by Council Directive 91/173/EEC was based on Article 100a TEC.

¹⁰⁸ See footnote *supra*.

¹⁰⁹ *Burstein*, paragraph 31 (n. 100 *supra*).

¹¹⁰ As a matter of fact, the Court noted that the Directive applied to products *treated with* the substances as well, but only in the rare cases that such application had been explicitly defined in the directive.

¹¹¹ The deliberations of the judgment do not reveal, whether Germany had seen the invoking of the safeguard clause necessary in order to preserve the national rules on the *treatment* of products with PCP. In other words, it is not evident whether the Germans understood the treatment rules as "more stringent measures" which they were required to notify, or if there were other aspects in the PCP-rules that triggered the notification. It would namely seem evident that measures beyond the scope of the directive would *not* necessitate the invoking of a safeguard clause.

Thus, when the scope of a directive is defined from more than a single angle as in *Burstein*, it will become increasingly difficult to separate the scope of an law from the level of protection it sets. This, in turn, will have consequences on the distribution of competences between the Community and the Member States. If a limit of a full-harmonization Community directive is considered to form the “scope” of the act, anything outside it remains at a Member State’s full legislative discretion. If on the other hand that limit forms the level of protection *within the scope*, the Member State may be precluded¹¹² from acting (i.e. regulating anything more stringent) altogether.

The example of the picture below may illustrate the matter. In *Burstein*¹¹³, the European Court of Justice’s judgment seemed to state that the *scope* of the Marketing of Dangerous Substances Directive¹¹⁴ covered products *produced from* PCP, but excluded products “treated with” PCP (or any other substance, as is assumed here).¹¹⁵ This situation is visualized in figure 1: products produced from PCP are within the scope of the Marketing Directive, whereas products treated with PCP are not. The *Burstein* judgment nevertheless also stated that the distinction in the Directive of products produced from PCP “set only a minimum requirement”. This interpretation is depicted in figure 2: “production from” and “treatment with” are now different levels of environmental protection (lighter blue color).¹¹⁶ In case the Directive sets only minimum harmonization, Member States remain free to set more stringent protection, even “within the scope of the law”. They may prohibit “treatment with PCP” in addition to a ban on producing it. However, if the “minimum requirement” sets *exhaustive* Community harmonization, a Member State would be impeded from enacting regulations to deal with the treatment of products, because now treatment forms a more stringent level of protection *within* the scope of the *full* harmonization directive¹¹⁷. The *Burstein* Court’s conclusion on this point was vague. Lastly, in figure 3 the scope and level of protection converge. In this strict interpretation, both the substance and its use are defined in a way, which leaves everything that is not explicitly dealt with in the directive outside the scope of harmonization. Member States have again a wide room of discretion. Reverting to Toolex (figure 4), this latter strict interpretation leaves the Member States ample room to regulate the use of trichloroethylene: it would be excluded in all

¹¹² Or at least needs to rely on the notification procedure and criteria of a safeguard clause.

¹¹³ N. 100 *supra*.

¹¹⁴ N. 99 *supra*.

¹¹⁵ Except for some particular cases.

¹¹⁶ Some substances, such as lithium, have not been explicitly listed in the Directive, and are therefore outside its scope. Note also here the difference to RoHS, which does not make such explicit listing, but discusses hazardous substances in general.

¹¹⁷ If the Directive is a minimum harmonizing directive, the difference between the scope and the level of protection does not present the problems described here. The Court in fact described the directive as setting minimum harmonisation, although it had the objective of approximating the laws of the Member States.

approaches analogous to the figures in the table¹¹⁸. All in all, the legislators should strive to define the scope and the pursued level of environmental protection in terms, which leave as little room for ambiguities as possible.

It seems that the simple, absolutist “structure” of the RoHS Directive makes similar analysis on RoHS relatively straightforward. Let us first analyze the view that the scope of the directive is limited to the six prohibited substances only. Member States’ ability to set more stringent national rules would then focus¹¹⁹ on the limited exemptions from the set prohibitions (lighter blue in figure 5 below). However, that approach does not seem prone to create any legal uncertainty regarding the scope, as the carving-out is done *explicitly* and from a *total* ban. The level of environmental protection is thus compromised in a controlled way; it is not plausible to argue that the exemptions would be outside the scope of the directive^{120, 121}.

¹¹⁸ Note that this analysis only refers to the Marketing directive. In the *Toollex* case, the joint applicability of three directives was under scrutiny.

¹¹⁹ As explained previously, the temporal scope of the prohibitions might also vary, if the text proposed in the Council Common Position was accepted. (“By 1 January 2007 *at the latest*, Member States shall ensure that new electrical and electronic equipment put on the market does not contain lead, mercury, cadmium, hexavalent chromium, polybrominated biphenyls (PBB) and/or polybrominated diphenyl ether (PBDE).) ”

¹²⁰ Thus, any derogation from them would trigger the notification procedure and criteria of the derogation clause 95(4-5).

¹²¹ As was stated earlier, the legal basis of RoHS Directive was under intensive internal debate in the Commission. In the light of these very modest room for national discretion that the scope would actually leave in the above described circumstances, the struggle seems trivial. Indeed, the change of the legal basis to Article 95 would seem to have concrete relevance only, if the scope of the Article was to cover all substances.

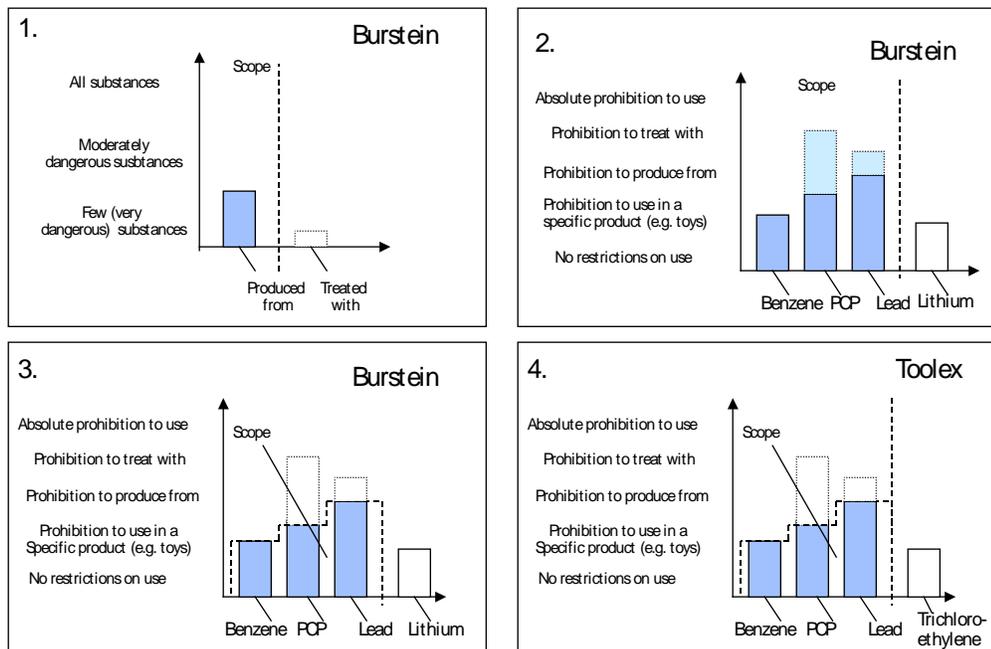


Figure 1 Scope and level of protection in *Burstein* and *Toolex*

The alternative view, where all substances are covered by the scope of the RoHS Directive, is depicted in figure 6. The uncertainty in this approach revolves around the Member States' ability to restrict the movement of goods, which contain any *other* substances than those banned by the directive. In other words, does the inclusion of all hazardous substances within the Directive, the limits of the ban and the free movement objective of the directive jointly preclude any additional national bans? In this view the Member States ability to enact more stringent measures on substances in EEE is exhausted. The tightly tailored scope of the *Burstein* and *Toolex* cases in pictures 3 and 4 above could indicate a third way. Even the inclusion of all (hazardous) substances in the scope of the RoHS Directive would then leave the Member States free to regulate. The law would "no more than state certain minimum requirements"¹²², which could be exceeded in two ways: either by limiting exemptions to the six existing bans, or by restricting the use of substances other than the six explicitly banned by RoHS. The scope of the Directive would shrink towards the level of protection set by it. Total harmonization under Article 100a would actually create minimum harmonization.

¹²² Cf. figures 3 and 4 with figure 7.

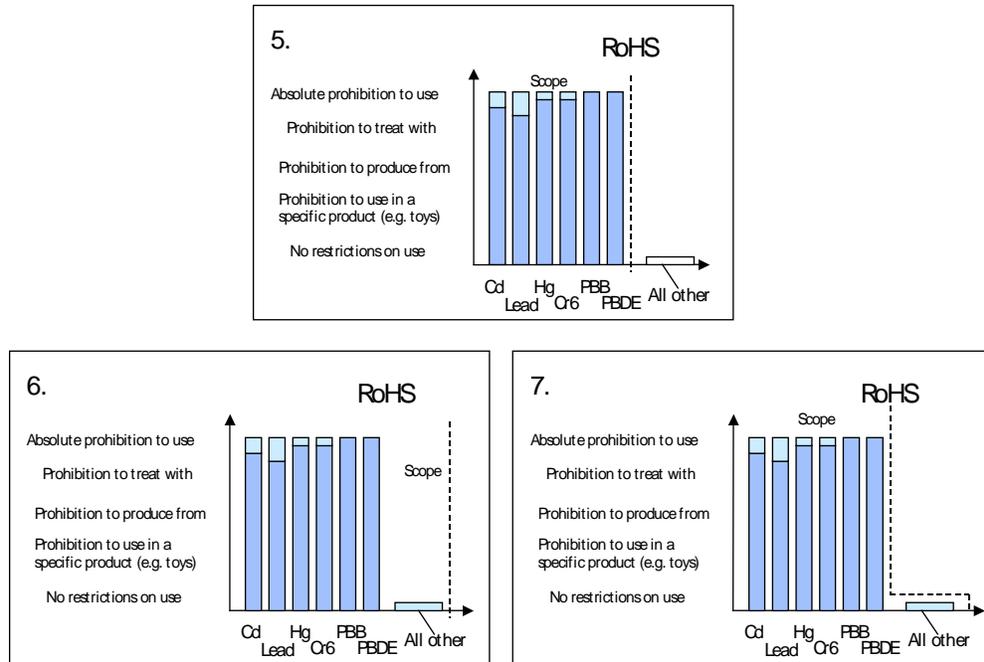


Figure 2 Scope and level of protection regarding the RoHS Directive

2.6.6 Wild Birds Directive¹²³ and case *van den Burg*¹²⁴

The Court of Justice was in a position to interpret the question on the scope of the Wild Birds directive in the *van den Burg* case. We may start with Article 1 of the Wild Birds Directive in order to assess the act's scope.

“This directive relates to¹²⁵ the conservation of *all species of naturally occurring birds* in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation¹²⁶.”

As may be seen, in an all-encompassing manner, any naturally occurring species is covered by the Wild Birds Directive. The structure of the directive thereafter is such that certain obligations¹²⁷ are laid on the Member States regarding all of the wild birds mentioned in Article 1. Indeed, the structure seems reversed in comparison to the RoHS Directive. First, the Wild Birds directive sets a wide presumptive prohibition on the selling and marketing of *any* wild birds.

¹²³ Council Directive 79/409/EEC on the conservation of wild birds. (“Wild Birds Directive”)

¹²⁴ Case C-169/89, *Criminal proceedings against Gourmetteria Van den Burg*, [1990] E.C.R. I-2143.

¹²⁵ It is not possible to discuss within the scope of this article whether the choice of the verb (predicate) has also relevance to the scope of harmonisation. (cf. “relates to” with “concerns” of the Plant Protection directive (n. 71 *supra*) or “aim of this Directive is to approximate laws - - on” of the Battery Directive (n. 92 *supra*)).

¹²⁶ Article 1(1).

¹²⁷ E.g. the obligation to maintain the population of these species, and to ensure the existence of sufficient habitats for these birds.

Then, that prohibition is loosened by allowing the selling of certain birds, specified in lists of exemptions¹²⁸.

Compared to RoHS, the scope of the Directive seems straightforward to define. The scope of the directive is to cover all birds, and within that scope varying levels of protection are set for different birds. In addition, the directive contains a safeguard clause¹²⁹, which allows the Member States to take more stringent measures nationally. Thus, only a minimum level of protection is set¹³⁰.

The question for a preliminary ruling in *van den Burg* concerned a Dutch law, which did not allow for the selling of red grouse. The Directive, however, *did* allow such sale under certain conditions. The Dutch government defended the national prohibition on the basis of Article 36, under which the Member States are not precluded from restrictions, which may be justified on (e.g.) grounds of the protection of the health of animals. This became a question on the scope of the directive, because

“with regard to Article 36 - - the Court has consistently held - - that a directive providing for full harmonization of national legislation deprives a Member State of recourse to that Article”¹³¹.

Reference to “full” harmonization here is misleading, because the Court is most probably referring to exhaustive harmonization from the viewpoint of the scope of the Directive¹³². The next paragraph adds to the confusion:

“As regards the *degree of harmonization* brought about by Directive 79/409, it should be noted that, although the bird in question may, in accordance with Article 6(2) and (3) of the directive, be hunted within the Member State in which it occurs, the fact remains that *Article 14 authorizes the Member States to introduce stricter protective measures* than those provided for under the directive. The directive has *therefore* regulated exhaustively the Member States' powers with regard to the conservation of wild birds.”

This almost implies that only the opportunity of the Member States to introduce stricter measures accomplishes exhaustive harmonization. A more correct interpretation would probably be that the Directive itself, by virtue of Article 14, sets the only exception to the protection standard, and

¹²⁸ Annex III/1, for instance, allows the selling of seven species to the extent that the birds have been killed in accordance with national law.

¹²⁹ Article 14 of the Directive states: “Member States may introduce stricter protective measures than those provided for under this directive.” The directive is based on the general implied powers (Article 235), whereby this clarification may have been considered appropriate.

¹³⁰ Yet there is also an exemptions clause, which allows for *laxer* environmental standards under certain circumstances (see Article 9).

¹³¹ Paragraph 8 of the Judgement.

that therefore the Directive should be considered exhaustive. Furthermore, the existence of (exhaustive) harmonization is obviously a precondition for the existence of more stringent measures. If there is no harmonization, there is logically no need for “more stringent measures”, either. The Member States may legislate as they deem appropriate.

The Court then proceeds with another odd conclusion, which involves the scope of the directive. In its view,

It follows from *those general objectives* laid down by Directive 79/409 for the protection of birds that the Member States are authorized, pursuant to Article 14 of the directive, to introduce *stricter measures* to ensure that the [migratory and endangered] species are protected even more effectively. *With regard to the other bird species* covered by Directive 79/409, the Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive, but *are not authorized to adopt stricter protective measures* than those provided for under the directive, except as regards species occurring within their territory.

The application of the more stringent measures is therefore *not* permitted in the Court’s opinion on the entire scope of the directive. The fact that the habitats of migratory birds and endangered birds are granted special protection¹³³ lead the Court to conclude that “normal” protection of other birds through the preservation of their habitats¹³⁴ is not a basis for more stringent national protection. This interpretation seems to disregard the fact that the preambles and Articles of the Directive offer ample support and references on the importance to protect other birds as well¹³⁵. It would seem more logical that in the case of migratory birds there is *less* need for national measures and more need for harmonization, as the birds do constitute a common heritage. This is purely a question of principle, because in a minimum harmonization directive the admittance of stricter national measures does, of course, increase the level of protection for the birds.

So, rather than deciding the case by analysing the compatibility of the Dutch prohibition with the environmental objectives they claim to promote, or on the proportionality or necessity¹³⁶ of such more stringent measures, the Court decides the case by defining a limited application for the more stringent national measures¹³⁷. Whether this could lead us to conclude that in the Court's

¹³² If the court does indeed mean full (as opposed to minimum) harmonization, the paragraph is not logical. The Directive has a “more stringent measures” clause, which cannot be the case with *fully* harmonizing directives.

¹³³ Under Article 4, preamble 3 and Annex 1.

¹³⁴ Article 3.

¹³⁵ See e.g. first part of preamble 3, preambles 4 and 7, 8 and articles 1 to 3.

¹³⁶ Cf. with paragraph 8 of the opinion of the Advocate General van Gerven, even if the Advocate General’s assessment regarding the applicability of (ex-)Article 36 appeared clearly erroneous.

¹³⁷ A legal realist could say here that the time was simply not ripe for making environmental protection in the European Communities extraterritorial. See e.g. Jans, J. H. (2000) *European Environmental Law*. Europa Law Publishing: Oxford, p. 262; and Scott, J. (2000) *On Kith and Kine (and Crustaceans): Trade and Environment in the EU and WTO*, pp. 126 – 132, in: J.H.H.Weiler (ed.) *The EU, the WTO and the NAFTA. Towards a Common Law of International Trade*. Oxford University Press: Oxford. By considering

view the scope of the directive is limited to the endangered and migratory birds only, seems nevertheless far-fetched. The Court, on the contrary, speaks of “the *other* species of birds covered by the directive” in the above quoted paragraph. The judgment therefore seems to offer an example on obscurity, rather than to provide interpretative guidance for the RoHS Directive.

2.6.7 Numerous directives assessed in parallel

Lastly, it is evident that there may be more than a single act, which regulates a particular matter. Consequently, the *joint* effect of the directives could extend the scope of harmonization over an entire field. Occasions, where a primary law has been purposefully updated or expanded by subsequent laws, are an obvious example¹³⁸. It is nevertheless also possible, that laws which as such are not intended for joint application, come under common scrutiny regarding the level of harmonization that they set.

The above noted *Toolex* case¹³⁹ provides a good example: the Commission contended in the case that “the classification¹⁴⁰ and marketing¹⁴¹ directives, together with the risks evaluation regulation,¹⁴² create a set of Community rules on trichloroethylene which is commensurate with stringent safety requirements and is sufficiently well developed to render any national prohibition on the use of the substance superfluous.”¹⁴³ Thus, the Court needed to assess the applicability of the Swedish restrictions on the use of trichloroethylene against three acts, not just one.

In the context of RoHS, the Commission has compared the very stringent tool of substance ban with other environmental protection measures such as the extensive take-back and recovery obligations of the WEEE directive. In simple terms it appears, that for less hazardous substances the WEEE takeback is sufficient, and for those substances *the WEEE* directive is the level of protection that is needed - not a ban.

From the viewpoint of the substances used in EEE, one might therefore need to take a broader view than just the RoHS Directive. The WEEE Directive would be one obvious candidate as explained above, as would the Marketing directive. However, since this analysis focuses on the

the *minimum* harmonizing directives exhaustive, the Court avoided pronouncing definitively on the delicate matter of Member States' right to have recourse to the justification grounds of Article 28 and mandatory requirements in order to protect environment outside their territories.

¹³⁸ See e.g. Directive 67/548/EEC on the classification, packaging and labelling of dangerous substances, which has subsequently been amended numerous times, including the fundamental sixth and seventh amendments (Directives 79/831/EEC and 92/32/EEC, respectively).

¹³⁹ N. 101, *supra*.

¹⁴⁰ *Ibid*.

¹⁴¹ Marketing of Dangerous Substances Directive (n. 99 *supra*).

¹⁴² Council Regulation (EEC) No 793/93 on the evaluation and control of the risks of existing substances.

¹⁴³ Paragraph 27 of the judgment.

scope of the RoHS Directive, such subsequent limitations on national legislatures must here be left aside¹⁴⁴.

At the same time it is nevertheless worth noting, that the parallel application of several directives could also create a novel problem of interpretation. To the extent that the Community law is internally coherent, parallel applicability of laws seems to imply exhaustive compliance with all of the rules concerned. However, the internal coherence is not necessarily perfect, in particular in a technical and nuanced area of legislation such as chemicals and substances. Moreover, to the extent that the scope of a directive is defined in an ambiguous manner, the risk of creating incoherent and contradictory Community rules is significantly increased. This is precisely the case with the RoHS Directive. The applicability of a horizontal Community substance restriction on a device, which has been excluded from such restriction on the basis of a vertical device-specific rule, seems very problematic. There appear to be no case law on this specific matter, either.

2.6.8 Summarising views on the comparative analysis

All in all, the comparative analysis did not regrettably offer a point of reference, that had been adequately analogous with the RoHS Directive so as to lead to firm conclusions. Either the interpreted directives were, after all, not sufficiently similar, or the jurisprudence ambivalent. There were nonetheless also model examples of precise legislation, which left little room for speculation on the scope of the act. The table below may help in summarizing the findings in broad terms.

¹⁴⁴ See Recital 9 in the Commission Proposal: “This Directive should apply without prejudice to Community legislation on safety and health requirements and specific Community waste management legislation, in particular Council Directive 91/157/EEC of 18 March 1991 on batteries - - .”

Directive	protection		Pesticide residues	Batteries	Marketing and use	Wild Birds
	Nijman. Some obscurities.	Cinisello Balsamo. Clear.	Cacchiarelli and Stanghellini. Clear.	--	Toolex; Burstein. Obscurity on scope v. level of protection.	Van den Burg. Obscure.
Objective as defined	Prohibition of products which contain <i>certain</i> substances (Art 1); eliminating obstacles on national provisions on <i>such</i> substances (recital)	General principles of waste management.	Protection of health and environment, removal of obstacles to trade Free movement clause.	Approximation of the recovery and disposal of certain batteries. Free movement clause.	Restricting marketing and use of <i>listed</i> substances, removal of obstacles to trade (recital).	Protect all birds, elimination of obstacles to trade.
Scope defined	Not complete harmonization, but of those <i>listed</i> in the Annex.	Broadly, and with no specific obligations. Court refused <i>e contrario</i> conclusions.	Precise: some products and some substances. Free movement within this scope.	Slight unclarities, as battery types are directly linked to substances.	Precise scope set against a more general background.	Quite clear; all wild birds within the scope, and specifications as to which ones may be hunted. Explicitly minimum protection.
Legal basis	100	100, 235	43	100a	100, 100a	235
Conclusions on RoHS	Due to a more specific, limited scope, no clear guidance.	Much broader. Left open the option of <i>e contrario</i> type conclusions on scope of RoHS.	Very specific. Therefore, no guidance on interpreting obscurity (but a good example on how to define scope accurately)	Specific. Shows well how the scope and prohibition may be two different things.	Precise. Ambiguity on the relationship between scope and the level of protection offers interesting analogies.	Scope as such relatively clear, but case makes conclusions difficult.

Table 1. A summary of the comparative study.

3. PRE-EMPTION AND THE ROHS DIRECTIVE

As was explained at the outset of this analysis, the distinction between the “scope” of a Community law and “pre-emption” created by it is not entirely clear. The target here is not to

determine a specific distinction for the definitions. Rather, this analysis attempts to dwell on the core areas of both legal concepts in parallel in the context of the RoHS Directive.

Pre-emption is understood in this analysis as the effect that the coverage of certain legal space (scope) by the Community will have on related Member State legislation. A taxonomy of pre-emption developed by Cross was introduced in section 1.1, whereby pre-emption was divided into 1) express prohibitions on the Member States to enact in a particular field, 2) express saving clauses for national legislation, 3) occupation of an entire policy field by Community legislation so exhaustively, that there is no room left for national rules, 4) pre-emption in cases of direct conflicts between national and Community provisions, and 5) pre-emption in conflicts, which arise from a more indirect interference with the proper functioning of the internal market. This framework is used in the ensuing pages for exploring in more detail the pre-emptive effects of the RoHS Directive. Regrettably, the inconclusiveness of the analysis on the scope of the RoHS Directive complicates also a research on the pre-emptive effects of the directive.

3.1 Express pre-emption – the “Free movement clause”

In a thorough article¹⁴⁵ on the pending WEEE and RoHS Directives, Garcia Molyneux has stated that “Unfortunately, the proposed RoHS Directive - - does not include a free movement clause guaranteeing the free movement of EEE complying with the proposed directive's ban”. He thus seems to take the view, that the pre-emptive effects of a directive are subject to *express* pre-emption clauses. As will be seen below, this conclusion appears nevertheless implausible.

Free movement clauses are provisions inserted in Community legislative acts, which expressly prevent the Member States from taking more restrictive measures on a matter, if that matter fulfils the requirements of the law in question. This question was already briefly encountered in the analysis on the scope of the directive. The Battery Directive offers an example:

The Member States may not impede, prohibit or restrict the marketing of batteries and accumulators *covered by this Directive and conforming to the provisions* laid down herein¹⁴⁶.

A Nickel-Cadmium battery which contains cadmium *in excess* of 0,025 % by weight, is¹⁴⁷ for example regulated by the Battery Directive. If that type of a battery conforms to all of the provisions of the Directive – it is for instance properly marked and readily removable from the equipment it supports – its marketing may not be prevented by a Member State. Thus, the ambit of the free movement clause is linked to the question on the scope of the law. Within the

¹⁴⁵ 2001, p. 17 (n. 18 *supra*).

¹⁴⁶ Article 9 of the Directive. (n. 92, *supra*)

¹⁴⁷ Note, however, the speculation on this point presented further below.

Directive, the environmental regulation of batteries has had the parallel beneficial effect of eliminating the potential trade restrictions on those goods.

The Court has had a chance to deal with a Directive with a free movement clause in the *Ratti* case. Italian government had set on certain solvents information requirements, which were clearly more stringent than what the respective Community Directive provided for¹⁴⁸. Italy had not notified the Commission in order to obtain an authorisation to maintain the measures under the derogation clause of Article 100a(4)¹⁴⁹ TEC, and the Directive had a free movement clause. Indeed, the Directive prevailed - but quite regardless of the free movement clause:

As regards Article 8 [of the Directive], to which the national court referred in particular, and which provides that Member States may not prohibit, restrict or impede on the grounds of classification, packaging or labelling the placing on the market of dangerous preparations which satisfy the requirements of the directive, *although it lays down a general duty, it has no independent value, being no more than the necessary complement of the substantive provisions contained in the aforesaid articles and designed to ensure the free movement of the products in question.*¹⁵⁰

Thus, a free movement clause is a manifestation of express pre-emption¹⁵¹, but seems to have in the Court's opinion no value as such. Since the clause only confirms the pre-emptive effect of the act, its application is entirely dependent on the substantive scope of the directive¹⁵². If the scope is clear, it constitutes in itself an implicit statement of pre-emption. And if the scope is unclear, the pre-emptive intent of the free movement clause would point to obscurity. The value added of a free movement clause is hence the following: as long as the scope of the directive may be ascertained¹⁵³, the intended effect of an act with respect to Member State law need not be inferred from the act implicitly, because it is pointed out explicitly. Contrary to what e.g. Garcia Molyneux¹⁵⁴ and Jans¹⁵⁵ have noted, a free movement clause does not therefore appear

¹⁴⁸ The Italian government had failed to implement the Directive at all, but that direct effect aspect of the case is not discussed here.

¹⁴⁹ Now Article 95(4-5) TEC.

¹⁵⁰ Paragraph 13 of the judgment.

¹⁵¹ The pre-emptive effect of a free movement clause is nevertheless limited to the *free circulation aspects* of national rules. Measures which do not interfere in any way with the circulation of goods would continue to be allowed. However, since the free circulation aspect is central in many directives, a free movement clause does constitute an important layer of pre-emption. Indeed, it is questionable whether an express pre-emption clause can ever be pre-emptive in an entirely comprehensive sense. A particular Community law is always surrounded by a complex network of other interrelated measures, which may or may not affect the law under certain particular circumstances.

¹⁵² This fact is obvious from the way most express pre-emption clauses are phrased. The Battery Directive is an example: "The Member States may not impede, prohibit or restrict the marketing of batteries and accumulators *covered by this Directive and conforming to the provisions laid down herein.*"

¹⁵³ The scope of a directive is naturally equally important in determining implicit pre-emption, as will be seen further below.

¹⁵⁴ See page 32 and n. 18, *supra*.

¹⁵⁵ 2000, p. 176 (n. 135 *supra*).

to be a prerequisite for pre-emption – just a facilitator in observing it. Even that role may be quite limited in practice, as may be seen from the Court’s holistic approach in the Ratti case:

Thus it is a *consequence of the system introduced by Directive No 73/173* that a Member State may not introduce into its national legislation conditions which are more restrictive than those laid down in the directive in question, or which are even more detailed or in any event different, as regards the classification, packaging and labelling of solvents and that this prohibition on the imposition of restrictions not provided for applies both to the direct marketing of the products on the home market and to imported products.¹⁵⁶

Similar conclusion may be drawn from the case *Commission v. United Kingdom* (Dim-Dip lighting devices)¹⁵⁷. The Commission relies in its allegations on the express free movement clause¹⁵⁸, but the Court – while agreeing with the Commission in substance – bases its judgment on the overall system and objectives of the law¹⁵⁹.

In the RoHS Directive, there is currently no free movement clause. As a matter of fact, if the Directive did contain a free movement clause, it would seem to support the presumption that all hazardous substances *are* within the scope of the directive. Otherwise – in the face of the quasi-absolute prohibition on the six listed substances - the relevance of the clause would be confined to the narrowly drawn exemptions. On the other hand, the lack of an explicit clause seems to be of no consequence. The pre-emptive effects of the Directive should in any event be considered on the basis of a more holistic approach. This analysis will take place below in the context of the other types of pre-emption.

3.2 Savings clause

As a mirror image to the express free movement clauses in the pre-emption discussion, a harmonizing Community law may also contain clauses, which expressly allow “stricter national measures”. The Directive on the Protection of Calves¹⁶⁰ and the Wild Birds Directive¹⁶¹ for instance, read:

“ - - [From] the date set in paragraph 1, Member States may, in compliance with the general rules of the Treaty, maintain or apply within their territories stricter provisions for the protection of calves than those laid down in this Directive.”

¹⁵⁶ Paragraph 27.

¹⁵⁷ N. 53 *supra*.

¹⁵⁸ “The Commission maintains *that by virtue of [the free movement clause] Article 2 (1) of Directive 76/756/EEC* it is not possible to prohibit the use of a motor vehicle on grounds connected with the installation of lighting and light-signalling devices if such devices are installed in the vehicle in question in accordance with the requirements set out in Annex I to the directive .” Paragraph 6 of the judgment.

¹⁵⁹ It could also be argued that the Court applied a nuanced “occupation of the field” pre-emption in the case.

¹⁶⁰ Council Directive 91/629/EEC laying down minimum standards for the protection of calves, Article 11(2).

¹⁶¹ Article 14 of the Directive (see section 2.6.6 and n. 121, *supra*).

“Member States may introduce stricter protective measures than those provided for under this directive.”

Such clauses must be distinguished from the “derogation” clauses in the Treaty Articles 95(4-5): the latter create indeed *Treaty* based constitutional rights for Member States to derogate from a harmonising act under certain circumstances. If the act itself contains a savings clause, the derogation clauses of the Treaty become redundant. It is evident that a savings clause and a derogation expressly create a lacune into a pre-empted field. The Court of Justice has respected the powers granted to the Member States in the savings clauses of Community law to restrict the free movement of goods¹⁶².

From the angle of value choices, this type of policy could be foreseeable for instance in a situation where the opinion is a split in three ways: extensive support for banning some substances (e.g. lead), a wide opposition towards a ban on other substances (e.g. lithium), and a third, limited group of substances, where the opinions of the Member States conflict diametrically. The savings clause would apply to the third, contentious group. The RoHS Directive *could* for instance hypothetically contain a provision on specific “second worst substances” such as a TBBPA-type flame retardant. The Member states would be able to – but not required to - ban such substances fully at their discretion. The savings clause would therefore help in achieving the national protection targets, while the limited number of the applicable substances would carefully confine the adverse free trade effects of the ban. Such a provision would naturally obviate any free trade analysis or arguments: the created trade impediment enjoys of special protection.

Nonetheless, when compared with the derogation clause of Article 95(4-5), the savings clauses appear to suffer from clear handicaps. Savings clauses are considerably less transparent, unless formulated in great detail. They may also lack the rigorous control of the Commission that is part of the derogation procedure. Indeed, because Articles 95(4-5) have in practice been used so sparingly, it would seem possible to turn those clauses into more active usage, instead of relying on the open-ended savings clauses of individual directives. The distinction could perhaps be that savings clauses are used in cases where there is, as explained above, a group of Member States with the identical concerns. In addition, situations with a low risk of market interference seem more apt to exemptions from harmonisation. A wide recourse to the savings clauses – and to the derogations, too, for that matter - has naturally the risk of fragmenting the market. Since there are no savings clauses in the RoHS Directive, they are not treated further here.

¹⁶² Poiaras Maduro, M. (1998) *We the Court - The European Court of Justice and the European Economic Constitution*, Hart Publishing: Oxford, p. 74.

3.3 Occupation of the field pre-emption

As there are neither express pre-emption (i.e. free movement) clauses nor express savings clauses in the pending RoHS Directive, the analysis may move on to the three types of implicit pre-emption¹⁶³. “The occupation of a field pre-emption” means a situation, where the mere exercise of Community competence through “exhaustive” secondary legislation has removed the competence of the Member State legislatures on the same matter altogether. There is little to dispute as far as the field of the six prohibited substances are concerned: that area is clearly occupied and pre-empted by the directive. But is the RoHS Directive so exhaustive as to preclude *all* national rules that deal with any substances in electronic equipment? In more general terms, should a silence of a Directive on a particular point, perhaps together with the non-applicability of the comitology procedure, be interpreted as retaining on the Member States the right to legislate? Or is the presumption of comity stronger, so as to exclude unilateral state actions unless they are specifically allowed?

The Court's judgment in *Bulk Fruit*¹⁶⁴ offers interesting viewpoints. In this case, Belgian regulations required that the minimum weight and the number of units must be indicated on the bulk packages of *all* agricultural products. Community Regulation 1035/72, which dealt with the same issue, nevertheless required the information on four types of produce only: onions, artichokes, celery and headed cabbage. Whether the Belgian rules potentially conflicted with the Community law or brought about discrimination, was irrelevant in the Court's view. It focused on the exhaustiveness of the Community rules regarding the common organization of the fruit and vegetable market, and deemed any parallel national regulations pre-empted. The Belgian requirements on produce other than onions, artichokes, celery and headed cabbage had also become inapplicable.

As explained above, the RoHS Directive has also expressly banned the use of (only) six specific substances in electrical and electronic equipment. Would a Swedish regulation, which would additionally ban the use of for instance TBBPA, be thus considered pre-empted? In the light of the Court's reasoning in *Bulk Fruit*, the focus of the discretion would seem to lie on whether all of the Community rules on the market in question taken together are exhaustive.

The first difficulty is in determining what such a “relevant market” would be¹⁶⁵. Without engaging in a thorough investigation on the matter, some potential classifications may be identified outright. The market could be that of electrical and electronic equipment in general – the sector identified by the RoHS Directive itself. Another possibility could be the market for the recovery of

¹⁶³ An express occupation of a field is covered by the express pre-emption clauses treated in section 3.1.

¹⁶⁴ Case 255/86, *Commission v. Belgium* [1988] E.C.R. 693.

¹⁶⁵ Any potential analogies with competition law are beyond the scope of this article.

EEE, because the substance restrictions arise from the overall framework of the Waste EEE Directive. “Hazardous substances” might be yet another way to define the market.

The first definition is clearly the widest. The Community rules that apply today to EEE cover an extensive field of issues from product liability to type approvals, consumer guarantees and child safety. In the more restricted field of *recovering* EEE, a wide array of applicable secondary legislation extends or will extend from hazardous substances to general waste rules. Hazardous waste rules as such are also relatively elaborate in the Community.

And still, the agricultural market in the Community is undisputedly unique in comparison with any one of these three markets. The Common Agricultural Policy is tightly vested in special, usually overriding Treaty provisions. Indeed, the field is one of a “common organization of the market”, rather than a “normal” market. It seems thus different from the commerce of electrical and electronic equipment.

The *Cinisello Balsamo* case provides another point of reference. As has been explained above in section 2.6.2, the decision of the City Mayor to prohibit non-biodegradable plastic bags had *not* been pre-empted by (the silence of) EC waste legislation. The general Waste Directive did not create an implied right to sell, which would have overridden a specific national law *prohibiting* such sales. This case seems to contrast sharply – both as to the circumstances and the end result – with the *Bulk Fruit* case¹⁶⁶. It appears therefore difficult to find definitive analogies for the RoHS Directive.

Overall, the Court has not yet adopted any explicit standards to limit or elaborate on its use of the occupation pre-emption¹⁶⁷. The applicability of the field pre-emption to RoHS could therefore be assessed on the basis of the three criteria, which Cross¹⁶⁸ has identified as important in analyzing field pre-emption: the level of harmonization in the field, the exclusivity of the competence in the field, and the applicability of the subsidiarity principle.

The first issue was already highlighted above; the level of harmonization relating to RoHS seems relatively high. Probably regardless of how the market is in this sense defined, the competences in the field of environment related free trade measures of EEE seems also concurrent. Lastly,

¹⁶⁶ Cf. also with the above described *Nijman* (see section 2.7.1). The conclusion of the Court was, that since the Plant Protection Directive (n. 71 *supra*) only *prohibited* certain substances, it did pursue a complete harmonization of plant protection products. The difference between this narrow interpretation and *Bulk Fruit* is apparent: the field of plant protection products is not pre-empted. An important difference to RoHS is, nevertheless, that the Plant Protection directive only intends to harmonise the field for *certain* substances. Thus, the free movement clause has the (harsh) function of establishing harmonisation through an absolute prohibition, nothing more.

¹⁶⁷ Cross (1992, p. 462) (n. 6, *supra*).

¹⁶⁸ *Ibid*, pp. 462-463.

the inclusion of subsidiarity in the Treaty Articles¹⁶⁹ has refuted the relevance of Cross' third criteria to a considerable extent. All recent Community secondary legislation has been enacted in accordance with the principle. To sum up, it appears that the first and second criteria point to opposite directions, while the third is no longer relevant. Hence, the applicability of field pre-emption to RoHS Directive remains uncertain.

If, on the other hand, the RoHS Directive was subject to field pre-emption, the controversy would revert also back to the scope of the directive. In other words, as regards field pre-emption, the questions on the scope and pre-emptive effect of a directive seem to converge to considerable degree. Occupation covers a legal space, which by definition overlaps *at the minimum* the scope of the directive. The standard would for determining the occupied field seem to lie somewhere between the *Bulk Fruit* and *Cinisello Balsamo* cases. Hence, it is important to notice that even if the scope of the directive itself is defined narrowly, the Member States' ability to regulate *around* the issue could be refuted through the occupying directive. The pre-emption may extend beyond the precise scope of the act. To quote *Bulk Fruit*, even if the positive Community provisions so far related to information requirements on four products only, similar requirements on any other agricultural products were considered equally pre-empted.

The latter scenario would obviously thwart all national rules regarding the prohibition of any substance in EEE – quite irrespective of the potential effects that such bans would have on free trade. From the perspective of value setting, an occupation of a regulatory field is therefore clearly a stifling modality of pre-emption¹⁷⁰. A national value choice is pre-empted as such, entirely regardless of its effects on the pre-empting Community act and its values.¹⁷¹

In addition, since the degree of harmonisation on the entire occupied field may vary, the occupation approach will easily create legal lacunes to positive law at the fringes of the scope of the act under scrutiny. If the scope of RoHS is construed narrowly – to cover the six substances only – but the occupied field widely – to overlap any substances - a legal lacune is created regarding substances, which the Directive does not expressly ban. A wider interpretation of the

¹⁶⁹ Article 5 TEC states: "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community".

¹⁷⁰ Goucha Soares, (1998, p. 137) (n. 7 *supra*)

¹⁷¹ In the *CERAFEL* case, for instance, the Advocate General was of the opinion that the Court should prefer a conflict analysis. The national regulations would be presumed lawful, unless they could be proven to conflict with the Community measure. (Cross, 1992 p. 460) (n. 6, *supra*) (Case 218/85, *Association comité économique agricole regional fruits et legumes de Bretagne (CERAFEL) v. Albert Le Campion*, [1986] E.C.R. 3513.

scope of RoHS or an abandonment of the occupation methodology would seem to avoid this problem.¹⁷² Otherwise the transparency of legislation will suffer considerably.

Lastly, as may be seen, all this speculation leaves wide room for judicial discretion.¹⁷³ Although the Court should not shy away from the responsibility to use such discretion, if needed, the legislatures would seem better suited for striking this type of necessary value decisions. As Cappelletti, Seccombe and Weiler have pointed out¹⁷⁴, a positive approach of the Court in determining field pre-emption could be an incentive for the Community institutions to legislate in more precise terms. Adequately detailed legislation would consequently improve the ability of the Member States to achieve on the federal level value choices that they – not the Court - deem the most appropriate.

3.4 Direct conflict pre-emption

Direct conflict pre-emption epitomizes the principle of supremacy¹⁷⁵ in Community law. A national measure that is in facial conflict with Community law will always be determined invalid¹⁷⁶. Only pre-emption against the free trade objectives is assessed here.¹⁷⁷

One must be able to define the scope of a law in order to define, whether a national measure is in *direct* conflict with it. Since the analysis in chapter 2 provided no clear answer regarding the precise scope of RoHS, a divaricated approach seems appropriate: both the narrow and wide interpretation of the RoHS's scope are scrutinized.

¹⁷² In the United States, such lacunes are overcome by presuming the preservation of the state laws in cases of unclear intent of the Congress to pre-empt a field. See also a very recent case on the relationship between federal pre-emption and *state common law*: *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.* 123 S.Ct. 518 (2002). The Supreme Court abrogated some of its earlier standings, ruling that even explicit pre-emption clause in a federal Act does not necessarily pre-empt *state common law tort* claims.

¹⁷³ Goucha Soares (1998, p. 137) (n. 7, *supra*)

¹⁷⁴ Cappelletti, M. & Seccombe, M. & Weiler, J. (1986) A general Introduction. In: Mauro Cappelletti & Monica Seccombe & Joseph Weiler (eds.) *Integration Through Law. Europe and the American Federal Experience. Volume 1, Book 1.* Walter de Gruyter: Berlin. Pp. 33 – 34.

¹⁷⁵ The principle of primacy of the Community legal order was established in the Case 6/64, *Costa v. ENEL* [1964] C.M.L.R. 425.

¹⁷⁶ “Disapplication” of a national law would probably be a more precise term, because the consequences of materialised conflicts are determined by the national law and do not usually lead to a formal invalidation of the law.

¹⁷⁷ Again, it seems possible to assess pre-emption from other angles as well. We could naturally also have a direct conflict against the environmental objective of the law. A direct conflict with the environmental requirements would arise, if a Member State allowed the circulation of products, which *did* contain e.g. lead despite the ban. In practice, this type of a situation could arise in the context of the RoHS Directive's list of exemptions. The removal of e.g. lead could also be subject to a national transition period, the length of which could exceed the limits set by the directive. In all these cases, the absolute and simplistic nature of the RoHS Directive would thus lead to a somewhat inverted conclusion from a free trade perspective. Instead of creating an impediment to the free movement of goods, the functioning of the internal market

If we interpret the scope of RoHS narrowly, it would seem logical, that the free movement objective is then also confined to the narrow scope of the six substances prohibited by the act. Direct conflict pre-emption would then appear limited to national measures obstructing the free movement of products, which contain substances that are in principle banned, but have been specifically exempted. The free movement of servers with lead¹⁷⁸ may not be hindered, for instance. A national ban against such servers would of course also mean, that the Member State had failed to properly implement the exemption of the directive. This rather banal result, which is shown in figure 8, shows how the absolutist substance ban and the free movement objective would really be two sides of the same matter.

Thus, the alternative scenario: the scope of RoHS covers all substances, even if only six of them are prohibited. The free movement objective is then also extensive. EEE, which does not contain any of the six banned substances, must be allowed to circulate without hindrances. A national act banning some other substance (e.g. TBBPA) would directly conflict with this objective. Such national measure would be pre-empted. This result is in turn depicted in figure 9.

In *Commission v. the United Kingdom* (Dim-dip lighting devices) Court rules on a resembling, even if “reversed” situation¹⁷⁹. The United Kingdom had particular national requirements for vehicle lighting: a so-called dim-dip lighting system had been mandated in all cars, allegedly on safety grounds. Cars that did not comply with this UK peculiarity could not be marketed in the country. The Community on the other hand had enacted a directive, which dealt with car lighting installations. In the Court’s view, the annex of the directive contained an exhaustive listing of permitted requirements on the installation of lighting devices; the UK dim-dip lighting system was not amongst those installations¹⁸⁰, which the Member States were allowed to require. Thus, the national measure was considered to be in conflict with the objective of the directive:

“Such an interpretation of the exhaustive nature of the list of lighting and light-signaling devices set out in Annex I to the directive is consistent *with the purpose of Directive 70/156/EEC which is to reduce, and even eliminate, hindrances to trade within the Community* resulting from the fact that mandatory technical requirements differ from one Member State to another - - . It follows that the Member States *cannot unilaterally require manufacturers* who have complied with the harmonized technical requirements set out in Directive 76/756/EEC *to comply*

would be disturbed by the creation of more favourable conditions to a national producer. In addition, the environmental objective of the Directive would obviously not be fully attained.

¹⁷⁸ Point 7, Annex II in (e.g.) the Joint Text of Conciliation (n. 15 *supra*).

¹⁷⁹ The Directive 70/156/EEC established a list of *positive requirements* which were *permitted*, excluding other such requirements. In case of RoHS, the Directive lists the permitted *negative requirements* (i.e. the prohibitions), excluding all other such requirements. See also Weatherill (1994, p. 17) (n. 7, *supra*)

¹⁸⁰ It could be argued, that the directive constituted also an “occupation of the field” pre-emption,. The Court nevertheless went on to analyse the actual conflict between the national and Community rules, rather than pre-empting the field.

with a requirement which is not imposed by that directive, since motor vehicles complying with the technical requirements laid down therein must be able to move freely within the common market.”¹⁸¹

Third, one could also potentially apply an interpretation, where the scope of the law would nevertheless not limit the ability of the Member States to set national measures. This situation was explained above in section 2.6.5. The Court namely seemed to imply in the *Toolex* and *Burstein* cases¹⁸², that the Member States could regulate within the scope of *total* harmonization, too, if the law “no more than set certain minimum requirements”. Even if TBBPA were within the scope of RoHS – but not banned by it – the Member States could then ban it because the absence of a Community ban would be a minimum environmental requirement which the countries could surpass. But presumably then also the free movement objective should apply within the scope of the act, whereby a national ban on TBBPA would clearly be in direct conflict with it (see figure 10), and hence be determined pre-empted. This solution seems logically implausible, and contributes to the criticism on the judgments.

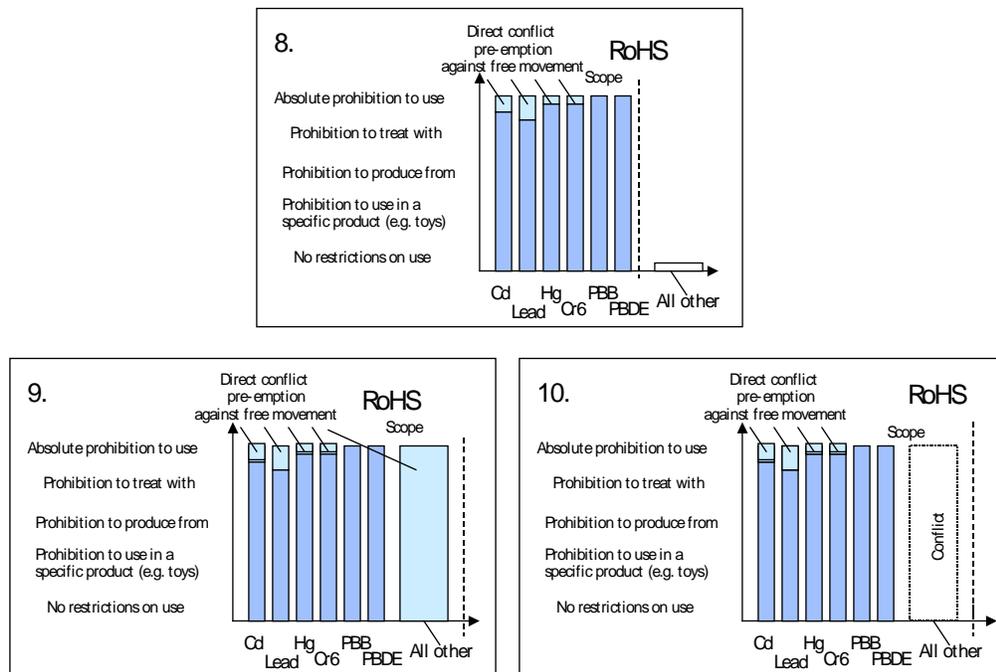


Figure 3 Direct conflict pre-emption on the RoHS Directive.

With the exclusion of the last hypothetical scenario, the instances of direct pre-emption seem quite obvious, even banal to some extent. The setting of value standards at national level is not affected as widely as in e.g. field pre-emption. Only a facially conflicting measure would be pre-

¹⁸¹ Paragraphs 11 and 12 of the judgment. Arguably, the Court’s reasoning has also elements of “object of the field” or “obstacle conflict” pre-emption.

¹⁸² N. 100 and 101, *supra*.

empted. For the same reason, there is also quite limited ambiguity in determining the pre-emption. The real difficulties lie with the vague cases. There may be less blatant forms of national environmental requirements, and the conflict may be against a quite general Community objective. This is the area of “obstacle conflict pre-emption” in the taxonomy of Cross.

3.5 Obstacle conflict pre-emption

3.5.1 Advantages (and disadvantages) of obstacle conflict pre-emption approach

Obstacle conflict pre-emption means a situation where a national measure interferes with the general objective of the act, which is usually the functioning of the internal market. The obstacle pre-emption seems quite wide, because the conflict may be just indirect. At the same time it is also the most nuanced type of pre-emption. Firstly, it targets only the particular national measure or provision at issue as opposed to an entire field of regulation. Second, a finding of a conflict may require the Member State to redraft the national law only slightly in order to avoid a potentially unintended conflict with a Community objective. And third, this approach allows the Member States a chance to survive judicial scrutiny on the basis of a more elaborate comparison of the opposing Community and Member State objectives. Due to these characteristics, the obstacle conflict approach could potentially be rather preservatory of the national value choices. The pre-emption is limited only to the value deliberation at issue; the value choice itself may be preserved by a new, alternative formulation of the measure; and the values may be maintained in case the conflict with the Community objectives is limited or justified.¹⁸³

3.5.1.1 Pre-emption and justifications

The *ratio* of the obstacle conflict pre-emption resembles certain fundamental concepts of free trade philosophy, because the EU directives so often build on the internal market objectives. Yet the applicability of free trade concepts such as the prohibition–justification construction has traditionally been limited to areas, which are *outside* the realm of the harmonised measures¹⁸⁴. The two last mentioned aspects of obstacle conflict pre-emption seem in this light problematic. Would the proposed obstacle conflict pre-emption thus actually introduce this type of philosophies *inside* a harmonised field?

Let us first look into the third aspect of Cross’s taxonomy – the comparison of the conflicting Community and Member State objectives – and then proceed to the second aspect in the next section. The focus of the obstacle conflict approach is on the intent, or *actual* effect of the

¹⁸³ Cross (1992, pp. 467-468) (n. 6, *supra*).

national measures as assessed against the objectives of the directive. Excerpts from the cases *Grosoli*¹⁸⁵ and *Irish Creamery Milk Suppliers Association v. Ireland*¹⁸⁶ illustrate¹⁸⁷ this approach:

“[A national measure is] incompatible with the common market in beef and veal *only to the extent to which it endangers* the objectives or operation of that organization.”¹⁸⁸

“[It is decisive whether the Irish law] *had effects which obstruct* the working of the machinery established by the common organization of the market.”¹⁸⁹

By qualifying the created pre-emption, one could nevertheless create the obvious risk of Member States starting to push the limits of pre-emption. It may be difficult to determine at what point the intent or effect of the national law becomes “obstructive”. It is also evident, that any obscurity between the scope of the directive and the level of protection created by it would further blur the lines of competence.

As noted, the value comparison approach of the obstacle conflict pre-emption resembles the justification criteria in free trade thinking: a national conflicting measure is in principle “prohibited” in case of a pre-emption, but may nevertheless in some occasions be “justified”, i.e. maintained even against the pre-emptive effect.

An important argument against the applicability of this justification construction stems from the very principle, which pre-emption intends to implement: the supremacy of Community law. It would namely seem to be a contradiction in terms to allow for any other criteria than the hierarchical status of a norm to decide the outcome of such conflicts. As a counter-argument, the principle of supremacy could in itself be subject to flexibility to the extent that the Treaty provisions so deliberate. The principle of subsidiarity is one example. If a restrictive interpretation on pre-emption is plausible to preserve the legislative powers of the Member States without endangering the effectiveness of achieving the Community objective, that interpretation should be followed¹⁹⁰.

¹⁸⁴ See n. 2, *supra*.

¹⁸⁵ Case 223/78 [1979] E.C.R. 2621.

¹⁸⁶ Case 36/80, [1981] E.C.R. 735.

¹⁸⁷ As Cross (1992, pp. 465) (n. 6, *supra*) seems to point out by these examples, the Court would consider the actual effects of the national measures on the *objectives* of the Community legislation, and thus determines if there is an obstruction to Community law. Hence, the mere co-existence of national measures or an insubstantial conflict with them could be overlooked.

¹⁸⁸ Paragraph 13.

¹⁸⁹ Paragraph 19.

¹⁹⁰ Since the obstacle conflict indeed presumes a *conflict*, the traditional view on subsidiarity as an effectiveness test of means to achieving a particular (single) objective does not seem applicable as such.

Perhaps an alternative way to state the same idea is, that the principle of supremacy could be applied in a compromised sense so as to preserve the *objectives and principles* of Community law, rather than the letter of the text in every embodiment of Community law. In cases where the practical conflict could not lead to a challenge on the fundamental principle, a national measure could be allowed. Thus, rather than juxtaposing the conflicting values¹⁹¹, one would evaluate the contradiction on a systemic level. The degree of conflict between the Community and national measures would hence be seen as a wide continuum rather than a precise and absolute point¹⁹². In one end of the spectrum, i.e. where minimal interference to Community market is caused due to essential national objectives, a measure could be acceptable. The supremacy principle would not be fully applied on the fringes of pre-emption.

This line of thinking would in actuality seem to shift the justification-assessment from the level of secondary legislation back to the level of primary law (principles). Thus, one would preserve symmetry on interpretation inside and outside harmonisation. It would perhaps not be that extraordinary to take an “inside-out view” in assessing the limits of the Member State competences in the face of harmonisation. Just as any measure that conflicts Community primary law *outside* the scope of harmonisation must respect certain guidelines to be justifiable, the same guidelines could be applied in defining the limits of such national law against *secondary* Community law. Since harmonisation forms the border, why not continue applying the same logic as is applied outside the borders, for determining the precise place of the border, too? The sharp contrast on the availability of justification grounds between harmonised and non-harmonised areas, as indicated by the *Hedley Lomas* case¹⁹³, is in any event subdued due to the existence of the safeguard clauses. The safeguard clauses do introduce national justifications within a harmonised area, although through a specific procedure.

The obvious disadvantage here is the potential for gradually eroding the Community secondary law. How can one determine when there is a challenge to the underlying principle and when not? The approach could thus simply transform the problem, rather than solve it. The justification criteria would be first applied to determine the existence of secondary Community legislation. In case of a negative result, they would subsequently determine the justifiability of the national clauses against primary Community law on e.g. free movement of goods (Article 28). Because the application of Article 28 is in many cases itself close to “field pre-emption” due to the breadth

¹⁹¹ Arguably there could some general qualifying standard for this, as there is in the mandatory requirements doctrine.

¹⁹² See Cross, (1992, p. 465). In his view, the conflicts vary from “direct and unavoidable conflict in most cases” to some level of obstruction in few cases and further to situations, where the Member State measure is completely irrelevant to the Community law.

¹⁹³ See n. 2, *supra*.

of the Dassonville formula¹⁹⁴, the justification-arrangement remains similar, even if the setting changes. The same justification criteria are applied twice.

In addition, the approach might not be plausible even theoretically, if supremacy indeed means the absolute prevalence of *any (lowest) level* of Community law over *any (constitutional) level* of national law¹⁹⁵. It would also seem to dilute the long-established demarcation line between Community law and national law. Consequently, the applicability of the supremacy principle to solving questions on the vertical division of powers might be endangered.

It is interesting to note in this regard, that in the more mature federal setting of the United States, the benefit of the doubt in cases of an unclear intent to pre-empt is granted to the state regulations. Congress' intention to occupy a field must be unmistakably ordained or the nature of the subject should make it self-evident.¹⁹⁶ The approach in the Community law today seems different. A limited use of the obstacle conflict pre-emption could, however, shift the onus. The reliance on a discrimination or justification –type logic in determining the limits of pre-emption would implicitly create a rebuttable presumption for the preservation of the national rules¹⁹⁷.

3.5.1.2 Pre-emption and least restrictive measures

According to Cross's second general advantage of the obstacle conflict pre-emption, the national environmental or other objectives may be legitimately replaced by alternative means, if such means do not conflict with the objectives of the Community law. As an example, a national requirement to label any products consisting of the flame retardant TBBPA with the text "Contains TBBPA", could be used instead of an outright ban. Such labels could avoid pre-emption, if they were considered not to actually obstruct the achievement of an internal market. In an occupation of the field approach a labelling requirement would probably have been presumed pre-empted¹⁹⁸.

Thus, a finding of a conflict still permits the Member State to redraft the national law in order to avoid a potentially unintended interference of the free trade objectives of a Community act. This brings us to another theme, which is central in free trade thinking: proportionality and the

¹⁹⁴ Any national measure which actually or potentially, directly or indirectly obstructs the free movement of goods, may be considered as a measure equivalent to quantitative restrictions on trade. The doctrine has been limited to a yet unclear degree by the Court's judgment in *Keck* (Joined cases C-267/91 and C-268/91, *Criminal proceedings against Keck and Mithouard* [1993] E.C.R. I-6097) and its progeny.

¹⁹⁵ N. 173, *supra*.

¹⁹⁶ Tribe (2000, p. 1207) (n. 7, *supra*) See also e.g. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132.

¹⁹⁷ Cross, (1992, p. 469) (n. 6, *supra*).

¹⁹⁸ The example assumes of course coherence with the general provisions of the Treaty.

principle of the least restrictive measures. In accordance with the objectives of internal market and loyalty of the Treaty¹⁹⁹, a Member State should always strive for protective measures, which are least restrictive on Community trade.

However, as Weiler has pointed out²⁰⁰, the least restrictive measures approach has the essential shortcoming that it presupposes the alternative measures to reach the same level of protection as the original measure. This is nonetheless not necessarily the case²⁰¹. The protective effect of labels, for instance, will rarely reach the level of an outright ban. There are always people who will not understand the text of a label correctly – “Contains TTBP” being a good example – or do not care to read it at all. Therefore, an alternative measure may in practice lead to a sacrifice of the national level of protection of the values, even if in e.g. the *Court’s* assessment the measures would be considered (approximately) equivalent. There would thus be partial pre-emption, because the Member State in question could not fully reach the objective and protection level it had chosen.

Weiler has also pointed out how the least restrictive measures approach in practice expands the role of the Community judiciary. If the Community legislation is unclear on the alternative, the Court of Justice will in case of dispute strike the (political) value choices. This could be particularly inappropriate on a question of pre-emption, which by definition deals with a *harmonized* field. In applying the least restrictive measures approach, the Court is required to assess competing values, despite the fact that the Community legislature has already had its opportunity to do so. In the non-harmonised fields the absence of harmonization - and thus of other Community involvement outside the Treaties - makes the Court’s role better justified. As far as the actual decisions on less restrictive measures are concerned, the discussion reverts back to the observations that were made earlier in this section.

Finally, these observations on the potential applicability of certain Treaty free trade principles and provisions to pre-emption lead to one further consideration. It could namely be pointed out, that the process of harmonisation contains - already as it exists today - numerous safety valves on the division of competences and preservation of important values. The derogation provisions

¹⁹⁹ See Articles 2, 3(c) and 4, as well as 10, respectively.

²⁰⁰ 2000, pp. 367–368. See also e.g. Krämer (Krämer, L. (2002) Casebook on EU Environmental Law. Hart Publishing: Oxford. Pp. 272-273), who discusses this scenario in the context of the *Crayfish* case (Case C-131/93, *Commission v. Germany* [1994] E.C.R. I-3033). Cf. also with Regan, D. (2001) Judicial review of Member-State Regulation of Trade Within a Federal or Quasi-Federal System: Protectionism and Balancing, *Da Capo*. Michigan Law Review, August 2001. Pp.1899 – 1902; and *Maine v. Taylor*, 477 U.S. 131 (1986).

of Articles 95(4-5) are a good example in the very field of free trade and environmental protection²⁰². And as a matter of fact, the application of the derogation clauses does itself rely on the principle of justification. Moreover, the Commission verifies that such preserved measures do not constitute arbitrary discrimination or disguised restrictions to trade, assessing thus also the existence of less restrictive measures.

There is yet another overlap between the derogation clause of Article 95 and obstacle conflict pre-emption discussion. The Commission should also verify, that the derogating national measure does not create “an obstacle to the functioning of the internal market”. In other words, even the Treaty itself already contains a rationale, whereby the acceptability of a national measure *in a harmonized field* is subjected to a test on the obstacles caused to the internal market. In the light of this, admittedly, argumentation against a recourse to justification grounds merely due to harmonisation is diluted.

Other safety valves for the preservation of important national values are the general reliance on qualified majority as opposed to absolute majority voting, and the above-elaborated reliance on the latest scientific data and a high level of protection. Therefore, the sacrifice of a clear-cut, yet rigid pre-emption policy might not be worthwhile from a value preservation perspective, after all.

3.5.2 Obstacle conflict pre-emption and RoHS

As far as the RoHS Directive is concerned, the general deliberation above regarding the obstacle conflict pre-emption revealed many of the complexities at issue. In addition, the lack of certainty on the RoHS Directive’s free trade objectives will also frustrate to some degree the applicability of the obstacle conflict approach, at least insofar as that approach should culminate in a comparative assessment of the national and Community objectives.

It seems in any event that only the scenario, where the Community has intended to include the use of *all* substances in EEE within its scope, has potential for adding on to the conclusions already drawn in the context of direct conflict pre-emption above. We analyse therefore pre-emption against a wide scope of the RoHS Directive, only. The three general advantages of

²⁰¹ Regan (2001 pp. 1899 – 1901) notes that usually alternatives achieve only most of the benefits at lower cost. He distinguishes thus between a “strict less restrictive alternatives” test (identical level of protection) and a “loose less restrictive alternative” tests (approximately similar level of protection).

²⁰² These Treaty Articles grant to the Member States the right to introduce more stringent national standards even after harmonization. In case of Article 95(5) (national measures implemented *after* harmonization), the setting of such standards is nevertheless subject to e.g. *new* scientific criteria (cf. with the discussion above in sections 2.3 and 2.4) and a *unique* national problem, which arose *after* the harmonising measure.

obstacle conflict pre-emption, which were mentioned in the beginning of this chapter, may next be assessed from the viewpoint of the RoHS Directive.

The first advantage was that obstacle conflict pre-emption may be quite nuanced and targeted. In a sense, the RoHS Directive is already very focused in its scope. It “only” deals with restrictions on the use of substances in EEE, and does so in a rather absolutist manner: specific substances either are or are not banned, save the limited exemptions.²⁰³ The practical effect created by the potential free movement pre-emption of RoHS would, however, be quite vast. It would seem to touch upon any EEE that contains hazardous materials. All national ordinances²⁰⁴, which address the use of substances in EEE from an environmental protection perspective would need to adhere to the act.

Under the obstacle conflict pre-emption thinking, however, this would mean, that these national environmental measures would not be prohibited as such, but only to the degree that they interfere with the internal market objectives of EEE. The analysis may consequently move to the second advantage of obstacle pre-emption: the availability of alternative means for achieving the environmental aims at stake.

The recourse to alternative protection measures seems to have limited relevance in *interpreting* the RoHS Directive. This fact is explained, once again, by the absolutist nature of the directive. The objective of the law is to ensure that environmental risks from substances are eliminated and to guarantee the free movement of any EEE, from which the six banned substances have been removed. Hence, for any other substance related rules, such as the label “Contains TTBPA”, the only point of comparison in the directive remains its free movement objective. At the same time this fact does not offer much further guidance: all measures are in a way “alternative”.²⁰⁵ In borderline cases the qualification of these measures under the Court’s scrutiny would in accordance with Cross’s taxonomy boil down to an analysis on the objectives of the national measure, and its potentially detrimental effects on the RoHS Directive’s internal market

²⁰³ The originally proposed WEEE directive, of which the present RoHS Directive only represents a small part, covers a much wider variety of issues such as takeback, treatment and information requirements of waste EEE.

²⁰⁴ Some of these fields are also already harmonised under other Community acts. The RoHS Directive is without prejudice to such parallel acts.

²⁰⁵ A national ban on, say, a TTBPA could be limited to handheld devices only on the fictional hypothesis that there were health risks with that substance which related to allergic contact dermatitis, or if the substance was present in that type of devices in particular. If the same health protection effect could nevertheless be achieved by limiting the substance to the insides of the equipment that could be a measure of less hindrance. Further, a warning label advising persons sensitive to the substance could be of even less restraint on trade.

objective. This shifts the discussion to the third advantage of the obstacle conflict approach; the flexibility which permits a value comparison.

The obstacle conflict approach could allow a Member State measure on dangerous substances a chance to survive judicial scrutiny on the basis of a more elaborate analysis of the Community and Member State objectives that are affected.²⁰⁶ The analysis could scrutinize e.g. the effects and intentions of the alternative national rule. Because the conflict is created against the free movement objectives, the “discrimination” tests of the free movement jurisprudence could offer a useful tool to evaluate the situation²⁰⁷. In case the alternative provision makes any distinctions on the basis of nationality, the credibility of a claim that a fundamental national value is at stake seems low. The intent of the law is therefore improper: the measure could clearly create a protectionist obstacle, which would conflict with the internal market objectives of the Treaty and the directive. To build on the earlier example, a requirement to have a label “Contains TTBPA” could not be applied to imported goods only, but should be mandated on all products. Otherwise it would have weak chances of avoiding pre-emption.

One could also apply a “*de minimis*” –type test on a national restriction. Let us assume that a Member State sets a prohibition on the use of TBBPA in EEE. Let us also assume that this substance is on one hand found hazardous to the environment and human health, but is on the other hand extremely rare in e.g. consumer electronics goods. Therefore the detriment of a ban to trade would be minimal, making a pre-emption on free trade grounds less likely.

The Court has applied an obstacle conflict pre-emption -type²⁰⁸ assessment in the *Holdijk*²⁰⁹ and *Cinisello Balsamo*²¹⁰ cases. It conducted a balancing of objectives, which lead to the preservation of national competences. In both cases, the Court seems to underline the fact that the potentially conflicting national measure simultaneously preserves a value, which is a *parallel* objective of the Community measures.

It should in the first place be emphasized that the establishment of such an [common] organization [of the agricultural markets] pursuant to article 40 of the Treaty *does not have the effect of exempting agricultural producers from any national provisions intended to attain objectives other than those covered by the common organization, even though such provisions may, by affecting the conditions of production, have an impact on the volume or the cost of national production and therefore on the operation of the common market in the sector*

²⁰⁶ Cross (1992, pp. 467-468) (n. 6, *supra*)

²⁰⁷ It is not possible to go further into the actual testing of discrimination in the context of this analysis.

²⁰⁸ It should be born in mind that the taxonomy here is that of Cross, not the Court.

²⁰⁹ Joined cases 141/81, 142/81 and 143/81 [1982] E.C.R.1299.

²¹⁰ N. 78, *supra*.

concerned . - - In those circumstances, *the absence of any provision* for the protection of animals kept for farming purposes in the regulations establishing common organizations of the agricultural markets *cannot be interpreted as rendering the national rules in that field inapplicable* pending the possible adoption of community provisions at a later stage. Such an interpretation would be incompatible with the *Community's concern for the health and protection of animals*, as evinced, inter alia, by Article 36 of The treaty and by Council decision no 78/923/EEC, of 19 June 1978, concerning the conclusion of the European convention for the protection of animals kept for farming purposes - - .²¹¹

It must be borne in mind that the *purpose of Directive 75/442 is to harmonize* the legislation of the various Member States regarding the disposal of waste *in order* on the one hand *to avoid barriers to intra-Community trade* and inequality of conditions of competition resulting from disparities between such provisions and *on the other to contribute to* the attainment of Community objectives concerning *protection of health and the environment*. It does not prohibit the sale or use of any product whatsoever, but nor can it be inferred that it prevents Member States from imposing such prohibitions in order to protect the environment. - - As is apparent from Article 3, the directive is *intended inter alia to encourage national measures likely to prevent the production of waste*. Limitation or prohibition of the sale or use of products such as non-biodegradable containers *is conducive to the attainment of that objective*.²¹²

Commensurability with parallel Community objectives will hence enhance a national measure's ability to stand a pre-emption challenge of RoHS: environmental protection for instance is naturally a parallel or at least secondary objective in the Directive. One could nevertheless also argue the opposite way: in cases where the Community *has* legislated with a particular objective in mind, a national measure could be practically futile from the angle of the objective. In particular where the precautionary principle has been followed - as is the case with the RoHS Directive - the *additional environmental* impact of a national measure could be quite limited. Then, in the absence of an environmental benefit, the conflict with the trade objectives would be *relatively* much greater, and the law potentially pre-empted. As far as the preservation of other national objectives is concerned, the justification grounds of Article 30 and the mandatory requirements could offer useful analogies.

Moreover, the application of the precautionary principle and of latest scientific results in Community law appears to reduce the weight of systemic²¹³ arguments against a wide pre-emption. Since the dissemination of scientific results today is practically ubiquitous and instantaneous, it is the legislative inertia, rather than the level of scientific knowledge, which determines the time it takes to transform new environmental findings into bans and other

²¹¹ Paragraphs 12 and 13. (Emphasis added.) (n. 207, *supra*)

²¹² Paragraphs 7 and 8. (Emphasis added.) (n. 78, *supra*)

²¹³ The assumption here is obviously that both the Community and the Member State would react to the scientific evidence in a similar fashion.

protective provisions. The co-decision procedure²¹⁴ may be notoriously slow, in particular from the viewpoint of an environmentally concerned Member State. It could be able to implement national legislation much more swiftly. Through a Community level application of the precautionary principle, there is a reduced likelihood that a new, blatantly hazardous substance appears and requires prompt legislative actions. It therefore seems that the precautionary principle supports a wide rather than a narrow interpretation of the RoHS Directive's pre-emptive effect²¹⁵.

Lastly, it is worth noting that the derogation clauses of Articles 95(4-5) will be applicable in the context of the RoHS Directive. The potential erosion of the RoHS Directive's free movement objective through a narrow pre-emption analysis may therefore seem pointless. Any national carve-outs from that pre-empted field, created by an interpretation of the conflict of values between the national and Community provisions, may become particularly onerous to control. The transparency of legislation could decrease considerably if obstacle pre-emption was applied widely. One may also ask, what on the fringes of RoHS Directive's scope could constitute a problem, which could not be addressed by the ability either to maintain or to introduce national provisions under the Commission's supervision in Article 95? The derogation clauses take into account the possibility, for instance, that new environmental risks may be discovered on the existing substances. Therefore the preservation of important national value choices remains feasible even after harmonisation. Indeed, the room for legislative manoeuvre that the obstacle conflict pre-emption or the direct conflict pre-emption leave, may in actuality be no different from the harbour of Article 95(4-5). This is particularly so in the cases of simple free movement directive such as RoHS. The very same free movement principles determines the outcomes in both cases. At the same time the transparency and predictability of a wide obstacle pre-emption approach appear clearly poorer.

4. TOWARDS A MATURING DOCTRINE OF PRE-EMPTION

The EC Treaty is, as noted, silent as regards the scope and pre-emptive effects of Community law²¹⁶. At the same time no clear doctrine has arisen from the jurisprudence of the Court of Justice. The analysis on RoHS also indicated that for instance the promising idea of using a doctrinal taxonomy to depict pre-emption may in practice quickly melt away, offering only limited support in predicting the outcomes. In the jurisprudence of the Court, for instance, the choice of

²¹⁴ Article 251 TEC. The Community measures are naturally not limited to this legislative process in all urgent matters.

²¹⁵ It appears that this conclusion could be generalised: the precautionary principle supports a wide rather than a narrow interpretation of the scope of Community environmental measures.

²¹⁶ Weatherill (1994, p. 13), (n.7, *supra*).

the pre-emption method seems to have varied case-by-case without clearly apparent consistency. It for instance not evident whether and when the Court's choices on a method of pre-emption have been affected by an attempt to maximize the freedom of the national legislatures in striking value choices within the limits permitted by harmonisation.²¹⁷ Likewise, it is not sure whether the simultaneous applicability of several pre-emption approaches should lead to the parallel utilisation of all of them, or perhaps of only the most exhaustive one of them. A more robust judicial approach would therefore seem longed-for. This conclusion is further supported by concurrent horizontal constitutional developments. Framed against the evolution of Community law during the past decade in particular, a paradigm shift could be expected in the field of pre-emption, too.

Two observations regarding the concurrent horizontal developments seem particularly enlightening. The first observation relates to the Community's *external* competences. They are of course intrinsically linked to the internal competences, but the jurisprudence highlights a development which in the internal sphere seems still concealed. In interpreting the external powers of the Community, the Court delineated in Cremona's view²¹⁸ during the 1970s and 1980s a jurisprudence, which marked a continued increase in the competences of the Community.²¹⁹ Nevertheless, a judicial culmination occurred during the 1990s²²⁰, as the most far-reaching judgments (such as *Opinion 1/76*²²¹) were toned down. Simultaneously, mixed agreements with both the Member States and the Community as contracting parties became a widely followed practice in external relations, excluding however the Common Commercial Policy. Indeed, in the fields of concurrent external competences, national measures would not be excluded merely because the Community possessed the competence, but only to the extent the national provisions conflicted with the Community measures.

In the field of free movement of goods, on the other hand, the Court's earlier case law from the 1970s and 1980s was altered *expressis verbis* by the seminal *Keck* judgment²²² in early 1990s. The Court's earlier jurisprudence from the *Dassonville* and *Cassis de Dijon* judgments²²³ had

²¹⁷ Cross (1992, pp. 449 – 450) (n. 6, *supra*).

²¹⁸ Cremona, Marise (1999) External Relations and External Competence: The Emergence of an Integrated Policy. In: P. Craig and C. de Búrca (eds.) *The Evolution of EU Law*. Oxford University Press: Oxford. Pp. 137 – 175.

²¹⁹ Key decisions in this jurisprudence include Case 22/70, *Commission v. Council (AETR)*, [1971] E.C.R. 263; *Opinion 1/76 (Rhine Navigation Agreement)* [1977] E.C.R. 741; Joined cases 3, 4 and 6/76, *Cornelis Kramer and others* [1976] E.C.R. 1279.

²²⁰ See e.g. *Opinion 2/91 (ILO Convention)* [1993] E.C.R. I-1061 and *Opinion 1/94 (WTO Agreements)* [1994] E.C.R. I-5267.

²²¹ The judgment conferred exclusive external competence to the Community on a field even absent prior exercise of the parallel internal powers.

²²² N. 192, *supra*.

²²³ Case 8/74, *Procureur du Roi v. Benoit and Gustave Dassonville*, [1974] E.C.R. 837; and Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein ("Cassis de Dijon")*, [1979] E.C.R. 649, respectively.

namely established a jurisprudence, which viewed even potential and indirect hindrances to intra-Community trade in a draconian fashion. The Member States' latitude to legislate had thereby started to grow narrower on a wide array of social policy fields. In *Keck*, however, the development was partly reversed. Certain selling arrangements – or probably more widely measures which dealt with market circumstances rather than market access²²⁴ – were excluded from the scope of a strict review. The Member States' competences on numerous policy areas could thus again be applied in parallel with the Community's free market requirements without the need to explicitly justify them, provided of course that they were non-discriminatory.

In the field of both external competences and free movement of goods, the Community law – and the jurisprudence of the Court of Justice particularly – has thus evolved along similar paths. It has matured from an activist, Community competence building and internal market creating approach towards more subtle regimes of “tolerant parallelism”. The Court has hence reacted to the EU's changing socio-economic realities. In light of comparative perspectives on American constitutional law, the evolution seems both natural and justified. It would also appear to fit well with Cross's conclusions²²⁵ on pre-emption; he, too, was willing to see more deference granted to the Member State legislation in cases where the legislative intent of the Community was not explicit. This conclusion is supported by the systemic effects of the EC Treaty's subsidiarity principle²²⁶: the Community has the burden of showing that a measure is better achieved on EU-level, and that a national measure is therefore pre-empted.

At the same time, however, the risks observed in this research regarding Scott's preference for e.g. the obstacle pre-emption approach call for caution²²⁷. It appears to undermine the principle of supremacy, and hence lead to too narrow an interpretation of pre-emption. Occupation of the field pre-emption, on the other hand, constituted too expansive pre-emption, when applied beyond the express intent of the Community legislator. Both the obstacle conflict and occupation of the field approaches also seemed to lead to legal uncertainty and poor transparency.

Thus, under these circumstances and devolutionary trends, one could predict that the Court will also address the vagueness, which continues to wreathe the doctrine of pre-emption. The Court's elaboration could proceed on the route traced by the parallel developments in the spheres of e.g. external competences and free movement of goods. Methodologically, this would

²²⁴ Weiler, J.H.H. (1999) *The Constitution of the Common Market Place. Text and Context in the Evolution of the Free Movement of Goods*, pp: 349 – 376, in: (eds.) P.Craig & G. de Búrca. *The Evolution of EU Law*. Oxford University Press: Oxford.

²²⁵ (1992, pp. 469 – 471) (n. 6, *supra*).

²²⁶ Article 5 TEC.

²²⁷ Cf. also e.g. Goucha Soares, who critiques (1998, pp. 141 – 145) (n. 7, *supra*) the obstacle pre-emption approach, although from the angle of creating too wide discretion in favour of *centralizing* tendencies.

imply focus on the modality of direct conflict pre-emption. Moreover, the interpretation of such conflicts between the national and Community legal orders would emphasize a careful construction of the law at dispute²²⁸, including the statutory intents of the legislator. This in turn implies, that the “scope “ of a law becomes even more integrally associated with its pre-emptive effects.

In fact, this is the very approach was used in the case study of this research: the scope of the RoHS Directive was explored in detail before engaging in an analysis on its potential pre-emptive effects. The methodology showed – in very realistic terms, it is hoped – how the task is often far from facile. Even simple directives may be onerous to interpret. Yet the suggested approach would seem to serve both the practical purpose of tying the judicial deliberation into pragmatism, while offering also a normative backrest to the adjudicator. The flexible approach resembles hence that traditionally used in interpreting international public law. Flexibility seems to resonate well with the Court’s above noted doctrinal evolution towards “tolerant parallelism”.²²⁹

In this scenario, pre-emption would thus converge towards the principle of supremacy, because supremacy in its essence is commensurate with direct conflict pre-emption. Pre-emption approach would therefore lose parts of its radicalism: the ability of the Community to exclude national legislation in cases, where reliance on supremacy would in itself not permit that, would be reduced. As in the United States,, the Community could expand the central premise of conflict pre-emption towards field pre-emption only by unmistakably expressing its intent to exclude national legislation in a field, it had chosen not yet to legislate on. Such could be the case, for instance, where the Community foresees that the objective in question may not be reasonably attained by the efforts of the Member States individually.

5. CONCLUSIONS AND SUMMARISING VIEWS

This analysis explored the legal concepts “scope” and “pre-emptive effect” of a Community law in the realms of the RoHS Directive. The scope and pre-emptive effects of Community legislation affect directly the vertical division of competences between the European Community and its Member States. The concepts are thus fundamentally linked to determining whether it is the EU institutions or the national legislatures that are charged with the value choices regarding for instance the level of environmental protection on electrical and electronic equipment in the internal market.

²²⁸ See also Weatherill (1994, p. 18) (n. 7, *supra*).

²²⁹ Yet the fact that the Community (environmental) policies are to become applicable in the new applicant countries as the EU enlargement proceeds may nevertheless affect the federal maturity of EU, and hence also the Court’s interpretations regarding the scope and pre-emptive effects of Community law.

The RoHS Directive has a very simple structure: it sets an environmental protection and a free trade objective, and in that context prohibits the use of six hazardous substances in electrical and electronic equipment. Nonetheless, it proved difficult to determine whether the Directive intends to prevent the Member States from prohibiting nationally substances *other than* those six explicitly prohibited by the Community. Thus, despite the manifest simplicity, it was onerous to define the actual scope or the pre-emptive effects of the RoHS Directive²³⁰.

The difficulties faced in interpreting the scope and pre-emptive effects of such a simple directive illustrate well the strains that complex federal settings like the Community set on the legislatures. Even simplicity may dissolve into obscurity, unless the legislator acts precisely and rigorously. As Kapteyn and VerLoren van Themaat²³¹ have noted:

“Poor quality legislation with vague provisions resulting from political compromises sometimes make it difficult to ascertain what the precise character of a harmonization directive really is. In many cases, the determination of the precise scope of a directive will require a close analysis of its objectives and the system involved.”

It may admittedly be difficult to maintain a clear and coherent view on the scope of a directive throughout the complicated co-decision procedure. Moreover, some of the pre-emptive effects of Community law are indeed quite indirect or otherwise practically unforeseeable. A comparative analysis to similar harmonizing acts and the case law of the Court of Justice in interpreting them illustrated, that the difficulties in precisely outlining the scope and pre-emptive effects of Community law are regrettably common.

In the course of the research, the selected level of environmental protection was identified as a third concept that closely related to the scope and pre-emptive effects of an act. Ambiguity on the distinction between the scope of the directive and the level of protection set by it will also have consequences on the distribution of competences between the Community and the Member States, as well as horizontally between the Community legislator and the Court of Justice.

The endeavour to retrospectively clarify the scope and pre-emptive effects of Community law is also somewhat inverted: a nuanced understanding on the value balance that the overarching federal law intends to strike becomes a pre-requisite for determining its scope, and hence also the division of powers regarding the field of the act. Yet it is the division of powers that should form the basis for striking the value choices on state and federal level. The directive should

²³⁰ It could also be argued that the simplicity of RoHS is in actuality a burden. The proposed law is perhaps not a clever test case, after all, as the absolutist, black-and-white nature of the directive may thwart the room for clear political compromises.

clearly state to what extent the federally agreed balance between values prevails. One reason for this “inversion” is that the Community competence under Article 95 harmonisation turns so tightly on free trade objectives and values.

The *nature* of Community directives as legislative acts may be relevant in determining their scope and pre-emptive effects. Directives are, after all, only to set the result to be achieved, while leaving the Member States flexibility in choosing the (legislative) means of attaining such results. A wide interpretation of the scope, as well as an expanding approach on pre-emption, would seem to contradict this principle. The scope and pre-emptive effects could thus be different for directives and for regulations, even if they were identical in substance. The use of a directive could in itself create a presumption in favour of preserving the national law, because a wide pre-emption policy could void the entire *ratio* of discretion behind the directives.

As far as the RoHS Directive is concerned, this research proposed a number of criteria for interpreting its statutory scope. The analysis concluded that the RoHS Directive is perhaps more likely to have a wide scope than a narrow scope. The scope could have been intended to cover all substances used in electrical and electronic equipment. The choice of legal basis (Article 95) and the free movement objective, as well as the application of the precautionary principle supported this conclusion; the rest of the used criteria – a textual analysis, the procedural aspects (i.e. recourse to the comitology procedure), and the scientific evidence - as well as the comparative analysis produced unclear or neutral results. The fact that RoHS is indeed a Community *Directive*, rather than a Regulation, would then again speak for a narrow scope. As noted, even if there were many tools to define the scope of a directive *ex post*, this proved a laborious and time-consuming exercise, which also raised concerns from the viewpoint of legal transparency.

In the absence of clear doctrine, on the other hand, the pre-emptive effects of the RoHS Directive were assessed through the five-type taxonomy of Cross. The RoHS Directive does not have express pre-emption or savings clauses. The existence of express pre-emption clauses seemed nevertheless irrelevant in the light of case law: the overall free trade objectives are decisive, and prone to support the allocation of powers on the Community. Recourse on express savings clauses, on the other hand, should be carefully considered against the availability of the derogations of Article 95(4-5). The latter often provide the advantages of transparency and Community control.

²³¹ Kapteyn, P.J.G. and VerLoren vanThemaat, P (1998) Introduction to the Law of the European Communities, from Maastricht to Amsterdam. Kluwer Law International: Amsterdam. Pp. 793-794.

Direct conflict approach forms the core of pre-emption, and its applicability to the simplistic RoHS Directive seemed straightforward, even banal to some extent. The pervasive role of the free movement philosophies in harmonisation policies decreases the difference between direct conflict and obstacle conflict pre-emptions. If the scope of the RoHS Directive covers all substances, as is proposed here, a direct conflict pre-emption excludes national legislation on substance restrictions on EEE. If the scope on the other hand is narrow, the above described devolutionary circumstances should be taken into account: it would appear unadvisable to then extend the RoHS Directive further so as to occupy the field of substance restrictions already prior to explicit Community legislation.

The fourth type of pre-emption, the occupation of a regulatory field approach, is a stifling modality from the perspective of balancing social values²³². A national value choice is pre-empted as such, entirely regardless of its effects on the pre-empting Community law and values. The applicability of field pre-emption to the RoHS Directive could not be determined with certainty.

Finally, the obstacle conflict approach offered many free trade -related analogies, such as recourse to “justifications” or “least restrictive measures”. Even if the introduction of the justification logic *within* a harmonized field would be accepted, far-reaching compromises on the supremacy of Community law appeared ungrounded. Indeed, the expansion of the free movement philosophies onto pre-emption seemed problematic and unnecessary. It could also create confusion regarding the domains of primary and secondary law. As long as the Treaty offers safety valves – such as the derogation clauses under Article 95(4-5) - for addressing serious national concerns, the dilution of a clear supremacy based pre-emption policy seems risky and futile. Application of the obstacle conflict pre-emption approach to the RoHS Directive did not therefore seem advisable.

Overall, the ambiguity regarding the scope of the RoHS Directive proved contagious: conclusions regarding the pre-emptive effects of the directive remained also on the level of probabilities. Due to these obscurities, the Community legislature may have in practice actually transferred part of its discretionary powers on the matter to Luxembourg: it is the European Court of Justice that will determine what the scope of Community environmental protection is on EEE and how this protection affects parallel national legislation. Again, the legislature should aim at precise provisions - already for the sake of guarding its own powers from potentially overbroad judicial interpretation.

²³² Goucha Soares (1998, p. 137) (n. 7, *supra*).

Whereas Cross's taxonomy on pre-emption proved fruitful in offering diverse viewpoints into question of division of powers, it became simultaneously obvious that for such a tool to have practical value in the interpretation, there would need to be some guidance as to which type(s) of pre-emption one should rely on. A more robust judicial approach would therefore seem longed-for. This conclusion is further supported by concurrent horizontal constitutional developments. In the field of both external competences and free movement of goods, the Community law – and the jurisprudence of the Court of Justice particularly - has evolved from an activist, Community competence building and internal market creating approach towards more subtle regimes of “tolerant parallelism”. This has increased the latitude of national legislators to enact parallel national provisions. Following the same doctrinal path also in pre-emption, the Court could start to apply a more robust pre-emption analysis, focusing on the direct conflicts between Community and Member State measures. The Community could expand beyond explicit harmonization only by expressing its intent unmistakably. Moreover, the interpretation of direct conflicts could rely on a careful construction of the law at dispute, including the statutory intents of the legislator – as onerous as that may be in case the statutes are obscure. Indeed, this very approach was in fact used in the case study of this research: the scope of the RoHS Directive was explored in detail before engaging in an analysis on its potential pre-emptive effects. Hence, the “scope” of a law becomes even more integrally associated with its pre-emptive effects – and pre-emption will in turn converge towards the principle of supremacy, because supremacy in its essence is commensurate with direct conflict pre-emption.

The experiences in the United States seem to lead to an interesting comparative observation: when the maturity of a federal system increases, there seems to be *less* need for applying wide pre-emption policies²³³. *Established* federal systems only require certain upgrading and maintenance, not exhaustive overhauls of centralistic legislation. Common legal foundations justify flexibility on the details.²³⁴

Combining the findings of the case study on RoHS with the American experience and with the latest developments in the EU in the fields of external competences and free movement of goods, the Community law – and the jurisprudence of the Court of Justice particularly – leads us to the final observation. It seems both necessary and probable that the Court will reconsider its

²³³ Note how in the United States, where the much of the federal pre-emption doctrine emanates from, there is no equivalent to the Community directives. A presumption for the preservation of state laws is created, if the federal act does not contain precise and express clauses on the pre-emptive intent of the Congress.

²³⁴ This conclusion appears well analogous with the finding regarding a situation prior to harmonization: the stringency of federal judicial reviews on state legislation restricting interstate trade may be relaxed once a certain maturity of integration in the trading area is reached. (Weiler (1999, pp. 369 - 376) (n. 222, *supra*))

jurisprudence on pre-emption. This presumption seems justified, as the Court evolves towards the more subtle and mature regimes of “tolerant parallelism”.

Overall it may be concluded, that the choice of legislative forum for striking value balances in the Community is affected by the scope and the pre-emptive effects of Community legislation, as well as the interrelationships between these concepts. Therefore, the legislature should aim at statutory precision. This has not succeeded well as far as the RoHS Directive is concerned. It appears unclear as to what extent the decision making powers on substance restrictions on electrical and electronic devices has been shifted from the EU Member States to the Community by the enactment of the RoHS Directive.