CHAPTER 7

Article 3 of Regulation 1/2003 and the Doctrine of Pre-emption

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1 INTRODUCTION

Which rule takes precedence in a case of parallel application of European Union (EU) and national competition law?[1] The Rome Treaty had not foreseen the question,[2] leading early commentators to propose to resolve conflicts in favour of the strictest rule and others to support the prevalence of EU law, whether or not it was stricter.[3]

In *Walt Wilhelm*, the European Court of Justice (ECJ) held that the application of national law should 'not prejudice the uniform application throughout the [EU] of the [EU] rules on cartels and of the full effect of the measures adopted in implementation of those rules'.[4] Consequently, 'conflicts between the rules of the [EU] and national rules in the matter of the law on cartels [should] be resolved by applying the principle that [EU] law takes precedence'.[5] *Walt Wilhelm* passed to posterity as one of the earliest applications of the principle of primacy of EU law by the ECJ.

The *Walt Wilhelm* Court, however, made clear that such judicial regulation of the parallel application of EU and national competition rules was not necessarily the end of

1. This chapter's references to the 'European Union' and to 'Articles 101 and 102 TFEU' shall include all previous designations, such as 'European Economic Community' and 'Articles 85 and 86 ECC'.
2. The first regulation implementing Articles 101 and 102 TFEU did not address the issue either. *See* Regulation No. 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21.2.1962, pp. 204-211.
3. For a review of the doctrinal discussion about the parallel application of EU and national competition rules until 1969, *see* Lúcio Tomé Feiteira, *The Interplay Between European and National Competition Law after Regulation 1/2003: 'United (Should) We Stand?'* (2016), pp. 29-37.
4. *See* Case 14-68 *Walt Wilhelm and others v. Bundeskartellamt*, 13.7.1969, ECLI:EU:C:1969:4 (1969), para. 9.
5. *See ibid.*, para. 6.

the discussion. In fact, the Court's judgment opened the door to the possibility of a different arrangement under a regulation adopted pursuant to the relevant treaty basis.[6]

The Commission came back to the question in the early 2000s. In a policy reform known as the 'modernisation' of EU competition law, the Commission proposed to explicitly introduce a principle of exclusion of national competition law:[7]

> *Article 3*
>
> *Relationship between Articles 81 and 82 and national competition laws*
>
> Where an agreement, a decision by an association of undertakings or a concerted practice within the meaning of Article 81 of the Treaty or the abuse of a dominant position within the meaning of Article 82 may affect trade between Member States, Community competition law shall apply to the exclusion of national competition laws.

The legislative compromise ultimately reached in the Council led to the promulgation of a different and more complicated arrangement. The Commission's principle of exclusion was abandoned in favour of a complex model that safeguards the application of specific types or provisions of national law. Article 3 of Regulation 1/2003 reads as follows:[8]

> *Article 3*
>
> *Relationship between Articles 81 and 82 of the Treaty and national competition laws*
>
> 1. Where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 81(1) of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article 81 of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article 82 of the Treaty, they shall also apply Article 82 of the Treaty.
> 2. The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict

6. In the ECJ's words, '[c]onsequently, *and so long as a regulation adopted pursuant to Article 87(2)(e) of the Treaty has not provided otherwise*, national authorities may take action against an agreement in accordance with their national law, even when an examination of the agreement from the point of view of its compatibility with Community law is pending before the Commission, subject however to the condition that the application of national law may not prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to implement it.', *see ibid.*, para. 9, emphasis added.
7. *See* Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty and amending Regulations (EEC) No. 1017/68, (EEC) No 2988/74, (EEC) No. 4056/86 and (EEC) No. 3975/87 ('Regulation implementing Articles 81 and 82 of the Treaty'), OJ C 365E, 19.12.2000, pp. 284-296.
8. *See* Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, pp. 1-25.

> competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.
>
> 3. Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws, nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty.

Article 3 is not an easy read. On the one hand, Article 3(1) and the first sentence of Article 3(2) work towards convergence. Article 3(1) requires that national competition authorities and national courts apply national competition law in parallel with EU competition law if the agreement or abuse affects trade between Member States. And the first sentence of Article 3(2) embodies a hard rule that prevents national competition law from prohibiting agreements that do not infringe Article 101(1) of the Treaty on the Functioning of the European Union (TFEU).

On the other hand, the second sentence of Article 3(2) and (3) work towards divergence. Both sentences embody exceptions.[9] Article 3(2) says that Member States can apply stricter national laws in relation to unilateral conduct by undertakings. Article 3(3) permits the application of national laws that predominantly pursues an objective different from that pursued by Articles 101 and 102 TFEU.

Different interpretations have been submitted in regard to the meaning of both exceptions. One thesis is that these legislative exceptions allow for more internal market fragmentation than the judicial arrangement in place since *Walt Wilhelm*, which did not provide any exception regarding the adoption or application of stricter national rules on unilateral conduct.

That reading, however, rests on a strong legal assumption. The assumption is that Article 3 insulates specific national rules from the displacing effects of the principle of primacy of EU law. The problem with the assumption lies in the fact that it is far from unanimous that Article 3 – more generally a provision of secondary law – can modulate the *primacy* of Articles 101 and 102 TFEU – more generally of provisions of primary law.

Still debated to this day, the issue of the appropriate reading of Article 3 of Regulation 1/2003 requires a reexamination. The text of Article 3 is so convoluted that it may be one of the most cryptic provisions of the EU competition law system. This paper seeks help in the explanatory power of the constitutional law doctrine of pre-emption to shed light on the legal significance of Article 3.[10]

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9. We refer to these rules as 'exceptions' because they are drafted as such. As we will see, the precise content of these exceptions is the subject of much debate.
10. On the doctrine of pre-emption and EU law, *see generally* Robert Schütze, *Supremacy Without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption*, 43 Common Market Law Review 1023 (2006) and Amedeo Arena, *The Twin Doctrines of Primacy and Pre-Emption*,

The chapter starts by considering the scope of Article 3, determining which national rules are regulated by Article 3(2) and (3) (section 2). The paper then construes Article 3 through the lenses of the doctrine of pre-emption (section 3). As will be seen, reading Article 3 through a pre-emption lens not only clarifies the situations covered in the provision but also yields interesting practical consequences.

2 THE SCOPE OF ARTICLE 3 OF REGULATION 1/2003

Article 3 is a difficult provision. The text uses vague, abstract and imprecise words. What is meant, for instance, by 'stricter' and 'national laws' or by national law that 'predominantly pursue an objective different from that pursued by Articles [101 and 102 TFEU]'? In addition, the text of Article 3(2) and (3) employs disconcertingly varying language. For example, Article 3(2) talks about 'adoption' and 'application' of national laws, when Article 3(3) only mentions 'application'. What legal significance should be attached to small variations between the two clauses?[11] Conventional methods of interpretation allow us to derive some general points concerning the proper interpretation of the situations covered by Article 3(2) and (3).

2.1 Which National Rules Are Covered by Article 3(2) and (3)?

The Article 3 exceptions allow for the application of certain national rules. The exception of Article 3(2) benefits to 'stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings'. And the exception of Article 3(3) safeguards 'national merger control laws' and 'provisions of national law that predominantly pursue an objective different from that pursued by Articles [101 and 102 TFEU]'.

Every lawyer confronted with the text of Article 3 will come away with questions. Is it for the Member States to decide which national rules are 'stricter' or pursue an objective 'predominantly different' from that pursued by Articles 101 and 102 TFEU? Is the concept of 'national laws' in Article 3(2) restricted to national *competition* laws? And how to say if national law pursues an objective 'predominantly different' from the one pursued by Articles 101 and 102 TFEU? We deal with all three questions in turn.

2.1.1 EU or Member State Power over the Article 3 Exceptions?

The question of who has the authority to decide whether a national law is stricter or pursues predominantly different objectives is critical. In a case against Facebook, the

in Oxford Principles of European Union Law: The European Union Legal Order: Volume I (Robert Schütze & Takis Tridimas eds, 2018).

11. Judicial guidance is, in this regard, scarce. *See*, for instance, Opinion of AG Trstenjak in Case C-484/08 *Caja de Ahorros y Monte de Piedad de Madrid*, 29.10.2009, ECLI:EU:C:2009:682; Opinion of AG Kokott in Case C-681/11 *Schenker & Co and Others*, 28.7.2013, ECLI:EU:C:2013:126; Case T-466/17 *Printeos, SA and Others v. European Commission*, 24.9.2019, ECLI:EU:T:2019:671; and at the national level *Expedia Inc/Autorité de la concurrence e.a.*, Cour de Cassation 10-14.881, 82011FR0510(01) (2011).

German Competition Authority (GCA) seized the authority to declare its national competition law 'stricter' than Article 102 TFEU, allowing itself to intervene below the threshold of unlawful abuse of dominance.[12]

A well-established interpretative principle of EU law states that 'the terms of a provision of [EU] law which makes no express reference to the law of the Member States *for the purpose of determining its meaning and scope* must normally be given an autonomous and uniform interpretation throughout the [EU]'.[13] The language chosen by the ECJ in this case law matters. Article 3 expressly mentions Member States' law. But there is no reference (or renvoi) to the legal order of the Member States to define the meaning and scope of 'stricter national laws' or 'provisions of national law that predominantly pursue an objective different from Articles [101 and 102 TFEU]'.[14]

In view of this interpretative principle, Article 3 regulates the application of the law of the Member States without '[deferring] to national authorities the task of classifying internal provisions in accordance to their primary goal […]'.[15] Indeed, and contrary to what some authors appear to suggest,[16] the words 'stricter' or 'predominantly different' in Article 3 embody *autonomous concepts of EU law*.[17] Thus, classificatory authority over Article 3 is vested with the EU, not the Member States.[18] This means that any classification of national competition law as 'stricter' than Article 102 TFEU may be overruled by the ECJ.[19]

2.1.2 National (Competition) Laws

The next question is whether the Article 3(2) exception covers national laws stricter than EU competition law or only national *competition* laws. In concrete terms, the issue

12. *See* Decision of the German Competition Authority in Case B6-22/16 *Facebook*, para. 914. An English translation of this decision is available at http://www.bundeskartellamt.de/. *See also* Giuseppe Colangelo & Mariateresa Maggiolino, *Antitrust Über Alles: Whither Competition Law after Facebook?*, 42 World Competition 372-373 (2019). It is contested that the GCA was applying a national rule on unilateral conduct that was stricter than Article 102 TFEU. *See*, in this sense, Wouter Wils, *The Obligation for the Competition Authorities of the EU Member States to Apply EU Antitrust Law and the Facebook Decision of the Bundeskartellamt*, Concurrences Review 58 (2019).
13. *See* Case C-174/08 *NCC Construction Danmark A/S v. Skatteministeriet*, 29.10.2009, ECLI:EU:C:2009:669, para. 24, emphasis added. The principle is based on the need for the uniform application of EU law and the principle of equality.
14. An example of such type of reference can be found, for instance, in Article 2(2) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 1872002, pp. 1-20; *see also* Case C-303/05 *Advocaten voor de Wereld VZW v. Leden van de Ministerraad* 3.5.2007, ECLI:EU:C:2007:261, paras 51-52.
15. *See* Lúcio Tomé Feiteira (2016), p. 63.
16. *Ibid*.
17. These are concepts with an 'independent meaning of legal terms which is distinct from those established in domestic legal orders'. Valsamis Mitsilegas, *Autonomous Concepts, Diversity Management and Mutual Trust in Europe's Area of Criminal Justice*, 57 Common Market Law Review 46 (2020).
18. *See*, for instance, Case 113/80 *Commission v. Ireland*, 17.6.1981, ECLI:EU:C:1981:139, para. 7.
19. Interestingly, the issue has not been raised in pending proceedings before the ECJ concerning the *Facebook* decision of the GCA. *See* Opinion of AG Rantos in Case C-252/21 *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)*, 20.9.2022 ECLI:EU:C:2022:704.

is whether Article 3(2) intends to safeguard Member States' power to apply national laws against abuse of economic dependence, prohibiting resale below cost or at a loss, etc., or whether Article 3(2) simply wants to allow the Member States to develop a stricter application of national competition law in relation to unilateral conduct.

The problem here stems from an ambiguity in the text of Article 3(2). The title of Article 3 and the first part of Article 3(2) uses the narrower concept of 'national competition law(s)'. The second part of Article 3(2) uses the broader concept of 'national laws'.

Several interpretive indicia support that the Article 3(2) exception applies only to national competition laws.[20] First, the title of Article 3 refers to the relationship between Articles 101 and 102 TFEU and 'national competition laws'. Second, Recital 8 of Regulation 1/2003 explicitly references stricter national *competition* laws on unilateral conduct.[21]

Whichever answer is right, the difficulty remains, in part, rather formalistic. To take a concrete example, a national law against abuse of economic dependence may be called a 'competition law' in one Member State and something else in another. In France, legal academics refer to laws against abuse of economic dependence as the '*petit droit de la concurrence*'. In Belgium, legal academics consider the same rules to belong to unfair trading laws. If form conditions the application of the Article 3(2) exception, discrepancies amongst Member States are predictable.

The better answer, therefore, consists in considering that Article 3(2) applies to all 'national competition laws', including statutes that do not come labelled as 'competition law'. The key then is to determine when a national rule can be considered a national competition rule. The ECN + Directive defines national competition rules as provisions of national law that 'predominantly pursue the same objective as Articles 101 and 102 TFEU'.[22] To determine whether a national rule predominantly pursues the same (or different) objective as Article 101 and 102 TFEU becomes, as such, key to both the interpretation of Article 3(2) and (3).

2.1.3 To Predominantly Pursue an Objective Different from Articles 101 and 102 TFEU

The question of what constitutes an objective 'predominantly different' from Articles 101 and 102 TFEU is harder. Since the early years of EU competition law, a substantial

20. *See*, in this sense, Eddy De Smijter & Alisa Sinclair, *The Relationship Between EU Competition Law and National Competition Law*, in: *Faull & Nikpay: The EU Law of Competition* (Jonathan Faull, Ali Nikpay, & Deirdre Taylor eds, 2014), p. 109.
21. Recitals may help clarify the content of an act. Koen Lenaerts & Piet Van Nuffel, *European Union Law* (Robert Bray & Nathan Cambien eds, 2011), p. 814. At the same time, the preamble to an EU act has no binding legal force. It cannot, in particular, be relied on either as a ground for derogating from the actual provisions of the act in question or interpreting those provisions in a manner clearly contrary to their wording. *See*, for instance, Case C-136/04 *Deutsches Milch-Kontor*, 24.11.2005, ECLI:EU:C:2005:716, para. 32.
22. *See* Article 2(1)(6) of Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, pp. 3-33.

debate over the objectives of Articles 101 and 102 TFEU has taken place.[23] To this day, the debate is still unresolved. As often, legal scholarship has tended to obfuscate more than clarify the issue of the concrete objectives of Articles 101 and 102 TFEU.

A close reading of the statutory text throws light on the purposes of Article 101 and 102 TFEU. Recital 9 of Regulation 1/2003 states that 'Articles [101 and 102 TFEU] have as their objective the protection of competition on the market'. Additionally, when exemplifying the type of rules that predominantly pursue an objective different from that pursued by Articles 101 and 102 TFEU, Recital 9 finds that '[s]uch legislation pursues a specific objective, irrespective of the actual or presumed effects of such acts on competition on the market'.

Accordingly, the difference between a rule that predominantly pursues the same objective as Articles 101 and 102 TFEU and one that does not hinge on the following question: is the primary purpose of the law to *protect competition on the market*? Words matter here. 'Protect' does not mean 'promote'. And the reference to 'competition on the market' invites us to think more of protecting competitors, compared to the protection of other business units like customers or suppliers.

If the answer is yes, the rule predominantly pursues the same objective as Articles 101 and 102 TFEU. National rules concerning resale below cost fall within this category. If the answer is no, the rule pursues a function distinct from Articles 101 and 102 TFEU. National rules on unfair trading practices fall within this category.[24]

2.2 Examples of National Rules Regulated by Article 3(2) and (3)

Most national rules that benefit from the Article 3 exceptions set forth in Article 3 do not refer expressly to this provision.[25] The preamble to Regulation 1/2003 and a Staff Working Paper from the Commission provide some authoritative illustrations.[26]

23. For a recent literature review and empirical analysis of the evolution of the goals of EU competition law *see* Konstantinos Stylianou & Marios Iacovides, *The Goals of EU Competition Law: A Comprehensive Empirical Investigation*, Legal Studies (2022).
24. More recently, the case law added further clarification. In *bpost*, the ECJ drew a line between the objective of promoting competition followed by sector-specific regulation and the objective of protecting competition from private and public distortions pursued by Articles 101 and 102 TFEU. *See* Case C-117/20 *bpost*, 22.3.2022, ECLI:EU:C:2022:202. The ECJ was called to determine whether the principle of *non bis in idem* precluded an undertaking from being sanctioned for abuse of dominance where, on the same facts, it had already been sanctioned for breach of sectoral rules on postal services. The ECJ found that the two sets of rules pursued distinct objectives. For the ECJ, the sectoral rules pursue the objective of liberalising the internal market for postal services. By contrast, Articles 101 and 102 TFEU pursue the objective of ensuring that competition is not distorted in that market. It remains to be clarified whether, for the ECJ, the rules on liberalisation pursue an objective different from those pursued by Articles 101 and 102 TFEU *predominantly*. *See bpost*, paras. 45-46. Also, whether this type of rule could be qualified as national rules, to begin with, as they result from the transpositions of directives. On this point, *see* Eddy De Smijter & Alisa Sinclair (2014), pp. 111-112.
25. There are some outliers, as the *Facebook* decision of the GCA demonstrates in para. 914.
26. *See* Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council – Report on the functioning of Regulation 1/2003 – COM(2009)206 final, (2009).

Additionally, authors have contributed to this exercise by providing additional evidence of national rules falling within the scope of the exceptions provided for in Article 3.

2.2.1 Stricter National Laws Which Prohibit or Sanction Unilateral Conduct Engaged in by Undertakings

The word 'stricter' in Article 3(2) is a comparative adjective. The object of comparison is Article 102 TFEU. Thus, the national rules regulated by Article 3(2) can be construed as rules that, compared to Article 102 TFEU, provide a stricter definition of abuse, a more stringent approach to market power or tougher sanctions.[27]

Within this category, one finds three types of laws:

(1) laws concerning economic dependence and similar situations which aim, for example, at '[regulating] disparities of bargaining power in distribution relationships' without a requirement of dominance;[28]
(2) laws on resale below cost or at a loss, which draw inspiration from predatory pricing rules without a requirement of dominance;
(3) laws that declare abusive practices which are not deemed abusive under Article 102 TFEU, like an abrupt termination of a contractual relationship, without a requirement of indispensability.

New examples of such rules have mushroomed in the digital sector. For example, Germany introduced a section 19a) to its competition act, intended to deal specifically with new forms of abusive conduct by firms of 'paramount significance for competition across markets'.[29] Similarly, new rules prohibiting the abuse of economic dependence have recently entered into force in Belgium,[30] a development that was welcomed by the Belgium Minister of Economic Affairs for its potential application to e-commerce platforms.[31]

2.2.2 Provisions of National Law That Predominantly Pursue an Objective Different from That Pursued by Articles 101 and 102 TFEU

The universe of rules that can be included in the category of laws that predominantly pursue an objective different from that pursued by Articles 101 and 102 TFEU is bigger

27. *See* Lúcio Tomé Feiteira (2016), p. 65.
28. *See* Commission Staff Working Paper accompanying the Communication from the Commission to the European Parliament and Council – Report on the functioning of Regulation 1/2003 – COM(2009) 206 final, (2009), para. 162.
29. An English translation of the German Competition Act is available at https://www.bundeskartellamt.de/.
30. *See* Arrêté Royal, of 31 July 2020, Modifiant les livres Ier et IV du Code de droit économique en ce qui concerne les abus de dépendance économique. Interestingly, no express reference to Article 3(2) of Regulation 1/2003 is found in the recitals of this statute.
31. *See* Marc Wiggers, Thomas Verstraeten & Robin Struijlaart, *New Rules Prohibiting the Abuse of Economic Dependence Entered into Force in Belgium on 22 August 2020: What Does This Mean for the Digital Sector*?, Kluwer Competition Law Blog (2020).

than that of stricter rules on unilateral conduct. For this reason, no aprioristic categorisation is available for the rules falling in the situation covered in Article 3(3). Recital 9 of the preamble to Regulation 1/2003 refers to 'legislation that prohibits or imposes sanctions on acts of unfair trading practice, be they unilateral or contractual'.[32] However, most laws in the Member States' legal systems will either exclusively or predominantly pursue an objective different from that pursued by Articles 101 and 102 TFEU.

3 ARTICLE 3 OF REGULATION 1/2003 AND THE DOCTRINE OF PRE-EMPTION

There is a debate on the effect of Article 3 in cases of conflict between EU competition law and national rules. The debate boils down to differing views about the application of the principle of primacy of EU law. Some authors – we may call them the literalists – claim that the text of Regulation 1/2003 'leaves the primacy rule untouched' when trade between Member States is affected.[33] Article 3(2) states that nothing 'in [Regulation 1/2003]' precludes Member States from adopting and applying stricter national rules on unilateral conduct. It does not say that Articles 101 and 102 TFEU do not apply. Similarly, Article 3(3) only exempts merger laws and provisions of national law that predominantly pursue an objective different from that pursued by Articles 101 and 102 TFEU from the application of Article 3(1) and (2). Additionally, Article 3(3) begins by stating that its application is '[w]ithout prejudice to general principles and other provisions of [EU] law', which includes the principle of primacy.[34]

Other commentators – we may call them the constructivists – disagree. In their opinion, the Article 3 exceptions insulate national rules from the primacy principle in regard to Articles 101 and 102 TFEU.[35] The argument builds on Article 103 TFEU, which contemplates the possibility of secondary legislation to determine the relationship between national laws and EU competition law.[36] Therefore, EU law embodies a

32. These rules 'prohibit undertakings from imposing on their trading partners, obtaining or attempting to obtain from them terms and conditions that are unjustified, disproportionate or without consideration'. *See* Recital 9 of the preamble of Regulation 1/2003. This is the only type of rule referred to in Recital 9 as an example of national rules that predominantly pursue an objective different from that pursued by Articles 101 and 102 TFEU.
33. *See*, in this sense, Eddy De Smijter & Alisa Sinclair (2014), p. 108. Other authors refer, more ambiguously, to Article 3(2) as 'implying' the application of the principle of primacy or to Article 3 as 'an expression' of this principle, *see*, in this sense, David J. Gerber & Paolo Cassinis, *The 'Modernisation' of European Community Competition Law: Achieving Consistency in Enforcement – Part I*, 27 European Competition Law Review 13 (2006); and Felix Müller, *The New Council Regulation (EC) No. 1/2003 on the Implementation of the Rules on Competition*, 5 German Law Journal 721 (2004), p. 731.
34. *See*, in this sense, Laurence Idot, *Le nouveau système communautaire de mise en œuvre des Articles 81 et 82 CE (Règlement 1/2003 et projets de textes d'application)*, Cahiers de Droit Européen 89 (2003), p. 304.
35. *See*, in this sense, Marek Szydlo, *Leeway of Member States in Shaping the Notion of an Undertaking in Competition Law*, 33 World Competition 549 (2010), pp. 557-559.
36. *See*, in this sense, Chris Townley & Alexander H. Türk, *The Constitutional Limits of EU Competition Law: United in Diversity*, 64 The Antitrust Bulletin 235 (2019), p. 282. Against, *see*

competition law system that tolerates possible modulations to the primacy of Articles 101 and 102 TFEU.

One way out of this discussion consists in approaching the issue from a different descriptive route. Instead of looking at Article 3 through the lenses of primacy, we now consider its 'twin doctrine': pre-emption.[37]

3.1 The Doctrine of Pre-emption

The doctrine of pre-emption is a federal theory of normative conflict developed in United States (US) constitutional law.[38] The idea underpinning pre-emption is that, acting in accordance with the federal constitution, the federal lawmaker is generally free to determine to what extent it wishes to pre-empt state law.[39] Pre-emption is not interested in whether EU law can evict national law – this is taken for granted.[40] Pre-emption is interested in understanding when national law is evicted – this cannot be conjectured a priori.[41]

For the purposes of the analysis of Article 3, the doctrine of pre-emption brings an important insight: a conflict between a national rule and Articles 101 and 102 TFEU does not necessarily mean that the EU rules will win. Primacy is contingent on pre-emption, and the extent of pre-emption depends on the model of pre-emption chosen by the EU legislature.

The ECJ case law embodies several categories of pre-emption.[42] Arena identifies three main categories.[43] Under *rule pre-emption*, the ECJ verifies whether the national rule contradicts the substantive content of the EU rule. Under *obstacle pre-emption*, the assessment is more abstract. The ECJ verifies whether the national rule hinders the attainment of the objectives of the EU rule. Finally, under *field pre-emption*, the ECJ will only verify whether the EU legislature has exercised a 'jurisdictional veto' by determining that no national rule can apply if EU law applies.

In short, pre-emption determines when primacy operates. This doctrine describes, thus, how normative conflict between federal and state rules is not always

Mariana Tavares, *A Constitutional Analysis of Multijurisdictional Conflicts in the EU Legal Order Confirms That Diversity Is Possible in EU Competition Law*, Thesis, King's College London, 2018, p. 55.

37. *See* Amedeo Arena (2018).
38. For a constitutional history of the doctrine of pre-emption in US law, *see* Stephen A Gardbaumt, *The Nature of Preemption*, 79 Cornell Law Review 785-807 (1994). In EU law, this theory has been imported by authors such as Schütze to explain the ECJ's case law on the principle of primacy. *See* the seminal article Robert Schütze (2006).
39. *See*, in this sense, Robert Schütze, *European Constitutional Law* (2021), p. 216.
40. As Hoke put it, primacy does not determine 'what constitutes a conflict between state and federal law; it merely serves as a traffic cop, mandating a federal law's survival instead of a state's law'. *See* S Candice Hoke, *Preemption Pathologies and Civil Republican Values*, 71 Boston University Law Review 755 (1991).
41. *See* Robert Schütze (2006), pp. 1023-1024.
42. As Arena explains, each category of pre-emption corresponds to the 'analytical paradigm the ECJ employs to ascertain whether the national norm is incompatible with the EU norm'. *See* Amedeo Arena (2018), p. 327.
43. *See ibid*.

decided in 'all or nothing' logic. The federal constitution can determine different modalities of pre-emption for different types of rules. Further, the federal constitution can empower the federal legislature to establish certain pre-emption arrangements for certain areas of law. This insight that has been missing in discussions over the interpretation of Article 3 is now looked at.

3.2 EU Competition Law and Pre-emption

The EU treaties provide for a default constitutional model of *field pre-emption* with respect to competition rules (i), while at the same time empowering the EU legislature to define its own model of pre-emption for the same rules (ii).

3.2.1 Constitutional Pre-emption

Since the Lisbon Treaty, *field pre-emption* has constituted the default model for establishing the competition rules necessary for the functioning of the internal market. The Lisbon Treaty introduced Article 3(1)(b) TFEU, which defines as an area of exclusive competence of the EU 'the establishing of the competition rules necessary for the functioning of the internal market'. And according to Article 2(1) TFEU, Member States can only adopt binding acts if so empowered by the EU within the scope of exclusive competences of the EU. In the absence of an EU act empowering Member States to adopt competition rules, primacy will displace most rules within the field of application of Articles 101 and 102 TFEU.

The logical consequence to draw from the Lisbon Treaty is that Member States cannot adopt national competition laws without a prior empowering EU act. An obvious difficulty with this reading is that most Member States had, and still have, after the Lisbon Treaty, enacted national competition laws. So, can national competition laws ever exist under the Lisbon Treaty? There is little doubt that the answer is yes. Regulation 1/2003 premises the existence of national competition laws on more than one occasion. Regulation 1/2003 thus appears to supply the empowering act that allows Member States to adopt national competition laws.[44]

3.2.2 Legislative Pre-emption

Empowerment of Member States competition laws by the EU is made possible by Article 103 TFEU. Under Article 103 TFEU, the Council can adopt '[t]he appropriate

44. Of course, Regulation 1/2003 predates the Lisbon reform, which introduced the competence rules in Articles 2(1) and 3(1)(b) TFEU. Trying to read this regulation in light of a posterior treaty reform amounts to a form of 'legal contortion', as Monti put it. *See* Giorgio Monti, *New Directions in EC Competition Law*, *in* European Union Law for the Twenty-First Century: Rethinking the New Legal Order (Takis Tridimas & Paolisa Nebbia eds, 2004), p. 179. Yet, according to the case law, secondary law – such as Regulation 1/2003 – must be interpreted, so far as possible, in a manner which is compatible with primary law – such as Articles 2(1) and 3(1)(b) TFEU. *See*, for instance, Case C-518/16 *ZPT AD*, 28.2.2018, ECLI:EU:C:2018:126, para. 29.

regulations or directives to give effect to the principles set out in Articles 101 and 102 [TFEU]'.

Further, Article 103 TFEU states that such regulations or directives shall be designed in particular to 'determine the relationship between national laws and the provisions contained in [Articles 101 to 106 TFEU] or adopted pursuant to [Article 103]'.

Article 103 TFEU constitutes, as such, a tool of pre-emption design, allowing the Council to decide the extent to which national rules are displaced by Articles 101 and 102 TFEU.[45] The originality of Article 103 TFEU is that it allows the Council to adjust the pre-emptive capacity of treaty provisions, Articles 101 and 102 TFEU. It is more frequent, in EU law, to witness a similar arrangement in regard to secondary law provisions.[46]

Article 103 TFEU constitutes the legal basis of Regulation 1/2003. And the EU legislature used it to establish a legislative model of pre-emption, regulating the extent to which EU competition rules will displace national competition rules.

3.3. Choice of Model of Pre-emption in EU Competition Law

3.3.1 From a Judicial Model of Rule Pre-emption

Pre-emption tells us when there is normative conflict and, thus, when EU competition rules will prevail and when they will not. Until the entry into force of Regulation 1/2003, the model of pre-emption that prevailed was one of *rule pre-emption*.[47] The ECJ

45. One limitation of Article 103 TFEU as a legal base for a legislative model of rule pre-emption relates to the principle of conferral. Pursuant to the principle of conferral, the EU can act only within the limits of the competences conferred upon it by the Member States in the treaties to attain the objectives set out therein. *See* Article 5(2) Treaty on the European Union (TEU). Article 103 TFEU only allows the Council to determine the relationship between national rules and EU competition rules. This excludes other EU rules, such as free movement provisions. Indeed, under the principle of primacy, stricter national rules on unilateral conduct may be disapplied in case of conflict with a provision of EU law other than Articles 101 and 102 TFEU. The application of the Czech Significant Market Power Act provides an example of this. Some have described this national law as discriminatory against foreign retailers, as these economic operators are more easily covered by the personal scope defined by the notion of significant market power. *See* Doris Hildebrand, *Article 3 (2) in fine: Time for review*, Concurrences Review (2015). Consequently, such national rules may conflict with free movement provisions and, for this reason, be displaced according to the principle of primacy.
46. In this respect, other legal bases fulfil a similar function as Article 103 TFEU. In the case of minimum harmonisation measures, Member States can introduce measures that go against the uniform application of the EU rule without primacy displacing those national rules. In fact, the approach of the EU legislature in Article 3 with respect to Article 102 TFEU resembles one of minimum harmonisation. Article 102 TFEU is, in this sense, the minimum liability threshold. Member States cannot hinder the uniform application of this treaty provision by introducing more lenient rules, but they may do so with respect to stricter rules.
47. Other national rules that do not qualify as national competition rules would (and continue to), through the application of the principle of sincere cooperation, occasionally be subject by the ECJ to a framework of *obstacle pre-emption*. In this sense, *see* Amadeo Arena (2018), p. 339. Some of these cases concerned national rules with anti-competitive effects that were liable to deprive Articles 101 and 102 TFEU of their *substantive* effectiveness. *See*, for instance, Case

confirmed this model in a line of cases that followed *Walt Wilhelm*. In a rule pre-emption model, the relationship between EU competition law and national law is considered on a case-by-case basis in the presence of a clear normative conflict. In several cases, the ECJ clarified, for instance, that the application of national competition rules could not lead to the prohibition of conduct benefiting from an Article 101(3) TFEU exemption granted in an individual decision or recognised in a regulation.[48]

3.3.2 To a Legislative Model of Field Pre-emption

The Commission's proposal in the procedure for the adoption of Regulation 1/2003 broke away from the judicial model of rule pre-emption. The Commission advanced a legislative model of *field pre-emption*. Articles 101 and 102 TFEU would apply to 'the exclusion of national competition laws'. The Commission proposed that any national competition rule covering conduct caught within the field of application of the EU competition rules would automatically be set aside in accordance with the principle of primacy. As such, no concrete or abstract assessment of normative conflict would have to be conducted. The difference, in other words, lies in the fact that no conflict between the national and EU competition rules must occur in a particular case for primacy to operate and displace national competition rules.

3.3.3 To a Legislative Model of Rule Pre-emption

The Council rejected the Commission's model of field pre-emption. Member States were, however, divided on which national rules should be pre-empted in case of parallel application of national and EU competition law. They also did not want to leave the resolution of conflict cases entirely to the ECJ, as had been the case under the judicial model of rule pre-emption of the past.

In the end, the Member States opted to reaffirm a model of *rule pre-emption*, codifying it through a specific legislative framework.[49] The selected design of rule pre-emption does not, however, correspond to the one that had prevailed since *Walt Wilhelm*.[50] In a departure from the prevailing model of judicial pre-emption, the Council specified in the text of Regulation 1/2003 situations that constitute conflict between national law and Articles 101 and 102 TFEU. Unfortunately, the text of

13-77 *INNO v. ATAB*, 16.11.1977, EU:C:1977:185 and, generally, Rene Joliet, *National Anti-competitive Legislation and Community Law European Community Law*, 12 Fordham International Law Journal 163 (1988). Other cases concerned rules, such as rules on limitation periods, liable to deprive Articles 101 and 102 TFEU of their *procedural* effectiveness. *See*, for instance, Joined Cases C-295/04 to C-298/04 *Manfredi*, 13.7.2006, ECLI:EU:C:2006:461.

48. *See*, e.g., Joined Cases 253/78 and 1 to 3/79 *Procureur de la République and others v. Bruno Giry and Guerlain SA* and others, 10.7.1980, EU:C:1980:188, para. 17.
49. This was something that the ECJ foresaw and accepted as early as *Walt Wilhelm*. *See supra* n. 6.
50. In fact, in the absence of the exceptions in Article 3, Article 3(1), alone could be construed, by the ECJ, as favouring a broader scope of rule pre-emption, where more types of national rules, such as stricter rules on unilateral conduct, could be found to conflict with Articles 101 and 102 TFEU.

Regulation 1/2003 does not engage in a very explicit form of codification. The following situations appear, directly or indirectly, to be considered conflict cases in the statute:

- [Adoption or application of] national competition rules that prohibit agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 101(1) TFEU which may affect trade between Member States but which do not restrict competition within the meaning of Article 101(1) TFEU;
- [Adoption or application of] national competition rules that prohibit agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 101(1) TFEU, which may affect trade between Member States but fulfil the conditions of Article 101(3) of the TFEU;
- [Adoption or application of] national competition rules that prohibit agreements, decisions by associations of undertakings or concerted practices within the meaning of Article 101(1) TFEU which may affect trade between Member States but which are exempted by a regulation for the application of Article 101(3) TFEU;
- [Adoption or application of] national competition rules on unilateral conduct engaged in by undertakings, that are more lenient that Article 102 TFEU.

By contrast, Article 3(2) reputes the following situation as not conflicting with Articles 101 and 102 TFEU:

- [Adoption or application of] national competition rules on unilateral conduct engaged in by undertakings, that are stricter than Article 102 TFEU.

Last, situations of conflict with other national rules, including those that predominantly pursue an objective different from that pursued by Articles 101 and 102 TFEU, are to be dealt with under the previous judicial arrangement on a case-by-case basis.[51]

One significant feature of Article 3 is that the ECJ is no longer the only institution setting the boundaries of the rule pre-emption model that regulates the relationship between national competition rules and Articles 101 and 102 TFEU since the Rome Treaty. The Council, acting as a federal lawmaker, also has a say.

3.4 Extent of Legislative Rule Pre-emption

In a literalist interpretation, the extent of legislative pre-emption cannot go beyond the text of Regulation 1/2003. Or put differently, the exception in Article 3(2) might be limited to situations of application of Articles 101 and 102 TFEU arising under

51. As these rules are not 'competition rules necessary for the functioning of the internal market', they are not caught by the residual constitutional model of field pre-emption under Articles 2(1) and 3(1)(b) TFEU. Further, as will be explained in the next subsections, these rules are only subject to a limited procedural exception under Article 3(3).

Regulation 1/2003.[52] For example, Article 3(2) operates when the Commission adopts an inapplicability decision under Article 10 of Regulation 1/2003, finding that a conduct does not amount to an abuse of dominance under Article 102 TFEU. In such a case, stricter national rules on unilateral conduct can apply. Assume, by contrast, that the ECJ reaches the same conclusion but in a referral under Article 267 TFEU. Here, the exception in Article 3(2) would not operate to safeguard the application of the stricter national rule on unilateral conduct.

Is a literalist reading of legislative rule pre-emption correct? We believe the main criticism of a literalist construction is to turn a blind eye to established principles of interpretation that must be considered when applying EU secondary law.

First, the text of Article 3 itself says that the exceptions in Article 3(3) are 'without prejudice to general principles and other provisions of [EU] law'. No similar statement is made in regard to the exception in Article 3(2). The omission allows the inference that the lawmaker intended to limit the application of some of the general principles of EU law, such as primacy, in Article 3(2).

Besides, preparatory works (or *travaux préparatoires*) go against such literal reading. Fundamental differences exist between the Commission's proposal and the final text of Regulation 1/2003. The Commission wanted to exclude the application of 'national competition laws' without any verification of conflict with EU competition law. Rejecting field pre-emption, the Council adopted a model of rule pre-emption, drafted through the use of exceptions. It is settled case law that the Council's reading prevails.[53]

Finally, secondary law must be interpreted in a way that does not render it meaningless.[54] An interpretation of Article 3(2) that would limit its application to certain procedural contexts would limit its effectiveness considerably. That interpretation would be at odds with the legislative compromise reached with the adoption of Regulation 1/2003. The concerns of the Member States that pushed for the exceptions were not procedural but substantive. Study of the legislative record – in what has become known as the Belgian compromise – shows that '[s]ome Member States were indeed keen to preserve some of their specificities in condemning, for instance, abuses of "economic dependence" or of "essential facilities"'.[55]

52. According to the text of Article 3(2) 'Member States shall not *under this Regulation* be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings' (emphasis added).
53. Preparatory works gain interpretive weight when combined with a *a contrario* argument. *See*, for instance, Case C-17/96 *Badische Erfrischungs-Getränke GmbH & Co KG v. Land Baden-Württemberg*, 17.7.1997, ECLI:EU:C:1997:381 paras 16-17 and, generally, Koen Lenaerts & José A. Gutierrez-Fons, *Les Méthodes d'Interprétation de la Cour de Justice de l'Union Européenne* (2020), p. 52. As such, where the Council deviates from the Commission's proposal, the resulting act should not be interpreted contrary to the position of the final decision-maker.
54. *See*, for instance, Case C-439/08 *VEBIC*, 07.12.2010, ECLI:EU:C:2010:739.
55. *See* Koen Lenaerts & Damien Gerard, *Decentralisation of EC Competition Law Enforcement: Judges in the Frontline*, 27 World Competition 313 (2004), note 38.

3.5 Why Article 3(3) Contains Only a Limited Procedural Exception

Labouring under an erroneous reading of Article 3(3), one could conclude that Member States are always permitted to adopt and apply national rules that predominantly pursue an objective different from Articles 101 and 102 TFEU.

This is not the model of pre-emption set forth in Regulation 1/2003. Contrary to the situation under Article 3(2), where the Council established by decree that there is no conflict between Articles 101 and 102 TFEU and stricter national rules on unilateral conduct, the Council did not safeguard national rules that predominantly pursue an objective different from that pursued by Articles 101 and 102 TFEU. These rules can still be found in conflict with EU competition rules and consequently, be disapplied by virtue of the principle of primacy.

Many interpretive indicia favour this reading of Article 3. The main one is the text of Article 3. The exception embodied in Article 3(3) says that Article 3(1) and (2) do not apply. It does not say that Articles 101 and 102 TFEU do not apply. This literal argument which proved insufficient for the interpretation of the Article 3(2) exception, finds support in further elements of interpretation when it comes to Article 3(3).

A study of the historical context further endorses this interpretation. The concerns of the Member States that pushed for the Article 3 exceptions related, in essence, to the possibility of maintaining in force or adopting stricter national rules on unilateral conduct.[56] Also, an alternative legislative model of rule pre-emption safeguarding laws that pursue predominantly different objectives would insulate too large a universe of national rules from the primacy of Articles 101 and 102 TFEU. This would potentially overturn an established body of case law concerning the principle of sincere cooperation.[57]

This means that, with respect to national rules that predominantly pursue an objective different from Articles 101 and 102 TFEU, Article 3(3) only maintains a limited procedural exception. Indeed, when it comes to such rules, Member States are not obliged to consider the possible application in tandem with Article 101 and 102 TFEU in every case – and as the case may be, to apply both laws in a convergent manner. Article 3(3) thus provides a limited procedural exception to the obligations of parallel application and convergence of national and EU competition rules set forth in Article 3(1) and (2).

But conflicts remain possible. Taking the example of national rules on unfair trading practices, if these rules hindered the effective and uniform application of Articles 101 and 102 TFEU, primacy would require their disapplication. Indeed, by contrast with Article 3(2), the text of Article 3(3) states that its exceptions are '[w]ithout prejudice to general principles and other provisions of [EU] law', which would include the principle of primacy.

56. *See ibid*.
57. For examples of this case law, *see* the examples in *supra* n. 46.

4 CONCLUSION

Article 3 of Regulation 1/2003 is a great example of legalese. This chapter has shown that some clarity of thought over the purpose and effect of Article 3 can be attained by recourse to the power of the constitutional law doctrine of pre-emption. Through a pre-emption lens, the law is clearer.

What do we know? Member States can maintain the application of stricter national competition laws on unilateral conduct in cases in which Articles 101 and 102 TFEU apply. And Member States can maintain the application of national laws pursuing predominantly different objectives in cases in which Articles 101 and 102 TFEU apply, within the limits of general principles of the EU law. With respect to the primacy of Articles 101 and 102 TFEU, Article 3(2) sets forth an unconditional exception. Article 3(3) provides a conditional one.

A policy debate has emerged about the Article 3 exceptions. If national law can prohibit business conduct permitted under EU law, the internal market will suffer fragmentation. As Cseres notes, there will be no level playing field providing for a single standard of assessment allowing undertakings 'to design EU-wide business strategies without having to check them against all the relevant national sets of competition rules'.[58] Rather, 'businesses wishing to engage in cross-border trade [have] to adapt their strategy and conduct based on the rules in force in different national territories'.[59]

The *Facebook* decision of the GCA illustrates the problem.[60] The national authority applied national competition law in a way that could be considered stricter than Article 102 TFEU.[61] A resurgence of nationalism and unilateralism in the field of competition law cannot be discarded. At the same time, the fragmentation of the internal market resulting from the application of Article 3 can be rationalised as the consequence of a process of experimentalist governance in EU law.[62] The idea is interesting, but it fails in so far as Regulation 1/2003 was never conceived as an experimentalist architecture, as can be seen from the lack of mechanisms and processes for feedback collection, benchmarking, etc.[63]

58. *See* Katalin Cseres, '*Comparing Laws in the Enforcement of EU and national Competition Laws*', 3 European Journal of Legal Studies 7 (2010), p. 15.
59. *See The Impact of National Rules on Unilateral Conduct that Diverge from Article 102 of the Treaty on the Functioning of the European Union (TFEU)* (2012), report commissioned by the Commission to the College of Europe and the Centre for European Policy Studies, on file with the authors.
60. *See Facebook*. *See also* Giuseppe Colangelo & Mariateresa Maggiolino (2019), pp. 372-373.
61. *See supra* n. 12.
62. For an account of the *Facebook* decision of the *Bundeskartellamt* in the context of experimentalist governance, *see* Yane Svetiev, *Experimentalist Competition Law and the Regulation of Markets* (2020), pp. 45-46.
63. On experimentalism as a type of governance in EU competition law, *see generally* Yane Svetiev, *Experimentalist Competition Law and the Regulation of Markets* (2020) and Giorgio Monti & Bernardo Rangoni, *Competition Policy in Action: Regulating Tech Markets with Hierarchy and Experimentalism*, 60 Journal of Common Market Studies 1106 (2022).

Whichever interpretation is right, the policy debate must take place on a firm descriptive footing. With this paper, we have tried to set the record straight. We leave to other contributions the role of evaluating the normative costs and benefits of a more or less expansive usage of the Article 3 exceptions.