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**TOWARDS A CLEARER DELIMITATION
OF INTERNAL EUROPEAN COMMUNITY
COMPETENCES**



THEODOROS KONSTADINIDES

UNIVERSITY COLLEGE LONDON

DOCTORAL THESIS IN LAW

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THESIS ABSTRACT

This thesis is a study of the distribution of competences between the main actors in European integration: namely the European Community and the Member States. It aims to evaluate the place of the competence provisions in the current Treaty structure as well as within the Treaty Establishing a Constitution for Europe¹. This task first involves a legal-technical exercise based on a textual interpretation of different categories of competences within the above-mentioned sources. Second, it involves a review of the relevant Court of Justice case law with regard to those competences. The study of both has led the author to consider how the evolution of Community competence has given rise to the phenomenon of 'competence' creep'. It is argued that Member States contend that the Community assumes more powers than those it possesses. Thus, the thesis provides an insight into concerns about 'creeping competence'. Certain types of situations are identified under the title of 'creeping competence'. These include, the adoption of unjustified or undesired EC legislation under qualified majority voting; the expansion of the Community's competence under Article 308 EC and finally the adoption of EC legislation that goes beyond the scope of Article 5 EC (principle of attribution of powers). The thesis will provide certain examples to underline the problem. It will take account of the use of the flexibility provisions of Article 95 EC and 308 EC with regard to the regulation of health and the Community's accession to the European Convention of Human Rights (ECHR), which are treated as case studies in the thesis.

In the context of a problematic system of competences, the author will consider the assumptions made in the Nice and Laeken IGCs as well as the European Convention

¹ The Treaty Establishing a Constitution for Europe or EU Constitutional Treaty has been ratified by thirteen Member States (See http://europa.eu.int/constitution/ratification_en.htm)

for a clearer distribution of competence and assess the role of the principle of subsidiarity as a tool against the expansion of Community competence into new policy areas. It is argued that the reform of subsidiarity will enhance EU legitimacy and enlarge the role of national legislatures in the Union. The reconstruction of subsidiarity procedures may remedy the tensions in the current system of competence and provide limits to the degree of EU intervention. Besides tidying up competences between the EU and Member States, European Constitutionalisation hides a question of political finality and further integration. How can the EU establish an effective and democratically legitimate governance beyond the Nation State? Via a European Constitution or through alternative methods? This question is particularly important in the current context following the French and Dutch rejection of the EU Constitutional Treaty. The chances of the EU Constitution being revived in the near future are slim, since it is unlikely that either France or Holland will soon hold another referendum. Thus, either a period of reflection shall be allowed to Member States or alternative routes to integration shall be considered. The thesis concludes with the hypothesis that as the EU Constitutional Treaty does not provide the answers to most of the questions posed by the Nice and the Laeken European Councils, enhanced cooperation may be utilised as a future method of governance and Fischer's 'Core Europe' as a tool capable of a redistribution of competences inside the Union. But then again the European Union needs to avoid a new iron curtain descending between those Member States that represent the 'core' and those that constitute the 'periphery'.

THESIS INTRODUCTION

The aim of this thesis is to cast light on the path towards a more efficient distribution of competences between the main actors in European integration: namely the European Community and the Member States. The aim is to evaluate the place of the competence provisions in the current Treaty structure as well as within the Treaty Establishing a Constitution for Europe¹. This thesis argues that the vertical relationship between the Community and the Member States should be preserved through the exercise of different levels of competences.

Before entering into a detailed discussion of the different categories of competences, Chapter 1 introduces the question of institutional balance and horizontal relationship between the Community Institutions as a point of reference in measuring the way a Member State influences Community decisions. It will provide an intra-institutional insight on a search for a possible Community equivalence of the three levels of democratic governance characterising nation states (the legislative, executive and judiciary). Discovering whether these elements exist within the EC may lead one to determine whether the Community acts as a federal state. Thus, the notion of 'power' within the Member States is not only synonymous with their external capacity of developing constitutional defences as a mechanism of maintaining their national sovereign values. It owes also to the less visible internal influence of supranational decisions by being able, for instance, to make or break a winning coalition in the Council of Ministers. The Chapter contends that the horizontal division of competences within the Community, along with the principle of EC law

¹ [CIG 87/2/04] Signed by the Representatives of the Governments of the Member States [October 29, 2004]. Referred as EU Constitutional Treaty hereafter.

supremacy as established by the Court of Justice, constitute the site where the vertical division of competences operates.

The main analysis in the thesis however focuses on the gradual evolution and exercise of Community competences through the successive Treaty amendments over the last fifty years. This evolution, discussed in Chapter 2, reflects the changing role of a Community that has evolved economically, socially and politically. Particularly, additional powers to act to ensure the functioning of the internal market were granted to the Community by means of introducing qualified majority voting to Article 95 EC. Additionally, the attainment of a Community objective in the course of the operation of the common market has during the years of treaty amendments necessitated the use of Article 308 EC as a 'catch all' provision (when there is insufficient textual basis for the EC to legislate) that although residual this power has proved wide ranging. Finally this chapter will put EC competences into the current context of European constitutionalisation by presenting the approach of the Laeken European Council and the European Convention in relation to internal EU competences and briefly examining how these appear as a whole in the Treaty Establishing a Constitution for Europe. Despite the crisis inspired by the double rejection of the EU Constitutional Treaty in the French and Dutch referendums, the text itself represents a product of a long political compromise between the heads of state and government of Europe. As such, it makes a significant contribution to the broader debate about a balanced delimitation of competences in the Community. However, it does not constitute the only source of ideas for this thesis. Thus, although the outcome of the French and Dutch referendums is important, this thesis does not rely upon the events prior to the ratification of the EU Constitutional Treaty but is rather informed by them.

The evolution of Community competences has given rise to the phenomenon of 'competence creep', where the Member States contend that the Community assumes more powers than those it possesses. The author uses a particular conception of the term 'competences'. Competences will therefore be divided into Subject-Related, considered in Chapter 3 and Objective-Related, examined in Chapter 4. These categories draw their titles from their subject matter (exclusive, shared and complementary competences) or their internal market objective (the flexibility provisions of Article 95 and 308 EC with regard to the regulation of health and EC accession to the ECHR). As regards Subject-Related competences, while it is clear that any action taken by the Community must have a legal basis either in the Treaty or secondary legislation and that certain Treaty provisions address the extent of that power, there is no clear substantive division of powers in the EC or EU Treaty. The problem of a clear delimitation of internal Community competences lies in the fact that those competences attributed to the supranational cannot be regarded separately from those attached to the intergovernmental arena. Instead, competence in Community law is based on an interplay between the two levels. With reference to Objective-Related competence, the Court has restricted the conditions under which the EC Institutions might rely upon Article 95 EC, especially as a way of overcoming restrictions on EC competence in fields other than the internal market. Similarly, the Court has recognised that new Community competences can only be launched through valid legal instruments. Article 308 EC constitutes such an instrument with the exception of instances when its use would entail a substantial change in the present Community system, such as the entry of the Community into a distinct international institutional system.

The trend to change the current system of competence division between the Community and the Member States in order to introduce a clearer classification is a persistent issue throughout the thesis. Chapter 4 in particular, analyses the work of the Convention on the Future of Europe and the relevant competence provisions of the EU Constitutional Treaty towards this end. The arguments as to the allocation of competence and competence creep are strengthened by a clear treatment of the concept of subsidiarity. Chapter 6 provides an insight into subsidiarity, as a principle that aims to regulate the exercise and not the existence of Community competences. The Member States' demand for an accurate monitoring of subsidiarity is manifested within the EU Constitutional Treaty, which provides for National Parliaments to adopt a monitoring role in EU legislation. The so-called 'early-warning system' has a dual purpose. First it aims to promote the principle of subsidiarity compliance and second, to enhance the Union's democratic legitimacy by giving national parliaments a direct role in EU politics for the first time. The Chapter poses the question as to whether this early warning system is enough to guarantee EC compliance with subsidiarity or more efficient monitoring devices are necessary. Ultimately, it emphasises the importance of effective judicial subsidiarity checks not only *ex post* but also *ex ante*, when EC legislation is prepared as a proposal by the Commission.

Conclusively, Chapter 7 will consider the role of enhanced cooperation as a flexible mechanism to accommodate diversity when certain Member States are unwilling or unable to participate in the Union's policy developments. This is particularly important in the current context following the French and Dutch rejection of the Constitutional Treaty. The chances of the EU Constitution being revived in the near future are slim, since it is unlikely that either France or Holland will soon hold another referendum. Thus, either a period of

reflection shall be allowed to Member States or alternative routes to integration shall be considered. Yet, the extent to which European integration can proceed by rules that are made by and apply to a small number of Member States brings competence issues to the fore, especially as enhanced cooperation would cover a larger part of the Union's policy areas in the EU Constitutional Treaty. The author concludes by making a comparison between enhanced cooperation as a method of governance and Fischer's 'Core Europe' as tools capable of a redistribution of competence inside the Union. The exclusivity of the proposal for a 'Core Europe', albeit temporary, is sufficient to lift up the weaker and less demanding idea of Communitarian enhanced cooperation. Yet as the Communitarian approach has historically failed to lead to a settlement, since Member States tend to identify more with the concept of national competence / sovereignty than European integration, the Franco-German relationship can emerge as a close association based on the shared belief that there is something over and above the interests of the nation state.

The research question raised at the beginning of this introductory chapter with regard to the level of efficiency of competence delimitation in the current EC Treaty and the draft EU Constitution has led the author to make the following assumptions. Being a *sui generis* entity, the EC / EU cannot in practical terms utilise the same formulas that have shaped power relationships within the nation states to divide competences. The study of the evolution of Community competence confirms that neither can the delimitation of competences between the EC / EU and the Member States be solved once and for all. The evaluation of the flexibility provisions of Article 95 and 308 EC as well as the principle of subsidiarity prove that flexibility and change in the tasks of the two actors must be taken into account. The study of the relevant provisions of the EU Constitutional Treaty suggests

that it is possible to establish a much clearer definition and codification of competences, but this will not stop conflicts between subsidiarity on the one hand and the need for integration on the other. Finally, the author suggests that the need of certain Member States for further integration may exploit the example of 'enhanced cooperation' as a model to engage into a more selective partnership agreement, a hard core Europe operating beyond the control of the majority of Member States.

CHAPTER 1

THE BACKGROUND TO THE VERTICAL DELIMITATION OF COMMUNITY COMPETENCES

Introductory note

Since the founding of the European Economic Community the approach taken in relation the vertical division of competences between the two main actors, namely the Community and the Member States, has considerably changed. The Community has evolved in a legal / political creature and this has an impact upon three issues: First, the distinctive features of democratic governance that mark the separation of powers at national level (executive; legislative and judiciary) have been steadily developed at EC level. This obviously affects the way powers are distributed horizontally. Since these different functions were not initially designed for a supranational organism such as the EC, they are based upon an intra-Institutional interplay rather than a separation of powers per se. Second, the development of a horizontal tripartite level of governance among the Institutions has contributed towards a relevant vertical evolution to define the relationship between the EC and the Member States.

Third, the EC, not possessing a higher norm such as a written Constitution, allowed the Court to constitutionalise (through its decisions) the Treaties establishing the concept of supremacy of EC law. Subsequent Treaty revisions extended the ambit of EC competences through relevant provisions, manipulated by the proactive Court to Communitarise national practices. In such a climate, Member States - alarmed as to the Court's expansive interpretation of EC law - have been eager to balance EC law supremacy with national sovereignty and to retain control over the way powers are

distributed horizontally between the EC Institutions. This is to ensure a chain reaction in the manner powers are divided vertically between the former and the latter. Nevertheless, the recognition of precedence of EC law over national law has not brought the supranational and intergovernmental elements of the Union to different ends. Certainly, the capacity for unilateral decision-making in areas of Community law has been removed from individual states but still ultimate sovereignty rests in them and has not been totally transferred to the EC¹. Besides, sovereign intergovernmental bodies are still competent to make decisions that are implemented by national governments and enforced by national courts reserving also key policy areas such as defence. On the other hand, through their accession to the Community the Member States have recognised that the Treaty forms an inherent part of their national legal heritage². They assist the Court in its enforcement through ensuring its uniform implementation³.

The method under which powers are allocated horizontally between the Community Institutions, although at first glance may be regarded as irrelevant to the way powers are divided vertically between the Community vis-à-vis the Member States, is vital in the debate concerning a clear vertical distribution of internal competences within the EU. The national recognition of the supremacy of EC law has placed restrictions on Member States' ability to act independently and on their own initiative contrary to their

¹ See Lord Denning's speech in Case 129/79 *Macarthys Ltd v Smith* [1980] ECR 1275 "if Parliament deliberately passes an Act' contrary to the EC Treaties, it would be the duty of the UK courts to follow the Act"

² The European Communities Act 1972, adopted by the UK showing a dualist approach in its reception of EC law, is a Constitutional Statute and as such cannot be 'impliedly repealed' by a new statute. See *Thoburn v Sunderland City Council* [2003] QBD 151

³ "A national court...is under a duty to give full effect to [Community law], if necessary refusing...to apply any conflicting provision of nation legislation...." Case 35/76 *Simmenthal v Commission* [1980] 1 CMLR 25; See also Lord Bridge's speech in *R v Secretary of State for Transport Ex p Factortame* (No.2) [1991] AC 603

obligations arising from the Treaty⁴. Therefore, the more they retain power over the EC Institutions the more they are likely to control the delimitation of competences at vertical level. Thus, the notion of 'power' within the Member States is not only synonymous with their external capacity of developing constitutional defences as a mechanism of maintaining their national sovereign values. It owes also to the less visible internal influence of supranational decisions by being able, for instance, to make or break a winning coalition in the Council of Ministers.

The first part of the chapter will attempt to identify the ways in which EC Institutions resemble national-level institutions. This requires an intra-institutional insight on a search for a possible Community equivalence of the three levels of democratic governance characterising nation states (the legislative, executive and judiciary). Discovering whether these elements exist within the EC may lead one to determine whether the Community acts as a federal state. One can also observe whether national influence over the EC legislation would have the same effect as within the Member States where legislative power is vested in a single body, the Parliament. Following a degree of continuity, the second part of the chapter will provide an insight to the supreme nature of EC law through the Court's expansive interpretation, identifying therefore the extent of national competence / sovereignty that has been surrendered. The issues involved in this chapter serve therefore to ascertain whether or not national membership in the Community is more than a process of cooperation resulting in a partial or total shift of

⁴ Case 26/62 *Van Gend En Loos* [1963] ECR 1; Case 6/64 *Costa v ENEL* [1964] ECR 585; Case 35/76 *Simmenthal v Commission* [1980] 1 CMLR 25; See also Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr - und Vorratsstelle fur Getreide und Futtermittel (Solange I)* [1970] ECR 1125 "the law stemming from the Treaty...cannot...be overridden by rules of national law....[T]he validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights [in]...the constitution of the State or the principles of a national constitutional structure."

constitutional authority from the Member States to a *sui generis* autonomous level of organisation possessing powers of coercion independent from the state.

A. THE HORIZONTAL DIVISION OF COMPETENCES IN THE COMMUNITY

Setting the scene

...the necessity of maintaining the so-called “separation of powers” (*separation des pouvoirs*), or, in other words, of preventing the government, the legislature, and the Courts from encroaching upon one another's province.⁵



The manner competences are allocated horizontally in the Community, as a multi-layered system of governance is difficult to compare against the relevant structures existing within a nation state pointing to a clear separation of powers. An open translation of Article 16 of the French “*Déclaration des droits de l’homme et du citoyen*” of 1789⁶, to which the current Fifth Constitution of 1958 commits itself⁷, affirms that “a society in which the guarantee of rights is not assured, nor the separation of the capacities determined, does not have a Constitution.”⁸ On the other hand, The German “*Grundgesetz für die Bundesrepublik Deutschland*” (Basic Law) of 1949 establishes in Article 20 (2) that “all state authority emanates from the people. It is exercised by the people by means of elections and voting and by specific organs of the legislature, the

⁵ See Dicey, A.V., “Introduction to the Study of the Constitution” (1885) in Marshall, G., & Moodie, G., “Some Problems of the Constitution”, Hutchinson, 5th Edition, London, (1971)

⁶ ‘Déclaration des Droits de l’homme et du citoyen du 26 août 1789’ (Declaration of the Rights of Man) available at www.conseil-constitutionnel.fr/textes/d1789.htm

⁷ ‘Constitution De 1958, publiée au JO du 5 octobre 1958’, p. 9151, esp. *Préambule*, available online at <http://www.conseil-constitutionnel.fr/textes/constit.htm#Preambule>

⁸ “*Toute Société dans laquelle la garantie des Droits n’est pas assurée, ni la séparation des Pouvoirs déterminée, n’a point de Constitution.*”

executive power and the judiciary.”⁹ Even in the British ‘unwritten Constitution’ the principle of separation of powers exists. This corresponds to an artificial separation between the executive, largely assigned to the Ministers of the Government, and perhaps to the civil service and the police. The ‘Sovereign’ Parliament as a whole forms the legislature, while the role of the judiciary is taken by the courts, and to a certain extent by tribunals.

An express statement of the principle of separation of powers does not exist within the EC Treaty or in the Court’s teleological interpretations¹⁰. Yet, the lack of an equivalent to an allocation of nation state power in the Community may not prompt a conscious or unconscious association / comparison of the Community’s horizontal power division with the traditional separation of powers in the Member States. This in its turn could create a case for popular misconceptions regarding the current and future fashion under which competences are vertically divided. Before illustrating the reasons behind such a potential fallacy based upon a wrong impression – that the Union is more competent than the Member States¹¹ – it would be wise to provide a synopsis of the

⁹ ‘Grundgesetz für die Bundesrepublik Deutschland’, Vom 23. Mai 1949 (BGBl. I S. 1), Available online at <http://www.bundestag.de/gesetze/gg/>; Artikel II-20 (2) “Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt.” According to Article 79 (3) of the ‘Grundgesetz’ the principle of separation of powers cannot be amended: “Eine Änderung dieses Grundgesetzes, durch welche...der Gesetzgebung oder die in den Artikeln 1 und 20 niedergelegten Grundsätze berührt werden, ist unzulässig.” (trans: An amendment of this Basic Law affecting....the basic principles laid down in Articles 1 and 20, is inadmissible)

See Currie, D., “Separation of Powers in the Federal Republic of Germany” (1993) 41 American Journal of Comparative Law 201

¹⁰ See Joined Cases 188-190/80, *France, Italy & UK v. Commission*, [1982] ECR 2545, 2573

¹¹ See Maduro, M.P., “We The Court: The European Court of Justice and the European Economic Constitution”, Hart, (1998). The author here presents one side to the shaping of the European Economic Constitution, namely the Court’s case law on Article 28 EC. The vagueness of the concept of measures equivalent to quantitative restrictions has left the Court sufficient space for manoeuvre, making therefore the degree of integration it sought to achieve ambiguous. Although the prohibition of Article 28 EC was a Treaty obligation its application by the Court raised up questions about whether it aimed to merely remove national protectionist measures or establish a Community based on a neo-liberal economic model.

horizontal division of competences as they presently appear in the Community. This will assist one to appreciate first that the Community's institutional arrangements differ substantially from those of the Member States and second that, as with vertical competences, there is no clear-cut separation of horizontal powers per se but rather an interaction between the Union's organs.

The basis for the division of competences within the Union as set down in Articles 5 TEU and 7 EC is not static in character. On the contrary, there is a rather pluralistic and flexible interplay of authority between EU institutions. This has much to do with the way competences are allocated as a result of the pillarised structure of the Union after the Maastricht renovations¹². According to the latter, depending on the pillar that these powers are exercised they vary in nature being at times more supranational in character and less intergovernmental (especially when they concern Pillar I issues: European Community) and vice versa (in relation to Pillars II: Common Foreign and Security Policy and III: Police and Judicial Cooperation in Criminal Matters). Although different in nature to the nation state, one should be cautious about reaching the other end claiming that there is no connection whatsoever between the assignment of functions as they appear in the Union and the classic governmental functions as shared by the Member States' institutions. The three elements that bind together modern democracies are also apparent within the Union as a democratic system of governance. These are: i) the legislative, ii) the executive and iii) the judicial power. What differs in the Union as compared to the nation state is the way these are distributed between the EU organs since

¹² See the 'single institutional framework' as established by Article 3 TEU; also Hartley, T.C., "Constitutional and Institutional Aspects of the Maastricht Agreement" (1993) 42 *International & Comparative Law Quarterly* 213

no power is exclusively vested in any one of its political institutions but still there are many parallels to be made between the two.

1. The Legislative: A Shared Power

In view of the fact that the EC is not a state in the sense European citizens are familiar with, the people's will has been preserved and upheld by the Council, which constitutes in a way the Community's equivalent of national parliaments being composed of national representatives. This collective representation of national parliamentarians in the Council is a good indication that EC legislation and governance is not about a pure surrender of national sovereignty from the intergovernmental structures to the supranational. It is rather about a joint or collective exercise of power, which aims at a closer integration without distorting national interests, but through reaching a compromise in such a way that powers are harmoniously distributed and exercised within the EU.

The delimitation of competences within Community decision-making was initially developed towards the preservation of national interests by the Member States. However, the deepening of European integration, especially during the period of market building succeeding the Single European Act (1986) gradually publicised the aim of a more balanced even supranational approach to legislation. Nevertheless, the Community never adopted a state equivalent structure and for that reason the traditional in the Member States separation of powers never occurred within the EC legislative system. On the contrary the EC followed a unique method whereby all of its political Institutions are

active participants in the legislative process, which is performed on four stages governed by different procedures¹³.

The EC legislative power is therefore split between the Council of Ministers and the European Parliament, whilst the Commission submits its policy proposals to both and under the EC pillar it has an exclusive agenda-setting role. There are also instances (competition law) where the Commission may legislate without the direct involvement of the Council or Parliament. The Council¹⁴ on the other hand, may sometimes act as a sole legislator (under Article 133 EC) by choosing not to co-decide, as required, with the Parliament (Article 251 EC) or consult it (Article 308 EC). Nevertheless, the legislative interplay between the Council and the Parliament reminds one of federal democracies where the two-chambered model operates. In the same manner that a state's second chamber represents the constituencies' local interests, the Council takes up this role to make sure that the Community method does not overtake the preservation of national interests. To this end, the Council of Minister, is assisted by other actors such as the European Council, national governments and interest groups that play an important role in taking initiatives and advancing policy proposals.

Under the European Convention's Constitutional Treaty¹⁵ (Article I-24) the General Affairs and Legislative Council shall ensure consistency in the work of the

¹³ For instruments of general validity (regulations and directives), there is the consultation procedure, the cooperation procedure, the co-decision procedure and the approval procedure; ii) implementing measures are adopted by specific procedures; iii) there is a simplified procedure for binding individual decisions and non-mandatory instruments; iv) ECSC instruments are subject to their own specific procedures.

¹⁴ The Treaty lays down formal requirements for the adoption of legislation allowing for unanimity, a simple majority or a qualified majority within the Council of Ministers in different circumstances. Consisting of representatives from each member state, the Council makes general policy decisions and adopts formal legal acts, such as EC primary and secondary legislation.

¹⁵ European Convention draft EU Constitution [CONV 850/03] and Conference of the Representatives of the Governments of the Member States [CIG 87/2/04]. The EU Constitutional Treaty and its provisions in relation to competences will be discussed in Chapter 5.

Council of Ministers¹⁶. The Council, acting in its legislative capacity, shall consider and, jointly with the European Parliament, enact European laws (ex Regulations) and European framework laws (ex Directives), in accordance with the provisions of the EU Constitutional Treaty (Articles I-33 (1) and I-34). The definitions of what constitute the Union's legislative acts, given by Article I-33 (1) of the EU Constitutional Treaty, aim to correspond to those referred to previously in Article 249 EC. Regrettably, reading through the lines defining 'European framework laws' reveals that they have been marked by a somewhat awkward terminology. The 'entire freedom' bestowed upon Member States by Article I-33 (1) to implement European framework laws falls short of producing some sort of legal effect undermining therefore the wording of Article 249 EC relying on the 'discretion of each individual Member State'. What is more, the wording of Article I-33 (1) contradicts the Court's established principles in *Marleasing*¹⁷ of the duty on a Member State to achieve the objectives of a directive and *Francovich*¹⁸ of the requirement to compensate individuals for damages incurred as result of the State's breach of its public law obligations¹⁹ under a directive.

Further to that, Article I-25 introduces new rules for the calculation of a qualified majority within the decision-making process of the Council of Ministers. A qualified majority is defined by the abovementioned Article as "a majority of Member States, representing at least three fifths of the population of the Union". In this so-called 'double

¹⁶ When the Council acts in its General Affairs function, it shall, in cooperation with the Commission, prepare and ensure follow-up to, meetings of the European Council.

¹⁷ Case C-106/89 *Marleasing* [1990] ECR I-4135 "It follows that in applying national law whether the provisions concerned pre-date or post-date the directive, the national court asked to interpret national law is bound to do so in every way possible in light of the text and aim of the directive to achieve the results envisaged by it, and thus to apply Article 189 of the Treaty"

¹⁸ Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357

¹⁹ Dougan, M., "The Francovich Right to Reparation: Reshaping the Contours of Community Remedial Competence" (2000) 6 European Public Law 103-128.

majority voting', intended to take effect as from 1 November 2009²⁰, all countries will have one vote, but in order to get a qualified majority, those representing at least 60% of the total EU population must vote in favour of a proposal. This innovation to the rather new system of votes introduced by the Treaty of Nice²¹ to accommodate the ten new members of the EU became one of the main points of contention among the states for finalising negotiations on the EU Constitutional Treaty²².

In particular, Poland and Spain felt they had more power in the weighting of votes under the Nice system than under the EU Constitutional Treaty²³. Under the Treaty of Nice, Poland was to get 27 votes in the Council, just two fewer than the four largest countries: France, Britain, Italy, and Germany, even though Poland's population is much smaller. Likewise, Spain was also given a relatively generous 27 votes in the Council of Ministers by the Nice Treaty. Under the EU Constitutional Treaty it, too, stand to lose disproportionately. The Summit of the Heads of State and Government of the European Union on the IGC that met in Brussels on December 12-13, 2003, failed to bridge the differences of the Member States over this controversial issue. However, in the agreement on the EU

²⁰ This of course depends upon the ratification of the EU Constitutional Treaty by all twenty-five Member States, which was scheduled to take place on November 1, 2006 (although the French and Dutch rejection has led to a period of reflection before the state of discussions will be re-examined in the first half of 2006.)

²¹ Under current rules, qualified majority voting involves each Member State casting a certain number of votes with more populous states having more votes. Totally, there are 87 votes in the current Community of 15 and 62 are required to make a majority and therefore pass a proposal. The Treaty of Nice changed qualified majority voting in the Council by increasing the number of vote shares of big states along with the majority threshold adding a 50% of states and 62% of population. Under the EU Constitutional Treaty each state's vote is assigned to two different weights: i) its population share (i.e. the number of states - 60%) and ii) its membership share (i.e. how many people you have - 50%).

²² The Italian Presidency of the European Council failed during its course to emerge with a comprehensive agreement on the text of the future EU Constitutional Treaty due to the Polish and Spanish veto for preservation of the previous voting regime. Talks on an EU Constitutional Treaty were therefore concluded with no agreement at the Summit of the Heads of State and Government of the European Union on the IGC that met in Brussels on 12-13 December 2003. See Italian Presidency Website <http://www.ueitalia2003.it>

²³ European Commission, Enlargement Directorate General Information Unit, "No New Treaty for a new Europe" (16.12.2003) Enlargement Weekly

Available at: http://europa.eu.int/comm/enlargement/docs/newsletter/latest_weekly.htm#A

Constitutional Treaty at the Brussels summit on June 18, 2004, Poland and Spain managed to insert a safeguard clause under which a blocking minority must consist of at least four countries. This will give them more weight against bigger Member States²⁴. The new double majority voting system, as introduced by the EU Constitutional Treaty, appears more transparent both against the relevant provisions of the EC Treaty (qualified majority system) and the Nice Treaty (triple majority system). Yet, the raised thresholds and safeguard clauses, added at the request of Spain and Poland, will possibly outweigh some of the benefits of the proposed system by making legislation in the Union of twenty-five Member States a complicated process.

Thus, a country's weighting of votes in the Council indicates something about its size and power and openly affects the nature of EU policies directed to it as a Member State. Therefore its capacity to control / block legislation from the inside has an obvious consequence upon its vertical relationship with the EU and its obligations arising from its membership – accession to it. But still, the new dimension given by the EU Constitutional Treaty to the co-decision procedure²⁵ as the general decision-making rule for EU legislation, illustrates that Member States would need to do a lot more than exercising their power in the Council to influence the legislative outcome of the EU.

²⁴ In Foreign and Security Policy, Justice and Home Affairs and Monetary Policy, it is the Council, a Member State or the European Central Bank that takes the legislative initiative and not the Commission. There, the voting threshold is raised to 72 per cent of the member-states representing 65 per cent of the population.

²⁵ Under the EC Treaty, Article 251 EC, the 'co-decision' or 'conciliation' procedure occurs when the Parliament and the Council decide jointly. Under the Amsterdam Treaty, the simplified co-decision procedure shares decision-making power equally between the Parliament and the Council. A legal act is adopted if Council and Parliament agree at first reading. If they disagree, a 'conciliation committee' - made up of equal numbers of members of Parliament and of the Council, with the Commission present - convenes, seeking a compromise on a text that the Council and Parliament can both subsequently endorse. If this conciliation does not result in an agreement, the Parliament can reject the proposal outright - but only by an absolute majority. The co-decision procedure, which strengthens the role of the Parliament as co-legislator, applies to a wide range of issues (39 legal bases in the EC Treaty), such as the free movement of workers, consumer protection, education, culture, health and trans-European networks.

Under the EU Constitutional Treaty, the number of policy areas subject to the co-decision procedure, which involves both the Council and the European Parliament, would substantially increase. Currently, more than thirty policy areas are subject to the co-decision procedure where legislative proposals have to be approved by both the Council acting by a qualified majority and the European Parliament.

It is therefore important under the EU Constitutional Treaty, not only that the European Parliament matters in some legislative capacity, but also that it has transformed to a great degree from a mere symbolic consultative Assembly to a legislative force that will potentially bring about real changes in the nature of the European Union. Under Article I-23 of the EU Constitutional Treaty, the co-decision procedure becomes a general principle, except where the text specifically provides otherwise. This enshrines a dual democratic accountability, already existing in the Community, by turning a system of double checks to a general norm of the EU legislative process. Given that under the co-decision procedure the Parliament stands on an equal footing to the Council, it can veto a law or propose amendments by absolute majority of its members. This practically means that Member States alone (through their representation in the Council) would not be able to pass legislation without the Parliament's approval. Thus, if Member States desire to control the legislative outcome of a constitutionalised EU, further to their need to ensure a good representation of their national interests in the Council, they need to establish their proximity to the political groups that the co-legislator Parliament consists of. Since the European Parliament is not organised by nationalities but by political groups in association to national political groups, a double democratic legitimacy of the EU is based on a close relationship between the former and the Member States, whose governments are controlled by democratically elected Parliaments.

The figures for the last Parliament election held in June 10-13, 2004²⁶ contradict the existence of such a relationship. An overall turnout of 45.7 per cent in the currently twenty-five Member States demonstrates that neither national governments nor the European Parliament have sufficiently introduced the Community Institutions to the *demos* (people). Hence, the European citizen, may find it more convenient to believe that national Parliaments can more effectively scrutinise their national governments when these act at a European level in the Council. This undermines the idea that apart from national parliaments the elected representatives of the European citizens are located in the European Parliament. As a result, an improvement in the figure in Parliament elections is important to bring legitimacy to the democratic body, which is armed with increasingly important oversight powers in the Union. This is particularly important at a time where the European Parliament struggles to come across a political solution on what to do as regards the future of the EU Constitutional Treaty.

2. The Executive: Commission or European Council?

The executive authority in the EC appears very much to be a matter largely reserved to the Commission, which has often been characterised as the EC law enforcer or the 'Guardian of the Treaty'. Similar to the executives in the Member States, the Commission initiates and formulates policies in the form of legislative, budgetary and programme proposals prepared for the Community's legislative organs. It is also expected to implement the policies that have been decided by the legislature. In other words it is occupied with the monitoring and supervision of the relative national implementation procedures as these appear in the Member States. At another level, it

²⁶ See the EP elections results at <http://www.elections2004.eu.int/ep-election/sites/en/index.html>

negotiates trade and cooperation agreements with third countries on behalf of the Union providing also financial and technical assistance. To summarise, the Commission's task within the EC is to formulate policy proposals to present to the Council for adoption, to draft legislation for Council approval and finally to 'police' the Treaty.

Additionally, the Council has certain powers as regards Article 23 TEU issues (implementation of the European Council's EU Common Strategies). But, even where the Council passes legislation (e.g. a Directive) there is a dichotomy between legislation and implementation. While the power of Community law implementation is normally shared with national authorities, sometimes the Council delegates implementing powers to the Commission assisted by a committee of experts in accordance with a procedure known as 'comitology'²⁷. According to Georg Haibach writing in 1999, "Comitology in the last forty years has been probably the most fervently contested interinstitutional battleground between the Commission, Council and the European Parliament"²⁸. The lack of a specification within the Treaty of how much discretion can the Council delegate to the Commission in its transfer of implementing powers has not been dealt with by the Court that has left the interplay between the Community's 'legislative' and 'executive' operate in tension, despite its attempt to provide guidelines as to the nature of legislative and

²⁷ Where EC legislation prescribes implementation by the Community and not by the Member States, the Council confers this task upon the Commission. In practice, each legislative instrument specifies the scope of the implementing powers granted to the Commission and how the Commission is to use them. Frequently, the instrument will also make provision for the Commission to be assisted by a committee in accordance with a procedure known as 'comitology'. Article I-37 of the EU Constitutional Treaty contains a reference to mechanisms for control over implementing acts of the EU by the Member States (comitology framework).

²⁸ Haibach, G., "Council Decision 1999/468 - A New Comitology Decision for the 21st Century?" European Institute of Public Administration, (1999) 99/3 Eipascope Working Paper

implementing acts.²⁹ Thus the Council has been eager in the past to confer wide powers on the Commission since it exercises considerable control through comitology committees³⁰. This practice has caused certain discontent within the Parliament, which is merely 'informed' and has no influence on the committee procedures. This reality is particularly important in raising conflicts between the Council and the Parliament, predominantly in cases decided by the co-decision procedure where the two Institutions need to arrive at a compromise as to what is decided in the legislative and what in the implementing / executive act³¹. This constitutes a further reflection of the author's assumption that the principle of separation of powers has neither been institutionally manifested by the Treaty nor the case law of the Court³².

From the above, one may conclude that the effect of comitology on the horizontal distribution of competences within the EU is a complex one and demands special study of its own³³ that goes far beyond the scope of this thesis. On the other hand the social reality

²⁹ Case 25/70 *Einfuhrstelle v. Köster* [1970] ECR 1161. Here the Court interpreting Article 211 EC established a distinction between measures directly based on the Treaty itself (considered as legislative acts) and derived law intended to ensure their implementation (executive acts).

³⁰ Article I-37 of the EU Constitutional Treaty contains a reference to mechanisms for control over implementing acts of the EU by the Member States (comitology framework). Article 202 EC, restated in Article I-37 (2) and (3) of the EU Constitutional Treaty states, contrary to the 'Comitology Decision' that European law will lay down the general principles regulating the control of the executive by the Member States.

³¹ See Council Decision 1999/468, 'the Comitology decision' of 29 June 1999. Inter alia the 'Decision' gave the comitology system as sound legal basis under Article 202 EC.

³² Article 7 (1) EC provides that "each institution shall act within the limits of the powers conferred on it by this Treaty". In Joined Cases 188-190/80 *France, Italy and UK v. Commission*, [1982] ECR 2545 the Court referred to Articles 7 EC; 202 EC; 211 EC and 249 EC ruling that "the limits of the powers conferred" upon a EC Institution "are to be inferred not from a general principle, but from an interpretation of the particular provision in question". But still the EC as a body of law retains a hierarchical system consisting of three kinds of rules: i) Primary Law, ii) Secondary Law (basic acts) and iii) other procedures (implementing acts). See Haibach, G., "Comitology: A Comparative Analysis of the Separation and Delegation of Legislative Powers", (1997) 4 (4) *Maastricht Journal of European and Comparative Law* 373; Lenaerts, K., "Regulating the regulatory process: delegation of powers in the European Community" (1993) 18 *European Law Review* 23

³³ Joerges, C., and Vos, E. (eds.) "EU Committees. Social Regulation, Law and Politics", Oxford, Portland: Hart, (1999)

of comitology is relevant as far as it has an impact upon the EC vertical division of competences. While the comitology committees are intended to monitor the Commission and therefore represent the Member States, the implementing committee participants are not government representatives but independent experts having their own views and normative visions³⁴. This raises questions as to the extent the Commission's implementation of EC legislation corresponds with the individual needs of the Member States³⁵. Being an operation outside the constitutional framework of the Treaty and a back door to achieving intergovernmentalism due to its link with the state, comitology lies somewhere between a supranational and an intergovernmental approach creating what is often called 'infranationalism'³⁶.

Despite its idiosyncrasy, the nature of the comitology procedure is capable of attracting comparisons in terms of the operation of the Commission vis-à-vis the national executive³⁷. A similar process to that of comitology operates within a Member State when the legislative leaves certain space to the government to regulate particular areas. Member States have also experienced similar problems to the Community when it comes to distinguishing between legislative acts and implementing acts. This can be compared to the Treaty's lack of a clear definition in terms of classifying measures directly based on the Treaty itself (considered as legislative acts) and derived law intended to ensure

³⁴ Although the Commission officials will eventually receive information about their governments' position on the relevant issues, they are exercising power away from political accountability and judicial review. See Schaefer, G.F., Egeberg, M., Korez, S., and Trondal, J. "The Experience of Member States Officials in EU Committees: A Report on Initial Findings of an Empirical Study" (2000) 3 *Eipascope* 29, Maastricht: European Institute of Public Administration.

³⁵ Stevens, A., & Stevens H., "Brussels Bureaucrats? The Administration of the European Union", Basingstoke, Palgrave (2001)

³⁶ See Joerges C., and Neyer, J., "From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology" (1997) 2 *European Law Review* 273

³⁷ See Hooghe, L., "The European Commission and the Integration of Europe. Images of Governance", Cambridge University Press, (2001)

their implementation (executive or implementing acts). National constitutional orders have attempted to remedy this problem in various ways. The French constitution provides a somewhat clear-cut separation of legislative (Article 34) and executive (Articles 21; 37) powers, although the executive may also adopt acts of legislative nature (Article 38).³⁸ The German Constitution on the other hand restricts the allocation of such powers and leaves it up to the discretion of the Bundesverfassungsgericht³⁹ to police the distribution of legislative and executive powers⁴⁰. Finally, the UK possessing neither a written Constitution nor a set of criteria for the allocation of law-making powers relies to the principle of Parliamentary Sovereignty that allows no legal restrictions to an Act of Parliament. As regards implementation, a joint politico-judicial monitoring of Parliamentary acts exists without challenging the definition of their scope. The same role of the courts is also employed to monitor the administrative conduct of the executive.⁴¹

Having seen both the way laws are implemented in the Community and the Member States, parallels can be raised between the two legal systems, especially the

³⁸ 'Constitution De 1958, publiée au JO du 5 octobre 1958', p. 9151

³⁹ Des Bundesverfassungsgericht or BverfG in short. (German Federal Constitutional Court)

⁴⁰ Although under the theory of 'Essentialness' (Wesentlichkeitstheorie) the Federal Constitutional Court requires in constant jurisdiction that the most important questions are decided by the legislator (Bundestag). See The Constitutional Court's decision over the right of a female Muslim teacher to wear a headscarf in school. [2 BvR 1436/02 vom 24.9.2003 <http://www.bverfg.de>] The BVerfG underlined that though Germany's constitutional law did not explicitly forbid the wearing of headscarves in the classroom in state-run schools in the first place, the possibility remained for states to legally enact such a ban. Thus the BverfG left it up to the state Parliament to decide if Baden-Württemberg should have such a legal regulation in place.

⁴¹ See Dicey, A.V., "Introduction to the Study of the Constitution", (1885) in Marshall, G., & Moodie, G., "Some Problems of the Constitution", Hutchinson, 5th Edition, London, (1971). "The plain truth is that the power possessed by the judges of controlling the administrative conduct of the executive has been, of necessity, so exercised as to prevent the development with us of any system corresponding to the 'administrative law' of continental states. It strikes at the root of those theories as to the nature of administrative acts, and as to the 'separation of powers'...the *droit administratif* of France." See *R v Secretary of State for the Home Department, Ex p Daly* [2001] UKHL 26 concerning a challenge to the decision of the Secretary of State for the Home Department to apply a policy of cell searches in all closed prisons in England and Wales. The House of Lords quashed the administrative action on human rights grounds, adding a 'proportionality test' to the grounds for judicial review.

Commission's operation vis-à-vis the national executive. The question is whether this comparison can be extended to Community cases of handling individual cases on competition policy (e.g. merger applications). Can the Commission's functions in competition policy be put next to a national executive in the same manner as the legislative actions of the Council along with the Parliament were compared to the work of a two-chambered national legislative. At first glance, the Commission's composition (top rank politicians) and its functions point towards a predominantly executive role comparable to national governments. The only ambiguity as to its role is raised in accordance with the nature of its motivations when it acts in an executive / administrative capacity for the Community as a whole. There the question is whether its actions are influenced and therefore directed according to the Member States' intentions aiming at an elevation of the national voice in the EC or rather the Commission has a will of its own pointing towards a supranational reality?

Looking at the EU as a whole with the EC as a part of it, the Commission is neither the absolute nor exclusive holder of executive authority. As regards policy initiatives, when it comes to the other two pillars (Common Foreign and Security Policy and Justice and Home Affairs) the Commission, challenged by the Council secretariat, plays a limited role in setting the EU political agenda. It can only submit proposals in the same fashion as national governments and be present at the discussions. Despite the somewhat marginal contribution of the Commission in the intergovernmental pillars (developing policy programmes), one could argue that after the Amsterdam transference of certain third pillar issues to the first EC pillar (visas, asylum and immigration), the influence of the Commission has grown bigger and it will most possibly carry on likewise in the future. Especially after the Convention's Constitutional Treaty is put into operation

(an action that will eventually bring down the Maastricht pillarised system) the Commission's contribution to the once intergovernmental pillars will no longer be uneven compared to the supranational EC pillar. This unveils a critical debate about whether the Commission or the newly institutionalised European Council⁴² should take up the leading role in collective European governance.

Article I-22 (1) of the EU Constitutional Treaty proposes the new post of permanent President of the European Council. This includes a term of office renewable every two and a half years instead of the present six-month rotation between Member States. Such proposal leaves behind the existing partnership model of the rotating presidency in the European Council, which assured that every Member State has its turn at the Chair regardless of its size and influence. Going back to the question of whether and in what ways EC Institutions resemble national-level institutions, one would conclude that the institutional architecture put forward by the EU Constitutional Treaty introduces an additional fundamental characteristic of the nation state: the 'Head of State' as the face of the EU President. However symbolic, Article I-22 (2) states that the President will represent the EU "on issues concerning its common foreign and security policy". This may create possible reactions considering that the whole European Council agenda may be dictated by the Member State occupying the fixed Presidency chair.

A more competent politicised Commission could perhaps provide an alternative to this challenge. Such a Commission - protector of the small Member States - would be in full control of all EU executive tasks gradually developing to an equivalent of national

⁴² Article I-22 of the EU Constitutional Treaty states that the European Council shall elect its President, by qualified majority, for a term of two and a half years, renewable once. The Council President would "chair and drive forward" the work of the European Council and replace the current system of six-monthly rotating chairs. The person nominated to be the President of the European Council would have to be approved by the European Parliament.

governments for the Union⁴³. Article I-26 (6), however, entails the loss of the right of each State to appoint a voting Commissioner. This may cause certain uneasiness amongst small Member States although the number of Commissioners is not directly linked to the degree that national interests are represented in the EU. The politicisation of the Commission may on the other hand upset the institutional balance by counteracting the new EU constitutional order through its transformation from a 'policeman of the Treaty' to a 'butterfly of EU government'. Possibly this was anticipated by the Constitution's drafters who decided to attribute executive powers to the state representative European Council. As for the Commission, following this reasoning, its future role would presumably be reduced to a mere European Council secretariat or a gap-filling player in the conduct of the EU's foreign policy as a way to ensure that the centre of power in the EU would not shift to the hands of the large Member States⁴⁴.

A fresh debate on the EU Constitutional Treaty need to determine whether the EU should turn further to the supranational method, where Member States surrender several competences to central authorities or whether intergovernmentalism should win through, leaving therefore Member States to make decisions with less recourse to common institutions. On the other hand the Commission might be alarmed as to the predominance of intergovernmental trends in the future shape of the Union. It may fear that the intergovernmental system lacks functionality and accountability. Therefore if it is to be applied in areas where the Commission presently represents the Union in a collective

⁴³ Egeberg, M., "The European Commission: The Evolving EU Executive" (2002) 02/30 Arena Working Papers, Oslo

⁴⁴ The fact that under the EU Constitutional Treaty (Article I-26) only 15 of the 25 Commissioners will have voting rights is capable of raising some concern in the small Member States. However one could argue that the question as regards the composition of the Commission is not one of nationality but of efficiency. Therefore the determination of its number should be fixed according to the number of areas of EU activity and not to a fixed number representing an operational compromise in view of the Union's enlargement.

manner based on a Council mandate any vision for common federal action would be frustrated. But even if a federal action were to be taken, would the Union's system ever reflect what is happening in the Member States?

3. The Judicial: The European Court of Justice

Last but not least, the judicial power is at large exercised by the European Court of Justice (the Court hereafter), despite the attempts of the European Council at Nice (2000) to hand over key functions such as preliminary references (Article 234 EC) over to the Court of First Instance - to be renamed High Court according to the EU Constitutional Treaty -. The legal basis of the Court's competence over Community matters lies in Article 220 EC and when it comes to certain Union activities in Article 46 TEU. Under these provisions the Court is competent to ensure that both EC Institutions and Member States comply with the law of the Treaty both in its interpretation and application. Unlike the other three Institutions, the Court's functions have never been dramatically modified by a Treaty review or even by the EU Constitutional Treaty. This relates to the overwhelming majority of government representatives in European Summits wishing to preserve the Court's leading role in the operation of the Community.

Despite that, the Court does not enjoy an absolute monopoly over the assurance of the uniform application of EC law throughout the Community compared to a national constitutional court. To pick an example, in cases concerning competition issues, the Commission may act as a judge of first instance. Before Council Regulation No 1/2003⁴⁵

⁴⁵ Council Regulation No 1/2003 of 16 December 2002 on the interpretation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty. OJ L1/1

national courts were only competent to apply Article 81(1) EC⁴⁶ while the Commission had exclusive competence to do so in relation to Article 81(3) EC. Such a system of public enforcement by the Commission undermined the very essence of the *Van Gend En Loos*⁴⁷ judgment that emphasised the significance of private enforcement in EC law. Regulation No 1/2003 underlines in paragraph 4 that “the present system should therefore be replaced by a directly applicable exception system in which competition authorities and courts of the Member States have the power to apply not only Article 81(1) and Article 82 of the Treaty....but also Article 81(3) of the Treaty”.

Furthermore, talking about the distribution of judicial power, the Council - acting under the procedure requiring the assent of Parliament - may take the appropriate steps to ensure the uniform application of Article 6 (1) TEU in the Member States by taking action against relative breaches of the Union values. The values of the Union are summarised in Article 6 (1): “the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law,” the rights guaranteed by the ECHR and “respect for the national identities of the Member States.”⁴⁸ As provided by Nice and the EU Constitutional Treaty, besides the Court of First Instance there will be specialised judicial panels with jurisdiction in individual areas. Hence, the exercise of judicial power

⁴⁶ As regards Article 82 EC, it is directly applicable and national courts are responsible for its application.

⁴⁷ Monti, M., “The Application of Community Competition Law by National Courts”, Conference at the Europäische Rechtsakademie, ‘Towards the Application of Article 81 (3) by National Courts’, Trier, (27.11.2000) Speech/00/466, European Commission Press Room; *Van Gend En Loos* Case 26/62 [1963] ECR I

“...On questions of legal interpretation national courts will and should continue to turn to the Court of Justice or to the Court of First Instance if this Court is made competent for Article 234 questions in the field of competition. The preliminary reference procedure will play a crucial role in maintaining coherent application throughout the Community as it has done since the very beginning in all other areas of Community law.”; See also: Conference on “The Reform of European Competition Law”, Freiburg, (9-10.11.2000) available at <http://europa.eu.int/comm/competition/speeches>

⁴⁸ Under the EU Constitutional Treaty there would be a triple guarantee of human rights in the EU: i) the Charter of Fundamental Rights (Part II of the EU Constitutional Treaty); ii) the ECHR and iii) the principles common to the Member States.

within the Union is similar to the exercise of legislative and executive power. Although at times it seems that certain organs have greater competence to act in certain areas, this competence is not exclusive but part of a network of parallel competences.

Nonetheless, the Court - maybe more than any other EC Institution - exercises the Community's judicial functions, being the prime interpreter and developer of the 'unwritten' European Constitution. J.W.R. Reid writes that "where there is no constitution, and by implication where the constitution establishing the 'delicate balance between majority rule and certain fundamental values' is open-textured, then it is the Court which must guarantee that balance."⁴⁹ One should not overlook its contribution in adjudicating vertical conflicts arising between the Community Institutions and the Member States (Articles 226 and 230 EC⁵⁰), as well as its teleological approach in solving horizontal disputes between citizens and their national governments (State liability doctrine⁵¹). The Court has jurisdiction to give preliminary rulings on an act of one of the Institutions of the Community within the meaning of Art 234 (1) (b) EC and its decisions form an integral part of the Community's legal system. Besides the very foundations of Community law, instituted on a unique complex between direct effect and supremacy of EC primary and secondary law, were developed by the Court itself on a non-textual / Treaty basis. Accordingly, the Court has also jurisdiction to give preliminary rulings under Article 234 EC concerning the interpretation of provisions of a mixed agreement in any case not concerning the exclusive powers of the Member

⁴⁹ Reid, J.W.R., "Political Review of the European Court of Justice and its Jurisprudence" (1995) 13/95 Harvard Jean Monnet Working Paper, NYU

⁵⁰ Especially as regards the use of Article 230 EC, the Court of First instance has played a significant role in opening up standing rules for private applicants in Case T-177/01 *Jégo Quéré et Cie SA v Commission* [2002] ECR II-2365

⁵¹ Joined Cases C-6/90 and C-9/90 *Francoovich* [1991] ECR I-5357; Joined Cases C-46 and 48/93 *Brasserie du Pecheur and Factortame III* [1996] ECR I-1029

States⁵². Thus the Court is an alternative means of accomplishing a certain desired outcome outside the scope of internal /domestic law.

Once the EU Constitutional Treaty is ratified, the Court would according to Article I-29 (3) be the prime interpreter of the provisions laid within it deciding therefore conflicts over competences and disputes over subsidiarity. According to the relevant Protocol attached to the EU Constitutional Treaty ⁵³, Member States acting under the request of their national legislatures on the basis of violation of the subsidiarity principle may challenge EU legislation in Luxembourg.⁵⁴ Such monitoring of the constitutionality of acts of the Union would have a direct impact to the vertical division of competences. Not only that but in addition, the individual will be at an advantage, albeit a small one, in bringing his case to the Court. Article III-365 (4) of the Constitution grants the individual a right to institute proceedings against a regulatory act provided that it concerns him/her directly and does not entail implementing measures. This deviation from the unrealistic *Plaumann* criteria⁵⁵ owes much to the *Jégo Quéré* decision of the Court of First Instance to dismiss the objection of inadmissibility raised by the Commission against a private applicant, whose vessels were ultimately found to be covered by the scope of a regulation on fisheries⁵⁶. There the Court of First Instance highlighted in contrast to what had been ruled before:

“A natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if

⁵² See Case 12/86 *Demirel v Stadt Schwäbisch Gmünd*, [1987] ECR 3719

⁵³ Protocol on the Application of the Principles of Subsidiarity and Proportionality, para 7

⁵⁴ See more in Chapter 6

⁵⁵ Case C-25/62 *Plaumann v. Commission* [1963] ECR 95

⁵⁶ Regulation (EC) No 1162/2001

the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.”⁵⁷

The Court fairly soon after *Jégo Quéré* rejected the proactive judgment of the Court of First Instance in the *UPA* case⁵⁸ in a somewhat egoistical approach to preserve its own restrictive *Plaumann* locus standi test. Such a decision frustrates J.H.H. Weiler’s recognition that individuals are the principal guardians of the legal integrity of Community law⁵⁹ since in the pre-*Jégo Quéré* case law they had little opportunity to prove it.

Moreover, with the ratification of the EU Constitutional Treaty, the provisions of the Charter of Fundamental Rights⁶⁰ will become an integral part of EU law (Part II of the EU Constitutional Treaty) and consequently take constitutional value by becoming justiciable by the Court⁶¹. Fundamental rights presently consist of general principles of EC law based on the constitutional traditions of the Member States and international treaties to which the latter belong⁶². In view of that, despite the positive air surrounding the legalisation of the Charter⁶³, there may be concerns as to the equivalence of level of

⁵⁷ Case T-177/01, *Jégo Quéré et Cie v Commission* [2002] ECR II-2365, para 51

⁵⁸ Case C-50/00P *Union de Pequeños Agricultores v Council* [2002] ECR I-6677, para 45

⁵⁹ Weiler, J.H.H., “The Transformation of Europe.” (1991) 100 Yale Law Journal 2403-2483

⁶⁰ Charter of Fundamental Rights of the European Union, 2000 OJ (C 364) 1, entered into force Dec. 7, 2000

⁶¹ See Case C-173/99 *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v Secretary of State for Trade and Industry*, Opinion of 8 February 2001. The Advocate-General, Tizzano’s Opinion attracted attention not only because it implied the amendment of UK working time legislation but also because he cited as a “substantive point of reference” the provisions of the Charter.

⁶² Weiler, J.H.H., “The Jurisprudence of Human Rights in the European Union: Integration and Disintegration, Values and Processes” (1996) 2/96 Harvard Jean Monnet Working Paper, NYU

⁶³ Opinion of AG Jacobs in C-263/02 *Jégo Quéré et Cie SA v Commission* [2002] ECR II-2365

fundamental rights protection granted by the Constitutional Treaty's Part II (which contains the unamended Charter in format) as compared to the way they are safeguarded in each Member State. For instance, the Charter does not expressly state that European legislation in violation of the Charter shall be void. This contrasts with the Constitutional practices of several Member States. Article 15.4 of the Irish *Bunreacht na hÉireann*, for instance, provides that "the Oireachtas (Parliament) shall not enact any law which is, in any respect, repugnant to the Constitution...."and in case it does is to be declared invalid⁶⁴. Moreover the EU Constitutional Treaty does not include the possibility of an individual complaint alleging breach of fundamental rights whilst in the United States individuals have been the prime actors in ensuring the vindication of the Bill of Rights.

Scepticism as to the Court's aptitude to adjudicate on future EU constitutionalised values such as human rights, which already enjoy constitutional protection in the Charter or Constitution of each Member State may bring to the fore a good basis for those proposing the establishment of a new institution to hold the Court accountable. However, one could add that it is rather awkward to carry on building up counter-institutions in a constitutional process that initially begun in the name of simplification. Alternatively, EU constitutional issues could start and finish at national courts, rendering therefore the Court of Justice a last resort national Constitutional Court. As regards objectivity and harmony of application, each high constitutional court of a given Member State could comprise an independent representative that irrespective of his nationality could seat at the national court providing an alternative opinion, acting very much in the capacity of an Advocate General.

⁶⁴ Constitution of Ireland, Enacted by the People (01.07.1937)

To summarise, even though only a few reforms in the EU Constitutional Treaty affect the Union's judiciary, the Court's role will still be valuable within a constitutionalised EU. Besides it was the first Institution to transform and therefore constitutionalise the Treaties⁶⁵; legitimise new legal avenues and de-legitimate other EC measures; call for legislative intervention and compensate for lack of it. Even though its activism / jurisprudence has been criticised for being dominated by a profound element of proactiveness⁶⁶, the self-restraint of the Court has been greater in recent years than those of the highest national courts. Despite the fact that the Court has very much acted as the Community's motor of integration, any egoistical attempts to increase its power and pursue its agenda have been held up within the constraints imposed by the national courts and the scope of the Treaty. Hence any hostility towards the Court is located in what G.F. Mancini describes as the "self-preserving interests of the political and bureaucratic elites in the fifteen Member States"⁶⁷, now twenty-five.

Not surprisingly, the Union's alleged constitutionalisation involves a detailed discussion about the role of justice and the relation between judicial and political organs within Europe. It concerns very much the relation between justice and politics, dealing, to put it otherwise, with the judicialisation of political decisions and accordingly with the politicalisation of the role of judges in the Member States. The Court has attained great political influence facilitating the evolution of European integration. The reasons vary: from its very nature, being a dependent variable to the technicality of issues involving EC law. Whatever the case may be, the judicialisation of European politics has gradually

⁶⁵ Case 294/83 *Parti ecologiste 'Les Verts' v. European Parliament* [1986] ECR 1339

⁶⁶ Rasmussen, H., "On Law and Policy in the European Court of Justice – A Comparative Study in 'Judicial Policy-Making'" (Hague: Martinus Nijhoff 1986)

⁶⁷ Mancini, G.F., "Europe: The Case for Statehood" (1998) 4 *European Law Journal* 29

occurred through the tendency of EC Institutions, national governments and private applicants alike to resort to the Court in order to vindicate and consequently enhance their competences under the Treaty. To quote from R. Dehousse: “the more decisions are taken by the judiciary the more potential plaintiffs will be tempted to go to court to protect their interests.”⁶⁸ As litigants have voluntarily agreed to implement and enforce the Court’s decisions, the latter’s role as prime judiciary and compensator for lack of legislative initiative at EC level has been elevated and along with it the legitimacy of EU law.

In contributing towards the judicialisation of politics the Court has itself been transformed by the collective political environment in which it evolved and operated. From the 1990s to the present day it has given signs of retreat from its previous theses that caused considerable national reaction. This tendency of self-limitation⁶⁹ or ‘reasonable activism’ has been defined by J.H.H. Weiler as “a return to orthodoxy”⁷⁰ manifested in decisions such as *Keck*⁷¹ and *UPA*⁷². At another level it owes much to the anticipation that the EC has completed its circle as a quasi-legal state, which allows a more relaxed stance taken by its Institutions compared to the early developmental stages of building up a new legal entity.

⁶⁸ Dehousse, R., “The European Court of Justice: the Politics of Judicial Integration”, Basingstoke, Macmillan, (1998) at 115

⁶⁹ See also Sweet, A.S. and Brunell, T.L., “The European Court and the National Courts: A Statistical Analysis of Preliminary References, 1961-95” (1997) 14/97 Harvard Jean Monnet Working Paper, NYU

⁷⁰ Weiler, J.H.H. “The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods” in Craig, P., and De Búrca, G., (eds.) “Evolution of the EU law”, Oxford University Press, (2000), p.349-376

⁷¹ C-268/91 *Keck and Mithouard* [1993] ECR I-6097

⁷² Case C-50/00P *Union de Pequeños Agricultores v Council* [2002] ECR I-6677, para 45

B. THE DOCTRINE OF SUPREMACY OF EC LAW

Introduction

Before examining the way vertical competences have developed throughout succeeding Treaty revisions, it is important to define the power relationship between the Community *vis-à-vis* the Member States. The tranquillity of this relation, dependent upon the extent of transferral of national competences to the Community, has been turbulent in times due to national reaction in terms of the bi-dimensional concept of EC law supremacy. The two dimensions of the doctrine of 'supremacy' can be summarised first, in the Court's monist conception of the supremacy of EC law and second, in the Member States' problematic response to the fact that an EC law provision is a higher norm compared to a conflicting national rule. But since the reception and therefore validity of EC law depends in certain Member States on their dualist approach to international law demanding a self-revision of the national constitution, how could they be irritated by the reality that EC law is supreme? During the course of this chapter one will identify that more than anything else it is the Court's 'teleological' interpretation of constitutionally recognised EC law provisions that has caused national uneasiness and not the doctrine of 'supremacy' *per se*.

Certain Member States, at least during the so-called 'political' judgments of the Court in the 1970s, were almost taken by surprise as the Community's judiciary was giving interpretations to EC law provisions sometimes reaching far beyond the scope of the Treaty. Consequently these judgments went further than the expectations of the nation states as to the degree of integration or surrender of national sovereignty they intended when they signed the Treaty. On the other hand such an expansive interpretation of EC

law by the Court may be characterised as necessary given the circumstances of integration throughout the years and the peculiarity of the nature of the Community as a body consisting of states with diverse legal heritage. Does this assumption take us to the conclusion that the Court's interpretation of EC law in a rather expansive fashion - different to national legal traditions - was or is justifiably subject to legal criticism?

The transference of national competences to the Community and their expansion by the Court may be regarded as necessary, not so much as symbolic but practical in the name of furthering European integration. When the Member States transferred their competences to the Community they explicitly recognised that they entered a new organisation with authority and principles different to domestic ones along with its own executive, legislative and judiciary to create or interpret the constitutional rules of the independent legal order. The imperative of furthering European integration was something that Member States accepted when they transferred their competences to a *sui-generis* legal system but perhaps the level of change was not in their contemplation at the time of their accession to the EC.

A reference to the arguments of the three Member States before the Court in *Van Gend En Loos*⁷³ suggests that the Member States were not aware that Article 12 EEC (now 25 EC) in relation to custom duties was intended to have a direct effect. The Court however established that directly effective rights arise from the provisions of the Treaty and individuals may rely upon them in bringing a case before their national courts. One can argue that the concept of direct effect did not constitute a part of the obligations that

⁷³ Case 26/62 *Van Gend En Loos* [1963] ECR I

the Member States agreed to when they joined the Community⁷⁴. It was the Court that interpreted Article 12 EEC in the light of the general aims of the Community as manifested in the Treaty. In its future case law, the Court went one step further by holding that directly effective rights may also spring out of secondary Community legislation⁷⁵. In the present context this is very important in relation to the accepted limitation / transference of national competences to the Community. The topical question is how far a system that has re-defined its level of integration, from peace and stability to economic and then political, is allowed to change the original national competences along with what has been left of national sovereignty. Asking this question, national authorities conclude that not all changes of competences thrown into this new organisation can be tolerable.

1. Justifying Supremacy: A *sui generis* Constitutional order

(a) Introduction

Being more than international or mere socio-economic agreements, the Union's founding Treaties very much like a national constitution do organize the administration and governance of the Union in a political fashion. They describe the composition and functions of the main actors on the Community stage, namely the European Council⁷⁶, Parliament, Commission and the Court conferring upon them a power to act when necessary for the attainment of the Treaties' objectives⁷⁷ prohibiting the carrying out of

⁷⁴ Pescatore, P, "The Doctrine of Direct Effect: An Infant Disease of Community Law" (1983) 8 European Law Review 155

⁷⁵ See for instance: Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337; Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825; Case 148/78 *Pubblico Ministero v Ratti* [1979] ECR 1629

⁷⁶ Of course not referred to in the original Treaties

⁷⁷ Articles: 308 EC; 203 Euratom; 95 (1) ECSC

tasks outside these goals. Already from the starting point, since the Treaty of Rome to the succeeding agreements, the Community was never meant to be limited solely to a free trade zone on the basis of international law. It was rather drafted as a “legal community” built upon the fundamental principle of supremacy that EC law prevails over national legislation regardless its nature and the time that comes into force (enactment)⁷⁸. The Court emphasized this in *Simmenthal*.⁷⁹

The doctrine of supremacy is one of the most fundamental bases of European Law. It defines the importance and overruling effect of primary and secondary Community legislation within the European Union. Although never laid down in the Treaties, the European Court of Justice relatively early ruled that, according to the Treaties’ intentions, EC Law had to be considered above any national provision.⁸⁰ Also national constitutional provisions may not be applied by national courts if obstructing Community law.⁸¹ In a series of decisions the Court has pushed this evolution by means of its case law making considerable efforts to constitutionalise the Treaty so that the individual is protected by it and enjoys rights derived from it vis-à-vis his / her own national government. To name but a few controversial ‘politically driven’ decisions, in *Van Gend En Loos*⁸² the Court declared that “the Community constitutes a new legal order of international law”, hinting that EC law is a sub-system of international law. It stated clearly that the Treaty not only addresses the Member States as such, but also the

⁷⁸ Craig, P., “UK Sovereignty after Factortame”, 11 Yearbook of European Law 221, (1991), at 246, See *Simmenthal* 106/77, (1978) ECR 629 at 651-2; *Matra Communications v Home Office* [1999] 1 Common Market Law Review 1154

⁷⁹ Case 106/77 [1978] ECR 629

⁸⁰ Steiner J., & Woods, L., “Textbook on EC Law”, 7th ed., Mayfield Blackstone, (2000), 85.

⁸¹ Case 106/77 *Simmenthal* [1978] ECR 629, 643-644.

⁸² Case 26/62 *Van Gend en Loos* [1963] ECR 1

individual citizen granting rights and founding obligations. Spiermann explains⁸³ that because the EEC Treaty, in addition to the Member States, counted individuals as its subjects, the legal order set up by the Treaty was ‘a new legal order of international law’. Yet, he argues that the concept of direct effect was established three years before the *Van Gend En Loos* ruling in the application of the ECSC Treaty⁸⁴. Additionally, speaking from an international lawyer’s perspective, he challenges the Court’s idea of international law for being “essentially ahistorical”⁸⁵.

From an EC lawyer’s perspective, the principle of direct effect was introduced so that EC law can be invoked in a Member State without prior implementation. Besides the concept of EC law supremacy would be fruitless without being backed by directly effective provisions. Thus the Court established the existence of a new legal order through its conclusion that international law enjoys no direct effect over the nation state and therefore making what Mancini calls a “unique judicial contribution to the making of Europe.”⁸⁶ Further, in *Costa v ENEL*⁸⁷ the Court moved one step further by establishing that “by contrast to ordinary international treaties, the EEC Treaty has created its own legal system...which became an integral part of the legal system of the Member States and which their courts are bound to apply.” Thus, the Court not only recognized that the

⁸³ Spiermann, O., “The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order”, (1999) 10 (4) *European Journal of International Law* 763-789

⁸⁴ See Case 20/59 *Italy v High Authority* [1960] ECR 325, at 335 and Case 25/59 *Netherlands v High Authority*, [1960] ECR 355, at 371.

⁸⁵ “There is, however, no doubt that under international law a national court, being an organ of the state, is obliged to reach decisions that are in accordance with the international obligations of the state. This is so even when the holder of the corresponding right does not take part in the proceeding before the national court, though this will often be the case since, in modern international law, interests in the subject-matter governed by a rule normally breed rights (to lay claims and to bring actions) on the basis of the rule, also for individuals.”

⁸⁶ Mancini F., and Keeling, D., “Democracy and the European Court of Justice” (1994) 57 *Modern Law Review* 175, at 183

⁸⁷ Case 6/64 *Costa v ENEL* [1964] ECR 585/595.

Community's legal system is separate to the Member States but also disconnected from the intergovernmental nature of international law⁸⁸ to further enhance the supranational principle of supremacy⁸⁹. It accepted the power of the Member States to create law that could be incompatible with Community law. In the Court's own words this was expressed as following:

“It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.”

Looking at the history of European integration one could argue that it has highly contributed to diminish national barriers and as a result national competences. One might even be tempted to state that the interpretation of the European Treaties in this special way was crucial on the way to reach the declared aim of economic and political integration. Besides, all sympathy one might feel for the idea of European nations moving together under the shield of a higher authority / constitutional order, the sovereignty of the EU Member States must always be borne in mind.

⁸⁸ See Case C-20/93 *Germany v Council* [1994] ECR 4973. The Court held that an EC regulation couldn't be invalid just because it comes into conflict with an international treaty, GATT in particular.

⁸⁹ The Community has legal personality and can enter into contractual relations with other either persons or organizations. Yet, the EC has been reluctant to apply international law in some cases arguing that “it is not capable of conferring on citizens of the Community rights, which they can invoke before the courts”. (e.g. when a Community norm is in conflict with GATT. (See Case 21-24/72 *International Fruit Company v Produktschap voor Groenten en Fruit* [1972] ECR 1219).

(b) The European constitutional order: a new legal order of international law?

The European Treaties might have led to a legally unique and not clearly definable structure in terms of international law,⁹⁰ but nonetheless the agreeing governments were and are today still obliged to respect their own national constitutions. But being “an integral part of the legal systems of the Member States”, EC law was declared to be in *Costa v ENEL* not just applicable to define / facilitate the relations between them but has given confidence to their nationals to act as direct enforcers of EC law. What also played a part in the surrendering of national competences is the fact that the Community legal order was not seen as a part of international law. There, it is the principles of direct effect and supremacy that made the EC legal order find its own feet compared to the international.

Both principles of direct effect and supremacy are interconnected and interrelated. If a citizen of a Member state was unable to invoke a Community law provision how could EC law enjoy primacy over national legal norms? So not only does the individual enjoy rights under EC law, but these rights are justiciable before his / her national court. Furthermore, these rights not only exist where they are expressly granted in the Treaty but by reason of obligations that the Treaty imposes on individuals, their Member States and the EC Institutions. Hence, direct effect is not just about direct individual rights conferred from the Treaty to the individual as a Member State citizen. It is also about the broader horizontal relationship between the individual as a ‘subject’ of the national legal system and the national sovereign body as the ‘master’. According to the Court, international law merely regulates the relationship between the states and does not count

⁹⁰ Rodriguez-Iglesias, G. C., “Mackenzie-Stuart Lecture, 10. Feb. 1997”, (1998) 1 Cambridge Yearbook of European Law 1, 2; 10.

their citizens as 'subjects'. This is a matter traditionally reserved by the sovereign states. For the first time in *Van Gend En Loos* the Court indicated that by setting up a new legal order the EEC Treaty also counts the individuals of the Member States as subjects. Not only that, but by defining "the legal relationship between Member States and their subjects", the Court hinted at a change of roles. It almost feels that the Community has taken the place of the national sovereign (e.g. the British Parliament) in exercising sovereign rights. This includes of course its ability to produce legislation that has direct effect on individuals. This however does not imply that a state is precluded from enacting rules that are in conflict with Community law.

Although in *Van Gend en Loos* the Court affirmed that the Community is a "new legal order of international law", a year after, it surpassed the term "international", by moving towards its autonomy in *Costa v ENEL*⁹¹. In *Costa* the Community legal order was no longer, as in *Van Gend* "a new legal order of international law". It was more of "an integral part of the legal systems of the Member States", a new legal order within national law so to say. The doctrines of direct effect and supremacy gave grounds to the prevalence of the Community's legal order over national legislation. Both decisions were not just about rearticulating common principles of international law. The "new legal order" wording is more than rhetoric. Both decisions formed the basis of the Court's innovative approach to the Community legal order explicitly departing from the international legal order theory.

One though could argue that the Court's conception of international law was somewhat blurry or even 'ahistorical' at the time of the *Van Gend* and *Costa* judgment.

⁹¹ See De Witte, B., "Rules of Change in International Law: How Special is the European Community?" (1994) 25 *Netherlands Yearbook of International Law* 299; Schilling, "The Autonomy of the Community Legal Order: An Analysis of Possible Foundations" (1996) 37 *Harvard International Law Journal* 389.

Certainly, the traditional view of international law illustrates that despite the fact that a country enters an international treaty for the benefit of its individuals (for instance international human rights treaties), these treaties do not confer direct rights to individuals per se under international law. Therefore the traditional view of international law wants individual rights to be interpreted as derivative rights by reason of a state's obligations that arise from it being party to a treaty. Accordingly, national courts are compelled to comply with the international obligations of the state even though individuals, who may benefit from the state's compliance with an international treaty, cannot participate in the relevant proceedings before their national courts.

Nowadays it is acknowledged that individuals can be the subject of specific rights and responsibilities under international law, albeit to a limited extent. A small number of international treaties have institutionalised complaint procedures where individuals are allowed to bring complaints before international bodies regarding breaches by a state contrary to their rights under the respective treaties. The Optional Protocol to the International Covenant on Civil and Political Rights⁹² is an indicative example. The Protocol gives legal force to the Covenant on Civil and Political Rights by allowing the Human Rights Commission to investigate and judge complaints of human rights violations from individuals from signatory countries⁹³. It also allows individuals to bring

⁹² Optional Protocol to the International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976.

⁹³ Part II, Art. 2 "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.";

their claims to the United Nations Human Rights Committee for a violation of their civic and political rights and fundamental freedoms under the Covenant⁹⁴.

This takes us to the conclusion that the Community legal order is not the only one that confers rights upon individuals. However, there is no doubt that the Community and its laws form an inimitable complex. Although the EU cannot yet be said to possess a constitution, the very nature of the rights and obligations that it creates extend beyond the contracting states. This justifies that it is more than a mere international organization. Yet, an orthodox approach to the world order will demonstrate that it is composed on the one hand of several sovereign states and on the other by a group of international organisations. The EU does not fall into any of those two categories and quite naturally so. The Constitutional Court of Germany was accurate to question the nature of the Community and reject the notion of a *Bundesstaat* (federal state) by upholding the idea of a *Staatenbund* (a confederation of states).

(c) The Court's Jurisprudence

The concept of judicial activism, which involves a teleological approach on the part of the Court, often has negative connotations. Its activism, however, has at times proved to be a necessity to point towards a legal / political Community. As the Court went beyond a mere interpretation of the Community prohibition on a Dutch customs duty under Article 12 EEC in *Van Gend En Loos* and a question on the legality of the

⁹⁴ Article 1: A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant, which is not a Party to the present Protocol.

Article 2: Subject to the provisions of Article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

nationalisation of an Italian electricity company in *Costa v ENEL*, it established two of the most fundamental and interrelated constitutional principles of European law: direct effect and supremacy. On the basis of its jurisprudence the law of the Treaty was later proclaimed as the Community's "Constitutional Charter" in *Le Verts*⁹⁵. As the Court became the initiator of the so-called "*nouvel ordre juridique*" (new legal order) it moved towards replacing internationalism with European constitutionalism. Its jurisprudence has been such as to claim autonomy of EC law and subsequently prevalence of its legal order over national via the express establishment of fundamental principles of EC law.

The Court's shaping of the Community legal order has been evident in the case law succeeding *Van Gend en Loos* and *Costa*. In the abovementioned case of *Les Verts* for instance, the facilitation of Article 173 EEC (now 230 EC) was given a positive characterisation and the Court's approach was described as teleological for interpreting the Treaty according to its objectives. By holding that the European Parliament is a body subject to review, something that did not occur earlier, the Court was attempting to uphold the intention of Article 173 EEC – that Community Institutions should be subject to review. The power to subject the Parliament to review was not inherent within Article 173 EEC and in that sense the Court's interpretation was teleological. But that again is the very problem of the *Le Verts* decision since the Court was doing more than interpreting what was in the provision, by interpreting into it an element, which was not there. This takes us closer to Judge Donner's definition of the Court "not as an

⁹⁵ Case 294/83 *Parti ecologiste 'Les Verts' v. Parliament* [1986] ECR 1339, at para. 23.

international court, but as the administrative and sometimes constitutional court of the Communities”⁹⁶.

When it comes to the Member States, Article 234 EC sets out the rules governing the co-operation between the Court of Justice and the national courts concerning preliminary references. The Court co-operates with national courts in assessing whether a case is a ‘dispute of a purely domestic nature’ that falls overall outside the range of Community law. The question of whether the exercise of a competence falls under the headline of shared or exclusive competence is up to the Court of Justice to decide respecting that the EC is competent to act only in so far as a Member State cannot achieve the objectives of the Treaty (subsidiarity). It should also be cautious that its actions are proportionate as to the aim achieved (proportionality). These are constitutional limitations or alternatively devices for ‘pause and rethink’ the Community’s competences.

Up till now, the Treaty never had and till today does not maintain an explicit provision to define the relationship between national and Community law. The European Court established the latter’s supremacy that only enabled integration to the extent, we are used to nowadays. Irrespective of the nature of the Community rule, it prevails.⁹⁷ From a historical point of view the European Court truly was at this stage the driving force or ‘motor of integration’, as Gerber⁹⁸ would have put it, to ensure the realization of the politico-economic aim of European integration as laid down in the Treaty. It took a

⁹⁶ Donner, A.M., “National Law and the Case Law of the Court of Justice of the European Communities”, 1 CMLR (1963-64) 8, at 9.

⁹⁷ Hartley, T.C., “The Foundations of European Community Law”, 4th edition, Oxford University Press, (1998), 232.

⁹⁸ Gerber, D., “The Transformation of European Competition Law”, 35 (1) Harvard international Law Journal 97

rather practical and functional approach in its reasoning when finding, that no national rule whatsoever can override Community law, as this would jeopardize the rationale of this very body of law called European Community.⁹⁹

Although the early Court rulings have been coloured as politically driven¹⁰⁰, the doctrine of supremacy according to the spirit of the Treaty is now well established in the Court's judicial practice¹⁰¹ and from the Community's point of view it is a settled matter. However, one can find a contrary situation within the Member States. As easy as it was for the Court to constantly proclaim precedence of EU law over national law mirrors the difficulty for some national courts to deal with this concept as soon as constitutional law was involved (i.e. declared not to be applicable). Whatever the conception of international law that a Member State adopted in incorporating EC law into its constitution when it joined the Community ('monist'¹⁰² or 'dualist'¹⁰³) the national courts' argument is whether the incorporation of EC law within a national constitution is a mere delegation of power or a pure transference of sovereignty.

This is evident in the Court's case law where even in cases of hard constitutional conflicts between the two norms, national judges have gone as far as threatening not to apply EC law, with cooperation finally prevailing. This goes back to the notion that it is

⁹⁹ Case 11/70 *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, 1134; Case 48/71 *Commission v Italy* [1972] ECR 527, 532.

¹⁰⁰ Weatherill, S., & Beaumont P., "EU Law", 3rd ed., London, Penguin, (2000), p. 433.

¹⁰¹ Wyatt, D., & Dashwood, A., "European Union Law", 4th ed., London, Sweet & Maxwell, (2000), 67.

¹⁰² A monist country is one, which already has a constitutional mechanism for the direct application of EC law in its domestic legal system. In *Minister for Economic Affairs v Fromagerie Franco-Suisse 'Le Ski'* (1972) CMLR 330. The domestic judge declared that since the Belgian Constitution was silent about the position of Belgium in the EC, Belgium was a monist country and thus the national court could disregard national legislation in favour of an EC Treaty provision. Hence, the provision of Art. 12 EEC had direct effect and consequently the national court was under an obligation to uphold it even if it was contrary to Belgian law.

¹⁰³ A dualist country is one that needs to legislate in order to transfer its powers and give effect to EC supremacy over national sovereignty.

the national constitutions that permit primacy of EC Law. In consequence, we witness a peculiar situation where although national judges appear that they would not accept the constitutional character of EC law, they persist in enforcing the constitutional features of the Treaties at any rate. In this way, to quote from Weiler, we have “constitutionalism without Constitution”. The problem with this ‘quasi-constitutional’ or for some ‘quasi-federal’¹⁰⁴ structure lies in the question of whether the relevant model of governance employed by the EU points towards the emergence of a European form of statehood that will degrade national institutions to simple executors of supranational decisions. This leads us to the question of how the supremacy of EC law, as recognised by the laws of the Member States, affects the relationship of competence between the European “constitutional” legal order and the national.

Long before the adoption of the Convention’s Constitutional Treaty, the signatories to the Treaty of Rome fashioned a supra-national legal system amongst themselves, with individual enforcement instruments (the Commission and Court) to ensure compliance with the new legal norms. Since all Member States are equal under the Treaty, they too enjoy identical rights and duties. This uniformity can only be achieved by ensuring that, in the areas where the Member States have agreed to act as a Community, they limit their own national competence to act. However, the relevant provision in the EU Constitutional Treaty on the primacy of Community law over national¹⁰⁵, may suggest to certain Member States that what started as an express

¹⁰⁴ See Hartley, T., “Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community”, 34 *American Journal of Comparative Law* (1986) 229; Lenaerts, K., “Constitutionalism and the Many Faces of Federalism”, 38 *American Journal of Comparative Law* (1990) 205.

¹⁰⁵ See Article I-6 of the EU Constitutional Treaty [CIG 87/2/04]], which states that: “The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it, shall have primacy over the law of the Member States.”

assignment of sovereignty has reached a climax by being included as a written provision in the future Constitution. It is highly unlikely that the EU Constitutional Treaty aims for that. Instead the motive behind a basic binding text suggests that the objectives and competences of the Union along with the rights and duties of European citizens need to be spelled out.

An Imperfect Constitutional Order?

As illustrated in the first part of the chapter, the institutional arrangements found in the Union do not allow for a single institutional framework, despite the wording of Article 3 TEU. Instead one witnesses a complexity in the allocation of competences as split between EU institutions. Not only that but various others institutions - the so-called advisory bodies¹⁰⁶ and other distinctive actors¹⁰⁷ - have in recent years become an integral part of the EC / EU to add to this complexity or polyphony, depending upon one's views.

Going back to the assumption of popular misconceptions with reference to the nature of the division of competences within the EU, there is nothing - apart from the existence of the main three elements mentioned previously: executive, legislative and judicial powers - in the Union's institutional interplay of competences, characterised by great diversity of interaction between its organs, that corresponds to the allocation of competences at national level. This is evidence to start making hypotheses that even after its constitutionalisation, the EU will not resemble the liberal democracies that compose it. Perhaps this was not intended by the European Convention. A call for a well-defined delimitation of competences amongst the EU Institutions as well as the former and future

¹⁰⁶ The Committee of the Regions and the Economic Social Committee

¹⁰⁷ The European Council and the European Central Bank

Member States appears therefore as a method of counter-balancing the Union's tendency to concentrate competence within its supranational cell.

A first glance at the European legal order may suggest that the EU does not satisfy the characteristics inherent in constitutionalism since it does not maintain a Constitution as a basis to define its legal order. Despite the fact that in a legal sense it maintains a 'constitution', the Treaties are not formulated as such. Even the establishment and ratification of the EU Constitutional Treaty, involves a unique process of constitutionalisation incomparable with the traditional notion of constitutionalism. In view of that, one may claim that the assumption that there is a European constitutional order is imperfect from its outset, if not a fallacy, despite Bruno de Witte's remark that "the supremacy of EC law over national legislation...gives to EC law a quasi-constitutional status within the domestic legal orders"¹⁰⁸.

Thus, the first rather traditionalist conclusion to be drawn is that a real constitution cannot exist without a nation state to uphold it. A constitution, in the traditional sense of the term, as is manifested in the legal systems of the Member States is the supreme law of the state. By saying this, it is right to claim that no possible source of law is superior in the sense that it can question the validity of the constitution and by reason of that its authority. What is more, the sovereign constituent power (the Parliament in the UK) has the authority to bind all sub-national bodies. But most important, the acknowledgment of a constitution requires the acceptance of the demos so that democracy is exercised both in law and in fact.

¹⁰⁸ De Witte, B., "Agreement or Constitution?" in J. A. Winter et al. (eds), "Reforming the Treaty on European Union" (1996) 3, at 12

Raz¹⁰⁹ distinguishes between two senses of the term constitution. He describes a 'constitution' in the 'thin sense' as the law that establishes and regulates the main organs of the government and in the 'thick sense' as being 'constitutive', 'stable', 'written', 'superior', 'justiciable', 'entrenched', expressing therefore a 'common ideology'¹¹⁰. Having observed the principles behind the concept of supremacy of EC law and the subjection of the Member States to its fundamentals, a second conclusion can be made. One can refer to the Treaties as forming the Union's Constitutional Charter that establishes a distinct and unique legal order built upon concrete constitutional guarantees that subordinate national law to EC law and excludes their unilateral action. Despite the Union's portrayal of the Treaties as a Constitutional Charter they should not be misconceived and therefore labelled as forming a constitution in the manner we are familiar with from national constitutions. Thus, the case of the Union's constitutional order, the actual power of which has a large effect on the nation state, involves a partial or total re-definition of what the term 'constitution' entails.

The preparation of a Treaty establishing a Constitution for Europe manifests more than anything that a constitution can survive independently of national authority. There may be political and social events appearing in constitutional documents without having safeguarded the content of authority, which internally is secured by the primary and secondary legislative and externally with the constitution as a symbol of the existence of an independent and dominant nation. It is the breaking free of the constitutional discourse from the boundaries of state structures that has recently released it from several

¹⁰⁹ Raz, J., "On the Authority and Interpretation of Constitutions: Some Preliminaries" in Alexander, L., (ed) "Constitutionalism; Philosophical Foundations", Cambridge University Press, (1999).

¹¹⁰ For details on the meaning of those senses see also Craig, P., "Constitutions, Constitutionalism and the EU", (2001) 7 (2) European Law Journal 125-150

theoretical and practical constraints allowing its wider application to a non- state body such as the EU¹¹¹. Needless to say that the role of national constitutions would still be crucial. Besides, the acceptance of a European Constitutional text is conditional upon agreement on the text and finally prior ratification by the Member States' legal systems while its absorption requires the appropriate national constitutional background.

But as the EU is neither a sovereign state, nor an international organisation it is rather an oxymoron to assert that its legal order is an autonomous one for the following reasons. First, it is not a state; it does not possess the organic notion of European peoplehood (the demos hypothesis exemplified time and again by J.H.H Weiler¹¹²); it does not have a government (although its governance and law making capacity derives from an interplay of its political institutions) and finally it has no territoriality. Thus, the supporters of European constitutionalism are confronted with the question of the democratic legitimacy or lack of 'democratic deficit,' which primarily rests on the fact that the Community draws its legitimacy from a transfer of normative power / competence from the national sovereigns of the Member States as representatives of their citizens and not from a constitutional enactment of an identified European demos.

The Union is not a sovereign in itself but is rather composed by sovereigns (states). It owes its very existence to the convergence of the Member States' sovereign will, through their unanimous incorporation and amendments of the founding Treaties to their legal systems and their entrenched approval of the Court's interpretations to

¹¹¹ Shaw, J., "Postnational Constitutionalism in the European Union", 6 *Journal of European Public Policy* (1999) 579-597; Zuern, M., "Democratic Governance beyond the Nation-State: The EU and Other International Institutions" (2000) 6(2) *European Journal of International Relations* 183-221; Zuern, M., and Wolf, D., "European law and international regimes: the features of law beyond the nation state." (1999) 5 (3) *European Law Journal* 272-292.

¹¹² Weiler, J.H.H., "The State 'über alles': Demos; Telos and the German Maastricht decision" (1995) 1 *European Law Journal* 219

them. The European Constitutional area as it is formed by the common constitutional traditions of the nation states, the Union's primary law and its acceptance by the constitutions of the Member States suggests a scattered European Constitution, uncodified and un-systematic. To recapitulate, the 'unwritten' European Constitution, although existing, lacks all those features of a traditional or contemporary constitutional document as met in the nation state. The scattered and partly unwritten European Constitution is therefore fashioned, as already discussed, by the rules comprising the Union's primary legislation that regulate the organisation and function of the institutional organs of the Community; the procedures for producing secondary legislation; the way of amending primary Treaty provisions; measures concerning citizenship and fundamental rights in conjunction with the aims and policies of the Union, making also direct reference to the common constitutional traditions of the Member States as well as the European Convention of Human Rights.

One could compare the EU to a unique version of a federal state. However, as the substitution of national or any other identity with a monolithic European identity cannot be possible, similarly the establishment of a Constitutional democracy in Europe cannot replace but only enhance the democracy of the nation states. This suggests the unlikelihood of a total transferral of national competences to the EU. The emerging federal union in Europe that Joschka Fischer proposed in 2000 in his "Thoughts on the Finality of European Integration"¹¹³ at the Humboldt University in Berlin is a unique process and cannot be compared to the federations founded in the course of establishment

¹¹³ Fischer, J., "Vom Staatenverbund zur Föderation - Gedanken über die Finalität der europäischen Integration" (trans. "From Confederacy to Federation: Thoughts on the Finality of European Integration"), Berlin, Humboldt Universität, (May 2000). English version with commentary in Joerges, C., Meny, Y., and Weiler, J.H.H. (eds) "What Kind of Constitution for What Kind of Polity?", EUI, Florence (2000)

of the nation states, like USA and Australia¹¹⁴. This is why Fischer has been criticized for depriving the argumentation of its force¹¹⁵. The Convention's constitutional debate was not therefore about state building, since the Union is missing the attributes that make up a state. Europe is not just one nation but more a confederacy that consists of several members eager to maintain the key characteristics of the state. These can be epitomised in the desire to preserve ultimate sovereignty and delicate areas of competence as well as the diversity of heritage, culture and language.

This leads to the conclusion that the autonomy of the EU legal order as expressed in *Costa v ENEL* is at best a legal fiction. Domestic courts appear to enforce EC law out of the same reason that obliges them to uphold the legal provisions of their own constitutions. Accordingly they neither act as the voice of the Court at Member State level. They endorse EC law simply because by joining the Community, its norms have actually become part of their legal heritage. As was held in *Van Gend en Loos*, Community law is an independent body of law, unlimited in duration and an integral part of the legal systems of the Member States. It is the national legal systems themselves that create the obligation of EC law enforcement under the relevant provisions in their national constitutions and legislative Acts. Respectively national judges claim that it is their national constitutions that allow EC law to be supreme. This means that Community norms are not imposed on Member States against their will. It is rather the Member States

¹¹⁴ "In federations, whether American or Australian, German or Canadian, the institutions of a federal state are situated in a constitutional framework which presupposes the existence of a 'constitutional demos', a single *pouvoir constituant* made of the citizens of the federation in whose sovereignty, as a constituent power, and by whose supreme authority the specific constitutional arrangement is rooted."

Weiler, J.H.H., "Federalism and Constitutionalism: Europe's Sonderweg", (2000) Harvard Jean Monnet Working Papers, NYU

¹¹⁵ See Joerges, C., Meny, Y., and Weiler, J.H.H. (eds) "What Kind of Constitution for What Kind of Polity?", EUI, Florence (2000); Olsen, J.P., "An Institutional response to Herr Fischer's vision of a European Federation", (2000) Arena Working Papers, Oslo

that partially surrendered certain areas of competence and part of their sovereignty by acceding to the Union.

CHAPTER 2

THE EVOLUTION OF COMMUNITY COMPETENCES

Introduction

The existing system of delimitation of competence was established according to objectives to be achieved and means for achieving those objectives¹

As regards the way competences have historically been distributed between the Community and the Member States they were not initially anticipated by the drafter of the Treaty in a way that would make them definable within express provisions appearing in the text of the first Community Treaties. In a way Community competences evolved very much in a rather accidental way while their origins can be traced to the common market. The absence of an adequate legal base in the Treaty implies that Member States 'retain competence'. Moreover, the Community is not capable of adopting acts in areas where it is not competent. Such actions, according to Advocate General Jacobs in *Parliament v. Council of the EU*², could lead to a possible annulment of the legislation in question through Article 230 EC seen as an unfounded intrusion into national competence.

In subsequent years the Member State governments have proved their position as custodians of decision-making power in Europe. The Community / Union could only exercise power where the Member States chose to grant it. However the Community has

¹ European Convention Secretariat, "Delimitation of Competence between the European Union and the Member States – Existing System, Problems and Avenues to be explored", [CONV 47/02], Brussels, (15 May 2002)

² Case C-316/91 *Parliament v Council of the EU* [1994] ECR I-00625

acquired increasing competences in areas around the internal market, specifically due to the trend of Treaty revisions to elevate the role of qualified majority voting. For instance, extra powers to act to ensure the functioning of the internal market were granted to the Community by means of introducing qualified majority voting to Article 95 EC. Furthermore, the attainment of a Community objective in the course of the operation of the common market has during the years of treaty amendments necessitated the use of Article 308 EC as a 'catch all' provision (when there is insufficient textual basis for the Community to legislate) that although residual this power has proved wide ranging. Frequent recourse to those provisions by the Community has formed the root of vertical disputes between the former and the Member States over whether EC legislation is founded on the appropriate Treaty basis or constitutes a 'competence creep' into areas traditionally reserved to the nation state.

This chapter will provide a historic overview of the way internal Community competences developed vertically on a Treaty-by-Treaty basis. The so-called Treaty of Paris (1951) established the European Coal and Steel Community; the following Treaty of Rome (1957) established the European Economic Community; the Single European Act (1986) provided for the completion of the internal market; the Treaty of Maastricht (1992) established a fairly fundamental restructuring of the treaties; the Treaty of Amsterdam (1997) and the Treaty of Nice (2001) introduced other changes in line with the growing importance of policy co-ordination in areas such as economic and monetary policy. Finally this chapter will put EC competences into the current context of European constitutionalisation by presenting the approach of the Laeken European Council and the European Convention in relation to internal EU competences and briefly examining how these appear as a whole in its Constitutional Treaty.

1. The ECSC and Euratom

The Treaty that established the European Coal and Steel Community³ and later the European Atomic Energy Community, the so-called Euratom⁴, only went as far as allowing competences to be exercised in a common fashion by the Member States or High Contracting Parties that “having exchanged their full powers, found in good and due form, have agreed as follows”⁵.

Although the ECSC expired on July 23, 2002⁶, almost fifty years after its entry into force, today it is rather symbolic in terms of competences that Member States from an early stage of integration undertook the task of pooling their coal and steel resources together lifting restrictions on imports and exports creating therefore a single coal and steel market. The rationale of the ECSC’s founding fathers was to promote political integration (not that they anticipated the level of integration EU has reached at present) by starting with economic integration, on a gradual basis. Neofunctionalist thinkers would have expected that future integration would be fashioned similarly to the evolution from coal and steel to atomic energy through spill over of national policy sectors to the Community⁷. According to Lindberg⁸ “...’spill-over’ refers to a situation in which a given action, related to a specific goal can be assured only by taking further action,

³ The Treaty of the European Coal and Steel Community (ECSC), or Treaty of Paris, was signed on 18 April 1951 and came into force on 25 July 1952. It makes visible its supranational method of integration through explicit reference to the future establishment of a European Federation.

⁴ The Euratom Treaty also signed in Rome along with the EEC was concluded for 50 years (Art. 97). It was therefore a sector-specific Treaty of limited application.”

⁵ This wording appears both in the ECSC and Euratom Preambles of the Treaties

⁶ Following the expiry of the ECSC Treaty, the field of competence of the European Economic and Social Committee will extend to the coal and steel sectors.

⁷ “In a nutshell, it [Neofunctionalism] identifies several paths toward greater integration, recognizing that any shift of political authority from the national to the supranational level will engender opposition, as well as support. Neofunctionalism emphasizes sub-national actors and transnational coalitions pursuing their own material or ideological interests.” Büthe, T., “The politics of Competition in European Union: The First 50 Years”, Proto-Paper prepared for the Conference of the State of the European Union (Vol. 8), Princeton University, September 16, 2005

⁸ Lindberg, L., “The Political Dynamics of European Economic Integration”, Stanford University Press, USA, (1963), at 10

which in turn create a further condition and a need for more action, and so forth.” Yet the history of European integration itself demonstrates that Member States on occasion restrict the grant of competences to the Community to these powers they have agreed to confer, and no more. Thus, before trade liberalisation would lead to economic harmonisation and ultimately to spill over into political areas leading towards a political Community, the European integration process would need to take into account national diversity. Hoffmann wrote in 1966⁹ that “every international system owes its inner logic and its unfolding to the diversity of domestic determinants, geo-historical situations, and outside aims among its units”.

As to the Euratom Treaty, although it has been overshadowed by the EEC Treaty signed at the same time; it is still in force and surprisingly with the same aim of developing the nuclear industry despite the fact that the context has in recent years radically changed¹⁰. Seeing it from a competences angle, under the provisions of the Euratom Treaty, the European Commission acquired the status of a supranational regulatory authority in three areas: radiation protection; supply of nuclear fissile materials and nuclear safeguards. But since the Treaty makes no reference to fixed criteria as regards the standardisation of design, operation and maintenance of nuclear installations, regulatory activities in this sphere evolved by means of the national authorities and to a lesser degree by International Organisations / Agencies¹¹. However in *Commission of the European Communities v Council of the*

⁹ Hoffmann, S., “Obstinate or Obsolete? The Fate of the Nation-State and the Case of Western Europe”, (1966) 95 *Deadalus* 862-915, at 864

¹⁰ See Proposal for a Council Regulation amending Regulation (EURATOM) No 2587/1999 defining the investment projects to be communicated to the Commission in accordance with Article 41 of the Treaty establishing the European Atomic Energy Community (presented by the Commission) COM/2003/0370; Communication from the Commission to the Council and the European Parliament: COM (2002) 605 final “Nuclear Safety in the European Union”

¹¹ The Convention on Nuclear Safety for instance was adopted in 1994 by a diplomatic conference convened by the International Atomic Energy Agency. It was also ratified by all the Member States and entered into force in 1996.

*European Union*¹² the Court stressed that Euratom possesses competences under the EC Treaty to establish a legislative and regulatory framework governing the design, operation and safety of nuclear installations affecting public health¹³. Those competences, the Court held, should have been mentioned in the declaration attached to the Council decision approving the Euratom's accession to the International Convention on Nuclear Safety. Further to that, the authority of the Euratom to oblige its Member States to set up funds for financing the decommissioning of nuclear facilities is questionable given that no explicit competence to do so springs out of the Treaty¹⁴. The nuclear package presented by the European Commission in November 2002¹⁵ was an attempt to alleviate problems related to the vertical limits of competence between the Community and its Member States within the framework of the Euratom Treaty. Yet, one may criticise it as a means for the EU to disguise developing nuclear power. Universal nuclear safety standards are maintained without such a 'package', given that both EU Member States and accession countries are already party to the International Atomic Energy Agency's Nuclear Safety Convention.

It is peculiar that at the fringes of the Union's constitutionalisation, the Euratom Treaty remains an independent settlement and has not yet been reformed by any Intergovernmental Conference revising previous Community Treaties. This perhaps reflects the Community's

¹² Case C-29/99 *Commission of the European Communities v Council of the European Union* [2002] ECR I-11221

¹³ The Court concluded that it is not appropriate to draw an artificial distinction between the protection of the health of the general public and the safety of sources of ionising radiation.

¹⁴ To some Member States potential financing of the nuclear industry from public funds seems unacceptable. See Art. 30 ff. of the Euratom Treaty; "A review of the situation of decommissioning of nuclear installations in Europe", European Commission report (DG XI/C3) EUR 17622 (1997).

¹⁵ "Towards a Community Approach to Nuclear Safety" (2002), The package was aimed to make the point that only a common approach by EU Member States can guarantee that high nuclear safety standards will be maintained in an enlarged EU. The Commission's proposals included the establishment of a directive defining the basic obligations and general principles on the safety of nuclear installations during operation and decommissioning.

troubled legal jurisdiction in the area of nuclear safety accompanied by continuous calls for Member States to retain their own national responsibility over nuclear regulations. While working on the EU Constitutional Treaty, the Convention addressed the Euratom question, although not very satisfactorily one could argue. The updating of the Union's Constitution could as well imply an express statement within the EU Constitutional Treaty of Euratom's expiration time by 2007¹⁶. The Convention's Praesidium instead, feeling that that issues interconnected to Euratom's application had not been raised previously in the Laeken Declaration, decided to adapt it to the new provisions of the EU Constitutional Treaty by adding a relevant protocol, which will ultimately leave its independent legal status intact¹⁷.

On the other hand, a debate led by Civil Society Groups¹⁸ and Green Party members of the European Parliament, may raise a case before the ratification of the EU Constitutional Treaty against having Euratom altogether as a freestanding part. Since health protection, waste disposal and treatment and decommissioning of nuclear power stations (to name but a few) may fit under the environmental title of the EU Constitutional Treaty, there seems to be no substantial reason why the environmental policy competences of the Union should not also allow the adoption of minimum standards to be taken on all energy issues with environmental consequences. The EU Constitutional Treaty has introduced an energy section (Article III-256), which

¹⁶ Following the 50-year time period of expiration given to the ECSC (1952-2002).

¹⁷ Treaty Establishing a Constitution for Europe, Signed in Rome by the Representatives of the Governments of the Member States, October 29, 2004, [CIG 87/2/04], Protocol 36 Amending the Treaty Establishing The European Atomic Energy Community: "*The High Contracting Parties recalling the necessity that the provisions of the Treaty establishing the European Atomic Energy Community should continue to have full legal effect*".

¹⁸ On Monday, 3 March 2003 a number of Civil Society Groups urged (via a declaration) the Convention to abolish Euratom. See http://www.foeeurope.org/press/2003/MJ_03_March_declaration.htm

establishes shared competence for energy policy and specifies the objectives of European energy based on the establishment of the internal market. Furthermore, the Euratom Treaty has been annexed to the EU Constitutional Treaty as a separate, stand-alone Treaty from the legal entity of the European Union. This compromise reached within the Convention has been welcomed by environmental groups¹⁹ as it gives Member States the right to abandon Euratom without consequences for their membership of the Union.

2. The EEC Treaty

The Euratom model (“resolved to create the conditions necessary for the development of a powerful nuclear industry...”²⁰) was almost adopted by the EEC Treaty, also known as the Treaty of Rome.²¹ In the EEC Treaty, however, the extent of Community powers appeared implicitly by reason of its objectives as these were stated respectively in Articles 2 and 3 of the EEC Treaty centering round its task of establishing a common market along with its four freedoms (free movement of persons, goods, services and capital) and an economic and monetary union. The abstractness of these aims and objectives made it necessary for the Community to maintain a ‘safety clause’. This, also known as a ‘safety valve’, would actually stand as a technical formulation of the assignment of powers to the Community should the powers conferred by the Treaty be too limited. Such a clause was included within the Treaty in the face of Article 235 EEC (now 308), which states as follows:

¹⁹ Görlach, B., and Meyer-Ohlendorf, “Energy Policy in the Constitutional Treaty”, Ecological Briefs, A Sustainable Constitution for Europe, (December 2003), available at <http://www.ecologic.de>

²⁰ See the Preamble of the Treaty Establishing a Constitution for Europe [CIG 87/2/04]

²¹ The Treaties of the European Economic Community (EEC) and the European Atomic Energy Community (EAEC, otherwise known as 'Euratom'), or the Treaties of Rome, were signed on 25 March 1957 and came into force on 1 January 1958

“If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.”

Although Article 235 EEC was to be considered only if a Community measure could not be based on any other provision of the Treaty, fields not included in the EEC Treaty, were gradually brought under the umbrella of Community law by way of the broad application of the provision²². Thus, Community objectives under the common market were gradually extended by Community Institutions to regulate inter alia trading companies²³, energy policy²⁴ and financial services²⁵. Not to mention how increasing resort to the Article also affected vocational training²⁶, social policy²⁷, drugs monitoring²⁸, and the environment²⁹. The Treaty of Rome still provides the basis for the most part of the European Union's decisions and responsibilities and it has been added to by a number of other Treaties and protocols over the years.

²² In Opinion 2/94 (1996) the ECJ held with reference to Article 235: “That provision, being an integral part of the institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community.”

²³ See Council Regulation No 40/94 of 20.12.1993 on the Community trade mark (OJL11, 14.1.1994); Council Regulation No 2309/93 of 22.7.1993 laying down Community procedures for the authorization and supervision of medical products for human and veterinary use and establishing a European Agency for the Evaluation of Medical Products. (OJL 214, 24.8.1993)

²⁴ Includes framework programmes, international cooperation measures and conclusion of international agreements. See for instance Council Decision of 14 December 1998 adopting a multiannual programme to promote international cooperation in the energy sector (1998-2002).

²⁵ See Council Regulation No 907/73 of 30.4.1973 setting up a European Monetary Fund (OJL 89, 5.4.1973)

²⁶ Council Regulation No 337/75 (OJL 39, 13/2/1975)

²⁷ Council Regulation No 90/73 (OJL 89, 5.4.1973); Council Regulation No 1062/94 (OJL 216, 20.8.1994)

²⁸ Council Regulation No 302/93, (OJL 36, 12.2.1993)

²⁹ Council Regulation No 1210/90 (OJL 120, 11.5.1990)

Before the Single European Act, the objectives of the Community were once more elaborated by the Commission's Internal Market White Paper³⁰, approved in June 1985 by the European Council in Milan³¹. The White Paper spelt out the legislative programme for the completion of the 'internal market' listing about three hundred legislative measures of harmonisation to be taken, grouping them under three main objectives: i) The elimination of physical barriers, by abolishing checks on goods and persons at internal frontiers, ii) The elimination of technical barriers by breaking down the frontiers of national regulations on products and services, by harmonisation or mutual recognition, iii) The removal of fiscal barriers / elimination of tax frontiers: by overcoming the obstacles created by differences in indirect taxes, by harmonisation or approximation of VAT rates and excise duty.

3. The Single European Act

The Single European Act (SEA)³² did not refer explicitly to the abovementioned White Paper, although the Intergovernmental Conference that concluded the Treaty did so in one of the declarations contained in the Final Act.³³ The SEA led to the adoption of a programme of numerous measures to complete the Community's 'internal market', which under Article 8A EEC replaced the well-established notion of the 'common market'. It also gave the Community competence in the area of the environment under

³⁰ European Commission, "Completing the Internal Market: White Paper from the Commission to the European Council", Milan, 28-29 June 1985; COM (85) 310

³¹ Conclusions of the European Council in Milan, 28-29 June 1985

³² The then twelve Member States signed the Single European Act in February 1986. It was a major revision to the original EEC Treaty or Treaty of Rome and became applicable the following year. It was intended, as from 1 January 1993, to open up a huge internal market where goods, capital, services and people could circulate freely within the Community.

³³ Declaration on Article 8A of the EEC Treaty, OJ (1987) L 169/24

the legal basis of the now Article 174 and the procedural basis of Article 175 EC³⁴. The single market imperative was back then more clearly foreseen and the systematic harmonisation of national rules was taken even further.

The SEA's contribution to European integration was large, first by giving a specific concept of the internal market in the Treaty also providing for its completion by 31 December 1992³⁵ and second by introducing qualified majority voting in a number of areas previously decided by unanimity. Especially as regards the second parameter, the SEA started a tradition followed by subsequent Treaty revisions at Maastricht, Amsterdam and Nice. Among the areas³⁶ to be decided under qualified majority was the approximation of national legislation under the general clause of Article 100a (now 95 EC) so that it provided as follows:

³⁴ Folmer, H., and Jeppesen, T., "Environmental Policy in the European Union: Community Competence vs Member State Competence", 94 (4) *Tijdschrift voor Economische en Sociale Geografie* 510, (September 2003)

³⁵ Article 18 (8a)

³⁶ Amendment of the common customs tariff [Article 26(28)], free provision of services [Article 49 (59), second paragraph] and free movement of capital (Article 70, repealed subsequently)

Article 100a

By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 7a. The Council shall, acting in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

The increasing use of qualified majority voting into the Council's legislative practices had a double impact on the vertical allocation of competences. First it stripped Member States of their power to veto EC legislation through unanimous voting. This has created a trend towards enhancement of the Community's functional competences, an example that, as mentioned, was followed by subsequent Treaty amendments. This of course gave more political weight to EC decisions since the acts of the Council no longer require that every Member State is in agreement. Second, such a horizontal change has raised the apprehension of the Member States as to the level of importance of ensuring the legitimacy of decisions taken within the area of EC competences. This is evidently the vehicle to maintain national control over EC decisions. The necessity to promote legitimacy at European level has thus become strongly linked to the political responsibility of the EC and the determination of the limits of its competence. It is arguable whether at the time Member States were in a position to ascertain the consequence of the otherwise technical redefinition of the 'common market' to 'internal market' by Article 8A EEC.

As already illustrated, although the SEA did not cause an immediate political blast it was more of a silent revolution adding to the broadening of Community functional competences over the Member States. This was achieved via the use, or abuse to the most cynical, of the technique of “approximation of legislation” under Articles 100 and 100a (now 94 and 95)³⁷, already existent in the EEC Treaty³⁸. The innovation of the SEA was to repackage these provisions as an integrated plan for the internal market so that the dominant purpose for employing them should be economic where other purposes should be included only in so far as they are incidental to some economic purpose. This simply means that Articles 94 and 95 EC are still today only relevant insofar as the internal market is concerned, whereas Article 308 EC is still an umbrella provision allowing for open Community competence. In that respect, Article 308 EC it gives the Community the opportunity to decide its competences contrary to what the German Constitutional Court has said about the EU’s lack of ‘*Kompetenz-Kompetenz*’.

With the Delors Report of 1989³⁹ and its subsequent approval by the European Council summit in Madrid in June 1989⁴⁰, the Community’s plan for achieving a progressive transfer of decision-making power on monetary policy matters to the supranational institutions via establishing a European system of central banks gave even

³⁷ “By the deadline, most of the 1992 target had been met. Over 90 % of the legislative projects listed in the 1985 White Paper had been adopted, largely by using the majority rule.” European Parliament Fact Sheets, “3.1.0. Principles and general completion of the internal market”

³⁸ House of Lords Select Committee on the European Communities, 22nd Report, VI Sessional papers 1977-78, (H.L.131), HMSO, (1978) This report is an attempt to make certain the extent of the Council’s powers under Article 100, and to examine the purposes for which the powers have been used hinting some loss of national sovereignty.

³⁹ “Delors Report: together with the proceedings of the Committee, minutes of evidence and an appendix”, House of Commons Treasury and Civil Service Committee, (341) Sessional Papers 1988-89, HMSO, (1989)

⁴⁰ Presidency Conclusions, 15 & 16 December 1995, at http://www.europarl.eu.int/summits/mad1_en.htm. It gave name to the single currency in 1995, EURO and established the date of the beginning of the third stage of the EMU, January 1, 1999.

greater boost to the internal market objective. By reason of that, broader power was attributed to the Treaty for elimination of all market frontiers and tariff barriers, which consequently can be translated as widening the application of Article 308 EC. This gradual growth of the Treaty's application and therefore competence reaffirms Monnet's 'functionalist theory' of economic cooperation within a free market economy and guarantees the supremacy of the supranational legal order that slowly but steadily proclaims its rule of law to be a basic principle for the assessment of both governmental and Community authorities' acts. This became more visible in due course especially since the succeeding Treaty of Maastricht emphasised the transnational character of the EC necessitating a widening of its activities beyond the mere economic. This is something received with particular suspicion by the Member States' Institutions (particularly the Bundesrat always eager to protect the prerogatives of the *Länder*.⁴¹) taking into account that control at national level has become inadequate.

4. The Treaty of Maastricht

The Treaty on European Union (TEU) or Treaty of Maastricht, followed along the lines of the SEA and took the Delors Report one step further by providing inter alia for the setting up of an economic and monetary union (EMU); the development of common foreign and security policies (CFSP); cooperation on justice and home affairs (JHA)⁴² and the confirmation or extension of Community powers in education (Art 149 EC), trans-European networks, industry, health, culture, consumer protection and development policy. Pillarisation, a new term for the European Economic Community became a norm

⁴¹ Bundesrat, Decision 1081/01, "Resolution on the division of competences in the context of discussions on the future of the EU", Session 771, (December 2001)

⁴² Both areas of CFSP and PJCC were excluded from the supranational Community legal order and handled through purely intergovernmental techniques.

for what was to be named the European Union, a structure set up on three distinct pillars, a supranational (EC) and two intergovernmental (CFSP and JHA).

The SEA 'market building' imperative became a 'market completion' objective in Maastricht, which resulted to further harmonisation / subordination of national policies to Community internal market legislation. Thus, the TEU will on the one hand be remembered as the most dramatic extension of Community's competences inserting a big range of legal bases to the Treaty. On the other hand it will be recalled for introducing a number of restrictive devices / structures such as the three pillar system; the complementary character of Community interventions⁴³ and last but not least the principle of subsidiarity, which constitutes a subject of extensive academic debate sometimes reduced to a mere 'background noise' than an effective constitutional check on the exercise of Community powers.

Even if the extent of Articles 94, 95 and 308 EC grew over the years from simply being collateral features of the common market to fully equipped harmonisation measures, this was a growth with restrictions. The Maastricht Treaty formulated the principles of subsidiarity and proportionality in Article 3b (now Article 5 EC) in an attempt to provide an answer to those eager to hold the Community accountable for its lack of a system of competences⁴⁴. By establishing that the Community competences are attributed, the Treaty made explicit that there are 'limits'⁴⁵ in the EC sphere of

⁴³ This concept, introduced in the TEU, invites the Commission and Member States to work more closely together deciding who is best placed to do what in a continuous cooperation. Yet, the search for improved complementarity has been a rather difficult process and rather a political slogan than a practical reality of mutual contribution in policy making. The Commission has feared that some Member States may use the complementarity debate to reduce EC competencies and budgets.

⁴⁴ Art.7EC also requires each institution to act within the limits of the powers conferred upon it by the Treaty.

⁴⁵ Art.5 EC "The Community must act within the limits of the powers conferred upon it by the Treaty and the objectives assigned to it."

competences and implicit that the Member States have residual powers. In October 1992, the Birmingham European Council⁴⁶ confirmed that decisions should be taken as closely as possible to the citizen under Article 5 EC. The same reasoning was followed by the Edinburgh European Council of December 1992.

Article 5 EC expressly established that the Community lacks '*Kompetenz Kompetenz*' for it is not capable of enlarging its own competence over matters not covered by the Treaty. Ironically, Article 5 EC operates in full armour save those areas where the EC has exclusive competence; the application of Article 308 can be triggered; or the utilisation of Articles 94 and 95 EC go far beyond achieving the objective of the internal market. As regards the application of Article 308 EC, the Maastricht Treaty did not introduce any new changes while the provision still granted the Union the power of creating new competences for the establishment of the prolonged 'free trade area'⁴⁷. Unfortunately, the tripartite 'pillarisation' at Maastricht, which kept competences in a somewhat firm division between the supranational (EC) and intergovernmental (CFSP and JHA), did not succeed in achieving a balance as regards the vertical distribution of internal Communitarised competences between the Community on the one hand and Member States on the other. This can be justified due to the fact that the flaws of the European Economic Community were transferred to the renamed European Community.

Yet, as previously stressed, the EC widened in Maastricht its activities beyond its economic imperative boosting its political and moral ethos. It is not certain whether this owes more to its market completion or to the social / human element that the Community

⁴⁶ See Birmingham European Council in October 1992, The Conclusions of Presidency are available at www.europarl.eu.int/summits/birmingham/default_en.htm

⁴⁷ See Edinburgh European Council, December 11 – 12, 1992. The Conclusions of the Presidency are available at www.europarl.eu.int/summits/edinburgh/default_en.htm

cultivated in the Treaty. The constitutionalisation of EC citizenship under Article 17 (1) EC can be seen as part of this evolution in building up an inclusive notion of political belonging despite the wording of the provision that citizenship “shall complement and not replace national citizenship.” What also added to the human element of the constitutional equipment of the new-founded Union was the introduction of Article 6 TEU. In its second paragraph Article 6 embodies the express commitment of the Union to observe fundamental rights. There, the Court’s jurisdiction / power to review the conformity of acts of the Institutions in relation to Article 6 (2) is set out by Article 46 (d) TEU⁴⁸. The development of concrete and shared supranational values far from domestically coloured policies goes back to the notion of a political belonging to the European Polity.

The notion of political belonging is vital to the subject of competences due to its relation to the broader horizontal relationship between the individual as a ‘subject’ of the national legal system and the national sovereign body as the ‘master’. According to the Court, international law merely regulates the relationship between the states and does not count their citizens as ‘subjects’. This is a matter traditionally reserved by the sovereign states. For the first time in *Van Gend En Loos* the Court indicated that by setting up a new legal order, the EEC Treaty also counts individuals of the Member States as ‘subjects’. Not only that, but by defining “the legal relationship between Member States and their subjects”, the Court hinted at a change of roles. It almost seems that the Community’s transnational level of policy-making has to a certain degree taken the place

⁴⁸ The provisions of the Treaty establishing the European Community, the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community concerning the powers of the Court of Justice of the European Communities and the exercise of those powers shall apply only to the following provisions of this Treaty: (d) Article 6 (2) with regard to action of the institutions, in so far as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty.

of the national sovereign (e.g. the British Parliament) in exercising sovereign rights. This includes of course its capacity to produce legislation that has direct effect on individuals. This does not imply that a state is precluded from enacting rules that are in conflict with Community law, but the insertion of Citizenship and Human Rights within the Treaty proper have created a momentum towards a widely shared appreciation of the vast political and legal weight of the Community. The increasing political / legal consequence of the Community has not escaped national scepticism as regards the cost of the gradual increase in power at European level. The preservation of national autonomy, including regulatory freedom, still worries most Member States. Such concerns are not unjustifiable given that both vertical and horizontal constitutional limitations to Community's ambitions cannot provide such safety. The former (vertical) subsidiarity falls short of defining the exclusive competences of the EC and the latter (horizontal) unanimity has given its place to qualified majority in most policy areas, meaning that the national veto can no longer strike out unwanted legislative proposals in the Council.

Such a climate has encouraged a cautious stance on the part of the Member States as regards their tolerance to accepting changes in the architecture of the supranational organisation. For instance, by ratifying the Maastricht Treaty, Germany made express that it did not submit itself to an uncontrolled automatism towards Monetary Union pointing to a lack of democratic legitimisation of the EC Institutions. According to Article 38 GG:

“Any German citizen with the right to vote is guaranteed the subjective right to participate in the election of the German Federal Parliament, and thereby to co-operate in the legitimation of State power by the people at a federal level, and to influence the implementation thereof.”

This provision of German Basic Law constitutes the minimum requirement of democratic legitimation to which national citizens are subject. The fundamental right of individuals to participate in national elections can be violated once the exercise of the responsibilities of the German Parliament is transferred extensively to one of the Institutions of the Community. If, for instance, the Council enacts legislation that goes beyond the authority delegated by the German parliament, then the German government (that represents Germany in the Council) would violate the separation of powers by engaging in executive law-making. In October 1993, the German Federal Constitutional Court (BverfG) issued its *Brunner / Maastricht* decision⁴⁹, which upheld the constitutionality of the Treaty of Maastricht. The morale behind the judgement of the BverfG can be summarized in that when EC Institutions act beyond their attributed powers bestowed to them by Article 24 GG (reception of EC legal order) the German state organs, by reason of constitutional law, would automatically be prevented from applying these legal acts in Germany.

The case before the BverfG thus raised – according to Steve J. Boom⁵⁰ – two rather interconnected although discrete questions namely: i) the expansion of EU competences through treaty amendment and ii) the interpretation, and potential existence of “absolute” limits to European integration. The fact that most new competences

⁴⁹ *Brunner v European Union Treaty* [1993] BVerfGE 89, 155 / CMLR [1994] 57

⁵⁰ Boom, S.J., “The European Union after the Maastricht Decision: Is Germany the “Virginia of Europe?” (1995) 43 *American Journal of Comparative Law* 177

attributed to the Community through the periodic Treaty revision are supplementary in nature (Article 176; 137 and 153 EC)⁵¹ in conjunction to the Court's *Tobacco Advertising* dicta may demonstrate that on the whole national preference for producing stringent rules and regulatory experimentation have been preserved in the course of European integration despite the re-emergence of the Community with a novel political and legal ethos.

5. The Treaty of Amsterdam

The Treaty of Amsterdam, which came into force in 1999, further strengthened the arrangements for CFSP; transferred visas, asylum and immigration policies from the third intergovernmental pillar (JHA) into the Community pillar and framework and provided for the merger of the EC Treaty (Title IX) and the Social Agreement (1992) annexed to the Social Protocol⁵². Article 136 EC (ex 117) reaffirms that social policy constitutes a shared competence between the Community and the Member States. Yet, the incorporation of the Social Agreement extends the former powers in the improvement of the working environment, working conditions, information and consultation of workers, integration of persons excluded from the labour market and sex equality. Moreover, taking into account the future enlargement from the perspective of an essential renovation of the EU institutional system, the Treaty of Amsterdam introduced several reforms to the functions and competences of the main Institutions by way of closer cooperation, which will be considered individually in a Chapter 7.

⁵¹ These provisions govern EC competence to legislate in relation to Environmental Protection (Art. 176 EC); Social Policy (Art. 137 EC); Consumer Protection (Art. 153 EC)

⁵² Additionally, the EC and the Member States have defined the social rights they hold to be fundamental on the basis of the European Social Charter signed at Turin on 18 October 1961 and the 1989 Community Charter of the Fundamental Social Rights of Workers.

The principle of closer or enhanced cooperation invented at Amsterdam and redefined at Nice, was significant in preserving flexibility and preventing certain Member States from setting a slow pace to the integration process. It is aimed at addressing issues such as social affairs (Social Charter) or elimination of border controls (Schengen Accords) by enabling a limited group of Member States to broaden European integration within the single institutional framework of the Union. The very notion of enhanced cooperation is restrictive, first as regards the number of the participant states involved in the process (comparisons arise with Fischer's *avant garde* or *core Europe*⁵³) and second, as to its character as a last resort solution. Despite the fact that its potential is to reduce the tension between the Community *vis-à-vis* the Member States by diverting from a mode of integration based around the principle of subsidiarity. It achieves that by introducing progress at a different pace and with different objectives without contradicting the principles laid down in the Treaties and the Community's *acquis communautaire*.

The Treaty of Amsterdam was intended, although unsuccessfully, to address the issues of the adaptation of Community Institutions to an enlarged and democratic Union. These became known later as the 'Amsterdam leftovers'. Moreover, Community competences in the spheres of common foreign and security policy (CFSP) and police

⁵³ Fischer, J., "Vom Staatenverbund zur Föderation - Gedanken über die Finalität der europäischen Integration" (trans. "From Confederacy to Federation: Thoughts on the Finality of European Integration"), Berlin, Humboldt Universität, (May 2000). English version with commentary in Joerges, C., Meny, Y., and Weiler, J.H.H. (eds) "What Kind of Constitution for What Kind of Polity?", EUI, Florence (2000)

"One possible interim step on the road to completing political integration could then later be the formation of a centre of gravity. Such a group of states would conclude a new European framework treaty, the nucleus of a constitution of the Federation. On the basis of this treaty, the Federation would develop its own institutions, establish a government which within the EU should speak with one voice on behalf of the members of the group on as many issues as possible, a strong parliament and a directly elected president. Such a centre of gravity would have to be the *avant-garde*, the driving force for the completion of political integration and should, from the start, comprise all the elements of the future federation."

and judicial cooperation (JHA) were not enhanced. Instead, as already illustrated, the Treaty provided for a bilateral cooperation between governments and nation states. The text of the Treaty itself consisted of three parts, one annex and thirteen protocols. One of those protocols introduced was the Protocol on the Application of Subsidiarity and Proportionality. It was aimed to codify and give legal substance to the guidelines adopted by the Edinburgh European Council of 1992⁵⁴. Following the inclusion of Article 5 EC (formerly 3b) by the Maastricht Treaty on European Union and the initial refusal by the Danish to ratify it, the Community through the Subsidiarity Protocol attempted to proceduralise the subsidiarity principle through posing three legally-binding guidelines according to which the EC may act in the areas of shared competence⁵⁵:

- i) When an issue has transnational aspects, which cannot satisfactorily be regulated by Member State action.
- ii) When Member State action or lack of Community action would conflict with Treaty requirements.
- iii) When action at Community level would produce clear benefits of scale or effect.

The problem with these guidelines is that they did not address directly or even sufficiently the open-endedness of the principle of subsidiarity, although they have been credited for adding to limits of the power of the Community. But then again the nature of the principle of subsidiarity itself as a dynamic concept is open to interpretation not to

How
can
it
be
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?

⁵⁴ The Protocol aimed to “establish the conditions for the application of the principles of subsidiarity and proportionality enshrined in Article 3b of the Treaty establishing the European Community with a view to defining more precisely the criteria for applying them and to ensure their strict adherence and consistent implementation by all institutions” and “to ensure that decisions are taken as closely as possible to the citizens of the Union”.

⁵⁵ De Búrca, G., “Reappraising Subsidiarity’s Significance after Amsterdam”, (1999) 7/99 Harvard Jean Monnet Working Paper, NYU.

say a value judgement, therefore allowing EC action within its attributed limits to be expanded once circumstances demand and vice versa when there is insufficient justification to achieve Community objectives⁵⁶.

The Treaty also provided the ground for a Charter of Fundamental Rights⁵⁷ at EU level. At first glance, it was aimed at strengthening fundamental rights as these form an inherent part of the Union's objectives rooted according to the Treaty on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. The Charter of Fundamental Rights was not only destined to raise an awareness of fundamental rights among European citizens but also to supply the Community with a powerful human rights policy with powerful enforcement mechanisms, indispensable to any polity. The Union had prior to the Charter a bi-dimensional source of human rights borrowing from the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) signed in Rome on 4 November 1950 and the constitutional traditions common to the Member States. This owes, according to Mancini, to the inadequate protection of fundamental rights within the founding Treaties that failed to "safeguard the fundamental rights of the individuals affected by its application"⁵⁸.

The impact of the German BVerfG '*Solange-Rechtsprechung*' ('so long as...' judgements)⁵⁹ of the early Seventies have surely been critical in motivating the establishment of a human rights Charter at EU level as supplementary to the Court's

⁵⁶ See Chapter 6 for a detailed discussion of the principle of subsidiarity

⁵⁷ In 1998, the European Council held in Cologne, decided to begin drafting a Charter of Fundamental Rights. The Charter was to be based on the Community Treaties, international conventions such as the 1950 European Convention on Human Rights and the 1989 European Social Charter, constitutional traditions common to the Member States and various European Parliament declarations.

⁵⁸ Mancini, G.F., "The Making of a Constitution for Europe", (1989) 26 Common Market Law Review 596

⁵⁹ *Solange I* [1974] BVerfGE 37, 271 / 2 CMLR 540; *Solange II* [1987] BVerfGE 73, 339 / 3 CMLR 225 (1987)

established human rights jurisprudence. However, commentators such as Coppel and O'Neil⁶⁰ adopt a critical perspective on the Court's reactive role creating a human rights jurisprudence in response to challenges to the supremacy of Community law from national courts. Indeed, the Court has accepted that the fundamental rights drawn from the national constitutional traditions and the guidelines supplied by international treaties form an integral part of the general principles of Community law. However, early in its case law, the Court has also emphasised upon the independence of those rights from the nation state claiming that "the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself."⁶¹ Additionally, the Court has extended the exercise of its human rights jurisdiction to national measures. Weiler identifies two types of situation: "(a) the agency situation - when the Member State is acting for and / or on behalf of the Community and implementing a Community policy (*Klensch* and *Wachauf*); and (b) when the State relies on a derogation to fundamental market freedoms (*ERT*...and ...*Bauer*)."⁶²

Thus the Community has gradually developed a general human rights policy. Textually, the Treaty of Amsterdam attempted to secure that the Community guarantees fundamental rights in an adequate way. Any Member State violating human rights in a "serious and persistent" way may lose its rights under the Treaty. The Council, after

⁶⁰ Coppel, J., and O'Neil, A., "European Court of Justice: Taking Rights Seriously?" (1992) 29 Common Market Law Review 669-92

⁶¹ Case 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, Para 14 and 15.

⁶² Weiler, J.H.H. and Fries, S.C., "A Human rights Policy for the European Community and Union: The Question of Competences", (1999) 4/99 Harvard Jean Monnet Working Paper, NYU. Case References: Joined Cases 201 and 202/85 *Klensch v Secetaire d'Etat EO l'Agriculture et EO la Viticulture* [1986] ECR 3477; Case 5/88 *Wachauf v Germany* [1989] ECR 2609; Case C-260/89 *ERT v DEP* [1991] ECR I-2925; Case 368/95 *Vereinigte Familiapress Zeitungsverlags und Vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR 3689.

complying with different conditions, can determine the existence of a serious breach of the fundamental principles included in Article 6 EC by a Member State. Then acting by qualified majority the Council can suspend certain rights derived from the Treaty to the respective Member State. This may go as far as including a suspension of voting rights of the representative of the national government in the Council. In February 2000, for instance, the EU adopted sanctions against Austria because of the access of Jörg Haider's far right party to the Vienna governmental coalition⁶³. The Union's attitude again not only demonstrates a clear defence of fundamental rights through a prevention of political views that endanger the nature of those rights but also a self-recognition of the enormous political and legal authority of the Community.

Last but not least, under the Treaty of Amsterdam a new Article 13 EC has been written into the Treaty to underline the guarantee of non-discrimination laid down in the Treaties and extend it to cases similar to ones cited previously. Having secured a good level of human rights protection and therefore some security as regards national threats against such a protection, the Union has moved forwards in bringing more issues under the competence of the Community Institutions. As a result all affairs related to the free movement of persons: including controls over external borders; asylum; immigration; protection of rights of third-country nationals as well as judicial cooperation in civil matters were brought under the umbrella of the Community pillar by the Treaty of Amsterdam. As a result, the *Schengen acquis*⁶⁴ became part of the supranational legal

⁶³ Haider's so-called Freedom Party (FPÖ) had obtained more than 27 percent of the votes in the Austrian parliamentary elections of October 1999. See Programme of the Austrian Freedom Party adopted on 30 October 1997, available at <http://www.fpoe.at/>; Johnson, L., "On the Inside Looking Out: Austria's New ÖVP-FPÖ Government, Jörg Haider and Europe" (2000) 2 (10) *Central Europe Review*

⁶⁴ The Schengen Agreement and Convention were included in the Treaty. The UK, Ireland and Denmark voluntarily stayed out and reserved the right to independently exercise controls on people in their frontiers.

framework of the Community as opposed to intergovernmental arrangements of the third EU pillar (Police and Judicial Cooperation in Criminal Matters).

However, the Member States' willingness to keep intergovernmental matters away from a Communitarised constitutional package shows a national fondness for the maintenance of the second and third pillar. This is a rational response having in mind that second and third pillar cooperation deals with delicate issues of national competence such as defence (including compulsory military service) deeply rooted to the idea of national sovereignty. Their subjection to Community centralisation has been met with caution even by the Court itself. In the decision of the Court of Justice in *Alexander Dory*⁶⁵ in a preliminary reference from the Verwaltungsgericht Stuttgart (Germany), it held that the Community provisions of equality between men and women do not limit the right of Member States to compel only men to enlist to the military service, although such an obligation involves a delay in the career of male European citizens.

⁶⁵ Case C-186/01 *Alexander Dory and Federal Republic of Germany* ECR I-2479.

....The delay in the careers of persons called up for military service is an inevitable consequence of the choice made by the Member State regarding military organisation and does not mean that that choice comes within the scope of Community law. The existence of adverse consequences for access to employment cannot, without encroaching on the competences of the Member States, have the effect of compelling the Member State in question either to extend the obligation of military service to women, thus imposing on them the same disadvantages with regard to access to employment, or to abolish compulsory military service⁶⁶.

Enhanced cooperation instead of Community harmonisation appears therefore as a preferable way of achieving integration in relation to delicate intergovernmental issues. Community integration of the result of enhanced cooperation (instead of harmonisation) could be brought in once Member States have arrived at a consensus on a given matter. The example of Schengenisation⁶⁷ as opposed to Communitarisation⁶⁸ demonstrates the success of intergovernmental cooperation, Communitarised once it has reached a state of maturity between its architect Member States. The subsequent Treaty of Nice in fact introduced the possibility of closer cooperation in the field of the Common Foreign and Security Policy, except for matters having military or defence implications. Procedurally,

⁶⁶ Para 41 of the Alexander Dory judgement. See also Para 39: "The decision of the Federal Republic of Germany to ensure its defence in part by compulsory military service is the expression of such a choice of military organisation to which Community law is consequently not applicable."; Para 42: "In the light of all the foregoing, the answer to the national court's question must be that Community law does not preclude compulsory military service being reserved to men."

⁶⁷ The term has been used by scholars to emphasise the exclusive intergovernmental approach taken in relation to asylum. It derives from the Schengen Convention [30 International Legal Materials 69 (1991)]. Schengen was originally signed in 1985 by Germany, France and the Benelux countries on their gradual abolition of their common borders and was followed by an Implementing Convention in 1990, which entered into force on September 1993, when more countries joined except the UK, Ireland and Denmark.

⁶⁸ Peers, S., "Undercutting Integration: Developments in Union Policy on Third-country Nationals", (1997) 22 European Law Review 76; Marie-Claire S.F.G. "Europe and its Aliens After Maastricht: The Painful Move to Substantive Harmonization of Member States' Policies towards Third Country Nationals", (1994) 42 American Society of Comparative Law 783

the Council decides after an Opinion from the Commission, acting by qualified majority on the basis of a common strategy.

6. The Treaty of Nice

The aim of the Treaty of Nice Treaty was to create the grounds for an adequate institutional infrastructure for an enlarged Union. Ironically, similar provisions for EU enlargement to twenty Member States had already been included at Amsterdam. In that respect, the Treaty of Nice failed to address the so-called ‘Amsterdam left-overs’ involving issues such as the size and composition of the Commission; the reweighing of votes in the Council of Ministers and the possible extension of qualified majority voting. Instead it became a renegotiation of the Treaty of Amsterdam considering that important issues such as the status of the EU Charter of Fundamental Rights (Declaration no. 23) and the role of a Security and Defence European rapid reaction force, under the foreign and security policy (Declaration no. 1), proved to be too contentious to be agreed on at the Nice Summit. Consequently, these were excluded from the text of the main Treaty, although referred in the aforementioned relevant Declarations attached to it. However, the Treaty of Nice can be credited for putting onto agenda the commencement of the debate about ‘the Future of Europe’⁶⁹, which incidentally hinted at a clear vertical division of competences⁷⁰.

The morphology of the enlarged Union – political, institutional, economic – was planned to be defined and framed across the debate concerning the future of Europe that

⁶⁹ Additionally the Treaty did well in increasing the importance of the Court of First Instance (Articles 224 and 225 TEC); pushing the development of enhanced co-operation [Common Foreign and Security Policy (Articles 27a to 27e TEU) and Police and Judicial Co-operation (Articles 40 to 40b TEU) are incorporated in the Treaty establishing the EC (Article 11 TEC); extending qualified majority voting in thirty-nine areas

⁷⁰ Para 5 of the 23rd Declaration on the Future of Europe (see below)

had already opened in the entire European area according to the relevant Declaration annexed to the Treaty⁷¹. This annex, drafted as the 23rd Declaration, is of wide significance taking into account that it describes the future aims of the Community both in the immediate future and the long-term. The issues that it put forward for consideration, including a clear delimitation of competences, paved the way towards an Intergovernmental Conference (IGC), which started in Rome on October 4, 2003. The IGC worked through the relevant arrangements regarding the political future of the enlarged European Union with the aim of agreeing a new European Constitution to replace the current Treaties. The Nice agenda that was later replicated by the Laeken European Council includes:

- i)* The inclusion of the Charter of Basic Human Rights into the EU Treaties;
- ii)* The simplification of the EU Treaties in order to increase their legitimacy;
- iii)* The ordering of competences between the vertical and horizontal layers of governance in the European Union;
- iv)* The future role of national parliaments in the European architecture.

Additionally, the Treaty of Nice adopted provisions that should smoothen the progress of the mechanism of enhanced cooperation that, as already mentioned, allows a group of Member States to establish closer ties in certain areas (inside the framework of the EU institutions) independently from non-participant Member States. Eight Member States are therefore required to form closer cooperation subject to a number of

⁷¹ The 23rd Declaration adopted by the Conference of Nice annexed to the Treaty, also known as the "Declaration on the future of the Union", SN 1247/01 REV, p 167. Treaty of Nice, Brussels, (14/02/2001)

technicalities⁷². Comparisons to Fischer's model are unavoidable but, as argued in Chapter 7, there is a fundamental difference between his example of a 'Core Europe' and enhanced cooperation. Fischer's 'centre of gravity' is made out of the most determined Member States to push forward the integration momentum. If this 'centre' proves to be fruitless within the EC framework then it can always transform to an *avant-garde*, capable of surviving outside the Community with its own institutions⁷³. In contrast, enhanced cooperation ought to remain within the limits of the attributed powers of the Community and should not cover its areas of exclusive competence. From the vertical distribution of competences point of view, enhanced cooperation may not affect the competences, rights and obligations of non-participating Member States⁷⁴.

Furthermore, it would have been expected that the need for a Constitution at European level should be weighed up once the amendments made by the Nice Treaty have been implemented in an enlarged Union. Reality has been different since the Convention's Constitutional Treaty was presented sooner than the Treaty of Nice came into force. This may raise criticism that the process of European centralisation of competence has built up a momentum of its own aloof from external events such as enlargement, which in this case has almost been manipulated to justify the Union's constitutional agenda. But one could argue that as a matter of law, the Treaty was not legally necessary to authorise the accession of the twelve applicant states, especially

⁷² Member States can no longer prevent closer cooperation: the matter may be referred to the European Council but it is the Council of Ministers that decides by the majority provided for in the Treaties; under the EC Treaty, Parliamentary assent is required if closer cooperation covers a field subject to co-decision; an additional condition for the implementation of closer cooperation has been added: it must not jeopardise the internal market or economic and social cohesion.

⁷³ Olsen, J.P., "How, Then, Does One Get There? An Institutionalist Response to Herr Fischer's Vision of a European Federation", (2002) 00/22 Arena Working Paper, Oslo

⁷⁴ See Chapter 7 for a detailed discussion on enhanced cooperation

since the particulars of admission of the new candidates to the Union are negotiated in their individual Accession Treaties and are not inherent in any EC Treaty⁷⁵.

Since the Nice Declaration on Enlargement was not at the time a legal part of the Treaty proper, its rejection by Ireland did not in practical terms hinder the accession of new Member States to the Union. Quite the opposite, it looks as if the allocation of Council votes and seats in the Parliament as set out in the Declaration was of no direct concern to the approaching enlargement and therefore there appears no particular reason why the enlargement countries could not instantly join the Union. Hence, the changes made by Nice were not necessary in order to allow an enlarged Union to function and ultimately decide on its vertical share of competences. Those familiar with the 'Fischer rhetoric' would recall a similar manipulation without substance of European enlargement as the dominant factor that necessitates EU political reform⁷⁶.

What is more, unanimity was also selected at Nice in relation to Article 133 on Common Commercial Policy ('the French clause') specifically on negotiations with third countries; cultural and audiovisual services; educational services and social and human health services and Article 161 on structural funds and cohesion fund ('the Spanish clause'). In a Union of twenty-five, it is more than obvious that a competence constrained by the unanimity requirement would not consist of a real but rather a virtual competence. In that respect, the Nice compromise came to a sticky end. But then again Nice could not

⁷⁵ The first enlargement of the EU in 1973 when the EFTA states (Ireland, Britain and Denmark) joined did not necessitate the sketching of a particular treaty signed between the founding six Member States. Neither did the subsequent accession of the Mediterranean states during the 1980s enlargements, or later on when the Scandinavian countries and Austria joined the EU in 1995.

⁷⁶ The Minister spoke in contradictory terms when at the beginning of his speech in Berlin he supported the argument that European enlargement makes EU political reform imminent and then during the course of his lecture he declared that such a change should take place in 'ten years' time. See Cruz, J.B., "Whither Europe and When: Citizen Fischer and the European Federation", 7/00 Harvard Jean Monnet Working Paper, NYU

act towards a clear separation of the competences of the Union and the Member States. Even when the Treaty was compromised such delimitation was not feasible, as it would have been incompatible with the specificities of European integration.

Therefore all that the European Council was left with at Nice was setting the rules of interplay between areas decided by qualified majority and those determined by unanimity. The flexibility of the basic rules and the institutional mechanisms of the system, laid down by the previous Treaties, was otherwise maintained despite the calls in the Nice Declaration for a more precise definition of the competences and the subsequent reference in the Laeken Declaration to a greater and more transparent division of competences.

7. The Laeken European Council / Declaration

The political dialogue as shaped at Nice, reconfirmed the fact that the views of European leaders about the future shape of the EU substantially fluctuate in their totality. The proposals that stood out embraced all possibilities: from a European federation to a simple intergovernmental cooperation limited to certain areas. In the context of the debate about the future of Europe ignited by Joscha Fischer and given a public dimension by the Nice “Declaration on the future of Europe”, the European Council meeting in Laeken, in December 2001⁷⁷ introduced the European Convention, an intergovernmental and inter-ministerial body composed not only of governments’ delegates but also representatives drawn from the European and national Parliaments as well as the Commission. The Convention was challenged at Laeken with a prime task: the creation

⁷⁷ On December 15, 2001 the European Council approved the Laeken Declaration on the Future of the European Union, which includes a decision to set up a broad-based Convention to pave the way for an open, transparent reform of the EU. The text is entitled the Laeken Declaration, “The Future of the European Union”

of a constitutional text as a means to unlock the debate about the future of the Union taking into account the need to familiarise the EU citizen with the Union's political agenda⁷⁸.

The diverse political offers considered by European leaders both pre-Laeken and post-Laeken demonstrate that the obstacles to a Constitutional text were plenty and visible. The Declaration adopted in Laeken, annexed to the European Council conclusions aimed to commit to paper an alternative to the traditional method of negotiating EU Treaties. It was therefore split into three principal elements / chapters to address such obstacles: i) Europe at a crossroads; ii) challenges and reforms in a renewed Union and iii) convening a Convention on the future of Europe. The second chapter of the Declaration named "challenges in a renewed Union" framed the constitutional debate into four central issues, which aimed to summarise the Union's expectations from the Convention. The aim was to broaden altogether the points marked down at the Nice Summit into a well-built institutional and constitutional agenda and open a conventional constitutional debate. The need for a clear delimitation of competences was included. The four points sketched out by the European Council were the following, namely:

⁷⁸ See the European Commission, IP/01/602, 25 April 2001, "Proposals on procedures for debating the future of the Union". The debate on the future of the Union comprised two features: i) It should develop in the member and applicant states according to their traditions and national and regional priorities; ii) It should be strengthened in taking account of the different national debates.

i) The reorganization and simplification of the Union's overlapping Treaties with a view to making them clearer and better understood without changing their meaning or substance.

ii) The accurate division of the Union's competences or delimitation of powers between the Union and its Member States and regions reflecting the principle of subsidiarity.

iii) The legal status of the European Charter of Fundamental Rights.

iv) The role of the national Parliaments in the European structure.

The Nice "ordering of competences between the vertical and horizontal layers of governance in the European Union" was transformed in Laeken to an "accurate division of the Union's competences or delimitation of powers between the Union and its Member States and regions reflecting the principle of subsidiarity." It therefore appears, as regards the distribution of competences, that the institutionalisation of the constitutional debate by the European Council at Laeken was merely concerned with point (ii) the vertical dimension / delimitation of powers between the two principal actors (EU - Member States - regions). Alternatively, the horizontal division of competence, based upon the interplay of power between EC Institutions, was incidentally addressed or inferred by point (iv) of the Laeken list. Despite being a minor observation it appears that the issue of the vertical distribution of powers between the EU and the Member States should be considered individually and therefore given more weight.

The emphasis on the vertical delimitation of competences demonstrates the realisation that the current system of assigning competences is manifested on scattered Treaty Articles and thus requires change at all levels of EC competence (exclusive - shared - complementary). Not only that, but the Laeken European Council operated under

the impression or recognition that EU Citizens often hold expectations of the Union that are not always fulfilled and vice versa. It supported that EU Citizens have the impression that the Union takes on too much in areas where its involvement is not always essential. The explicit reference to the principle of subsidiarity and its reinforcement in the Laeken agenda proves the previous conclusion correct. Yet, the inclusion of the 'old' principle of subsidiarity within a 'new' constitutional debate does not suggest drastic changes in the exercise of competences, something that was made evident in the EU Constitutional Treaty's provisions of Title III entitled 'Union Competences'. It, however, portrays a refusal to take into account political proposals as illustrated in the unconventional constitutional debate corresponding to competences. Fischer's strict catalogue of competences constitutes a facet of the unconventional debate that sidetracked the Nice and Laeken conventional agenda.

The establishment of a *Kompetenzkatalog* (catalogue of competences) or quasi-constitution based upon a delineation of powers awarded to supra-national authorities and to national and regional bodies was the basis of Fischer's proposal in Berlin in 2000. This delimitation of competences at all costs is something expected from a German politician at the time. One needs to take into account Germany's early interest in a supranational initiative to divide competences on an equal footing between the EU, the Member States and the *Länder* or regions. Even so, Minister Fischer avoided the hazard of indicating examples as to how the proposed division of competences should occur within the federation. Nor was the effect of the Constitution upon subsidiarity illustrated in his speech but was merely hinted in his version of the legislative structure of the federation consisting of national representatives and possibly an additional subsidiarity body, next to the already existing Community institutional organs.

The abandonment by the Laeken European Council of a positive list of competences as an alternative to a European Constitution is not due to a fundamental disagreement of objectives between the two. Besides, the aims of a list of competence are proximate to Laeken's vision of a Constitution for Europe, which aims to "ensure that a redefined division of competence does not lead to a creeping expansion of the competence of the Union..." The motive behind both proposals is to target the Union's competence creep. By competence creep we mean the situation where the Community has been increasingly competent to legislate in order to achieve the aims of the internal market and beyond. The question is: How far will the Community push its boundaries in the name of those objectives? Since most competences are shared and need to be exercised flexibly the establishment of competence catalogues does not seem to be the best solution to the problem. Although preciseness is the sole objective of a strict competence list, the intention behind establishing a Constitution for Europe goes one step beyond ensuring that "the European dynamic does not come to a halt". Thus the European Council at Laeken, instead of producing an agenda that would potentially cause integration to freeze through a positive list of competences insisted on the maintenance of flexibility that subsidiarity allows.

Thus in a series of issues posed by the Laeken Declaration simplification and clarification stand out to produce the adjustments necessary to face the new challenges in Europe. The re-organisation of the current system goes a long way to meet the expectations of the EU Citizens (transparency) and the *acquis communautaire*. The question remains in relation to the *acquis jurisprudential*, especially as to the everyday administration and implementation of the Union's policy. Should it be left more emphatically to the Member States and, where national constitutions so afford, to the

regions / peripheries? Should both players (Member States and regions) be provided with guarantees that their spheres of competence will stay unaffected? If yes, what guarantees are there, apart from the principle of subsidiarity that competences will still be exercised in an efficient way? On the other hand if subsidiarity is given by the Court the same dynamic as in Article 5(2) EC (a wide interpretation to the powers of EC Institutions) then Member States will still talk about ‘competence creeps’ in the post-EU Constitution era, despite the fact that the EU Constitutional Treaty does clarify the areas falling under the headline of exclusive Community competence. This was admittedly anticipated by the European Council at Laeken that very accurately pointed to the importance of the role of National Parliaments⁷⁹ as an additional actor (even represented in a new institution) to monitor the legislative process at EU level and therefore ensure that all initiatives comply with the principle of subsidiarity thus contributing “...towards the legitimacy of the European project”.

The Laeken agenda made explicit that not only should a rearrangement of the division of competences occur to make the Union’s functions transparent without freezing the momentum of integration, but also made explicit that this change should occur on a canvas coloured by the dual notion of ‘simplification-clarification’. In fact the formal dimension to the Constitutional debate at Nice, Laeken and later as matured at the European Convention demonstrate that both ‘simplification’ and ‘clarification’ have been treated by politicians at the European Council and the Convention as synonymous notions, when legally they imply different things especially when they are employed in an institutionalised process of EU reform. Legal academics have shown considerable caution in using the term ‘simplification - clarification’ as individual while they have

⁷⁹ See Chapter 6 for the role of National Parliaments in detail.

demonstrated a preference to 'clarification' and an antipathy to 'simplification'. Particularly Weatherill⁸⁰ remarks that some matters are at an advantage when simplified, such as the elimination of the EU pillar structure but in other areas "simplification may be perilous". Weatherill argues that the "complexity of the EU is one of its strengths" and stresses that it can be clarified but not simplified. In other words "clarification of why the process is complex is virtuous. Simplification may rob us of dynamism and adaptability"⁸¹.

8. The European Convention

Introduction

Since its commencement, the European Convention always had in contemplation that any reference to competences within a newly-forged European Constitution would need to reflect the individuality of the EU system. A classic process of constitutional design based upon an imitation of national constitutions would therefore cause possible distortions as to the next stages in the establishment of competences within the original text of the constitution and the decent function of the document as a whole. The first expression of Europe's intentions as to the ideological stream it would follow (intergovernmental or supranational) came with the presentation of its first constitutional draft in October 2002, a draft constitutional model, including two Titles about the fair delimitation of competences⁸². On July 18, 2003 the Convention submitted to the

⁸⁰ Weatherill, S., "Competence and Complexity, Simplification and Clarification...and Legitimacy too", in Nicolaidis, K., and Weatherill, S., (eds) 'Whose Europe? National Models and the Constitution of the European Union', Papers of a Multi-Disciplinary Conference, Oxford, (April 2003). Also available at <http://www.europeanstudies.ox.ac.uk/WhoseEurope.pdf>.

⁸¹ Ibid

⁸² See The Convention, Praesidium, "Preliminary Draft Constitutional Treaty", [CONV 369/02], 28 October 2002, Title III: Union Competences and Actions, Title V: Exercise of Union Competence.

President of the European Council in Rome a full draft Treaty Establishing a Constitution for Europe. On June 18, 2004, the Heads of State or Government of the twenty-five Member States took the historic decision to unanimously adopt the Treaty. Thus the draft EU Constitutional Treaty was signed in Rome on the 29th of October 2004 by the twenty-five Member States of the Union. The Treaty can enter into force and become effective only after it has been ratified by all Member States either through the parliamentary method or referendum method. After the French and Dutch rejection of the EU Constitutional Treaty on May 29 and June 1, 2005, the ratification process will be examined by the European Council under the Austrian Presidency in the first half of 2006.

Arguably, a ratified EU Constitutional Treaty will elevate the Union's competences especially in the field of asylum and immigration and will to a certain extent bestow more legislative powers on the supranational creature. However one could contradict the view that these reforms are so crucial as to have a grave impact for the Member States since any changes introduced by the new fangled constitution adding to the Union's competences are trivial compared with those conferred in either the Single European Act or the Treaty of Maastricht. The problem with the distribution of competences as this currently appears within the Union's system is the fact that starting from the present structures of delimitation of powers to the principles that underpin such delimitation and types of competences available to the Union, nothing so far enjoys a clear definition within the Treaty. This does not go without having an impact upon the citizen's impression of the Union's interventionist role at large. This is something that was given particular consideration both at Nice and Laeken. The issue of a clear delimitation of competences

has been one of the top priorities of the Laeken Declaration on the Future of Europe⁸³ along with the simplification of the Community Treaties, the enhancement of the status of the Union's Charter of Fundamental Rights and the increase in the contribution of national Parliaments in the Community's legislative process.

Equally the Convention throughout its sixteen-month endeavour attempted to resolve the problem of competences within the Community. The first time it did so was in during its third plenary session of 15-16 April 2002⁸⁴. Even before that, the first Convention contribution to the issue of competences came in late March 2002⁸⁵. There the Praesidium started almost from basics providing an account of the current vertical separation of competencies along with a description of the existing checks / guarantees of the Union's compliance with the delimitation of competences and subsidiarity.

(a) Plenary Sessions

The Convention spotted two ways in which the Union does not remain unchallenged when its exercise of competences goes beyond its attributed powers by the Treaty. First it relied on the public control of EU competences based upon the interplay between the Community Institutions (in terms of the limits on their power in the decision making process) and national Institutions (which can control their Council representatives / Ministers). Second it recalled the importance of judicial control in the present exercise of competences pointing towards the role of the European Court of Justice and the

⁸³ 15 December 2001, at Europa: http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm

⁸⁴ Agenda, [CONV 21/02]; Summary Note of the Plenary Session, [CONV 40/02]; European Parliament Report on the division of competences between the EU and the Member States, Lamassoure Report, 24 April [2001/1034 (INI)]; Opinion of the Committee of the Regions on the Draft Report of the European Parliament on the division of powers between the European Union and the Member States, 13 March 2002 [CONV 26/02 Annex]

⁸⁵ "Description of the current system of competences for the delimitation of competence between the EU and the Member States", 28 March 2002, [CONV 17/02]

national courts acting as Community courts and the limited jurisdiction of the former in Titles V and VI of TEU. This contribution formed the gist of the Secretariat's discussion paper on the delimitation of competence that appeared during the fourth plenary session examined below.

Overall the Convention's third plenary session⁸⁶ was based on an attempt to ignite talks on the issue of competences starting off with a 'general debate' on the so-called 'missions of the European Union'. It then went on to visit the question of 'which criteria should be used for deciding which missions should be carried out at Union level' concluding with a question upon whether the Treaties should spell out the Member States residual nature of competences on matters not covered by the missions of the Union⁸⁷. Therefore the whole session very much involved questions upon the systematisation of the current vertical division of competences so that according to the European Parliament "the transfer of the powers between the Union and Member States must work both ways" and "the principles of subsidiarity and proportionality must be taken into account."⁸⁸

In answering those questions about the nature of the criteria employed for deciding which missions should be carried out at Union and accordingly at Member State level, the Convention concluded with the following remarks: As regards the issue of whether and on the basis of what criteria the Treaties should carry on leaving matters outside the Union's objectives to the Member States, a positive list of competences was considered as the least appropriate solution. Such a categorisation would rather freeze the

⁸⁶ Meeting of the Praesidium, Brussels, 25 April 2002, [CONV 40/02]

⁸⁷ As it has been argued by establishing that Community competences must be attributed, the Treaty makes explicit that there are 'limits' in the EC sphere of competences and implicit that the Member States have residual powers.

⁸⁸ See Transcript of Proceedings, available at http://www.europarl.eu.int/europe2004/textes/1_001110.htm, and http://www.europarl.eu.int/europe2004/textes/2_001082.htm for 15 and 16 April 2002 respectively.

current system of flexible interaction existing between the Union and the Member States. The imperative to preserve Articles 95 and 308 EC was also pointed out and against that the principles of subsidiarity and proportionality as effective checks of their abuse. Complementary to these legal checks on EU competence, the Convention also made reference to the potential setting of a political (national parliamentarians) or judicial device to further ensure the Union's compliance with the division of competences.

Following the third plenary session, the Convention's re-visited the issue of vertical separation of competences in its next fourth plenary session held in May 2002⁸⁹. Inter alia, the main issues were the achievement of the Union's tasks and the creation of working groups and their mandate. Again as with its preceding session the debate shifted on to the vertical division of competences, particularly on to how the Union's competences could be exercised in a better manner from the point of view of legitimacy and efficiency. In its discussion paper⁹⁰ the Praesidium pointed to the system's lack of clarity in the allocation of competences in respect to the Member States' residual powers; the lack of precision of the so-called safety clauses of Articles 94, 95 and 308 EC; the incidental non-compliance with subsidiarity and proportionality; the false expectations of European citizens in terms of the Union's powers and the insufficient checks for the exercise of EU competence

⁸⁹ Agenda, [CONV 51/02]; Guideline, [CONV 47/02]; "Delimitation of competence between the EU and the Member States – Existing system, problems and avenues to be explored" [CONV 47/02]; "The legal instruments: present system", [CONV 50/02];

Transcript of Proceedings available at http://www.europarl.eu.int/europe2004/textes/verbatim_020523.htm and http://www.europarl.eu.int/europe2004/textes/verbatim_020524.htm for 23 and 24 May 2002 respectively.

⁹⁰ "Delimitation of competence between the EU and the Member States – Existing system, problems and avenues to be explored" [CONV 47/02]

The reality that the Union has in times exceed its competences and has therefore penetrated into areas traditionally reserved by the Member States strengthens the argument for examining the likelihood of having a '*Kompetenzkatalog*' (catalogue of competences) at EU level as a guarantee that the Community exercises its competences in a subsidiarity capacity. But during its third plenary session the Convention made it clear that the problem does not only lie with the strictness of the separation of competences or with what would be included in the list but more with the aftermath of such an action. Therefore one could claim that the Praesidium very accurately stressed in its fourth plenary session that there are two requirements, namely "the need for precise delimitation and...the need for a degree of flexibility."⁹¹ The truth is that once a choice has been made, the future Union would either continue to suffer from impreciseness or play safe within a static system, always depending on the choice. That is merely why the Convention agreed on placing emphasis upon the principle of 'attribution of powers' and an open method of coordination with some restrictions followed by good monitoring and restraints in resorting to Articles 94, 95 and 308 EC.

(a) Working Groups

Consequently, two working groups (out of six⁹²) were set up on June, 6-7 2002 (5th plenary session⁹³) on the subject of competencies, one on Subsidiarity⁹⁴ and the other

⁹¹ Ibid p. 10

⁹² Subsidiarity [CONV 71/02]; Charter of Fundamental rights [CONV 72/02]; Legal Personality [CONV 73/02]; National Parliaments [CONV 74/02]; Complementary Competences [CONV 75/02]; Economic governance [CONV 76/02].

⁹³ The definitive composition of the working groups is agreed [CONV 77/1/02 rev.1] while the Presidium produced guideline mandates for the first six working groups:

⁹⁴ Subsidiarity [CONV 71/02]

on Complementary Competencies⁹⁵. Their reports were then discussed in the 8th and 11th plenary sessions, respectively in September 12-13⁹⁶ and November⁹⁷ 7-8, 2002. This had as a result the presentation by the Praesidium on February 6, 2003 of a title of the first part of the EU Constitutional Treaty (Articles 1 to 16) that was dedicated to the topic of competences. The numerous proposals for amendments that were put forward by the Convention participants were then considered on February 27-28, 2003 when the Praesidium also approved a draft for a protocol on the application of the principles of subsidiarity and proportionality.

Due to the vast number of Articles amendments submitted to the Praesidium, including the draft for a subsidiarity / proportionality protocol, the 17th plenary session held on March 5, 2003 talked over the vertical separation of exclusive and shared competences as these were illustrated by Articles I-9 to I-17 of the draft EU Constitutional Treaty⁹⁸ (now I-11 to I-18 of the EU Constitutional Treaty⁹⁹). Taking into account the proposals for reform of the current system as elaborated by the members of the Convention, it almost feels that the whole atmosphere surrounding the potential reforms suggested a tidying up exercise rather than drastic modification of the rules. To summarise, the proposition for a potential categorisation of competences through the

⁹⁵ Complementary Competences [CONV 75/02]

⁹⁶ During this session the Convention's debate was focused on EU legislative procedures. Some issues also raised by the Presidium [CONV 225/02] were also discussed. First of all the Convention dealt with the question of how can the number of instruments available to the Union for the exercise of its competences be reduced, and how can their legal effects be clarified.

⁹⁷ During this session, the Convention talked over the reports of Working Groups V on Complementary Competences and VI on Economic Governance. There were also oral presentations by the Chairmen of Working Group X on security and justice as well as the Chairman of Working Group IX on simplification of procedures and instruments. Finally, the debate on the preliminary draft Treaty that occupied the Convention during its previous session was continued here.

⁹⁸ Adopted by consensus by the European Convention on June 13 and July 10, 2003 and submitted to the President of the European Council in Rome on July 18, 2003 [CONV 850/03]

⁹⁹ Signed in Rome by Representatives of the Governments of the Member States on June 18, 2004 [CIG 87/2/04]

establishment of a clear-cut list was unanimously rejected due to fears that it would render the allocation of competences inflexible. Therefore, at this stage, correction and flexibility constituted the two basic elements stemming from the Convention's endeavour. Another suggestion that sidetracked the idea of flexibility was the achievement of some differentiation in the scope of EU action in various fields of decision-making accompanied by sufficient procedural checks and balances.

The need for procedural safeguards was also reflected in the report of the Working Group on Subsidiarity that *inter alia* emphasised the necessity for efficient checks on the application of the principle of subsidiarity that could entail the active contribution of national legislatures. Having said that, the Union would need to combine its already existing system with new principles that are in a way the inevitable results of its constitutionalisation. This would in a way preserve a harmonious evolution, much preferable to both Union officials and citizens at large to an unprecedented evolution via positive integration that would ultimately imply a change of architecture. The problem of the uncertainty of effectiveness of procedural checks was silently put aside by the Working Group on Complementary Competences that went on to observe all questions related to competences, except of subsidiarity of course, that had been touched on by the preceding Working Group especially set up for this purpose. Here proposals put the clock back to the establishment of a fundamental delimitation of competences within each and every sector of the Union's operation. As already mentioned there was a call for review of the constitutional reference for "an ever closer union" as appears in Article 1 TEU. Such an action would be above all symbolic, implying that the transfer of competences to the supranational level should not be endless. The final suggestions involved definitional issues on respect of national identity under Article 6.3 TEU and most important calls for

restricting the scope and extent of EU harmonisation under the safety valves of Articles 94, 95 and 308 EC.

Due to its somewhat strict tone the report was not well received within the Convention during its 11th plenary session held on November 7-8, 2002¹⁰⁰. In fact it was criticised for bringing to the fore the already rejected idea of a competences catalogue. Further criticisms involved the somewhat faulty perception of the Working Group of the meaning of “an ever closer union” that is intended solely to amplify the concept of the people of Europe and has no practical consequence on the competences subject matter. Amongst other criticisms there was a feeling within the Convention that the report was harsh on the proposed procedure for exercise of complementary, harmonising and residual competences, particularly as regards resort to Article 308 EC.

Although the ideas expressed by this report, pointing at the abuse of the so-called safety clauses would be embraced amongst sceptics, the Convention’s integrationist approach stayed firm on the idea of positive harmonisation on the part of the Union, albeit with some checks and safeguards. After all, the Member States themselves agreed that the Union’s competences should be defined by reason of its objectives. Since these objectives, as included in Article 1 of the TEU, are aimed at an “ever closer union among the peoples of Europe”, a teleological interpretation of these objectives should not take the Member States by surprise. In the past, the Court by reason of its teleological interpretation has gained the competence to expand an otherwise limited Treaty provision and go rather far with it.

¹⁰⁰ During this session, the Convention discussed the reports of Working Groups V on Complementary Competences and VI on Economic Governance. There were also oral presentations by the Chairmen of Working Group X on security and justice as well as the Chairman of Working Group IX on simplification of procedures and instruments. Finally, the debate on the preliminary draft Treaty that occupied the Convention during its previous session was continued here.

Conclusion

To conclude, the tribute paid by the Praesidium to the issue of competences was neither accidental nor marginal. Far from it, the Convention's continuous discussion over the area of competences reaffirms, in conjunction with the proposals drawn from its sessions and the working groups reports, that any democratic form of multi-level governance should be characterised by a constitutional separation of powers. This is particularly important when one considers that the Convention was the first stage of the Union's constitutionalisation. Yet, being a *sui generis* entity, the Union cannot in practical terms utilise the same formulas that have shaped power relationships within the nation states. That is why a clear-cut delimitation of competences demands both a delicate and complex process at Union level.

CHAPTER 3

THE MAIN CATEGORIES OF SUBJECT RELATED EC / EU INTERNAL COMPETENCES

Introduction

The vertical delimitation of internal Community competence is based on a relentless tension between the vertical levels of government: namely the Community *vis-à-vis* the Member States. The current allocation of competences between the two does not imitate the positive provisions or competence catalogues as found in the constitutional traditions of Germany (Article 72 GG – Basic Law); Austria (Article 10, Federal Constitution); the United States (Article I (8), US Constitution) and Canada (Article 91, Constitution Act). The Community possesses no formal catalogue of competences to designate the sectors where compromises on the values between the two decision-makers (EC / EU and Member States) should be drawn. Neither does it maintain a systematic description of legal effects of its power with reference to national competence.

Instead, Article 3 and 4 EC provide an overview or checklist of the Community's spheres of activity. This list, however, is intended to provide guidance as to the scope of issues over which the Community has powers to take action. It is neither exhaustive nor does it include any powers from the side of the Community to establish legal instruments. On the other hand, according to Article 5 EC, under the principle of enumerated powers competences must be expressly specified. Part III of the EC Treaty, entitled "Community Policies" consists of seventeen Titles / enabling provisions that set out the different policy objectives of the Community and the means of achieving those objectives. While it is clear that any action taken by the Community must have a legal basis either in the Treaty or

secondary legislation and that certain Treaty provisions address the extent of that power, there is no clear substantive division of powers in the EC or EU Treaty. Hence the Community as an international organisation draws its powers from individual legal bases of its constituting Treaty, including any legislation based upon it. All other powers remain in principle within the nation state.

In the absence of a formal catalogue of competences, it is possible to identify several generic types of Community competence or general principles governing the relationship with domestic regulatory power. Article 5 EC distinguishes between the Community's exclusive and non-exclusive powers. Certain sectors can therefore only be regulated at Community level and the Member States may exercise legislative powers only if empowered to do so by the Community itself. The distribution of competences at all levels of government is a common characteristic of every multi-level system of governance, whether federal or decentralised. Certainly, the separation of powers occurring at Community level reminds one of the way competences (*Verbandskompetenzen*) are organised vertically between the Federation and State level in the German Basic Law (*Verflechtungsmodell*), which makes reference to exclusive and concurrent powers next to the framework powers of the Federation. As this chapter will attempt to demonstrate, the allocation of competences in the Community represents a unique example of distribution of competence intended for a multilevel system that although it does not resemble national constitutional democracies, is characterised by pluralism.

The difference between exclusive and non-exclusive competence exists insofar as the Community has not exercised its power. Von Bogdandy and Bast characteristically express the view that "if...the Union has enacted legislation, then the difference depends on a criterion that appears rather technical, namely, whether the norm that leads to the prohibition to enact different national legislation is at the level of primary or secondary

law.”¹ This chapter will attempt to provide an insight to the main categories of competences (exclusive; shared; concurrent). Almost in parallel it will concentrate on the notions of ‘exclusivity’ and ‘pre-emption’ whose balancing constituted the ground for the competence debates over the EU Constitutional Treaty, signed on October 29, 2004 by the Heads of State of the twenty-five Member States². When competences are transferred to a new legal system of international law, the argument is as to the degree of limitation over national regulatory power, original national competences and national sovereignty.

Exclusivity involves the more concrete sectors of EC exclusive competence that consist of Common Commercial Policy (CCP); the preservation of marine biological resources and monetary policy (EMU). On the other hand pre-emption is attached to the areas of shared and concurrent competence. Yet, the element of pre-emption operates next to the element of mixity. Internal powers are divided in a mode where as long as Community secondary legislation is absent in a given sector, the Member States may legislate provided that their measures are compatible with the Community’s primary legislation (the Treaty). If the Community on the other hand has chosen to harmonise national legislation by enacting secondary laws (e.g. a Directive), national competence to regulate is seen as pre-empted in accordance with the law in question.

¹ Von Bogdandy, A., and Bast, J., “ The European Union’s Vertical Order of Competences: The Current Law and Proposals for Reform”, (2002), 39 Common Market Law Review 227-268, at 243

² [CIG 87/2/04]

A. EXCLUSIVE COMMUNITY COMPETENCE

Introduction

Textually, the concept of exclusive EC competence appeared for the first time in the Treaty of Maastricht (TEU), Article 3b (now Article 5 EC) that contains the principle of attribution of powers, subsidiarity and proportionality. The Article excludes the application of the principle of subsidiarity in areas “which do not fall within the *exclusive* competence” of the Community. This limitation upon the principle of subsidiarity relieves the EC Institutions from the practical obligation to prove in accordance with the subsidiarity test that Community action is necessary to attain the objectives of the Treaty. The Protocol on the application of the principles of subsidiarity and proportionality introduced by the Treaty of Amsterdam contained a further reference to the notion of exclusive competence. Specifically: “The principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice. The criteria referred to in the second paragraph of Article 3b of the Treaty shall relate to areas for which the Community does not have exclusive competence.”

The Community thus enjoys exclusive competence in a handful of sectors where it is solely responsible for legislating and adopting legally binding acts. That is to say that Member States are even in the absence of EC measures, barred from enacting legislation in the relevant area except insofar as they are purposely authorised to do so by the Community or for the implementation of acts adopted by the Community. Internally, the Community enjoys exclusive competence with regard to the preservation of marine biological resources (Article 32 EC) and monitoring of monetary policy for those Member States that have adopted the Euro currency (Article 106 EC). Furthermore, the exclusivity of Community

competence in areas of external policy such as Common Commercial Policy (Articles 131-134 EC) may have an impact internally where Member States are precluded from imposing unilateral measures equivalent to customs duties. This partly justifies why certain commentators³ speak of an artificial distinction between internal and external competence.

1. The Area in Question Falls under the Exclusive Community Competence

The areas dominated by the *a priori* exclusive effect of Community law are limited in extent and have been developed by the jurisprudence of the Court. Action by the Member States is possible only where the Community has empowered such action. Mixity is preserved to a certain degree since a Member State is not precluded from legislating but this right is subject to it acting as a 'trustee of the Community interest'. Therefore, national legislation in areas of EC exclusive competence has practically an identical outcome to Community legislation. It demands prior authorisation by the EC Institutions that also exercise control to ensure that the actions of the Member State in question promotes the 'common interest'. Practically, this attitude represents a way of remedying the legal vacuum arising when the Community fails to address national regulatory needs. Symbolically, it represents a departure from the traditional definition of exclusivity.

(a) Common Fisheries Policy

An illustration of a Member State acting to promote the Community interest is in relation to the Common Fisheries Policy (CFP). Since the regulation of the CFP is not wholly attached to the Community, a preliminary introduction to this area might be valuable

³ Lodge, J., "The European Community and the Challenge of the Future", Pinter, London, (1989) p83
Lodge comments that "internal policies have external effects and the idea of an impenetrable barrier separating the two is misleading".

to the reader. The CFP is founded on Article 32 EC. Paragraph 1 establishes the legal basis for the competence of the Community within the fishing sector.

The common market shall extend to agriculture and trade in agricultural products. "Agricultural products" means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products.

The CFP is an area of regulatory polyphony characterised by a complex of Community and national institutions⁴. The Community is competent to pose limits to the Member States in relation to the rate of permissible catches and fishing fleets. Alternatively, the Member States are competent in terms of monitoring the management of fishing quotas and fleets. The principle of subsidiarity therefore applies in some areas of the CFP, although the Community has traditionally relied on the issuing of Regulations that suggests a direct intervention in the activities of the sector compared to Directives that allow certain national discretion as regards their implementation⁵. Council Regulation 3760/92⁶ on "Establishing A Community System For Fisheries And Aquaculture" brings to mind in Article 4 that "the Council shall establish... Community measures laying down the conditions of access to waters and resources and of the pursuit of exploitation activities"⁷. This emphasises the

⁴ For more information on the development of the CFP see Jensen C.L., "A Critical Review of the Common Fisheries Policy" (1999) IME Working Paper 6/99

⁵ Other legal acts referring to control of Member States or to delegation to the Commission include rules for the recording and transmission of information concerning catches taken by fishing vessels of the Member States (Reg. 753/80); Control measures for fishing activities by vessels of the Member States (Reg. 2057/82); Certifications and logbooks (Reg. 3723/85 and 2057/82); Recording of landings and inspections by Member States (Reg. 4027/86); certain control measures - e.g. illegal nets (Reg. 2241/87); Prevention of over-fishing (Reg. 3483/88); monitoring measures (Reg. 2870/95); surveillance (Reg. 686/97); simplification and reinforcement of controls on fishery products (Reg. 2846/98)

⁶ O.J.L 389, 31.12 1992; See also Reg. 170/83 in terms of legislation establishing a Community system for the conservation and management of fishery resources.

⁷ According to Article 10 of the Regulation a Member State has the competence to implement a national conservation policy only when the national measures are compatible with the intentions and objectives in the conservation policy of the Community.

Member States' transference of competence to the Council to make decisions in relation to the conservation regulation.

Communitarisation of fishing resources creates a sense of security by putting constraints on their users but "monitoring compliance with fisheries policies is relatively more difficult than, say, monitoring tariffs or monetary policy."⁸ This is a fair argument considering that the Community principle of equal access does not prevent fishermen from over-fishing outside their national fishery zone. Quota hopping has created a dilemma as to the prevalence of conservation objectives on the one hand and the fundamental freedoms of Community law on the other, particularly the freedom of competition and freedom of establishment⁹.

In the areas of CFP dominated by exclusive Community competence that are of direct relevance here (i.e. the regulation of fishing conditions designed to ensure the protection of fishing grounds and the conservation of biological resources of the sea) Member States may still act in order to promote the 'common interest', meaning in compliance with the Community's policy. Under the Community's CFP, Member States are given the right to fish for all descriptions of sea fish between 12 and 200 miles, subject to quotas and conservation measures in accordance with Regulation 2371/2002¹⁰ and the Fishing Boats Designation Order of 1983¹¹. In *Commission v UK*¹² the Court held that, "since the expiration on 1 January 1979 of the transitional period laid down by Article 102 of the [UK's] Act of Accession, power to adopt, as part of the common fisheries policy,

⁸ Payne, D., "Policy-Making in Nested Institutions: Explaining the Conservation Failure of the EU's Common Fisheries Policy" (2000) 38 (2) *Journal of Common Market Studies* 303-24, at 307

⁹ See Case C-213/89 *Factortame I* [1990] ECR I-2433; Case C-221/89 *Factortame II*, [1991] ECR I-3905

¹⁰ O.J.L 358, 31.12.2002, p59

¹¹ SI 1983/253 (amended by SI 1986/382, 1992/3108 and 1996/248)

¹² Case 804/79 *Commission v United Kingdom* [1981] ECR 1045

measures relating to the conservation of the resources of the sea has belonged fully and definitively to the Community.” In other words the Court made clear that a Member State could not take measures on its own in an area committed to Community jurisdiction, even though EC legislation had not been effected. However, it confirmed that Council Regulation 2371/2002 gives Member States the right to introduce non-discriminatory conservation measures, up to 12 miles from the shore line. Such measures must conform to the CFP and be cleared with the Commission in advance.

(b) Economic and Monetary Union

Having said about the variety of competence in the CFP, internally, the Treaty explicitly confers competence only in the Monetary Policy sector. The Community thus enjoys exclusive competence to monitor the Union’s Monetary Policy (EMU) in relation to the Member States that have adopted the Euro and therefore achieve its objective of price stability¹³. A pre-condition of a Member State’s membership of the EMU is that its national central bank has to be independent¹⁴. Initially, national governments gave up control of monetary policy to their national central banks and then the latter surrendered this control to the European System of Central Banks. Decisions in relation to Monetary Policy are thus taken by the heads of the national central banks and the European Central Bank (ECB), a body that forms an integral part of the Community framework. Article 106 EC states as follows:

1. The ECB shall have the exclusive right to authorise the issue of banknotes within the Community. The ECB and the national central banks may issue such notes. The banknotes issued by the ECB and the national

¹³ See Article 105 EC “The primary objective of the ESCB shall be to maintain price stability...”

¹⁴ See Article 107 EC

central banks shall be the only such notes to have the status of legal tender within the Community.

Almost¹⁵ all elements of monetary sovereignty - the power to adopt and issue a currency under public international law - have been surrendered 'irrevocably' by eleven out of the fifteen Member States / Members of the EMU¹⁶. Furthermore, the ten new Member States that acceded to the EU in May 2004 have to join the EMU once they fulfil the Maastricht criteria for EMU membership. As Begg¹⁷ explains, the criteria set out in Maastricht are "nominal convergence criteria". They "ensure that a country's fiscal and monetary position is compatible with the obligations of monetary union, irrespective of its growth rate." According to Zilioli and Selmayr¹⁸ the Euro-zone States are able at any given moment to break free from that obligation by simply revoking EMU through a Treaty amendment. This however, is not very likely given that currently most Euro-zone States participate in stage III of EMU. Most important, its statute is contained in a Protocol to the Treaty and can only be amended by an Intergovernmental Conference that requires a unanimous agreement by all Member States. Moreover, the Copenhagen criteria of accession to the Union¹⁹ include inter alia "the ability to take on the obligations of membership including adherence to the aims of political, Economic and Monetary Union." Finally the absence of a case before the Court demonstrates that Community's exclusive competence in the area has been widely accepted by the Member States. However the transference of national monetary sovereignty to the

¹⁵ In certain areas related to coinage and legislation against falsification, monetary sovereignty still remains attached to the Member States that have adopted the Euro.

¹⁶ See Art. 4 (2) and 3 of Council Regulation 974/98 on the introduction of the Euro, O.J.L 139/1, 1998

¹⁷ Begg, I., "Quick Entry for the New Members - A Good or Bad Thing?", Paper for the Conference on EU Enlargement and the Baltic Sea Region, The Swedish Institute of International Affairs (2003), Available at <http://www.ui.se/begg.pdf>

¹⁸ Zillioti, C., and Selmayr M., "The External Relations of the Euro Area: Legal Aspects" (1999) 36 Common Market Law Review 273

¹⁹ As laid down by the Copenhagen European Council in June 21-22, 1993 available at: http://www.europarl.eu.int/enlargement/ec/cop_en.htm

Community and the ECB has created in some cases a difficulty in drawing the boundaries of their horizontal competence to act to achieve the objectives of the EMU.

Contrary to other policies attached to Community's exclusive competence where national sovereignty is transferred to the Institutions of the Community, monetary sovereignty has been transferred from the Member States to the Community and the European Central Bank (ECB) that is given special reference in the wording of Article 106 EC. Herrmann adds that since "the ECB's competences are laid down in primary Community law, the conclusion is drawn that the sovereign powers of the Member States concerning monetary matters have been transferred directly to the ECB."²⁰ This has created a positive obligation to the Community Institutions and the Member States to respect the independence of the ECB. Yet, the ECB as an independent body free from direct political control has raised questions as to the degree of accountability and legitimacy of the EMU system as a whole²¹. It has separate legal personality and its members are immune from political interference²². Legal personality gives it standing before the Court, either as a litigant or defendant. Additionally, Article 110 EC empowers it to issue legislative measures in the form of regulations, decisions, recommendations and opinions without referring to an Institution.

When adopting a legislative measure, the ECB needs to determine whether the measure falls within its fields of competence outlined in Articles 105 and 106 EC. A challenge to

²⁰ Herrmann, C.W., "Monetary Sovereignty over the Euro and External Relations of the Euro Area: Competences, Procedures and Practice", (2002) 7 (1) *European Foreign Affairs Review* 1-24, at pp 5

²¹ Buiter, W.H., "Alice in Euroland", (1999) 37(2) *Journal of Common Market Studies* 181-209; Verdun, A., and Christiansen T., "Policy-making, Institution-building and European Monetary Union: Dilemmas of Legitimacy", in Colin Crouch ed., "After the Euro: Shaping Institutions for Governance in the Wake of European Monetary Union", Manchester University Press, (2000) pp. 132-44.

²² Article 108 EC and Article 7(1) Statute.

an ECB legislative measure by a Community Institution occurred in *Commission v ECB*²³. There the Commission brought an action pursuant to Article 230 EC for annulment of Decision 1999/726 EC of the European Central Bank of 7 October 1999 on fraud prevention. The Court held that in failing to apply Regulation 1073/1999²⁴ adopted under Article 235 EC (now 308) and adapting its internal procedures in order to satisfy the requirements laid down by it, the ECB infringed the regulation and therefore exceeded the margin of autonomy of organisation it retains to combat fraud. Hence, the Commission's claim was upheld and the contested decision was annulled. Advocate General Jacobs²⁵ commented:

“The case raises a number of important issues concerning, in particular, the scope of Community competence to adopt measures under Article 280 EC²⁶ aimed at combating fraud and other illegal activities affecting the financial interests of the Community, the obligation of the Community Institutions and the Member States to respect the independence of the ECB imposed by Article 108 EC and the duty to consult the ECB on proposed Community acts falling within its fields of competence laid down in Article 105 EC.”

To conclude, despite certain problems in determining the scope of the Community and the ECB, previously identified, the transference of national monetary sovereignty to a dual supranational authority having exclusive competence contributes to placing EMU on the path of both monetary and price stability.

²³ Case C-11/00 *Commission v ECB* [2003] ECR I-7147

²⁴ On investigations conducted by the European Anti-Fraud Office.

²⁵ Case C-11/00 *Commission v ECB*, Opinion of Mr Advocate General Jacobs [2003] ECR I-7147

²⁶ The founding Treaties did not provide a specific legal basis for measures in the field of fraud prevention in the Community. Article 209a of the EC Treaty (now Article 280 EC) - inserted by the Treaty of Maastricht - obliged Member States to take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests and to coordinate their action aimed at protecting the financial interests of the Community against fraud. It did not grant the Community any new legislative powers. Prior to the entry into force of the Treaty of Amsterdam, the Communities adopted various measures aimed at combating fraud committed by recipients of Community funds in the Member States on the basis of Article 308 EC. The Treaty of Amsterdam amended Article 280 EC granting the Community explicit competence to take ‘the necessary measures in the fields of the prevention of and fight against fraud.’

(c) Common Commercial Policy: Charges Equivalent to Customs Duties

Article 23 EC covers all trade in goods and incorporates a Common Customs Tariff that is to bring homogeneity of the charges levied at the Community's external frontiers on products imported from third countries to ensure that trade with non-Member States is not diverted and the free movement of products between Member States is not distorted. As the uniformity of the Customs Union and the CCP would be jeopardised by a Member State unilaterally imposing charges equivalent to customs duties on imports from third countries, the CCP enshrined by Article 133 EC entails that national differences of a fiscal and commercial nature affecting trade with third countries must be abolished. Article 133 (1) EC provides:

Customs duties on imports into the Member States of goods originating in the countries and territories shall be completely abolished in conformity with the progressive abolition of customs duties between Member States in accordance with the provisions of this Treaty.

The Court has affirmed that all measures containing instruments regulating trade with third countries come within the Community's exclusive competence by virtue of Article 133 EC.

In two cases lodged by the Commission against Italy²⁷, the former challenged national rules requiring from each undertaking, where services were rendered outside the customs area or outside normal office hours to several undertakings at the same time, in connection with the completion of customs formalities in intra-Community trade, payment of a fixed fee corresponding to one hour's work. Accordingly, Aprile (a customs agent / administrator of an insolvent company) paid the Italian administration fees for customs

²⁷ *Commission v Italy* [1989] ECR 1483; *Commission v Italy* [1991] ECR I-1575

transactions according to the respective national legislation. Consequently, he instituted proceedings to obtain repayment of those fees²⁸. Despite Italy's claims that Aprile's case was unfounded since the imports where the fee was imposed were goods from non-Member States (but EFTA in that case), the Court decided that the result of EC law applies to the claim as a whole and found an infringement by the Italian Republic of the prohibition on charges having an equivalent effect to customs duties (Articles 23 and 25 EC) declaring national legislation incompatible to the Treaty.

From the abovementioned judgments, it appears that the regulation of export controls falls under the headline of CCP and therefore Member States have no competence to take any measures aimed at safeguarding their external security. However, In *Fritz Werner*²⁹ v *Germany* and *Peter Leifer*³⁰ concerning a question on whether national restrictions on exports of dual-use goods are compatible with the concept of common commercial policy as envisaged in Article 133 EC, the Court's approach suggested that this impression does not correspond to the spirit of the Treaty. While any restriction on the export of goods in the form of strategic controls falls within the exclusive Community competence by reason of Article 133 EC, the Court stressed that national restrictive measures can be justified under Community law. According to Emiliou³¹, "on closer examination, these judgments seem to imply that the Community enjoys concurrent powers in this area..." Thus national export restrictions are not precluded as long as they do not

²⁸ Case C-125/94 *Aprile* [1995] ECR I-2919, paras. 32-37

²⁹ Case C-70/94 *Fritz Werner Industrie-Ausrüstungen GmbH v Federal Republic of Germany* [1995] ECR I- 3189

³⁰ Case C-83/94 *Criminal proceedings against Peter Leifer and Others* [1995] ECR I-3231

³¹ Emiliou, N., "Restrictions on Strategic Exports, Dual-Use Restrictions and the Common Commercial Policy", (1997) 22 (1) *European Law Review* 68-75

infringe the freedom to trade - being the foundation of the Community's internal market and CCP - or insofar as the Community has not harmonised the respective area.

In *Werner* a licence to export goods to Libya with a potential military use for the country's missile development programme (furnaces and coiling machines) was declined by Germany as being contrary to the Republic's Law on Foreign Trade. This prohibition aimed at national security by preventing any disruption to the external relations of Germany, preserving therefore the peaceful co-existence of nations. The Court held that such a national measure restricting the exportation of certain goods was not to be considered as falling outside the scope of Community law (CCP) since it had foreign policy and security implications. Germany could not therefore adopt a measure equivalent to quantitative restriction to that policy in the light of its own arrangements. Instead, national commercial policy measures are allowed only when they gain prior authorisation from the Community or when justified on the grounds of Article 30 EC³². The Court in *Werner* recognised that the principle of free exportation of EC law may be restricted when a strategic restriction on exports by a Member State poses such limitations where necessary for the protection of national / public security due to the risk of disturbance to its foreign relations and international peace. Such restrictions ought to be proportionate.

Leifer concerned Germany's criminal proceedings against traders for an unauthorised exportation to Iraq of goods suitable for producing chemical weapons. The Court was once again confronted with the question of whether national restrictions on exports could be adopted by a Member State unilaterally or such measures should rather fall under the Community's exclusive competence. Given that the national prohibition against the exporters occurred at the time of the first Gulf War, Germany claimed that the

³² See Regulation 2603/69 establishing Common Rules on Exports, Article 11

prohibition not only intended to secure its external security but the lives of people in Iran-Iraq. Once again the Court stressed that export restrictions on goods going to third countries is reserved exclusively by the Community by virtue of its CCP, Article 133 EC. Equally with *Werner*, the Court stated that prior authorisation is required for a Member State to adopt a restrictive rule against exports to third countries. Under Article 11 of Regulation 2603/69 a Member State may introduce restrictive measures against imports if necessary to prevent public security risks related to its foreign relations or to the peaceful coexistence of the nations. In this case the national restriction was proportionate given the political situation in the Iraq and therefore Germany could take criminal action for breaches of the licensing procedure.

Thus, public security reasons and proportionality, as a way of maintaining national abidance with the rules of CCP, can excuse derogation from the principle of Article 133 EC. It might be argued that the Community has adopted a pragmatic approach in terms of its competence: While it reserves the right to harmonise export control policies with the aim of establishing a uniform external trade regime, it declines to take in hand purely security matters.

B. SHARED / CONCURRENT COMPETENCE

Introduction

In contrast to the areas of exclusive competence, in sectors falling under the leading of shared competence both the Community and the Member States are competent to exercise their regulatory powers. The Community's legislative action in those areas is subject to compliance with the principles of subsidiarity (the Union/Community should take action only if and insofar as the objectives of the proposed action cannot be sufficiently

achieved by the Member States and can therefore be better achieved at Community level) and proportionality (any action by the Union/Community should not go beyond what is necessary to achieve the objectives of the Treaty). Here, the exercise of Community regulatory powers takes precedence over the exercise of national regulatory powers. However, the intensity of the legislative action sometimes depends on the type of measure and the type of legal act provided for in the Treaties.

Article 3 EC contains a general 'list' of areas in which the Community may act to achieve the purposes set out in Article 2 EC aiming towards a:

“...harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.”

Under the primary Treaty provision of Article 14 EC, “the internal market shall comprise an area without internal frontiers in which the free movement of goods (Articles 28 to 31 EC), persons (Articles 39 to 48 EC), services (Articles 49 to 55 EC) and capital (Articles 56 to 60 EC) is ensured in accordance with the provisions of this Treaty”. The Community archetype of a fully integrated and deregulated market demands that Community initiatives override national trade and economic measures. The attainment of uniformity thus unequally divides competences between national and Community involvement in the market. The Treaty also defines by areas Community competence for the conduct of concrete Community policies such as customs (Articles 26, 27 and 135 EC); social policy (Articles 136 to 148 EC), environment (Articles 174 to 176 EC), consumer

policy (Articles 136 to 148 EC), transport (Articles 70 to 80 EC) and agriculture (Articles 32 to 38 EC).

1. The Pre-emptive effect of Community Law

The underlying principle behind the Court's jurisprudence in internal competence situations is the preservation of unity of the internal market and the uniform application of Community law. There, the preclusion of national regulatory powers by the Court reinforces the effect of normative supranationality by adding next to the principles of direct effect and supremacy the notion of implied pre-emption. Mixity is preserved to a certain degree as regards the identity of the actor / legislator but not the content of the legislation. In other words, where the Community fails to respond to national regulatory needs, a Member State may act under close supervision by the Commission to attain the objectives set out by the Community.

The principle of pre-emption originates in the U.S. Constitutional tradition and its effect is to remove national regulatory powers giving way to the federal³³. Pre-emption can emerge in different versions, either as 'express' or 'implied' pre-emption. In the former situation (express pre-emption) the removal of state power derives expressly from the text of a federal regulatory act establishing the will of the federal agency. The federal agency may optionally include in the act a saving clause intending to allow for state regulatory power in the relevant area as long as it is intended to achieve the same objective set out in the act³⁴. In

³³ Bleiweiss, S.J., "Environmental Regulation and the Federal Common Law of Nuisance: a Proposed Standard of Pre-emption", (1983) 7 Harvard Environmental Law Review 41; Newman, J., "A Consideration of Federal Pre-emption in the Context of State and Local Environmental Regulation", (1990) 9 UCLA Journal of Environmental Law & Policy 97

³⁴ See the judgment of the U.S. Supreme Court in *Sprietsma v. Mercury Marine*, [2002] 537 US 51. The Court said that the Federal Boat Safety Act (1971) contained an express pre-emption clause, pre-empting

the latter situation (implied pre-emption) there are two different scenarios namely that of 'direct conflict', where a state act comes into conflict with the relevant federal law and 'obstacle conflict', where the state act constitutes an obstacle to the law of the federation. Thus, the distinction between the two is related to the possibility of conflict. The first situation addresses a real disagreement while the second a potential clash.

Pre-emption in EC Law has been characterised as implied pre-emption³⁵. Both the Community and the Member States enjoy regulatory powers in the same field. However, conflict resolution between EC and national law does not arise expressly in the text of the Treaty. Quite the reverse, the concept of pre-emption in EC Law is identified as a conflict pre-emption always resolved by the Court in favour of the Community. The Court acts by emphasising that where the EC exercises its shared / concurrent powers, any Member State action is pre-empted. Where the EC exercises its shared / concurrent powers, Member States are not precluded from exercising their regulatory competence but pre-emption may appear either when a restriction to this competence arises by virtue of a Treaty obligation (e.g. Article 28 EC) or the area has been regulated (sometimes over-regulated) by Community secondary law. In that case, the Court interprets the principle of Supremacy of Community law as an ingredient adding to the binding force of the Treaty.

2. Before the Adoption of Secondary Legislation: Directly Effective Provisions

The obligations of the Member States under the Treaties are unconditional and their attainment of these objectives requires uniform application of EC law. In that sense,

any state or local law or regulation. The Act also contained a 'saving clause' providing that compliance with it did not relieve a person from liability under common or state law.

³⁵ Soares, A.G., "Pre-emption, Conflicts of Powers and Subsidiarity", (1998) 23 (2) *European Law Review* 132-145

uniformity justifies supremacy for a contrary national rule would cause the legal basis of the EC itself to be called into question. Universal acceptance by the Member States of the rights and obligations arising from the Treaty carries with it a clear and permanent limitation of their sovereign rights, and any subsequent unilateral act incompatible with the aims of the Community cannot prevail. Member States are thus competent to legislate as far as the Community has not exercised its regulatory powers by adopting rules, which it may do as of right. Thus, directly effective Treaty provisions, which create obligations to Member States, restrict their regulatory competence to legislate in a given sector. This section will examine certain examples of Treaty provisions that pose such limitations to Member States' competence.

Under *Walt Wilhelm* national competition authorities are precluded from continuing proceedings to apply EC law when the Commission has initiated a procedure. This, however, does not preclude them from applying national competition law subject to the obligation of co-operation under Article 10 EC, implying a general rule that in case of conflict between EC and national law, the former prevails. More to the point, in *Walt Wilhelm*³⁶ in deciding upon the question of whether national and EC antitrust cases concerning the same conduct can run parallel, the Court declared that "...conflicts between the rules of the Community and national rules in the matter of law on cartels must be resolved by applying the principle that Community law takes precedence." It is clear from the judgment that in case of conflict or interference with each other, EC law prevails. This re-affirms the nature of implied or conflict pre-emption of EC law as first elaborated, albeit implicitly, by the Court in *Costa*³⁷. It also poses a question as to the determination of

³⁶ Case 14/68 *Walt Wilhelm and Others v Bundeskartellamt* [1969] ECR I

³⁷ Case 6/64 *Costa v ENEL* [1964] ECR 565

compatibility of national proceedings with EC law. In particular, can multiple sanctions exist for the same conduct, one imposed by the Member States and the other by the Community?

The area of competition law is one of those areas that Community policy making is not subject to any explicit exceptions apart from the possibility of Article 81 (3) EC where an anti-competitive agreement may be saved (determined by the Commission). In particular, Article 81(1) EC poses extreme limits on private autonomy and freedom of contract of private undertakings. Deckert comments: “in such cases we have a true conflict of competences that cannot be solved simply by proclaiming direct primacy or unconditional supremacy of Community law. The theory of practical concordance does not sufficiently take into account this competency issue, which seems to be at the heart of the problem.”³⁸ The employment of the German judicial principle of practical concordance³⁹ to balance specific Community and national interests falls short of addressing the wider problem of competence delimitation between the former and the Member States.

Furthermore, in certain areas of shared competence the Court has assumed that the task of coordinating national legislation has been entrusted to the Community through a given Treaty provision without demonstrating that responsibility for attaining that objective was to be shared with the Member States. In *Germany v. Parliament and Council*⁴⁰, the Court facing a German challenge to the adoption of a directive harmonising national laws on deposit guarantee schemes held that “the legislature cannot be criticised for having provided for

³⁸ Deckert, M.R., “Some Preliminary Remarks on the limitations of European Competition Law” (2000) 1 *European Review of Private Law* 173-185

³⁹ Mortelmans, K., “The Relationship Between the Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market – Towards a Concordance Rule” (2002) 39 *Common Market Law Review* 1303-1346

⁴⁰ Case C-233/94 *Germany v. Parliament and Council* [1997] ECR I-2405.

an obligation to join a scheme, despite the proper functioning of a voluntary membership scheme in Germany.”⁴¹ The legal basis chosen by the Community legislature was Article 57(2), under which the Council may issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons. Most interesting was the Opinion of the Advocate General Leger who elaborated on the exclusive competence of the Community to exercise its competence on the given matter:

82. In such cases, however, competence is clearly stated to be shared. In contrast, at no time does Article 57 refer to the competence of the Member States. It entrusts the Community alone with the responsibility for the coordination of national legislation in this field, which shows that, from the very outset, the authors of the Treaty considered that, as regards the taking-up and pursuit of activities as self-employed persons, coordination was better achieved by action at Community rather than national level.

Thus, certain Treaty provisions act as a virtually complete regulatory code, severely restricting / pre-empting national freedom of manoeuvre. On the other hand other Treaty provisions offer only an incomplete regulatory code. This means that Member States enjoy the freedom to legislate only insofar as they respect their Treaty obligations. The Court’s jurisprudence on the free movement of goods (Articles 28-31 EC) provides a peculiar manipulation of a Treaty obligation in relation to measures adopted by Member States that can place a limit on the amount of imported goods and measures, which although not explicitly, create a hindrance to the free flow of goods. Article 28 EC is a key Treaty provision concerning the integration of national markets. The deregulation of national measures by the Community through Article 28 EC was in the early stages of the internal market considered crucial in creating a centralised environment where it was easier for

⁴¹ Ibid Para 82 of judgment

importers to break into the market. As we will examine below, the Court pushed this deregulatory momentum too far by unleashing negative integration to build more than a liberalised trade area. However its case law has not always been consistent creating therefore problems in setting limits to the outer boundaries of Article 28 EC.

Both in *Dassonville*⁴² and *Cassis de Dijon*⁴³ the Court established that even non-discriminatory equal burden rules which did not favour domestic products over imports, could be caught by Article 28 EC. The distinction between equal burden rules and dual burden rules is a test based on the existence of direct or indirect, actual or potential discrimination by the importing Member State. Equal burden rules apply to all goods and are not designed to be protectionist. They do not have a greater impact on the sale of foreign goods, even though they can affect the overall trade volume. On the other hand, dual burden rules apply to imported goods that have fulfilled similar rules in their state of origin. There was a point in the case law of the Court where equal burden rules had no effect upon the importation of goods and escaped the prohibition of Article 28 EC⁴⁴. Article 28 EC was thus only aimed to cover dual burden rules, which in most cases concerned the content - inherent characteristics of the imported goods. However, after its decision in *Cinéthèque*⁴⁵, the Court started to experience difficulties on the outer boundaries of Article 28 EC. It held that the rule in question, which applied equally to domestic and imported videos, was *prima facie*

⁴² Case 8/1974, *Procureur du Roi v. Dassonville* [1974] ECR 837

⁴³ Case 120/1978 *Rewe Zentrale AG v Bundesmonopolverwaltung für Branntwein (Cassis De Dijon)* [1979] ECR 649. *Cassis* established that national rules would still be in breach of Article 28 EC even though they do not discriminate against imported goods but hinder free trade because they are simply different than the national rules of the country of origin of the imported goods.

⁴⁴ See Case 155/80 *Oebel* [1981] ECR 1983. The case concerned an equal burden rule prohibiting the delivery of bakery products to consumers and retailers at night. The Court concluded that this rule was not caught by Article 28 EC.

⁴⁵ Joined Cases 60 and 61/84, *Cinéthèque SA v. Fédération Nationale des Cinémas Français* [1985] ECR 2605

within Article 28 EC. Equal burden rules could be caught by Article 28 EC unless there was an objective justification under EC law and the method of attaining that objective was proportionate.

This was challenged in *Keck*⁴⁶ where the Court took a step backwards and excluded the application of Article 28 EC from rules that do not prevent market access (equal burden rules) by labelling them selling arrangements. The Court distinguished between measures falling under the prohibition of Article 28 EC (relating to the inherent characteristics of the goods) and measures that escape the prohibition of Article 28 EC (relating to the extrinsic characteristics of the goods). The latter, known as selling arrangements, although affect the sale of goods they do not aim to regulate trade. The Court's decision in *Keck* did not rescue the application of Article 28 EC from ambiguity as to what constitutes a selling arrangement and what a rule relating to the nature of the product⁴⁷. However, *Keck* demonstrates the Court's change of attitude from its previous anti-protectionist manner towards a willingness to sustain a mature regime of market integration where trade liberalisation can be achieved without strict economic deregulation⁴⁸. The case outcome of *Keck* reflects a respect for the traditional value of subsidiarity and gradual limitation of the Community's competence to interference with national policy-making. After *Keck* the free movement of goods principles are not aimed at deregulating economic measures but at liberalising trade in a way which reflects the precise wording of Article 28 EC. But still the Court's approach reflects a semi-

⁴⁶ Cases C-267-268/91 *Keck and Mithouard* [1993] ECR I-6097

⁴⁷ See Case C-391/92 *Commission v Greece* [1995] ECR I-1621; Case C-368/95 *Vereinigte Familiapress Zeitungsverlags und Vertriebs GmbH v Heinrich Bauer Verlag (Familiapress)* [1997] 3 CMLR 1329

⁴⁸ For details over the case-law see Weatherill, S., "Recent Case Law Concerning The Free Movement Of Goods: Mapping The Frontiers Of Market Deregulations" (1999) 36 Common Market Law Review 51

decentralised model as the Community still maintains competence to strike down discriminatory state measures even though these are labelled as selling arrangements⁴⁹.

One has to balance the division between the Community's interests and the Member States' responsibilities to their nationals in order to assess whether there should be a difference between trade liberalisation and economic deregulation in a single market. The whole issue shifts to the question of competence⁵⁰. Should national regulatory autonomy be undermined by the Member States' Treaty obligations that emphasise the Community's harmonisation imperative or should states rather be left to regulate their markets freely? Seeing the purpose of the single market as "*a fusion of the national markets*" harmonisation at Community level appears desirable. On the other hand, if we establish that its objective is to "*facilitate individual freedoms*"⁵¹ a more active state involvement seems to be appealing.

3. After the adoption of Community Secondary Legislation

The Member States' freedom to legislate is not only conditional upon their Treaty obligations but also upon obligations imposed by Community secondary legislation. Once the Community has legislated in a sector, Member States may no longer be competent to do so in the field covered by this legislation, except to the extent necessary to implement it. It is important that this prohibition is usually unwritten and attributable to the principle of supremacy of EC law. Therefore, by attributing precedence to the legislative rules adopted

⁴⁹ Case C-368/95 *Familiapress* [1997] 3 CMLR 1329

⁵⁰ "Disputes over the application of Article 28 are disputes over different conflicting Constitutional models: Harmonised rules in a Centralised model are achieved through positive integration at Community level. In a Competitive or Neo-liberal regime harmonisation is achieved through a Darwinian competition, for only the fittest state measure survives in a *laissez faire* market. Finally in a Decentralised model Member States keep hold of regulatory powers in a system based very much on competition and anti-protectionism. All these conceptions presuppose different legitimacy sources: Therefore one comes across three sources of legitimacy: The Community, the self-regulated market and the National democratic authority."

⁵¹ Chalmers, D., "Repackaging the Internal Market - The Ramifications of the Keck Judgment" (1994) 19 *European Law Review* 385

by the Community over those of the Member States, Community competence becomes pre-emptive through its exercise. What is more, the areas of Community harmonisation cannot be characterised as examples of pre-emptive exclusivity per se, since power has not passed definitely to the Community. This however does not prompt certain Community secondary legislation from having full or partial pre-emptive effects (i.e. occupy the relevant regulatory field, preventing national exercise of competence)

(a) Fully pre-emptive effect

When Community legislation is fully pre-emptive, Member States are entirely barred from exercising their regulatory competence in the particular sphere. The case of *Commission of the European Communities v United Kingdom and Northern Ireland*⁵² involved Directive 76/756/EEC on the approximation of the laws of the Member States relating to the installation of lighting and light-signalling devices on motor vehicles, as amended by Directive 83/276 EEC. The UK had decided that Directive 76/756/EEC, which specifies the harmonised technical requirements applicable to the installation of lighting and light-signalling devices, does not contain an exhaustive harmonisation of the requirements relating to the installation of lighting devices. This means, according to the UK, that Member States have the power to lay down additional requirements such as the installation of dim-dip lighting devices. The Court rejected this argument holding that the UK had failed to fulfil its obligations under the Treaty by adopting the Directive.

This approach by the Court necessitates a definition of the precise scope of application of the Community's secondary legislation. In fact the Court established in subsequent decisions that national competence is pre-empted within the scope of

⁵² Case 60/86 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland (Dim-Dip Headlights)* [1988] ECR 3921

Community law but nonetheless survives intact outside. In *Mayenne Cooperative*⁵³ the Cour de Cassation asked the Court of Justice whether the French rules on insemination of animals (where each authorised insemination centre serves an exclusive territory and imports of semen from other Member States are free but must be delivered to authorised production or insemination centres) were compatible with the rules of the Treaty on competition and on the free circulation of agricultural products. The Court held that the granting of exclusive rights did not infringe the Community's principles of Competition law under Articles 90(1) and 86 EC since the 'abuse' concerned the allegedly exorbitant prices charged by the insemination centres and not an encouragement by the French law to the centres to charge disproportionate costs. The Court added that if the obligation to deliver semen to the authorised centres was caught under Article 30 EC (now 28) it could be justified on the grounds of health under Article 36 EC (now 30) - provided that it is proportionate to its aim so that the pricing policy did not discriminate actually or potentially against imported semen.

What is important in terms of the vertical distribution of competence is that the Community had not harmonised by means of legislation the trade of semen within the internal market. Pre-emptive Community harmonisation indeed plays a significant role to the extent of Member States' competence⁵⁴. One however should not underestimate the principle of 'mutual recognition' as an additional factor of limitation to national competence. The operation of the principle of mutual recognition between Member States

⁵³ Case C323/93 *Societe Civile Agricole du Centre de l'Insemination de la Crespelle v Cooperative d'Elevage et d'Insemination Artificielle du Departement de la Mayenne* [1994] ECR I-5077; See also Case Comment (1995) 20(6) *European Law Review*, Supp. (Competition).

⁵⁴ See the new approach to technical harmonisation where both harmonised safety specifications for products and the principle of mutual recognition may contribute seriously in reducing national competence to legislate.

on product requirements case law demonstrates that regulatory control lies in principle with the state of origin whilst the exercise of control is also undertaken by the state of importation. This results in a double regulatory burden. Nevertheless, in this case not only was the subject matter not harmonised by the Community but also the relevant French legislation did not hinder the marketing of imported products, it neither favoured domestic products or imported ones. As a result, the requirement that all semen coming from outside the exclusive territory needed to be delivered to the competent centre, applied equally to both domestic and imported products.

(b) Partially Pre-emptive effect

Having examined about the fully pre-emptive effect of Community secondary legislation, there are cases where Member States retain the competence to engage in regulatory activity even within the relevant field of Community secondary legislation. This can be interpreted as the exception to the general rule that expects Directives to harmonise national laws providing common rules for the achievement of a more integrated internal market. A Directive, when adopted constitutes more than a point of reference as to the field that it addresses. It is a governing norm for the respective field safeguarding the interests in question. Yet there are situations where the pre-emptive effect of EC soft law is only partial. This occurs intentionally to allow national regulatory competence operate without non-exhaustive Community harmonisation, especially in terms of the marketing of products.

A Directive is 'minimum' in character only insofar as this is indicated in the Treaty basis or in the Directive itself. There, national regulation is allowed as long as it respects the principle of market access being a fundamental principle of the internal market as established by the Treaty. In particular, Member States are competent to enact regulatory

code for products intended to circulate only in their domestic market next to the already established Community regulatory codes that aim to achieve what is often called minimum harmonisation⁵⁵ for the marketing of products circulating in the internal market. Minimum harmonisation therefore occurs when the Community rule provides a 'floor of rights' without preventing Member States from applying stricter standards provided they are otherwise compatible with the Treaty. This means that there is a Community wide standard with which every Member State needs to comply as a minimum. Minimum harmonisation differs from total harmonisation since Member States are allowed to do more by deciding on stricter standards.

Member States are competent to enact higher standards and the Treaty contains legal bases for minimum harmonisation measures adopted for the protection of consumers (Article 138 and Article 153 EC) and the environment – particularly quality standards - (Article 176 EC), to name but a few. Yet, one could argue that if Member States are allowed to protect their domestic markets against imported products using only minimum standards then it is the Community that should ultimately decide. The realisation of the internal market contains a continuous conflict between an uncontrolled market re-nationalisation and the goal of keeping a high level of protection under the Communitarian harmonisation of national standards. The political choices of the Community are important in adopting harmonisation at a high level of protection or mutual recognition and / or harmonisation at a low level of protection. For example, the recent European enlargement has, among else, raised questions as to the degree that new Member States can take on a complete

⁵⁵ Directive 71/316/EEC on the approximation of the laws of the Member States relating to common provisions for both measuring instruments and methods of metrological control, 26 July 1971, O.J. L 145, 27/06/1972 p. 11

environmental *acquis*⁵⁶. Their accession to the Community may therefore bring a lower level of protection in the decision of environmental policies. Alternatively, a higher level of protection may take place among a core group of States, which favour a high degree of harmonisation. This however may encourage the development of a multi-speed Europe, which is discussed in Chapter 7.

Articles 94 and 95 EC do not make reference to minimum harmonisation and in fact most Directives related to products do not permit this technique. In both cases a Member State remains free to act subject only to the control of primary EC law. This occurs according to Weatherill “because of the impediment to market integration which would follow abandonment of classic pre-emption, in contrast to environmental measures which have long had the minimum formula, accepting some incidental barrier to goods.”⁵⁷ In *R. v Secretary of State for Health Ex p. Gallaher Ltd*⁵⁸, British producers challenged the legality of the UK’s scheme on health warning labels printed on cigarette packets for posing a higher burden upon domestic products (a warning covering 6% of the surface area of the packet) compared to imported products (a warning covering 4% of the surface area of the packet according to Directive 89/622). The case went to the Court for interpretation of Directive 89/622⁵⁹ [particularly Articles 3 (3); 4(4); 8(1); 8(2)] on the labelling of tobacco products, which was intended, inter alia, to harmonise national laws on the size of health warning labels printed on cigarette packets declaring [according to Article 3(3)] that “the indications

⁵⁶ Carius, A., Von Homeyer, I., and Bär, S., “The Eastern Enlargement of the EU and Environmental Policy: Challenges, Expectations, Speed and Flexibility” in Holzinger, K., and Knoepfel, P., (eds) “Environmental Policy in a European Union of Variable Geometry? The Challenge of the Next Enlargement” Basel: Helbing & Lichtenhahn, Switzerland, (2000).

⁵⁷ See Weatherill, S., “Regulating the Internal Market: Result Orientation in the Court of Justice”, (1994) 19 (1) *European Law Review* 55-67

⁵⁸ Case C-11/92 [1993] ECR I-3545

⁵⁹ The Directive was adopted by qualified majority under Article 100a as part of the Council’s 1986 Resolution on action against cancer.

of tar and nicotine yields shall be printed on the side of cigarette packets...so at least 4 per cent of the corresponding surface is covered". Moreover according to Article 8(1) of the Directive, Member States should not impede the market access of products that comply with it. However, under Article 8(2), Member States maintain the right to pose "in compliance with the Treaty, requirements concerning the import, sale and consumption of tobacco products which they deem necessary in order to protect public health, provided such requirements do not imply any changes to labelling as laid down in this Directive."

This in conjunction to the "at least..." phrase in Article 8(1) can be interpreted in the following way: the EC Directive on labelling cigarette packets is intended to allow Member States the freedom to impose stricter conditions on domestic tobacco manufacturers. These conditions however do not catch importers since that would impede the Treaty's free movement of goods principles⁶⁰. Such an approach, adopted by the Court, is at odds with Advocate General Lenz's Opinion that Article 95 is intended to eliminate competitive distortion in the internal market⁶¹. Further, the Directive in question did not contain a market access rule similar to Article 3 of Directive 79/112 on the approximation of laws relating to labelling of foodstuffs⁶². Despite that, the Court ruled in favour of the UK. A broad interpretation of Article 8(1) of the Directive allowed the UK to adopt a more effective health policy by imposing higher objectives for internally produced tobacco products even if such a teleological interpretation could produce inequality in competitive conditions. As to any reservations about such an approach, the Court concluded: "those consequences are

⁶⁰ See Case C-267-268/91 *Keck and Mithouard* [1993] ECR I-6097; Case C-415/93 *Bosman* [1995] ECR I-4921

⁶¹ Advocate General Lenz's Opinion, delivered on March 2, 1993. The Advocate General was in favour of the tobacco manufacturers supporting that Article 8(1) refers to "sale" not "importation". He stressed that if a Member State can place extra burdens on domestic producers the spirit of Article 95 aimed to eliminate competitive distortion in the internal market would be frustrated.

⁶² OJ L 033 (08.02.1979)

attributable to the degree of harmonisation sought by the provisions in question, which lay down minimum requirements.“ The decision in *Gallaher* has been the subject of academic criticism for being “underdeveloped”. This is not unreasonable considering that “the Court itself has chosen to blur the apparently clear picture of the limits of the technique of minimum harmonisation.”⁶³.

The outcome of *Gallaher*, may suggest a preference for minimum harmonisation against the traditional notion of pre-emption. This soft approach by the Community (to allow decentralisation of regulation through minimum harmonisation even where the Treaty does not require⁶⁴) might be greeted with contentment in the Member States, given the difficulty of application of a single pre-emptive regulatory code in a Union of twenty-five Member States. As to the matter of balancing vertically the scale of powers in the Community, it appears that the allocation of competence within the EC is evolving in favour of the Member States. This hypothesis contradicts the previous situation where Community’s instruments had a fully pre-emptive effect but it does not imply a re-nationalisation of Community’s policy. If then the outcome of *Gallaher* does not ignite doom scenarios about the fate of the vertical division of competence within the Community, it reminds to one of the *Keck* dicta: there the question of competence was hidden beneath the Court’s dilemma of where market integration stops and national regulatory capacity begins. The outcome in *Gallaher* may thus mirror the Court’s consideration to the principle of subsidiarity. By ruling in favour of the UK while turning down the claim of domestic manufacturers one could identify behind the Court’s decision a political compromise

⁶³ Weatherill, S., “Regulating the Internal Market: Result Orientation in the Court of Justice”, (1994) 19 (1) *European Law Review* 55-67

⁶⁴ See Edinburgh European Council, December 1992, particularly its approach in setting minimum standards. Presidency Conclusions available at www.europarl.eu.int/summits/edinburgh/default_en.htm

between the Community and the Member States through a profound respect of the former to national sensitive regulatory choices.

C. COMPLEMENTARY COMPETENCE

1. Complementary Competence and Treaty Obligations under Article 18(1)

Complementary competence covers areas where Community action is supplementary to or supporting the action of the Member States⁶⁵. EC and national competences can therefore co-exist on the same plane and be exercised in parallel. This means that when the Community exercises a competence the Member States are not blocked from regulating in the given field, as when the area in question falls under shared competence. In contrast, national autonomous action is allowed and the Community may 'complement' (Article 164 EC) such an action and 'contribute' [Article 157 (3) EC] to achieve the common objectives set out in the Treaty. This of course stands insofar as the measures enacted do not come at different ends but rather support each other. When however problems arise the principle of supremacy of EC law applies as a coordinating norm.

Having said that in areas of complementary competence the Community may adopt legally binding acts, these do not have a harmonising / pre-emptive effect. Therefore regulatory power remains vested in the Member States with Community's intervention having a complementary effect. For instance, in relation to Education, Vocational Training and Youth (Title XI, Chapter 3 EC) Article 149 EC refers to the role of the Community in

⁶⁵ Community competence involve generally Economic and Social Cohesion; Employment; Customs Cooperation; Education, Vocational Training and Youth; Culture; Public Health; Trans-European networks (except for interoperability and standards); Industry; Research and Development; Development Cooperation; Common Defence Policy (Title V of the TEU).

“encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity....” The Council adopts measures by co-decision (Article 251 EC) “excluding any harmonisation of the laws and regulations of the Member States” and recommendations acting by a qualified majority on a proposal from the Commission. The same also applies to cultural policy; most aspects of public health policy; employment and industrial policy. Von Bogdandy and Bast add a subcategory to parallel competences: ‘non regulatory powers’.

Complementary competence refers only to Community regulatory powers under relevant legal bases. Member States are also bound within these policy sectors by obligations contained in the Treaty. In *Grzelczyk*⁶⁶ the applicant, a French national studying at a Belgian university, was refused a minimum subsistence allowance on the ground that a person of non-Belgian nationality was only entitled to the benefit if, inter alia, he was a “worker” within the definition of Regulation 1612/68. In this case the applicant was not a worker. The Court stressed that since the relevant Regulation did not apply to Belgian nationals as a condition to determine the allocation of the benefit, the Belgian law was discriminatory on grounds of nationality. This was contrary to Article 6 EC of the Treaty that had to be read in conjunction to the Union Citizenship provisions of Articles 8 to 8e EC (emphasising that same treatment in law should apply to all Community nationals irrespective of nationality). Additionally, the Court said that the Directive 93/96/EEC on the right of residence for students did not preclude students from receiving social security benefits from the host state. However the Court recognised in agreement with the

⁶⁶ Case 184/99 *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies Louvain la Neuve* [2001] ECR I-6193

Directive's preamble, that Member States have a legitimate interest in preventing other EU nationals being a burden on their public finances. In that case, the Member State in concern may consider that the claimant no longer fulfils the conditions laid down by Article 18(1) EC and may revoke or refuse to renew his/her residence permit and/or even expel him/her from the country.

The approach of the Court in *Grzelczyk* overruled its previous decision in *Brown v Secretary of State for Scotland*⁶⁷ where student maintenance grants were considered as falling outside the scope of Community law⁶⁸. This is due to the fact that at the time *Brown* was decided, EU citizenship had not yet been introduced in the Treaty and competence over education and vocational training was less clear. Thus, comes the difference in the Court's judgment in *Grzelczyk* confirming that in areas of complementary competence Member States have to respect the obligations of Citizenship contained in the Treaty. The Court confirmed that students, under certain conditions, could claim equality of treatment pertaining to social benefit. It imposed restrictions on Member States' powers to end the lawful residence status of poor nationals coming from other Member States. As to the "certain conditions" where a Member State can deny equality of treatment pertaining to social benefit, the Court emphasised that recourse to social benefits is not a sufficient reason for a Member State to withdraw residence permits or refuse to grant new permits. It is only if a Member State demonstrates that nationals of other Member States have or will become an unreasonable burden on its social assistance scheme that it can take such measures. Contrary to Directives 93/96, 90/365 and 90/364, the Court read into these Directives "a

⁶⁷ Case C-197/86 *Brown v Secretary of State for Scotland* (1988) ECR 3205, at 3243

⁶⁸ See Para 18 of the judgment: "at the present stage of development of Community law, assistance given to students for maintenance and training falls outside the scope of the EEC Treaty for the purposes of art 7 thereof (now Article 6 EC).

certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States”.

Furthermore, the Court’s decisions in *Martinez Sala*⁶⁹ and more recently in *Baumbast*⁷⁰ demonstrate the legal effects of Union citizenship. Not only has EU Citizenship been constitutionalised by the Treaty of Maastricht but also after *Baumbast* Article 18(1) EC it enjoys direct effect within the Member States. Theoretically, it can be invoked by private individuals - as long as they are nationals of a Member State - before their national courts. Regardless of whether they engage in some form of economic activity and receive remuneration in order to satisfy the requirements of Article 39 EC and the Court’s established case law⁷¹, EU Citizens can secure residence and social advantages in general⁷² subject to limitations contained in the Treaty⁷³. The judgments in *Grzelczyk* and *Martinez Sala* suggest that independent family members, who hold the nationality of a Member State and reside with the worker in the state of employment, are entitled to rely on Article 12(1) EC (discrimination on grounds of nationality). Thus, they are entitled to social benefit under the same conditions as the nationals of the host state. This is important since a Member State cannot terminate the lawful residence of an EU citizen on the basis of his / her economic inactivity and need of social benefit. Both in *Grzelczyk* and *Martinez Sala* the Court only referred to EU Citizens lawfully residing in the territory of another Member State but after *Baumbast* third country family members who have use of the right to reside guaranteed by

⁶⁹ Case C-85/96 *María Martínez Sala* [1998] ECR I-2691

⁷⁰ Case C-413/99 *Baumbast* [2002] ECR I-0000

⁷¹ Case 53/81 *Levin* [1982] ECR. 1035; [1982] 2 CMLR 454; Case 139/85 *Kempf* [1986] ECR 1741

⁷² Prior to *Baumbast* economically inactive persons derived their residency rights from Directives 90/364, 90/365 and 93/96. The rights of residency were subject to the claimant’s sufficient resources and his/her proof of comprehensive medical insurance.

⁷³ See Case C-357/98 *ex parte Yiadom* [2000] ECR I-9265

Article 10 (1) of EC Regulation 1612/68 also fall within the personal scope of Community law and thus Article 12 (1) EC.

This, however, challenges the integrity of welfare systems organised along national boundaries and dismisses the previously successful claims of Member States that such claimants constitute an ‘unreasonable burden’ on public finances being, as often referred, ‘welfare tourists’. Thus, comes the pre-*Baumbast* reluctance of the Court to accept preliminary references solely on grounds of interpretation of Article 18(1) EC⁷⁴. The Court’s jurisprudence can be criticised for not giving sufficient regard to the Member States’ interests. One could argue that Articles 12 and 18 EC should not have been interpreted as to impose on Member States the obligation to grant benefits irrespective of the individual’s participation in the workforce and economic contribution to the society in general. In that respect, the extent of application of Article 18(1) EC is in fact somewhat atypical. On the one hand Member States have to respect their obligations contained in the primary Treaty rules on EU Citizenship and on the other the practical significance of Article 18(1) EC is restrained due to the Community’s limited competence over the regulation of the welfare systems of its Member States.

Jacqueson⁷⁵ speaks of a rather ‘symbolic’ notion of EU Citizenship since “the Member States still hold exclusive competence in conferring their nationality while citizenship of the Union depends on whether one is a national of a Member State or not”.

⁷⁴ Quoting from Dougan, M. and Spaventa, E., “Educating Rudy and the Non-English Patient: A Double Bill on Residency Rights Under Article 18EC”, (2003) 28(5) European Law Review, 699-712

“e.g. Case C-100/01, *Olazabal* [2002] E.C.R. I-10981, on Art.39 EC; Case C- 193/94, *Sknavi* [1996] E.C.R. I-929; [1996] 2 C.M.L.R. 372, on Art.43 EC. Cf. Case C-92/01, *Stylianakis* (judgment of February 6, 2003), on Art.49 EC. However, the Court’s attitude has not always been consistent, e.g. Case C- 274/96, *Bickel and Franz* [1998] ECR I-7637; Case C- 135/99 *Elsen* [2000] ECR I-10409”

⁷⁵ Jacqueson C., “Union Citizenship and the Court of Justice: Something New Under the Sun? Towards Social Citizenship”, (2002) 27(3) European Law Review 260-281

This however does not imply that Community law cannot set limits to the sovereign power of the States when they put in danger the fundamental principles as laid down by the Treaty⁷⁶. By its decisions in *Grzelczyk* and *Baumbast* the Court did not make EU Citizenship, as established by Article 17 of the Treaty and Declaration No. 2 on Nationality attached to the Maastricht Treaty, unconditional, but rather limited the extent of the restrictions set by the previously mentioned Directives on Residence while respecting the regulatory power of the Member States. It is unrealistic to think that the funding of social assistance schemes will be gravely affected as a result of the Court's decisions in *Grzelczyk* and *Martínez Sala*. Besides those judgments do not grant an unconditional right to free movement of persons in the Community. Economically inactive EU citizens would still be required to satisfy the national eligibility criteria and present proof that they will not become a burden on the social assistance system of the Member State they wish to establish. It is rather the problem of a temporary financial need that *Grzelczyk* aims to address in relation to the right of residence and not to provide a panacea for intra-Community migration and social assistance benefits.

Conclusion

Having analysed the main categories of Community competence (exclusive, shared and complementary) this chapter attempted to provide a general flavour of the way competences are allocated vertically in the Community. To set the exact limits of the Community's express powers would imply a detailed analysis of each and every provision of Part III of the Treaty, something that Dashwood considers as "the subject...of a lifetime

⁷⁶ For instance a deprivation of nationality would breach Article 17(2). Thus, such a national practice would be against a Treaty obligation and is not related to the division of competence vis-à-vis the Community. See D'Oliveira, "Nationality and the European Union After Amsterdam Legal Issues of the Amsterdam Treaty", in O'Keeffe, D., and Twomey, P., (eds.), "Legal Issues of the Amsterdam Treaty", Oxford, Hart, (1999), pp. 395-412.

study”⁷⁷. Instead, this Chapter focused on the manner of allocation of vertical Community competences through broad categorisation. The account of the main categories of internal subject-related competence of the Community (as opposed to objective-related competence that constitutes the subject-matter of the next chapter) therefore provided an overview of the wording of the relevant Treaty provisions and the Court’s case law.

Such an assessment aimed to demonstrate that the problem of a clear delimitation of internal Community competences lies in the fact that those competences attributed to the supranational cannot be regarded separately from those attached to the intergovernmental arena. Instead, competence in Community law is based on an interplay between the two levels, establishing what Pernice identifies as “a cooperative system of separation of powers”⁷⁸. Any attempt to establish a clear separation of powers between the Community and the Member States in relation to the various levels of competence needs to take into account the existence of the cooperative system of power-separation that exists in the Community. This makes problematic the drawing of clear-cut lines of responsibility along with a strict allocation of competence.

⁷⁷ Dashwood, A., “The Limits of European Community Powers” (1996) 21 (2) *European Law Review* 113

⁷⁸ Pernice, I., “Kompetenzabgrenzung im Europäischen Verfassungsverbund” (2000) *JZ* 866, 871 *Antrittsvorlesung*”

CHAPTER 4

THE MAIN CATEGORIES OF OBJECTIVE RELATED EC / EU INTERNAL COMPETENCES

Introduction

Contrary to subject related competences linked to the conduct of Community policies, objective related competences are associated with the achievement of the Community's internal market goals. As it has already been illustrated, for every proposed Community act there must be an authorisation under a legal basis within the Treaty. However, a focus on the past use of the specific provisions of Article 95 EC¹ and the broader revision clause of Article 308 EC by the Community's legislature suggests that these general legal bases have often been interpreted broadly by the Parliament and the Council. This has often generated fear in the Member States with regard to the effectiveness of the principles of attributed powers and subsidiarity, creating what has often been referred in academic literature as the problem of 'creeping competence'. The term 'competence creep' has been used by academics² to demonstrate that in the present system, which governs the attribution and exercise of competence, the Community and its Institutions have encroached upon the sovereign spheres of the Member States.

¹ Article 95(1) EC reads: "The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."

² Weatherill, S., "Competences" in De Witte, B., *Ten Reflections on the Constitutional Treaty for Europe*, European University Institute Florence, (2003) at 45-66; Hoffmann, L., and Shaw, J., "Constitutionalism and Federalism in the 'Future of Europe' debate: The German Dimension", (2004) Online Paper 03 / 04, European Federal Trust, London

Against the post-Nice effort, culminating in the EU Constitutional Treaty, to establish a clearer and more precise delimitation of competence, one comes across instances where the adoption of measures by Community Institutions exceeds the limits of the Community's regulatory competence. This Chapter will focus upon the Community's competence to regulate public health under Article 95 EC (especially with regard to tobacco advertising) and to conclude international agreements under Article 308 EC (especially the European Convention of Human Rights). Examples from the relatively recent case law of the Court will be used in order to present the current problems of clarity as regards the attribution, exercise and control of competences within the Community. In each case the Court has encountered a conflict between the attempts of the EC Institutions to establish clear constitutional boundaries on a given area of national competence and the deliberate adoption of EC legislation on that same area, which goes beyond those limits.

The first part of the Chapter, which focuses on the so-called 'Tobacco Cases', examines the problem behind the lack of sufficient legal competence, when the Community attempts to pass harmonisation measures under Article 95 EC that aim to protect public health. The German *Tobacco Advertising Judgment*³ has been chosen as an indicative example of this challenge. Contrary to the Directive adopted by the Parliament and the Council, the Court recognised that the prohibition on tobacco advertising and sponsorship was not an internal market measure. Thus, the EC Institutions exceeded their legal competence in introducing a disguised 'internal market measure' that was intended to regulate public health. The Court, however, left open the possibility of a prohibition

³ Case C-376/98 *Germany v Parliament and the Council* [2000] ECR I- 8419

with a more limited scope, confined to areas where foreseeable obstacles to free movement of goods and services exist and where distortion of competition would be appreciable. In a relevant case⁴, it held that the Directive in question genuinely had as its object the improvement of the conditions for the functioning of the internal market. Thus, it was possible for it to be adopted on the legal basis of harmonisation of the internal market.

The second part of this Chapter will examine the Community's competence under the general provision of Article 308 EC. It will attempt to address the question of how far can Article 308 EC serve as the basis for widening the scope of Community competence. The author will focus on the Court's approach to the Community's competence to conclude an international agreement, particularly on the compatibility of accession to the European Convention of Human Rights (ECHR). In an act of self-restraint, the Court ruled in Opinion 2/94⁵ that the Union lacked the power to accede to the ECHR. This created an ideological split between those who argued that respect for human rights does not represent one of the objectives of the Community and those who argued the contrary. According to the former, the Community should not be competent to legislate over human rights issues and conclude international conventions since its objectives are limited to the politico-economic sphere of integration. According to the latter, the protection of human rights consists one of the objectives of the Community and its accession to the ECHR would prevent potential human rights violations by Community Institutions. This however suggests that the partial transfer of sovereignty by Member

⁴ Case C-491/01 *BAT Investments LTD & Imperial Tobacco v Secretary of State for Health* [2003] 1 CMLR 14

⁵ Opinion 2/94 *Accession by the Community to the ECHR* [1996] ECR I-1759

States in a number of areas through their accession to the Community could also be extended in the future to the area of human rights. Therefore, had the Community Institutions granted a positive opinion by the Court, the use of Article 308 EC in the accession agreement to the ECHR would have reduced the importance of the principle of subsidiarity. Taking these considerations into account one can empathise with the Court's decision in Opinion 2/94 that Article 308 EC cannot serve as a basis for widening the scope of Community competence beyond the Treaty.

A. ARTICLE 95 EC AND THE COMPETENCE TO REGULATE HEALTH POLICY

Public Health and Article 95 EC

Successive Treaty revisions have bestowed to the Community competence to legislate in the fields of education and vocational training [Articles 149(4) and 150(4) EC] culture [Article 151(5) EC] and public health [Article 152(4) EC]. The introduction of Article 129 EC (now Article 152 EC) by the Treaty of Maastricht conferred for the first time upon the Community Institutions competence in the area of health. Yet, as with Articles 149(4); 150(4) and 151(5) EC, Article 152(4) expressly excludes “any harmonisation of the laws and regulations of the Member States”. Particularly, Article 152(4)(c) EC states that the “the Council...shall contribute to the achievement of the objectives referred to in this article through adopting... incentive measures designed to protect and improve human health, excluding any harmonisation of the laws and regulations of the Member States.” Thus, Community competence in public health under Article 152 EC has been classified as complementary to those of the Member States

excluding Community harmonisation. Article 152(4)(b) is the most suitable legislative basis for promoting cooperation in relation to health policy by adopting incentive measures using the co-decision procedure. There the Court determines its “proper construction...in the context of its jurisprudence and legal basis.”⁶

Health policy has become a general Community policy as emphasised in Article 2 EC (...raising of the standard of living) and Article 3 (p) EC (a contribution to the attainment of a high level of health protection). As a result, the preservation of health standards occupies almost every Community policy following the constitutionalisation of the internal market, from the movement of medicinal and hazardous goods to road safety and food quality⁷. Directly effective Treaty provisions may produce a deregulatory effect while promoting health and disease prevention. Member States need to respect the primary Community law, as their competence monopoly over the regulation of health is limited. Not only the Community Institutions but also domestic manufacturers acting as enforcers of EC law may rely upon a directly effective provision to contest national protective measures that violate health rights under EC law. Nevertheless, there are ways of securing national competence in relation to health policy. For example, the Treaty provides derogations from the free movement principles, as in the case of Article 30 EC, where Member States need to show, *inter alia*, a risk to public health in order to be exempted from the prohibition in Article 28 EC.

⁶ Hervey, T.K., “Community and National Competence after Tobacco Advertising”, (2001) 38 *Common Market Law Review* 1421-1446. See also Case C-180/96 *UK v Commission* [1996] ECR I-3903 pp 1423

⁷ See the European Commission, Communication on the Development of Public Health Policy in the European Community, COM (98) 230 final. The Communication outlines a possible new Community public health policy, based upon three elements: Better information exchange; Rapid reaction to emerging health risks and health determinants.

Although Community Institutions cannot under Article 152 EC directly adopt secondary legislation in the shape of harmonising measures aimed at the protection of human health, a legislative measure under a different legal basis may achieve similar results. For instance, a provision standing as a legislative basis for Community secondary legislation (e.g. Article 175 EC for environmental legislation) may be employed to achieve a health objective (e.g. improvement of air and water quality) as long as this is incidental to the core aim of the measure (e.g. to protect the environment) and the choice of the legal basis is the right for the realisation of that aim. The same occurs with regard to Community harmonisation measures adopted under Article 95 EC by the co-decision procedure for the establishment and functioning of the internal market. As long as they are considered necessary for the completion and proper operation of the internal market, their implications for national health policy may not raise a problem in relation to the balance of competences. This means that the Community does not enjoy a general competence to harmonise national health policies under Article 95 EC in the same way it did prior to the Single European Act and the Treaty of Maastricht using the old Articles 100 and 100a EC (now Articles 94 and 95 EC) to introduce legislation in areas not listed in the Treaties. These areas (e.g. health and environment) now form independent spheres of Community action. Thus, the competence problem arises when the Community attempts to regulate these policy sectors by introducing legislation based on the old bases of the renumbered Articles 94 and 95 EC. The question each time is whether the correct legal basis for such a measure has been used and whether these Treaty provisions, particularly Article 95 EC, provide such a basis.

Generally, the Community is only competent to harmonise national policies under Article 95 EC insofar as such action is necessary for the attainment of the internal market. Otherwise, a specific legal basis is more desirable than a general one. In a case against the Council, Germany contested Article 9 of Directive 92/59/EEC (now repealed by Directive 2001/95/EEC⁸) on General Product Safety⁹ on the basis that it could not be enacted under Article 95 EC. The directive created a broad-based legislative framework imposing a general safety obligation to producers of the Member States to withdraw dangerous products from the internal market. In particular, Article 9 of the Directive allowed the Commission to take decisions requiring Member States to withdraw or restrict the distribution of such products on the basis that they consist a threat to public health. The Court expressed the view that the directive was aimed at preventing national barriers to trade and distortion of competition within the internal market caused by the absence of horizontal legislation in some Member States protecting the health and safety of consumers. Additionally, Article 9 was considered as an *ultimo ratio* provision in cases of serious health risk posed by a product or lack of uniformity in the protection offered by national laws in relation to the product in question. Article 95 EC was utilised here as a supplementary guarantee to Article 30 EC allowing for adoption of measures for the approximation of national legislation and removal of obstacles in relation to the free movement¹⁰ of a type of product with the aim of protecting public health.

⁸ Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety, O.J. L 011, 15/01/2002 P. 0004 – 0017. It is to be applied if there are no specific provisions among the Community regulations governing the safety of products concerned or if sectoral legislation is insufficient.

⁹ Case C-359/92 *Germany v Council* [1994] ECR I-3681

¹⁰ See Case C-350/92 *Spain v Council* [1995] ECR I-1995

From the above one may conclude that in cases where a Community's harmonising measure serves a genuine internal market approximation aim as well as pursuing health objectives, the Court considers the measure as being adopted within the legitimate limits of Article 95 EC. However, Article 95 EC cannot be used if other legal bases are more appropriate. This was emphasised in the *Waste Directive Case*¹¹ and in *Parliament v Council (Waste Shipments)*¹² where the Court held that any effect of the measures in question to the internal market was ancillary. The Court decided that Article 175 EC was in these cases a more sufficient legal basis to Article 95 EC for the adoption of Directive 91/156 on waste and Regulation 259/93 on shipments of waste. The same argument was also present in the landmark Tobacco Advertising Judgement, the most recent attempt of the Court to define the boundaries of Community competence.

Once a measure has been adopted, Member States retain competence to preserve their national rules and to introduce new measures or provisional ones. Article 95 (4) EC provides safeguards as to the maintenance of national provisions "on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment". Furthermore, under Article 95 (5) EC introduced by the Treaty of Amsterdam Member States have the power to introduce new measures after the adoption of a harmonisation measure. Finally Article 95 (10) EC provides for a safeguard clause within the measure itself "authorising the Member States to take, for one or more of the

¹¹ Case C-155/91 *Commission v Council (Waste Directive)* [1993] ECR I-939

¹² Case C-187/93 *Parliament v Council (Waste Shipments)* [1994] ECR I-2857

non-economic reasons referred to in Article 30, provisional measures subject to a Community control procedure.”¹³

1. The Tobacco Advertising Judgement

The Court has over the years limited the scope of Article 95 EC affirming in its case law that the internal market goes as far as the scope of the fundamental Community freedoms. This suggests that fields of competence such as public health, which extend beyond the internal market scope, include merely the establishment of minimum standards by the Community. This was illustrated in *Germany v the European Parliament and Council*¹⁴, known also as the *Tobacco Advertising Judgment*¹⁵. Germany contested the validity of Directive 98/43 EC¹⁶, which laid down a general prohibition on advertising and sponsorship of tobacco, on the grounds of a wrong legal basis for its adoption under Article 95 EC (ex Article 100a EC). The directive in question did not contribute to market building to such an extent that the harmonisation provision of Article 95 EC could be triggered. Thus, instead of pursuing the attainment of the internal market through eliminating obstacles to its functioning, it constituted a measure designed to protect health since the prohibition of tobacco advertising is predominantly related to that aim.

¹³ Case C-41/93 *France v Commission* [1994] ECR I-1829; Case C-3/00 *Denmark v Commission* [2003] ECR I-2643

¹⁴ Case C-376/98 *Germany v Parliament and the Council* [2000] ECR I- 8419

¹⁵ In fact, two cases appeared before the Court: first, the already mentioned action for annulment brought by Germany and second, a request for a preliminary ruling by the UK from the High Court of Justice after proceedings brought by tobacco manufacturers in *R v Secretary of State for Health, ex parte Imperial Tobacco* [2000] ECR I-8599

¹⁶ O.J. L213, 30/07/1998 p.0009 – 0012. The Council formally accepted the decision on 22 June 1998. It was decided that the directive would enter into force on 30 June 1998 and that it must be implemented by the Member States within three years.

Germany argued, therefore, that the legal basis for a directive on the approximation of laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products should be Art. 152 EC. The Advocate-General did not agree with that argument for the obvious reason that if the directive could not be presented as an internal market measure it would fail to be adopted. Article 152 EC could not be used as the legal basis for the directive simply because it cannot be utilised to achieve this end due to the exception in section 4. As the EC Treaty explicitly excludes in Article 152 (4) (c) EC the possibility of harmonisation legislation to protect public health, the Community was not competent to draft a directive relating to the advertising and sponsorship of tobacco products. Accordingly, in deciding upon the validity of the directive, the Court held that the Community could not extend indirectly its harmonization policy to health protection using Article 95 EC as a legal basis.

Although the Tobacco Case was not decided on the ground of the incorrectness of the legal basis cited for the adoption of the Directive, but on the Community's lack of competence to regulate public health, the choice of legal basis constitutes a great component of the case. When it comes to the choice of the right legislative basis, as De Búrca comments, "the crisis of the competences' scale lies more on the Union's institutional shape rather than its definitional clouds"¹⁷. While the general question concerning the extent of the Community's harmonisation competence in respect to the Member States' health policy is relevant to the allocation of vertical competence, the question of choice of the right legal basis in relation to the adoption of secondary legislation involves issues of horizontal competence related to the institutional balance of

¹⁷ De Búrca, G., "Setting Constitutional Limits to EU Competence?" Faculdade de Direito da Universidade Nova de Lisboa, (2001) 1001/02 Francisco Lucas Pires Working Paper, Series on European Constitutionalism

the Community. Thus the choice of a legislative basis to regulate an area does not only involve considerations of Community competence creep over national regulatory freedom. It also concerns different institutional requirements as regards the voting procedure in the Council and the legislative role of the Parliament or the Economic and Social Committee¹⁸.

In *Commission v Council (Beef Labelling)*¹⁹, the dilemma in the choice between Article 37 EC (ex 43 EC) (Agriculture) and Articles 95 EC as a legal basis for the adoption of Regulation 820/97 (labelling of beef in response to the BSE crisis) raised political arguments about the status of the Parliament as co-legislator²⁰ and the competence of the Council to extend the scope of the Treaty. The Commission, favouring the co-decision procedure, emphasised that the aim and content of the Regulation related to the protection of public health and / or consumer protection within the meaning of Articles 152 (public health) and 153 EC (consumer protection) [ex Articles 129 and 129a EC respectively] of the Treaty. Its argument was based on the presumption that the Treaty authors intended to impose the co-decision procedure on matters falling under Articles 152 and 95 EC. This would contribute to the growing influence of the Parliament over the Community's decision-making. Finally, Article 43 EC was chosen as the right legal basis by the Council. This provides only for consultation of the Parliament. The Court was called upon to clarify the choice of legal basis²¹. It held that the purpose of the

¹⁸ C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-2867

¹⁹ Case C-269/97 *Commission v Council (Beef Labelling)* [2000] ECR I-2405

²⁰ Article 95 EC (ex 100a EC), favoured by the Commission's proposal, provides for co-decision by the Council and Parliament.

²¹ See also Case C-155/91 *Commission v Council* [1993] ECR I-939 (Waste Directive); Case C-187/93 *Parliament v Council* [1994] ECR I-2857 (Waste Shipments) Here any effect on the internal market was held to be ancillary. Article 175 EC was a better legal basis to Article 95 EC for Directive 91/156 on waste and Regulation 259/93 on shipments of waste.

measure in question was not to protect public health but to stabilise the beef market in the Community destabilised by the BSE crisis, by improving the conditions for the production and marketing of those products.

By annulling Regulation 820/97, in the same way it did in relation to Directive 98/43 in the *German Tobacco Judgement*, the Court reinforced the constitutional limits of valid Community legislation / action and clarified that a political majority of Member States in the Council cannot take up responsibility for determining the scope of the Treaty when the Treaty itself has expressly excluded the harmonisation of public health since Maastricht. But one must not confuse the reasoning of the Court these two cases. In the *German Tobacco Judgment* the Court for the first time did not decide the case on the grounds that the Directive had been adopted on the wrong legal basis but on the basis of the Community's lack of competence to regulate public health.

To summarise, the proposed Tobacco Advertising directive could not be considered as a measure that aimed at promoting the operation of the internal market. It did not aim to remove obstacles for companies producing tobacco nor did it provide any advantages for manufacturers. Instead, its only effect was to bar access to advertising and sponsoring to tobacco manufacturers in relation to their products. This constituted an exclusion from a whole sector of services rather than a facilitation of mobility for tobacco products as could have been expected from an internal market measure. The Community Institutions had therefore gone beyond their respective competence, something that was recognized both by the Advocate General and the Court when it held the directive invalid and granted an annulment. An anti-tobacco advertisement policy would generally not

serve a clear internal market objective but instead protect the public, especially the young, from the harms of smoking.

It is important that in preparing the directive, public health had often been put forward as an important argument in the materialisation of the decision²² but the directive was ultimately disguised as an internal market measure in order to be adopted. As Von Bogdandy and Bast²³ point out “the qualification of Article 95(1) EC as an exclusive competence overlooks the fact that internal market harmonisation is consistent with the maintenance of autonomous Member State regulatory competence”. By holding that the directive prohibiting tobacco advertising was based on improper grounds, the Court established that both Article 95 EC and Community activity in the health field have limits and they should operate within those limits. However the Tobacco Judgement did not provide a clear division of responsibilities in the protection of public health between the national and Community legislature. Despite the evolving Community activity in the area of health²⁴, the lack of a clear allocation of responsibilities has become the source of practical problems when both have to deal with isolated incidents that nevertheless pose an imminent threat to human health. Incidents such as the BSE crisis reveal the

²² Before its adoption, the Parliament’s Legal Affairs Committee had insisted that article 95 EC was not a sound legal basis for such a directive because the provision constitutes the basis for legislation concerning the operation of the internal market, whereas the main aim behind the future directive was to protect public health. Thus, the proper basis for the tobacco directive should instead be Article 152 EC. Despite that, the Committee on the Environment, Public Health and Consumer Protection stressed that the directive was directly concerned with the operation of the internal market and that section 3 of Article 95 EC offered the possibility of a high level of protection of public health. On 13 May 1998, Parliament accepted the Council’s common position on a second reading without any amendments. The amendments proposed to change the legal basis were not accepted, nor was a proposal to reject the common position.

²³ Von Bogdandy, A., and Bast, J., “The European Union’s Vertical Order of Competences: The Current Law and Proposals for its Reform”, (2002) 39 Common Market Law Review 227-268

²⁴ See for example the European Commission Green Paper on Food Law COM (97) 183 final; White Paper on Food Safety, adopted on January 12, 2000; Commission proposal for a Regulation establishing a European Food Authority COM (2000) 716

Community's incapacity to respond quickly to emergencies due to the lack of discussion as to the proper construction of Article 95 EC.

2. Towards a Statement of Principle Regarding the Scope of Article 95 EC

In the *Tobacco Advertising Judgement* the Court confirmed that Article 95 EC provides a specific legal basis and thus cannot be cited for the adoption of a general internal market regulation. The use of Article 95 EC by Community Institutions as a legal basis for measures with an incidental health protection aim or effect was in fact allowed by the Court under one condition. The condition was that the harmonising measure in question must also serve a genuine internal market approximation aim. The Court stated as follows:

‘... a measure adopted on the basis of Article 95 of the Treaty must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result there from were sufficient to justify the choice of Article 95 as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory. The Court would then be prevented from discharging the function entrusted to it by Article 220 of the EC Treaty... of ensuring that the law is observed in the interpretation and application of the Treaty.’

In the text of the Tobacco Advertising Directive it was solely the preamble that made the attempt to disguise the measure as an internal market one whereas the content of the prohibition was clearly aimed at regulating public health. Hence the Court considered that the measure was adopted outside the legitimate limits of Article 95 EC,

which enables the Community to harmonise national regulation in order to establish or to facilitate the free movement within the internal market.

In contrast to that decision, in the more recent case of *British American Tobacco (Investments) Ltd v Secretary of State for Health*²⁵ the claim of tobacco manufacturers against the validity of the Tobacco Control Directive 2001/37/EC was struck down by the Court. The applicants (British American Tobacco and Imperial Tobacco) sought judicial review before the English courts of the English Government's intention to transpose the Directive, arguing that it was invalid. They requested a ruling that the purpose of the Directive is to harmonise national rules concerning the protection of public health, an area which the Community does not have competence. The Directive was adopted on the basis of Articles 95 EC and 133 EC (CCP). The tobacco companies argued that this dual legal basis was inadequate. According to their argument, Article 95 EC could not be cited to harmonise national practices on packaging requirements and harmful substance levels. They claimed that the measure was not aimed at ensuring the free movement of goods in the Community but rather at protecting public health. Similarly, Article 133 EC, which will not be considered hereafter, could not be employed to ensure that exported tobacco products conform to the new manufacturing requirements, out of fear that they may be re-imported or illegally placed directly on the internal market. As indicated by the applicants, the ban on tobacco exports not meeting Community requirements did not exclusively affect international trade but had an effect upon intra-Community trade. The export ban was thus not about external trade but rather the protection of public health.

²⁵ Case C-491/01 *BAT Investments LTD & Imperial Tobacco v Secretary of State for Health* [2003] 1 CMLR 14

The English High Court referred all validity arguments²⁶ against the Directive to the European Court of Justice (Court hereafter), which upheld all aspects of the Directive apart from its prohibition on the export of tobacco products that do not comply with internal Community standards²⁷. Contrary to its ruling in *Germany v the European Parliament and Council*, the Court held that the Directive in question genuinely aimed at the improvement of the conditions of the functioning of the internal market, an area in which the Community has competence to legislate and was therefore valid. The paradox is that in determining the scope of Article 95 EC, the Court referred to its *German Tobacco* reasoning. First, it established that Article 95 EC could be used as a legal basis for a harmonising measure provided that it is genuinely intended to improve the conditions for setting up the internal market. Then it moved ahead stating that Community Institutions must also consider the effects of a potential measure based on Article 95 EC. They need to identify whether the measure contributes, directly or indirectly, to the elimination or prevention of existing or future obstacles to free movement. As long as these two conditions are satisfied, it is irrelevant that public health protection plays a significant role in adopting the measure. Considering that the differences in national legislation as regards packaging requirements and harmful substance levels form trade obstacles to the internal market, their harmonisation by the Community is intended to directly eliminate those obstacles. Therefore recourse to

²⁶ The tobacco manufacturers raised seven pleas: Apart from the legal basis problem, arguments included an infringement of the principle of proportionality; a violation of the fundamental right to property under Article 295 EC; a violation of Article 253 EC and/or the duty to give reasons; finally, an infringement to the principle of subsidiarity and a misuse of powers.

²⁷ Article 5 of the Directive (ensuring that the consumer receives objective information on the level of harmful substances – e.g. tar and nicotine) providing that the labels on cigarette packets must be printed in the official language of the Member State where the tobacco products were to be placed on the market was to apply only to non-export products. On the other hand, Article 7 of the Directive (prohibiting the use of descriptions liable to mislead consumers in that respect – e.g. ‘mild’) was to apply only to tobacco products marketed within the European Community.

Article 95 EC as a legal basis is justified in its entirety. Equally, the export ban introduced by the Directive can be indicative of an indirect contribution to the aim of preventing a potential infringement on rules aimed at removing trade obstacles. Again Article 95 EC can be utilised as a legal basis for the export ban provision.

The difference between the *British American Tobacco Judgement* and the *German Tobacco Judgment* lies in the evidence of existence of trade obstacles. In the *German Tobacco Judgment* the existence of trade obstacles was a pre-condition even for the adoption of measures with a direct contribution to the removal of these obstacles. In the *British American Tobacco Case* the contribution of the export ban as an indirect measure was not supported by facts proving the existence of a trade obstacle but was rather based on a potential infringement on rules aimed at removing trade obstacles. Thus in its latter decision the Court widened the boundaries of Article 95 EC without however rendering it to a general legal basis provision in the sense of Article 308 EC. Besides, the internal market purpose of a potential measure was maintained as the basic factor of using Article 95 EC as a legal basis. Community harmonisation of diverse national regulatory practices through Article 95 EC is still allowed in those cases where a Community rule is necessary to eliminate competitive distortions that have a restraining effect upon trade. As the Court stated in an action brought on 19 October 1998 by the Kingdom of the Netherlands against the European Parliament and Council²⁸: “the purpose of harmonisation is to reduce the obstacles, whatever their origin, to the operation of the

²⁸ Case C-377/98 *Kingdom of the Netherlands, Italian Republic and Kingdom of Norway v European Parliament and Council of the EU* [2001] ECR I-7079

internal market which differences between the situations in the Member States represent.”²⁹

B. ARTICLE 308 EC

General Legal Basis

Considering Article 95 EC as a specific legal basis provision for the adoption of Community secondary legislation, Article 308 EC (former Article 235) provides a more general legal basis. Article 308 EC reflects the realisation of the drafters of the Treaty of Rome that the executive powers specifically allocated to the Community may not prove to be adequate for the purpose of attaining the objectives expressly set by the Treaties themselves. This has often been referred to as ‘*competence ratione materiae*’.

Article 308 EC reads: “If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.” Any measure may thus be adopted in case of the lack of specific competence if it is necessary to meet the Treaty’s objectives in relation to the internal market.

Contrary to the principle of attribution of powers (any Community legislative act ought to be based upon a Treaty Article), Article 308 EC is utilised when no legislative power as such exists to attain one of the objectives of the Treaty. One understands that the provision of Article 308 EC gives the Council a wide competence. However this

²⁹ Ibid Para 20

competence is not unlimited but instead requires that the power should be used to attain one of the objectives of the Community and the attainment of this objective must take place in the course of the operation of the internal market. Yet, given the breadth of the Treaty objectives and the Court's broad interpretation of Community aims, the conditions for the exercise of Article 308 EC do not always place a severe constraint on the Council's ability to legislate.

To provide an example, it can be argued that by virtue of the importance of quality of life in the Treaty, the protection of public health constitutes a Community objective. If so, since Article 308 EC is intended to "attain one of the objectives of the Treaty", it may be regarded as a legitimate legal basis to legislate on public health. This nevertheless depends on the existence of a specific legal basis to regulate health, as Article 308 EC cannot serve as the basis for widening the scope of Community competence beyond the Treaty framework. As regards public health, it should be underlined that Article 152 EC provides only for incentive measures where "Community action must be limited to measures of encouragement or to adopting recommendations."³⁰ Article 308 EC may thus constitute a last resort legal basis for a measure aimed at the protection of health where the Treaty has not provided the necessary powers. In certain cases, Article 308 EC may still be used if the given competence is regarded as insufficient. In *Ferguson*³¹ Regulation 803/68 on the value of goods for customs purposes was adopted on the basis of Article 308 EC (Article 235 EEC then) despite the existence of Article 27 EEC (now repealed) as a legal basis indicating Commission's recommendations to Member States as regards approximation of national practices on

³⁰ Case C-268/94 *Portugal v Council* [1996] ECR I-6177 at Para 57

³¹ Case 8/73 *Hauptzollamt Bremerhaven v Massey Ferguson GmbH* [1973] ECR 897

customs matters. But how far can Article 308 EC serve as the basis for widening the scope of Community competence. The Court has asked the same question as regards the Community's competence to conclude an international agreement, particularly on the compatibility of accession to that agreement.

1. Community Competence to Conclude an International Agreement

(a) Introduction

The debate in the European Convention about the incorporation of the EU Charter of Fundamental Rights (2000) within the EU Constitutional Treaty and the potential accession to the European Convention of Human Rights (ECHR) has raised questions related to the boundaries of EU competence. This chapter will focus on the Community's competence to accede to the ECHR by way of Article 308 EC. It will also attempt to portray the general EU competence to legislate over the area of human rights.

As the current situation stands, internal Community action generally requires compliance with the human rights principles. Article 6(2) of the Maastricht Treaty (1992) states that the EU shall respect fundamental rights, as guaranteed by the ECHR, and as they result from the constitutional traditions common to the Member States. Textually, the Maastricht Treaty inserted Article 6(2) (ex Article F) TEU into the Treaties' body. Accordingly, the Amsterdam Treaty (1997) clarified that the jurisdiction of the Court under the EC Treaty extends to Article 6(2) TEU with regard to action of the EU Institutions (Article 46(d) TEU). Further, the Court has progressively extended its review to include not only acts of the EC Institutions, but also Member States' derogations as long as those fall within the scope of Community law. Yet, the Treaty is not explicit

about human rights forming one of its objectives. In that climate the Community's formal accession to the ECHR appeared as a panacea to the protection of human rights.

Formal accession to the ECHR was first proposed by the Commission to the Council in 1979³² and later in 1990³³. Furthermore, in 1993 the Commission published a working document under the title "Accession of the Community to the ECHR". Finally, in 1996 the Court received a request for an Opinion from the Council pursuant to Article 228 (6) EC as to whether accession to the ECHR by the Community is compatible with the Treaty. The positive actions taken in the area of human rights during the past suggested a future framework for ratification of the ECHR where all Member States were parties. Unfortunately, a concrete human rights policy based on accession to the ECHR or the granting of binding legal force of the EU Charter as the equivalent of a 'bill of rights' was not conceived until the Convention talks.

The fact that past policy proposals in the area of human rights failed to gain acceptance may reveal the Community's lack of significant constitutional competence to deal widely with this subject matter. One could claim that to engage with every human rights issue at supranational level would imply Community action beyond its jurisdiction of limited governance and attributed powers, therefore penetrating delicate intergovernmental areas. Thus, the issue of clear-cut competences is at odds with any arguments for a solid EU human rights policy. In the context of the ECHR the current position of the Court is that it functions as an external check on Community actions. It is

³² Memorandum on the Accession of the EC to the ECHR, April 4, 1979 (Bulletin of the EC. Supplement 2/79)

³³ Commission's Communication on Community Accession to the ECHR, November 19, 1990

only when a question involves a Community competence that the matter is characterised as purely internal.

(b) The scope of EC competence on human rights issues: The Court's Self Restraint

The Court has accepted through its case law that human rights apply as part of the general principles of Community law, its implementation by national governments and their Member States' derogations from the fundamental Community freedoms and other rules of EC law. The Court has respected those boundaries by refusing to rule on human rights issues when there is no connection with the Treaty or Community secondary legislation³⁴. Discrimination cases are indicative of the Court's attitude towards human rights. The Court established in *Grant*³⁵ that EC law could not have the effect of extending the scope of the Treaty provisions beyond the competences of the Community³⁶. It differentiated this case from *P v S*³⁷ concerning discrimination for belonging to a particular sex, as opposed to "different treatment based on a person's sexual orientation" in *Grant*. The Court suggested that the prohibition of discrimination on grounds of sexual orientation is a task for the Community legislature and unless the Community Institutions adopted specific legislation it could not rule on the case. By rejecting the existence of an independent principle of equality as submitted by the applicant the Court ruled out the idea that such a right could be inferred from the International Covenant on Civil and Political Rights. This would have the effect of

³⁴ See Cases 12/86 *Demirel* [1986] ECR 3719; C-159/90 *Grogan* [1991] ECR I-4685; C-144/95 *Maurin* [1996] ECR I-2909; C-299/95 *Kremzow* [1997] ECR I-2629; C-291/96 *Grado and Bashir* [1997] ECR I-5531; C-309/96 *Annibaldi* [1997] ECR I-7493.

³⁵ Case C-249/96 *Lisa Jacqueline Grant v South West Trains Ltd* [1998] ECR I-621, at Para 45

³⁶ See also Case C-106/96 *UK v Commission* [1998] ECR I - 2729 (Social Exclusion Programme - unlawful expenditure by the Commission on certain projects.)

³⁷ Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-2143

extending the scope of Treaty provisions beyond the competence of the Community. Contrary to *Grant* when it came to the accession of the Community to the ECHR, the Court held that this is ultimately a question outside the competence of Community Institutions via Article 235 EC (now 308 EC).

The Court ruled in Opinion 2/94³⁸ that the Union lacked the power to accede to the ECHR. The basic question was that of competence of the Community to conclude such an agreement, given that the content of the agreement itself as well as the mechanisms under which the Union would submit to the ECHR enforcement mechanisms were ambiguous. The query as to whether there was an envisaged agreement within the terms of Article 228 (6) EC (now 300) raised further questions concerning the compatibility of the provisions of the Treaty with the ECHR, especially as internal conflicts between the Community and its Member States would remain to be resolved under the provisions of Article 219 EC (now 291). When it came to the question of a specific legal basis in the Treaty to enact rules in the area of human rights, the Court held that there was no such power, either specific or implied, to allow for Union accession to the ECHR. The Court affirmed that “no treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.” As a general rule, Community Institutions have the power neither to enact rules over human rights issues nor to conclude international agreements in that respect.

As regards the possibility of employing a flexibility provision from the Treaty, Article 308 EC did not constitute an appropriate legal basis for the given purpose since this provision was associated with the Community’s ability to carry out its functions for

³⁸ Opinion 2/94 *Accession by the Community to the ECHR* [1996] ECR I-1759

the attainment of a Treaty objective, whereby the Community has been given an express or implied power to act. Weiler explains that “following what it believes is the burden of Opinion 2/94 the Council comes to the conclusion that Article 308 EC also could not be used either to enact rules on human rights”³⁹ Reich also comments: “in thus limiting the powers of EC Institutions under the general clause of Article 235 EC (now 308 EC), the Court may have allowed a flexible approach to deciding the Kompetenz-Kompetenz issue. But it should be insisted that this self-restraint came from the ECJ itself and not from an outside institution”⁴⁰ Incapable of extending the scope of Community competence, Article 308 EC could not constitute a substitute for amending the Treaty

Accession to the ECHR would embody a transition of the Community legal system to a distinct organisation with its own legal principles, judicial structure and case law. It would “entail (as the Court said) a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order” The Community would thus be subject to the external judicial control of the European Court of Human Rights (ECtHR). The accession to the ECHR that inter alia demanded a uniform interpretation of Community case law with that of the ECtHR is entirely different to the current human rights protection guaranteed by the Treaty by way of general principles of law drawn predominantly from the ECHR and the national constitutional traditions. It is therefore obvious that accession to the ECHR would entail an amendment of the Treaty structure

³⁹ Weiler, J.H.H. “A Human Rights Policy For The European Community and Union: The Question of Competences”, Harvard Jean Monnet Working Paper 4/99, (1999), NYC

⁴⁰ Reich, N., “On National Courts, European Law and Constitutions: Dialogue and Conflict”, (1999) 5 (2) European Law Journal 154

being a constitutional change beyond the scope of Article 308 EC. If not, the Community would not have the competence to ratify such an international agreement.

The reaction in the Member States varied⁴¹. France; Spain; Portugal; the UK and Ireland claimed that even if the Community was competent to legislate over human rights issues and conclude international conventions, respect for human rights does not represent one of the objectives of the Community. Dismissing any social aspect of the Treaty they claimed that Community objectives are limited to the politico-economic sphere of integration. Against that, several countries⁴² argued that the protection of human rights does consist one of the objectives of the Community. According to this wider approach, accession to the ECHR was bound to happen, as it would prevent potential human rights violations by Community Institutions. The guarantee provided by the ECHR as a bill of rights could suggest that the partial transfer of sovereignty by Member States in a number of areas through their accession to the Community could also be extended in the future to the area of human rights.

(c) A substantial change in the Community system for the protection of human rights

Looking back at the question of the Union's accession to the ECHR, the Commission and the Parliament assumed that what happens in relation to the Community's internal competence also occurs in terms of its external competence. Thus Article 308 EC was put forward as an appropriate legal basis for attaining a Treaty objective drawn from the preamble of the Single European Act and enshrined in the Treaty of Maastricht: that of ensuring respect for human rights. From the EC Institutions'

⁴¹ See Burrows, N., "Question of Community Accession to the European Convention Determined", Case Comment, (1997) 21 European Law Review 58

⁴² Austria, Belgium; Finland; Germany; Greece; Italy and Sweden

point of view, Article 308 EC could be utilised to achieve at Community level the same level of human rights protection offered by the national law of the Member States. In Opinion 2/94, the Council acknowledged that the EC Treaty does not provide any specific powers for Community legislation in the area of human rights. In the absence of a specific legal basis and given that a call for human rights protection is supported in the Treaty, Article 308 EC could grant the Community competence to act in order to accede to the ECHR. The Court however held that without a Treaty amendment the Community had no competence to ratify the ECHR.

The Court used a competence reasoning bringing to attention the “constitutional significance” of accession to the ECHR that would “entail a substantial change of the Community system for the protection of human rights”. One would find this concern reasonable, taking into account that had the Community Institutions granted a positive opinion by the Court, the use of Article 308 EC in the accession agreement to the ECHR would have reduced the importance of the principle of subsidiarity. This reasoning, however, creates uncertainty as to the status of the ECHR as an external international agreement on the one hand and as an internal Community source of fundamental rights on the other. In other words, whenever the Court applies an ECHR principle it is not clear whether it is bound by it as a commonly agreed international agreement or whether it merely borrows a given principle and converts it into Community law.

Certainly, the Community possesses no competence to act beyond the boundaries of the Treaty. Yet one should not overlook the role of the Court in compensating for lack of legislative initiative by the Community Institutions through establishing respect to fundamental rights even before these were given a textual reference in the Treaty. It was

the Court through its case law⁴³ that upheld that the protection of fundamental rights in the Community is guaranteed by way of general principles of EC law referring to the common constitutional traditions of the Member States and to international instruments, predominantly the ECHR. In the same teleological manner, the Court could have employed Article 220 EC (which requires the Court to ensure that the law is observed in the interpretation and application of the Treaty) and Article 308 EC to determine the Community's accession to the ECHR. Taking this into account the Court's ruling in Opinion 2/94⁴⁴ that the Community lacked the power to accede to the ECHR may appear unsatisfactory to certain commentators that see a motor of integration within the structures of the Court.

Others may talk of a purposive manoeuvre of the Court to find obstacles in the Community's accession to the ECHR out of fear that this would undermine the autonomy of the EC legal order in the same way as the ECtHRs would threaten the Court's exclusive jurisdiction under Article 220 EC over the interpretation of all Community law. This anxiety may be partly justified due to the present aloofness of the two European Courts. However, the Union's lack of participation in decisions of the ECtHRs that have an indirect impact upon EU law is neither preferable. The European Convention's Working Group on Incorporation of the Charter / Accession to the ECHR underlined that all its members were unanimously in favour of a constitutional authorisation to enable the Union to accede to the ECHR, "given that Member States have transferred substantial

⁴³ Case 29/69 *Stauder v Ulm* [1969] ECR 419; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125

⁴⁴ [1996] ECR I-1759

competences to the Union and that adherence to the ECHR has been made a condition for membership of new States in the Union.”

Alternatively, having identified a correspondence between the EU Charter rights and rights guaranteed by the ECHR followed by a harmonious co-existence between the Charter and the common constitutional traditions, the Group suggested that the former should constitute a “legally binding text of constitutional status”. It also confirmed that the incorporation of the Charter would in no way modify the allocation of competences between the Union and the Member States (Art 51 para 2).⁴⁵ Thus, the whole question of accession to the ECHR is a political choice of the Community Institutions. Weiler identifies an oxymoron in the actions of the Council. On the one hand, having in mind the Court’s Opinion 2/94, it denies promotion of human rights policy whilst on the other it has attempted to regulate public health through a directive on Tobacco Advertising⁴⁶. He proposes a broader use of Article 95 EC for the protection of human rights against national measures that hinder one of the fundamental freedoms. “Subject perhaps to the principle of subsidiarity, there could be a Community harmonisation measure designed to protect human rights in the field of application of Community law, just as there is a Community harmonisation measure designed to protect the physical life or safety of individuals in this field of free movement.”⁴⁷ This however pre-supposes the existence of

⁴⁵ Report of Working Group II “Incorporation of the Charter / Accession to the ECHR”, Final Report of Working Group II, [CONV 354/02] “The fact that certain Charter rights concern areas in which the Union has little or no competence to act is not in contradiction to it, given that, although the Union’s competences are limited, it must respect all fundamental rights wherever it acts and therefore avoid indirect interference also with such fundamental rights on which it would not have competence to legislate.”

⁴⁶ Weiler, J.H.H. “A Human Rights Policy For The European Community and Union: The Question of Competences”, (1999) 4/99 Harvard Jean Monnet Working Paper, NYU

⁴⁷ Ibid

intra-Community trade barriers between Member States due to conflicting national legislation.

2. An evaluation of Article 308 EC: the door of creeping competence?

Having said that the purpose of Article 308 EC is to fill in the gaps in the current system of competence allocation, we need to emphasise that the Court has maintained that the provision cannot serve as a basis for widening the scope of Community competence beyond the Treaty. In Opinion 2/94 the Court did not propose to preclude the use of Article 308 EC from all cases of fundamental rights. On the contrary, one may recall that under certain circumstances, human rights constitute an objective of the Community. Article 308 EC may thus be brought into function allowing therefore the Council to exercise certain powers insofar as “action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers.”

Despite that, there are always concerns in the Member States as regards the potential abuse of the powers bestowed to the Community under Article 308 EC. The fears of the German Länder, going back to the 1996 IGC⁴⁸, have found expression in the ideas of Wolfgang Clement, Minister President of the German Land of North Rhine-Westphalia⁴⁹. Clement has supported the view that the flexibility provision of Article 308 EC shall be deleted in consideration of the Community’s creeping competence. His

⁴⁸ Schwarze, G., “Kompetenzverteilung in der Europäischen Union und föderales Gleichgewicht” (1995) DVBl. 1265 - 1269

⁴⁹ Clement, W., “Europa Gestalten – Nicht Verwalten, Die Kompetenzordnung der Europäischen Union nach Nizza”, (Feb. 12. 2001) Walter Hallstein-Institute for European Constitutional Law, Humboldt University, Berlin. Available in German at: <http://www.whi-berlin.de/clement.htm>; available in English at http://europa.eu.int/futurum/documents/speech/sp120201_en.htm

opinion aims to reiterate a “traditional demand of the Länder”⁵⁰ in view of the fact that the flexibility provision of Article 308 EC has often been used by the Council as a means for creeping into areas of national competence. Apart from Clement’s views another argument against Article 308 EC can be based on the fact that it reflects the demands of the earlier stages of European integration reflecting the ellipsis of specific powers to attain the objectives of the Treaty.

Currently, the gap-filling role of Article 308 EC in the Community’s system of competence allocation appears more and more outdated. The Union now possesses a vast number of expressly granted powers. Not to mention that the introduction of Article 95 EC, aimed for adoption of legislation at the establishment of the internal market, made it possible to adopt legislation on sectors such as social policy, environment and consumer that were previously reserved by Article 308 EC⁵¹. This renders resort to the power provided by the provision of Article 308 EC occasional if not rare. In view of this context, national objections to Article 308 EC outweigh the benefit of flexibility in emergency cases to attain one of the objectives of the Treaty. This thesis supports that the representatives of Member States in the Council should scrutinise the Commission’s proposals and focus to the potential misuse of Article 308 EC where it appears that other Treaty Articles are more appropriate⁵².

⁵⁰ See also Stoiber, E., “Reformen für Europas Zukunft”, (27.09.2000), Bayern in Berlin, available at http://www.bayern.de/Berlin/Veranstaltungen/Redenarchiv/rede_000927_Reformen_fuer_Europa.html

⁵¹ See figures in Bergstrom, C.F. and Almer, J. “The Residual Competence: Basic Statistics on Legislation with a Legal Basis in Article 308 EC, (2004) Swedish Institute of European Studies, Available at http://www.sieps.se/_eng

⁵² See Draft Council Regulation amending Regulation (EEC) No. 337/75 establishing a European Centre for the Development of Vocational Training

A proposal for radical constitutional change – deletion of Article 308 EC – does not take into account the emergence of unforeseen cases in the course of European integration. In such cases, all Member States represented in the Council are in favour of triggering Article 308 EC to address an issue of common concern for which the Treaty does not grant the necessary powers. The most indicative examples are the Union's recent enlargement to the East and Central Europe and the introduction to the common currency during the last phase of EMU. There, although Community action was both legally and politically essential, there was no textual reference in the Treaty providing a means of action. In the first case, in the framework of the pre-accession strategy, the Council adopted Regulation 1266/1999 under the legal basis of Article 308 EC. The Regulation aimed to provide aid to the applicant countries "as to include, in addition to the PHARE programme, aid to agriculture and for structural measures". In the second case, due to the lack of a Council decision clarifying which Member States were to adopt the Euro, the Council passed Regulation 1103/97 based on Article 308 EC. The Regulation sets out general principles and rules applying to the changeover during the transitional period and at the end of it. Both examples create a strong case for the maintenance of the provision of self-authorisation of the Community Institutions granted by the controversial Article 308 EC as a guarantee of the dynamics of the Union's evolution.

Even with the existence of the umbrella Article 181a EC introduced by the Treaty of Nice that covers economic, financial and technical cooperation measures with third countries⁵³, Article 308 EC appears valuable. It enhances the operation of the Community as an integrated social and political entity and not merely the harmonious operation of the

⁵³ See the "25th Report of the Select Committee on European Scrutiny", 4 HMT (25705) Loan Guarantees, (May-June 2004)

common market, as it is textually referred in the Treaty. At present, the powers of the Community are not constrained to establishing and regulating the operation of the common market. In fact, the gradual operation of Article 308 EC outside the constraints of the common market has liberalised the criteria for its use. Considering this development one can empathise with the fears of the German Länder that they gradually lose their regional policy-making capacity where the Community's overarching authority obtains superior political relevance⁵⁴. Against that they suggest a catalogue of competences or *Kompetenzkatalog* to restrain and list the regulatory powers of the Union. Yet their aim is seen as a bid to remain a point of reference in the constitutional debate of the Convention for the future of Europe and not a serious bid for reform at the heart of a more political Union.

Contrary to the view of the German Länder, certain commentators express the belief that the problem with Article 308 EC does not lie in its immediate effect upon the vertical relation between the Community and the Member States. Von Bogdandy and Bast⁵⁵, for instance, point out that there is "an urgent need to reform the legislative procedures of Article 308 EC. It is from a constitutional perspective, unacceptable that a competence of such breadth involves the European Parliament only by way of consultation." Without underestimating the preservation of institutional balance in the Community, the present author defends the view that the liberalisation of the conditions

⁵⁴ Certain commentators believe that the reservations of the German Länder arise from the Community's control of national state aids, especially the Commission's economic policy agenda in distributing European funds. See Mayer, F.C., "Competences – Reloaded? The Vertical Division of Powers in the EU After the New European Constitution", (2004) 5/04 Harvard Jean Monnet Working Paper, NYU

⁵⁵ Von Bogdandy, A., and Bast, J., "The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform", (2002) 39 Common Market Law Review 277-268

of resort to Article 308 EC can sometimes be problematic to the vertical distribution of competences.

In 2001, the Commission proposed the adoption of a Regulation on the fight against terrorism that would empower the Community to freeze the assets of persons and organisations considered to be participants in terrorist networks involved in the terrorist attacks of 9/11 in the United States. The Regulation was adopted as Council Regulation 2580/2001⁵⁶ and Article 308 EC was used among other bases as a legislative basis, a choice that reflects a response to an emergency. On February 6, 2003, Jose Maria Sison brought an action against the Council and the Commission before the Court of First Instance⁵⁷. Mr Sison, a Philippines national and resident in the Netherlands, sought annulment of the Council decision to update the list of persons covered by the respective Regulation and applied for interim relief, which was dismissed on the ground of urgency. Among other grounds⁵⁸, the applicant invoked the illegality of the Regulation 2580/2001 arguing that the Council had no competence to adopt it under Articles 60; 301 and 308 EC. He also invoked a violation of the principle of proportionality, the principle of legal certainty and a misuse of power by the Council. The decision of the Court of First Instance will be of particular importance in setting the limits of Article 308 EC.

⁵⁶ O.J.E.C. L344/70

⁵⁷ Case T-47/03 *Sison v Council* [2003] ECR II-2047

⁵⁸ The applicant also invoked the violation of several general principles of Community Law, such as the principles enshrined in Articles 6,7,10 and 11 of the European Convention on Human Rights and Article 1 of the First Protocol.

Conclusion

“...those legal rights that remain with the constituent states or their citizens, belong to the states in the United States as well as the EU, the highest courts of these entities enjoy the right of defining the outer limits of the EU and U.S. respective competencies. This leads to ‘creeping federal’ jurisdiction.”⁵⁹

This argument laid down by Thomas Fischer brings back in mind the question of who has the ultimate authority to determine the constitutionality of Community acts. In other words, the question remains: Who has the ‘Kompetenz-Kompetenz’? The main argument of this chapter is that despite the Community’s creeping attempts, manifested in the *German Tobacco Judgment*, there are limits to Community competence and the Court is ready to uphold those limits. Despite its different approach in the *British American Tobacco Case*, the Court emphasised upon the principle of subsidiarity. It declared that the competences of the Community, as attributed by the Treaty, exist “to improve the conditions for the establishment and functioning of the internal market, by eliminating barriers to the free movement of goods and the freedom to provide services or by removing distortions of competition”⁶⁰. Thus, the Court has restricted the conditions under which the EC Institutions might rely upon Article 95 EC, especially as a way of overcoming restrictions on EC competence in fields other than the internal market.

⁵⁹ Fischer, T., “Federalism” in the European Community and the United States”, (1994) *Fordham International Law Journal* 389, at 418

⁶⁰ The Court argued that the principle of subsidiarity “applies where the Community legislature makes use of Article 95 EC, inasmuch as that provision does not give it exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning, by eliminating barriers to the free movement of goods and the freedom to provide services or by removing distortions of competition”

As regards Article 308 EC, the Court has recognised that new Community competences can only be launched through valid legal instruments. Article 308 EC constitutes such an instrument. However, in Opinion 2/94 the Court decided that the use of Article 308 EC “would entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order”⁶¹ Thus, the Court imposed a limitation to the application of Article 308 EC that does not follow from a textual interpretation of the provision. Its decision demonstrates the desire to keep the outer constitutional limits of Article 308 EC within the framework of the Treaty by reading it in the light of Article 5 EC (subsidiarity).

The use of Article 95 and 308 EC in a way that does not undermine the fundamental principles of attributed powers and subsidiarity enshrined in Article 5 EC, constitutes, according to the author, the most effective barrier to the creeping expansion of Community competences. Undeniably a strict *Kompetenzkatalog* would have reduced to the minimum the danger of the Community penetrating into areas, which remain under national control, but would it allow the Community to react to fresh challenges? The next chapter will present how competences appear in the EU Constitutional Treaty. There one can see that the Convention has only used a positive list of competences only as regards exclusive competence. The remaining competences are open-ended and governed by the principle of subsidiarity. As regards the flexibility provisions, the Convention has not proposed any substantive reform of Article 95 EC whilst there are sufficient safeguards

⁶¹Opinion 2/94, 1996 ECR. I-1759, I-1789, Para 34

as regards Article 308 EC (Article I-18 in the EU Constitutional Treaty) to ensure that it should not pose any serious threat to the principle of conferred powers.

CHAPTER 5

CATEGORIES OF COMPETENCE IN THE EU CONSTITUTIONAL TREATY

Introduction

Taking into account the need to find a balance between the demand for flexibility and the demand for precision in delimitation of competences, the Convention's Constitutional Treaty establishes a list of general categories of Union competences rather than a positive list of competences or '*Kompetenzkatalog*' to cover all policy fields of Union action. A hard competence list would set up an antagonistic power relation between the Union and the Member States, whilst the intention behind the Union is to create an arena where Member States can exercise their competence and not to question who has power. Hence, the EU Constitutional Treaty introduces a number of alterations to the current system without changing the fundamentals of the present vertical allocation of competence between the Union and the Member States. This reflects a realisation that a strict competence catalogue would be impractical given the interplay of sectors such as the free movement with national policies on health or education.

Flexibility still characterises the treatment of competence within the EU Constitutional Treaty. To confirm this, the adoption of harmonisation measures for the establishment and functioning of the internal market under Articles 95 EC as well as the residual competence of Article 308 EC (named deliberately 'flexibility clause') have been maintained in the EU Constitutional Treaty through Articles III-172 and I-18 respectively. The most innovative adjustments introduced by the EU Constitutional Treaty merely lie in the classification / codification of the Union's exclusive, shared and complementary competence and the sectors falling into each category. What is more, National Parliaments

are given a scrutiny role at the early legislative stages of EU legislation to ensure compliance with the principle of subsidiarity. This chapter aims to provide a detailed picture of how competences appear in the EU Constitutional Treaty as well as certain textual problems and drafting uncertainties and finally avenues to overcome these problems.

A. SUBJECT RELATED COMPETENCES

Overview

This part will focus on the trend under which subject related competences are classified in Part I of the EU Constitutional Treaty agreed at the European Council in June 2004 and officially signed by EU Heads of State or Government on October 2004 in Rome¹. The EU Constitutional Treaty first of all defines essential principles as to the principle governing the allocation of the Union's powers, the principle of subsidiarity and proportionality, the primacy of the Union law and the obligation of Member States to implement Union law.

It is important to note from the beginning that certain aspects that previously fell outside the scope of this thesis, such as Common Foreign and Security Policy (CFSP), will need to be considered here due to the EU Constitutional Treaty's effort to merge the three EU pillars and create a single Union. The Treaties do not expressly confer legal personality on the Union and consequently the latter has no power to contract obligations binding in international law or to belong to international organisations. The EU Constitutional Treaty resolves this by bringing down the Maastricht pillared structure therefore extending the concept of legal personality to the EU (Article I-7). Since the dissolution of the Maastricht

¹ [CIG 87/2/04]

pillar structure is an inevitable step of constitutionalism, the relocation of competences from the Community to the Union would have occurred anyway and therefore it does not seem to constitute an achievement of the relevant 'competence provisions' inserted in the EU Constitutional Treaty.

Generally, the wording of the EU Constitutional Treaty in relation to competences does not suggest a radical change, although a few provisions or phrases do create certain confusion and uncertainty. The Convention aimed simply to respond to the Laeken question: "Can we thus make a clearer distinction between three types of competence: the exclusive competence of the Union, the competence of the Member States and the shared competence of the Union and the Member States?"² Thus, Part I of the EU Constitutional Treaty, determines the categories of competences, the principles governing their limits and exercise and finally the areas covered by each different category. Title III "Union Competences" within Part I specifies the three categories of Union's competences and asserts for each given category the consequences of the Union's exercise of its competences for the competences of the Member States. Article I-12, named 'Categories of Competence', provides a broad categorisation of defined powers. A distinction is made between exclusive and shared competences that are listed in Articles I-13 and I-14 respectively, while complementary competences are defined individually in Article I-17 of the EU Constitutional Treaty.

The provisions on the different policy fields as well as the specifications for each legal basis are addressed in Article I-12 (6) of the EU Constitutional Treaty, which provides that supranational competences shall be exercised according to the provisions set out in Part

² Laeken Declaration on the future of the European Union, December 14-25, 2001, available at http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm

III³. This reference covers competences as well as the form of legal acts provided for in those provisions. Moreover, the content of Article I-38 entitled 'Principles Common to the Union's Legal Acts' plays a significant part in the allocation of vertical competences. According to the first paragraph of the respective Article, "Where the Constitution does not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality referred to in Article I-11." What is not made explicit by reading this provision is whether Part III of the EU Constitutional Treaty (The Policies and Functioning of the Union) will include specifications in relation to the Union's legal acts (e.g. a general exclusion of legislative acts in the field of CFSP), therefore deviating from the current free choice of instruments under the Treaty.

Although, the definitions given to exclusive, shared and complementary competences have almost the same pre-Constitutional connotations given before by the Court, the mere listing of competences in the EU Constitutional Treaty represents a rather innovative approach not previously found in the EC Treaties. Still, however, there are some separate categories of competence in the EU Constitutional Treaty that do not fit into the general classification and are therefore assigned to no particular group. These are the following: The coordination of economic and employment policies of the Member States (Article I-15); the area of CFSP (Article I-16). It is debatable whether both categories should remain outside the three broad categories of competence or should rather be assigned to one of them. Taking the coordination of the Member States activities in the area of economic and employment policy as an example, one may contend that it could be listed under the

³ See also [CONV 724/03]

heading of complementary competences without the need to create a new category. Accordingly, following the appropriate changes in Part III of the EU Constitutional Treaty, the area of CFSP could consist a part of the category of shared or more preferably of complementary competence. Apart from the 'simplicity' that results from such an action, the coordination of economic and employment policies and the CFSP are closely attached to the Member States and therefore more proximate to the idea of complementary competence due to the inability of the Union to adopt harmonisation measures for matters falling within that category.

The Convention's method of positive integration in enlarging the previously express list of the Union's competences does not entirely echo the character of the constitutional process that begun in the name of clearness and transparency. Instead building up special categories of competence, especially in terms of the CFSP, may be translated as a political decision to maintain external relations or actions rooted within the federal / nation state rather than transferring them within a constitutionalised confederation of states. One could even talk of an attempt to put the clock back through an indirect maintenance of the intergovernmental pillar system of the Union that the EU Constitutional Treaty theoretically brings down. Nevertheless, the willingness to maintain an intergovernmental flavour within the Union's external action is evident Part III Title V of the EU Constitutional Treaty's Part III entitled "The Union's External Action". A look at Article III-293 suggests that the decisions adopted by the European Council in CFSP will diminish the actions of the other

Institutions of the Union and as Griller contends "...might prejudice all other external activities of the Union"⁴.

1. Exclusive Competence

(a) Internal Competence

Article I-13 lists exhaustively a number of exclusive competences for the European Union including competition rules; monetary policy; common commercial policy (CCP); the customs union; preservation of marine biological resources via a common fisheries policy⁵ and conclusion of international agreements. Initially, the Convention's draft proposal for a Constitutional Treaty included within the category of exclusive competence the four fundamental Community freedoms along with the rules on competition law. Kept outside the heading of exclusive competence, the four Community freedoms were ultimately enshrined in Title I of Part I of the EU Constitutional Treaty under the headline 'Fundamental Freedoms And Non Discrimination' (Article I-4) 'in accordance with the Constitution'. This has both a practical and symbolic significance. Practically, their inclusion in the first Part of the EU Constitutional Treaty as 'Objectives' gives them a wider legal significance and political weight. Symbolically, their location next to the principle of non-discrimination makes them more visible as constitutionally protected fundamental freedoms. According to the author, it appears more desirable that any limitations on national action in respect of the free movement provisions derives from the obligation on the

⁴ Griller, S., "External Relations" in De Witte, B., "Ten Reflections on the Constitutional Treaty for Europe", EUI, Florence, (2003), 133-157 at 136

⁵ Under the current situation Member States may at certain cases act as 'trustees of the common interest' supervised by the Commission. See Case 804/79 *Commission v UK* (Fisheries Conservation) [1981] ECR 1045

Member States to respect the Constitutional Treaty's established objectives / fundamental freedoms rather than the inclusion of those freedoms within the Union's exclusive competences.

The initial inclusion of the adoption of harmonising measures to complete the internal market under the leading of exclusive competence contradicted the recent decision of the Court in the *British American Tobacco Case*⁶, which confirmed that Article 95 EC does not provide an area of exclusive competence but rather gives the Union certain competence to improve the functioning of the internal market. Free movement is characterised by an interaction between directly effective Treaty provisions and national regulatory measures. The operation of directly effective Treaty provisions on the free movement of goods, persons, services and capital does not depend upon the adoption of secondary legislation. Similarly, the objectives of the internal market are not monopolised by EU primary legislation as the completion of the internal market involves the elimination of obstacles to free movement through the passing of harmonisation measures under Article 95 EC. The Praesidium considered the potential effect of a proposal to confer on the Union exclusive competence to adopt legally binding acts over the free movement provisions. Thus, the final EU Constitutional Treaty (Article I-13) reserves exclusively for the Community only the area of competition rules necessary for the functioning of the internal market⁷.

Even now, it appears that the Convention was troubled by the need to divide the competence to legislate from the obligation to regulate according to the Treaty. Thus it attached the same meaning to them. If a Treaty obligation is thus synonymous with

⁶ Case C-491/01 *British American Tobacco Case* [2002] ECR I-11453

⁷ See [CONV 797/1/03]

exclusive competence then other fields of Community law apart from competition may find a place in this broad definition. This includes the free movement provisions as well as other provisions such as equal pay under Article 141 EC. For this reason, Article I-13 (1) (b) should be interpreted narrowly to refer, as Davies argues, “to no more than measures governing undertakings and direct state interference with competition, notably via state aids.”⁸ This should reflect that one couldn’t simply treat harmonisation of competition distortions as an exclusive competence while maintaining the four freedoms within the realm of shared competence. They should have both been deleted from Article I-13 to achieve legal uniformity. As with free movement, treating harmonisation in relation to competition distortions as an exclusive Union competence contradicts the Court’s established case law that categorises competition law as an area of shared competence. In *Walt Wilhelm*⁹, the Court held that both Articles 81 and 82 EC constitute areas of shared competence. The Court affirmed that national competition authorities could apply national competition law subject to the obligation of co-operation under Article 10 EC. Community and national laws co-exist and can apply to the same agreement as long as Member States make certain that their measures would not jeopardise the value of the EC Treaty rules.

Moreover, Article 83(2)(e) EC enables the Community to adopt regulations in order to determine the relationship between Community and national competition law. The inclusion of the entire competition rules within the area of exclusive EU competence would be at odds with the so-called Modernisation Regulation¹⁰, which came into force on May 1, 2004. The Regulation substantially changes the framework for enforcement of European

⁸ Davies, G., “The Post-Laeken Division of Competences”, (2003) 28 (5) *European Law Review* 689-698

⁹ Case 14/68 *Walt Wilhelm and Others v Bundeskartellamt* [1969] ECR I

¹⁰ EC Regulation 1/2003 replaces Regulation 17/62

competition law empowering - alongside the Commission - national competition authorities and courts of the Member States to apply and enforce Articles 81 and 82 EC. In relation to Article 81 EC, national competition measures shall not deviate from the results of EC competition law. Accordingly, in relation of Article 82 EC, Member States are free to apply more stringent measures that prohibit abuses of dominant position. A wide interpretation of Article I-12 (1) of the EU Constitutional Treaty could overturn the current state of affairs by preventing the regulation of competition by the Member States. Finally, this *a priori* exclusion of national competence could also imply that the Member States cannot act as trustees of the Union's interest, since the list of exclusive competence is exhaustive in the EU Constitutional Treaty.

The merger model introduced by the EU Constitutional Treaty aimed to create a uniform legal - political Union, apart from incorporating competition rules within the Union's exclusive competence, extends the old sectors of Community's exclusive competence to the Union. As already illustrated this is a logical consequence following the transition from a three-pillar structure towards a single-pillar confederation of States. Moreover, its significance is symbolic. For instance, the inclusion of the conservation of marine biological resources under the Common Fisheries Policy (CFP), as an area of exclusive competence in the EU Constitutional Treaty (Article I-13), represents an accurate reflection of the current situation with regards to the Community's CFP. Yet, exclusivity to all fields of the common commercial policy (CCP) does not produce the same result.

(b) External competence

Contrary to current law under Article 133 EC (abolition of customs duties on imports into the Member States of goods from other Member States or from other

countries), Article I-13 (1) dismisses national competence to conclude international commercial agreements allowing only those related to goods, services and intellectual property. This of course does not exist without having a negative impact upon the economic freedom of the Member States attached to their statehood, i.e. to act externally as competent players on the international plane. Most important, the expansion of the CCP would diminish national internal competence as the Union could identify an international aspect in every national legislation.

The same could be said about the application of Article I-13 (2). In an oversimplified statement paragraph 2 of the Article gives the Union exclusive competence over the conclusion of an international agreement that affects an internal act¹¹ This attempt to codify the Court's ERTA decision¹² is inaccurate and clearly contradicts the Court's Opinion 2/91¹³. In the latter case the Commission argued that the Community had exclusive competence to conclude ILO Convention No 170 and requested an Opinion from the Court under Article 228(1) (2) EEC on the compatibility of the Convention with the Treaty. The Commission argued that under the ERTA principle, the Community had the competence to conclude an international agreement on any subject matter that fell under the internal legislative jurisprudence of the Community. Since Article 138 EC provided for a general legislative competence of the Community to regulate the safety of the working environment, the Commission contended that the Community had competence to conclude the Convention. Given that the subject matter of the ILO Convention was covered by internal

¹¹ "...when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope."

¹² Case 22/70, *Commission v Council (ERTA)* [1971] ECR 263

¹³ Opinion 2/91 on ILO Convention No 170 on Chemicals at Work [1993] ECR I-1061

Community legislation, the Community's competence was exclusive. The Commission further argued that it was irrelevant that some of these rules laid down only minimum standards, since the co-existence of Community law and partial obligations entered in to by the Member States would jeopardise the autonomy of the Community legislature.

Contrary to that, the Court pointed out that the Community has internal competence to adopt only minimum standards and the conclusion of international agreements shall be a joint and not an exclusive Community competence. The Court highlighted that under Article 5 EC (now Article 10 EC) Member States are obliged to support the Commission in carrying out its task regarding areas corresponding to objectives of the Treaty, and thus withdraw from all measures that risked jeopardising attainment of those objectives¹⁴. It appears that the spirit of this decision is either not reflected in Article I-13 (2) or that the provision of the EU Constitutional Treaty is aimed to be interpreted in a way that the vertical delimitation of competence will not be altered.

2. Shared Competence

Contrary to Article I-13 introducing an exhaustive list of exclusive competences, Article I-14 contains a residual category of split or shared competence between the EU *vis-à-vis* the Member States. There, Member States have the power to exercising their competence by enacting legislation only insofar as the Community has not exercised its own competence. Article I-14 (2) describes the areas of shared competence. These are the internal market; social policy; economic, social and territorial cohesion; environment; consumer protection; transport and an area of freedom security and justice to name but a few. Certain other areas such as research, technological development, space and

¹⁴ See Para 10 of Opinion 2/91 (*ibid*)

humanitarian aid also fall under the headline of shared competences [Article I-14 (3) and (4)]. The residual nature of shared competences within the EU Constitutional Treaty Article I-14 (1), implies that in case a new legal basis introduced within Part III neither falls within exclusive nor complementary competences it automatically forms part of the category of shared competence.

Touching upon delicate issues of national sovereignty (such as education and public health) the Union's exercise of competence as established in Article 14 (2), especially in relation to the internal market, seems better placed under the category of shared competence. There, the scrutiny test posed by the principle of subsidiarity, as illustrated in Article I-11 (3), is available. However if one approaches the principle of subsidiarity, as complemented by the relevant Protocol in the EU Constitutional Treaty, like a background noise rather than as a principle with actual effect, one may conclude that obstacles to free movement can be found in almost every area of Member States' law. This may imply that the Union's competence would stay uninterrupted regardless of whether the four freedoms fall within the category of exclusive or shared competence. Taking as an example the free movement of persons, it is highly unlikely that the EU Constitutional Treaty will allow discretion to the Member States to decide what constitutes employment in the public service in relation to Article 39 (4) EC derogation to the free movement of workers, as established by Article 39 EC.

Generally, decisions made at EU level will be capable of having an effect upon Member States, although the majority of such legislation is meant to be made by the latter therefore giving precedence to the exercise of national regulatory power. However, the vertical relationship that occurs from the definition given to shared competence by Article I-

12 (2) suggests that it is exclusively based upon the Union's competence to enact secondary legislation while the relation between EU primary and national legislation is not given particular reference. Article I-12 (2) of the EU Constitutional Treaty spells that "...the Union and the Member States may legislate and adopt legally binding acts in that area." Nowhere this provision suggests that even where the Union has not enacted legislation, the Member States shall respect their primary Treaty / Constitutional obligations.

Article I-12 (2) follows: "The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence." Likewise, this provision does not illustrate that Member States are still required to exercise their competence showing consideration for the primary provisions of the EU Constitutional Treaty. The wording of Article I-12 (2) misleads one to conclude that where the Union decides to take action in an area of shared competence, national competence is suspended. In fact this happens only in relation to the specific subject matter that the Union has taken action and not to the greater area of shared competence. The Cambridge Draft Constitutional Treaty¹⁵ spells accurately in Article 11 that "once the Union has acted in a certain matter, the legal framework of Member States' action changes." This however is unclear in the Convention's Constitutional Treaty.

What is more, the principle of pre-emption (i.e. that national competence seizes once the Union exercises its powers) was not given an individual reference within the Convention¹⁶, although it is made vaguely implicit in the EU Constitutional Treaty's Article I-12 (2). Yet the respective Article appears to suggest that once the Union has exercised its

¹⁵ Dashwood, A., et al, "Draft Constitutional Treaty of the European Union and Related Documents" (2003) I European Law Review

¹⁶ Text of Preamble, Part I, II and Protocols on Subsidiarity and Proportionality, 12 June 2003 [CONV 797/1/03]

legislative powers in an area of shared competence, the Member States are immediately precluded from exercising their competence. This picture of the power relation between the Union and the Member States as well as the obligations of the latter as to its use of competence is rather misleading. The uni-dimensional definition of shared competence based in terms of pre-emptive EU legislation neglects the possibility of certain areas of minimum harmonisation where the adoption of legally binding acts by the Union does not prevent national legislatures from enacting higher regulatory standards. This observation does not dismiss the express or implied pre-emptive effect of Union legislation, as the Union may still occupy an area by exercising its competence preventing Member States from exercising their own competence. However this provision could be rephrased to make explicit that the exercise of Union competence does not dismiss the Member States' capacity to exercise their regulatory powers. The Cambridge text again offers a clearer picture by explaining in Article 11: "Where the Union legislation is found by the Court to be pre-emptive...Member States are precluded from exercising any independent competence to derogate from or supplement the harmonised norms. Where the Union legislation provides for minimum harmonisation, Member States still remain subject to the relevant horizontal obligations"

The recognition of the possibility for Union legislation having a pre-emptive effect is not clear in relation to Article I-14 (3) and (4) where the relevant policy areas of research, technological development, space (3) and development cooperation with humanitarian aid (4) cannot be pre-empted by the Union. Both paragraphs suggest that "...the exercise of that competence shall not result in Member States being prevented from exercising theirs." The definition of complementary action here creates confusion as to the meaning of the

provision. The Convention appears to have preferred to call the relevant policy fields shared while in fact they are complementary and would fit better under Article I-17 of the EU Constitutional Treaty as “areas of supporting, coordinating and complementary action”. To maintain a balance between the concept of pre-emption and national regulatory competence, the ambiguous sentence “...the exercise of that competence...” could be erased from both paragraphs (3) and (4) of Article I-14. In doing this, the respective policy areas would fit without difficulty into the category of shared competence. But such a decision would potentially extend the boundaries of Union competence beyond the line agreed by the Convention.

3. Complementary Competence

The category of “supporting measures” was renamed to appear in the final version of the EU Constitutional Treaty as “supporting, coordinating or complementary action”. The category of Article I-17 reflects the current state of law in relation to competences that include protection and improvement to human health; industry; culture; tourism; education, youth, sport and vocational training; civil protection and administrative cooperation. The full application of subsidiarity does not apply in these sectors as according to Article I-12 (5) “legally binding acts of the Union adopted on the basis of the provisions in Part III relating to these areas shall not entail harmonisation of Member States' laws or regulations”. Article I-17 was introduced by the Convention in the draft Constitutional text as an answer to the pressure for competence containment in the final EU Constitutional Treaty. Paul Craig explains that “the desire for containment reflected the concern, voiced by the German Länder as well as some Member States, that the EU had too much power, and that it should

be substantively limited.”¹⁷ Thus the introduction of Article I-17 functions as a means to ring-fence competences proximate to the national and peripheral interests. Legislative competence lies with the Member States despite the fact that the Article’s wording related to the exclusion of harmonisation suggests that the Union could enact legislation in the included sectors other than harmonisation measures.

Despite the effort to fortify national competences and contrary to the final reports of the Working Groups of the Convention, the co-ordination of economic and employment policies has been disconnected from ”supporting measures”. Instead it has moved to the separate category of competences introduced by Art. I-15 under the title “The Coordination of Economic And Employment Policies”. Harmonisation there is excluded and the Union’s intervention is limited to coordination. This works as an exception to the principle of subsidiarity. Moreover, the second unique category of CFSP under Article I-16 creates some confusion as regards the nature and extent of the Union’s intervention. Article I-16 (2) mentions that “Member States shall actively and unreservedly support the Union’s CFSP in spirit of loyalty and mutual solidarity and shall comply with the Union’s acts in this area. They shall refrain from action contrary to the Union’s interests or likely to impair its effectiveness.” The wording of the provision suggests that it aims to prevent Member States’ abuses rather than defining the extent of Union action. According to the author both Articles I-15 and I-16 as well as the policy areas of Article I-14 (3) and (4) should have been incorporated within the title of complementary competences.

¹⁷ Craig, P., “What Constitution does Europe Need? The House that Giscard Built: Constitutional Rooms with a View”, European Federal Trust Online Paper 26/03, (2003). Available at <http://www.fedtrust.co.uk>

The politics of the delimitation of competence appears paradoxical. The Italian Presidency Proposal¹⁸ for instance suggested that the policies described in Article III-107 of the draft Constitutional Treaty¹⁹ (where the Commission shall encourage cooperation between the Member States and facilitate the coordination of their action in all social policy fields under this Section) should fall essentially within the competence of the Member States. According to this any Union action would be complementary in nature if it aimed therefore to encourage and promote coordination instead of harmonisation. Despite that, the IGC did not list the social policy dimension under the title of complementary competence. Instead social policy, for aspects defined in Part III, remains under Article I-14 (2) under the Union areas of shared competence. This is not the only problematic area as regards complementary competences. Article I-12 (5) needs clarification to make obvious that even though the category of competence represented there does not allow Union harmonisation of the respective policy fields, it does not totally preclude the Union from legislating. Finally the transfer of the areas listed under Article I-14 (3) [research, technological development and space] and (4) [development cooperation and humanitarian aid] as falling into the residual category of shared competence could perfectly fit under Article I-17 as “areas for supporting, coordinating or complementary action”. The fact that both Article I-14 (3) and (4) exclude the application of the principle of pre-emption, that mainly characterises the area of shared competence, makes a strong case for their incorporation to the title of complementary competence.

¹⁸ Presidency proposal, 9 December 2003, [CIG 60/03] ADD 1, 41

¹⁹ Now Article III-213 of the EU Constitutional Treaty

B. OBJECTIVE RELATED COMPETENCES IN THE EU CONSTITUTIONAL TREATY

Introduction

When it came to the issue of the division of competences the Laeken Declaration observed:

“Lastly, there is the question of how to ensure that a redefined division of competence does not lead to a creeping expansion of the competence of the Union or to encroachment upon the exclusive areas of competence of the Member States and, where there is provision for this, regions. How are we to ensure at the same time that the European dynamic does not come to a halt? In the future as well the Union must continue to be able to react to fresh challenges and developments and must be able to explore new policy areas. Should Articles 95 and 308 of the Treaty be reviewed for this purpose in the light of the ‘*acquis jurisprudentiel*’?”

As already mentioned, the adoption of harmonisation measures for the establishment and functioning of the internal market under Articles 95 EC as well as the residual competence of 308 EC have been maintained in the EU Constitutional Treaty through Articles III-172 and I-18 respectively.

1. Flexibility Clause

Article I-18 (1) empowers the Council (on a Commission’s proposal and the Parliament’s consent) to take appropriate measures in case action by the Union proves necessary within the framework of the policies of Part III to attain one of the objectives of the EU Constitutional Treaty. It goes further than the existing Article 308 EC, which referred only to powers “necessary to attain, in the course of the operation of the common

market, one of the objectives of the Community.” Given that the reference to the common market has been deleted and that there is a single pillar structure in the EU Constitutional Treaty (EU)²⁰, Article I-18 (1) extends the flexibility clause to the former second and third pillars. Union’s competence will thus increase to all the policies within Part III of the new Treaty, which includes the CFSP and police and criminal law.

One could easily claim that Article I-18 (1) confers substantial power upon EU Institutions providing also a backdoor to amend the Constitution and the delimitation of competences. Against this we should state that the Union’s action under Article I-18 must be necessary not merely to attain one of the objectives set out in the EU Constitutional Treaty but also within the framework of the policies defined in Part III. This reduces the capacity of the Union Institutions to add new objectives to the Constitutional Treaty via the use of Article I-18. Nor can they go beyond the constraints of Union competence as established in Part III of the draft Constitution. Article I-3 (1) states that “the Union’s aims is to promote peace, its values and the well-being of its people”. Article I-2 lists the Union’s values being “...respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”. Legislation related to those values can only be adopted within the policies listed in Part III of the draft Constitution and not by the Union.

²⁰ See Lenaerts, K., “The merits and shortcomings of the Draft Constitution for Europe”, Speech delivered at the occasion of the Leuven Centre for a Common Law of Europe Colloquium on the EU’s Draft Constitution, December 15, 2003

“The Draft Constitution brings first of all together into a single document the existing Treaties, namely the EC Treaty and the Treaty on European Union — I am stepping over the Euratom Treaty, which remains separate, but is linked to the Union through a special protocol. More importantly, the Constitution places the EC and EU Treaties under a single legal regime.”

There are additional defences to the principle of conferred powers. First, one may recall the Court's cautious approach in using Article 308 EC as illustrated in Opinion 1/94²¹ and 2/94²² as well as the constitutional safeguards appearing in the EU Constitutional Treaty itself: The Council can only act by unanimity (something that makes difficult the adoption of legislation in the current enlarged Union) after having obtained the 'consent' of the European Parliament. Thus unanimity-voting in the Council is supplemented by the necessary consent of the European Parliament. Further, under Article I-18 (2) the Commission must also draw Member States' national Parliaments attention to proposals based on Article I-18. This does not go as far as providing that national legislatures can veto EU legislation in case of a proposed extension of Union competence. It merely appears as an attempt by the Convention to cast away any scepticism as regards potential abuse of Article I-18. According to the House of Lords Select Committee on European Union "this is, however only the slightest of nod in the direction of national parliaments, even though the draft Treaty acknowledges that national parliaments constitute an important link in giving effect to the principle of representative democracy."²³ Hence, Article I-18 (2) could ideally be transferred to the text of the "Protocol on the Role of National Parliaments in the European Union"²⁴

In order to limit recourse to Article I-18, the Convention also included new legal bases in Part III of the draft Constitutional Treaty that explicitly empower the Union to take

²¹ Opinion of 15 November 1994, [1994] ECR 11/12 I-5267.

²² Opinion of 28 March 1996, [1996] ECR 3 I-1788

²³ House of Lords Select Committee on European Union, Forty-First Report, Chapter 2: "Does a Constitution imply a European State?", the UK Parliament, (October 21, 2003), available at <http://www.parliament.the-stationery-office.co.uk>

²⁴ See "IGC 2003 – Editorial and legal comments on the draft Treaty establishing a constitution for Europe", Conference of the Representatives of the Governments of the Member States, Brussels, October 6, 2003, [CIG 4/1/03] REV 1

action in certain sectors. For instance, under Article III-49²⁵ a new legal basis has been created, allowing the Council to adopt laws defining the legal framework needed to limit the free movement of capital and freeze the assets of persons, groups or non-state entities, as a means of fighting organised crime, terrorism and trafficking of human beings. Other areas in Part III include inter alia: combating tax fraud and evasion; intellectual property; space; energy; integrated management of external borders; criminal procedure; sport and civil protection. The introduction of new legal bases in the draft Constitution hardens the possibility of recourse to Article I-18 but does not reduce the functionality of this broad competence. The Convention seems to have weighed up the risk of paralysing the Union's activities by preventing it from responding to new demands and unforeseeable realities and has the general flexibility provision through Article I-18 (1). Emphasis is thus placed upon the Union's capacity to act, according to Weatherill, "in a dynamic manner as a problem-solver"²⁶.

The stereotypic 'problem-solving' capacity of the Union may however suggest an excessive use of this general competence. The lack of protection against a wide use of Article I-18 would contradict the Laeken concern about the phenomenon of 'competence creep' that damages the relation between the Union and the Member States. It would also undermine the Bundesverfassungsgericht's Maastricht decision²⁷ that the Union's *Kompetenz-Kompetenz* (or capacity to determine the limits of the powers conferred on it) contains the potential for review of Union acts by national courts when the Union's powers

²⁵ Now III-160 of the EU Constitutional Treaty

²⁶ Weatherill, S. "Competence" in de Witte, B. (eds) "Ten Reflections on the Constitutional Treaty for Europe", EUI, Florence (2003) 45-66

²⁷ Judgment of 12 October 1993 by the German Bundesverfassungsgericht, in *Brunner v The European Union Treaty* [1994] BVerfGE 89,155 / 1 CMLR 57.

extend beyond the scope of the act by which Member States acceded to the Union. It seems that the question before the Convention was whether the current unanimity requirement to use Article I-18 as a valid legislative basis was enough to uphold the principle of attributed competence. Commenting on the earlier Draft, Weatherill stressed that the new system “confers too much power on State executives” and called for “a special system of constitutional safeguards, which will constitute a more reliable method than that available via the orthodox system of institutional involvement in the Union’s legislative process backed by orthodox judicial control.”²⁸

Next to the requirement of unanimity Weatherill placed a legislative procedure involving Parliamentary approval - which is stronger than Article I-18 (2) - as an extra safeguard against excessive resort to Article I-18. The same argument was made by the House of Lords Select Committee: “In addition, any proposal to use the flexibility provision in Article I-17 (now I-18) to increase the competences of the European Union should not be supported by the Government without the prior approval of Parliament in each case.”²⁹ Such a constitutional scrutiny could perhaps overcome the problem of mistrust among European citizens towards the legislative Community Institutions that will be amplified once the flexibility clause of the EU Constitutional Treaty covers all Union policies after its ratification. Then, the suspicion of the Union’s invasion upon a larger number of competences will expand given that the ratification of the EU Constitutional Treaty will make ‘communitarisation’ inevitable to the second and third pillar.

²⁸ Weatherill, S. “Competence” in de Witte, B. (eds) “Ten Reflections on the Constitutional Treaty for Europe”, EUI, Florence (2003) 45-66

²⁹ House of Lords Select Committee on European Union, Forty-First Report, Chapter 2: “Does a Constitution imply a European State?”, Para 85, the UK Parliament, (October 21, 2003), available at <http://www.parliament.the-stationery-office.co.uk>

2. Internal Market Harmonisation

Under Article III-14 “the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Constitution.” Article III-172 offers a new but rather unchanged version of the current Article 95 EC. In that respect the Convention confirmed rather than revolutionised the trend of internal market harmonisation measures.

Under Article III-172, internal market laws and framework laws are passed by qualified majority (1) excluding taxation, movement of persons and employees rights (2). A high level of protection is provided for health and safety, the environment and consumer protection (3). However Member States may keep national rules for the environment and working environment (4) and introduce national rules in case specific problems arise after harmonisation (5). Further, the Commission decides whether a measure is excluding, discriminatory, a hidden trade restriction or an obstruction to the functioning of the internal market and notifies the Member States (6). If a national derogation from harmonisation is approved, the Commission shall propose adaptation of the measure in question (7). Public health is not included in the so-called environmental guarantee (8) and the Commission or a Member State may bring the matter before the Court (9) if another Member State makes improper use of the powers provided in Article III-172. Finally a safeguard clause authorises Member States to adopt provisional measures subject to Union control.

Article III-172 may still function as a Commission’s tool to force legislation upon Member States as long as it identifies a link between the object of legislation and the internal market. For instance, Under Article III-172 (3) health and safety is considered individually, compelling the Union to provide a “high level of protection, taking account in

particular of any new development based on scientific facts.” Article III-210 provides: “with a view to achieving the objectives of Article III-209, the Union shall support and complement the activities of the Member States in the following fields: (a) improvement in particular of the working environment to protect workers’ health and safety...” The identification of ‘working conditions’ as a complementary competence leaves all other health and safety issues, which can be associated to the aims of the internal market, to be treated as Union competence under Article III-172. Thus, if the Commission desires to propose legislation on a smoking ban it can force it to the Member States by qualified majority under Article III-172.

As regards consumer protection, the Union’s limits of competence to enact legislation for consumers remain unchanged. However, the EU Constitutional Treaty has placed consumer protection under the list of shared competence. There “the Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles I-13 and I-17.” Despite that, under Article III-235 (1) “the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests”. Both the current EC Treaty and the draft Constitution provide for a ‘high’ level of consumer protection, while placed high up the list of priorities of the internal market, one would have thought that consumer protection deserves the highest level of protection. An emergency may push a consumer protection measure beyond the internal market objectives when for instance a Member State restrict the free movement of goods on grounds of consumer protection (health and security of national consumers).

Conclusion

According to Article I-12 (6), “the scope of and arrangements for exercising the Union's competences shall be determined by the provisions relating to each area in Part III”. These legal bases in Part III define the scope of the policy field over which the Union’s competence takes effect. This Chapter has attempted to portray how subject and objective related competences appear in the relevant provisions of the EU Constitutional Treaty providing a critical approach. The question is did the Convention achieve what it was set up to do? According to Craig³⁰, the EU Constitutional Treaty as a reform process was driven by three main forces: ‘clarity’ to remedy the unclear division of competences in the EC Treaty; ‘containment’ to reflect the demands of the German Länder and ‘consideration’ as to the areas that the Union should act in the future.

As regards clarity in relation to the distribution of competences, the draft Constitution. does not fully correspond to the aim for simplification of the Community’s legal order marked by drawbacks as regards the choice of the Community’s decision-making procedures³¹ or the possible impact of a legislative provision upon the relationship between EC and national competence³². The way competences are categorised in the EU Constitutional Treaty beg the question as to whether they aim to provide the Union with a model of simpler / clearer delimitation of competences or simply with one that presents a mere statement of powers. Even as a mere statement of powers, the Constitutional Treaty’s competence categorisation lacks the crucial detail as to how these powers should be shared within an enlarged Union. This is made particularly manifest in the way shared external

³⁰ Craig, P., “What Constitution does Europe Need? The House that Giscard Built: Constitutional Rooms with a View”, (2003) 26/03 European Federal Trust Online Paper, London

³¹ See Case C-155/91 *Commission v Council (Waste Directive)* [1993] ECR I-939

³² See Case C 84/94 *UK v Council (Working Time Directive)* [1996] ECR I-5755

competence and mixed agreements have been allocated. The problem there lies in the difficulty of the task of codification of the Court's vast and complicated decisions as well as their subsequent transformation into a simplified and transparent formula. One can hardly say that clarity is apparent in the Convention's effort; at least to such a degree that candidate or new Member States will understand what they have committed themselves to.

Dougan³³ lists three major criteria under which "a category approach of EU competences can be judged successfully." Thus the general categories of Union competences need i) to be comprehensive yet abstract to ensure both information and flexibility in crossing different policy areas; ii) to provide reasons in case they deviate from the current Treaty regime and iii) to be clear to avoid undesired legal effects. Given that the EU Constitutional Treaty was formally signed by the twenty-five EU leaders in Rome (October, 29, 2004) there is little room for amendment unless in the next round of constitutional talks, scheduled for 2006, politicians remedy certain unintended legal consequences arising from the text. This verifies Amato's view almost ten years ago in relation to a Pan-European Constitution³⁴. He stressed that if the goal of the Constitution is to "give national public opinions the sense of the foreseeable dimension of the powers they are delegating to the central authorities...the draft Constitution has to be heavily amended, primarily because of its ambiguity." Thus, as Amato concludes, "if we want to pass from an incremental accumulation of treaties to a constitution, we need the courage to forge a new beginning, at least in terms of clarity."

³³ Dougan, M, "Assesing the 'Legal Legitimacy' of the Draft Constitutional Treaty", Seminar on Internal Reform and the Constitution Building Capacities, (April 2003) Centre for International Relations, CONVEU-30, Warsaw.

³⁴ Amato, G. "Distribution of Powers", in "A Constitution for the European Union?", Proceedings of a Conference, 12-13 May 1994, Organised by the Robert Schuman Centre, EUI Working Paper 95/9, EUI, Florence

As regards containment and consideration, the relevant competence provisions in the EU Constitutional Treaty suggest a peculiar mixture of the supranational and intergovernmental elements. This of course reflects the nature of the text as a product of political compromise and diplomacy. On the one hand, one witnesses a tendency of centralisation in relation to the Union's exclusive competences (competition distortions, CCP, international agreements) and on the other a strong preservation of intergovernmentalism (CFSP). Those desiring a strong maintenance of the intergovernmental element within a constitutionalised Union would support that although the initial proposal to extend the Union's exclusive competence in order to contain the four Community freedoms was abandoned by the Praesidium in its final Draft, an analogous outcome could emerge in the Constitutional Treaty from the management of the "Union's external relations, through an expansion of the CCP for instance. As regards objective related competence, the Convention did not propose any considerable reform of Article 95 EC. The Court's decision in the *German Tobacco Case*³⁵ appears to have very much set the boundaries under which the Community Institutions may rely on Article 95 EC as a valid legal basis and have restricted their legislative competence within the area of the internal market. In contrast, the Convention approached with more interest the general flexibility clause of Article 308 EC that under Article I-18 may enjoy a wider scope of application but is also burdened with safeguards to avoid a threat to the principle of conferral of powers within the Union.

Clarity, Containment and consideration thus emphasise the technical side of a constitution based on competence distribution. This neglects the fact that a constitution

³⁵ Case C-376/98 *Germany v Parliament and Council* [2000] ECR-I-8419

symbolises the legal manifestation of the social contract attached to the notion of the nation state. But yet again the EU Constitutional Treaty is not a state-like constitution but begun in the name of simplification and codification and ending up as a tidying-up exercise. The question is whether this ‘tidying-up exercise’ needs some ‘tidying-up of its own’³⁶. As the vice-president of the Convention, Giuliano Amato, had commented early on the Constitution negotiations: “we wanted a girl, we gave birth to a boy, but we do have a child.”³⁷

³⁶ Dougan, M., “The Convention’s Draft Constitutional Treaty: A Tidying Up Exercise that Needs Some ‘Tidying-up’ Of Its Own”, (2003) The Federal Trust, UK

³⁷ See Article in EurActiv entitled “The European Convention and EU Foreign Policy”, available at <http://www.euractiv.com/Article?tcmuri=tcm:29-110177-16&type=Analysis>

CHAPTER 6

COMPETENCE, SUBSIDIARITY & MONITORING DEVICES

Introduction

As illustrated in previous chapters the balance of the vertical relation between the different levels of governance (i.e. the Community vis-à-vis the Member States and peripheries) depends upon the issue of competence. The question of who has the competence to legislate and the rightness of choice of the legal basis once the Community has been assessed as competent to do so, has always created room for conflict. Subsidiarity comes as an additional feature that aims to preserve the balance of this relationship in the absence of a clear division of competences between the Community and the Member States. The principle of subsidiarity (which does not apply in areas of exclusive competences) operates on the one hand as a constitutional safeguard to national autonomy against excessive Community centralisation and on the other as a vehicle of extending EC legislative competences, provided that state action is insufficient in a given area¹.

This chapter will focus on how the evolution; restraints and potential of the principle of subsidiarity influence the vertical delimitation of EU competences. It appears that whilst until the Treaty of Amsterdam subsidiarity was running an identity crisis with particular focus on definitional and procedural aspects, in the post Amsterdam period, it has undergone a monitoring crisis. Both crises have a direct impact on the vertical delimitation of competences in the Community. To allow flexibility, the EU Constitutional Treaty has been called to remedy the monitoring gap of subsidiarity by modifying the Union's legislative procedure. It has partly succeeded by allowing national parliaments to scrutinise Council

¹ See Lenaerts, K. and Stewart, R. "The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism", (1994) 17 Fordham International Journal 846, at 879

legislation before its adoption through what has been called an ‘early warning system’. This, however, does not imply that national parliaments are entitled under the EU Constitutional Treaty to bring legal proceedings against Community legislation. Additionally, the Court’s history of *ex post* monitoring of the Community’s compliance with the principle does not suggest that it can do more than policing procedural subsidiarity.

A. THE DEFINITIONAL CRISIS

1. The Duty not to Interfere and the Duty to Supplement

The principle of subsidiarity, which was first mentioned in Article 25(4) of the 1987 Single European Act in relation to environmental policy, was incorporated in the EC Treaty through the Treaty of Maastricht Article 3b following “the debate on the Community’s legitimacy between the Member States from the end of the 1980s onwards”². The content of this provision was repeated in Article 5 of the Treaty of Amsterdam. The aim behind it was to ensure that action is most accurate where competence is shared between the Member States and the Union. As the competence of implementation and application of legislation is vested upon the Member States, subject to limitations deriving from the Treaty and the EC Institutions, the Community exercises that competence only in compliance to subsidiarity [Article 5 (2) EC] and proportionality [Article 5 (3) EC]. The set of norms posed by the principle of subsidiarity delineates the spheres where the Community may or may not engage into legislative action. The choice of where to allocate power while avoiding unrestrained behaviour and gaps is summarised in Article 5 (2) EC:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if

² Estella A., “The EU Principle of Subsidiarity and its Critique”, Oxford University Press, (2002)

and in so far 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.

Article 5 EC defines the use and not the meaning of subsidiarity. The principle aims to be a guiding light to condition the exercise of Community competence and not a signpost of the subject matter over which the Community has or has not competence to act. As seen in Chapter 3, the clarification of the term 'exclusive competence' (i.e. subsidiarity applies within the Community's non-exclusive / shared competence) has been left to the jurisprudence of the Court. The same occurs with subsidiarity as a justiciable principle of Community law³. Yet, being the result of a political negotiation, there is ambiguity in the Treaty as to whether the Court's jurisprudence applies in reviewing the legislative process or / and in interpreting Community legislation. The Court from its side has been cautious in applying subsidiarity to its interpretations of Community law. This happens, according to the author, not out of concern of the Court about the degree of 'justiciability' that it is allowed but out of fear of extending Community competence. The purpose of this example is to highlight that a definitional crisis of subsidiarity has a direct impact upon the vertical division of competences as this occurs between the supranational and intergovernmental levels of Community governance.

One could suggest that the definition of subsidiarity is possibly broad to allow scope for flexibility in the policies to be followed at Community level. The wording of Article 5 (2) EC sets two main obligations for the Community: The duty not to interfere and the duty to supplement. Both duties do not ascertain when the Community has competence to intervene. Instead it is through Article 5 (1) EC that the Treaty determines textually when

³ See Case C-491/01 *R v Secretary of State for Health ex parte British American Tobacco* [2002] ECR II-11453, particularly paragraphs: 177-185

the Community shall take action. Article 5(1) EC lays down the principle of attribution of powers, which states that “the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”. Suitably, Article 5 (2) EC establishes that decisions and responsibilities should lie as low down in the system as possible. A competence can therefore be exercised on the lower (Member States) level of government as long as the objectives of an action can be achieved at that level. Accordingly, a competence can be exercised on the higher (Community) level as long as the Member States cannot achieve these objectives. Thus, subsidiarity carries several political consequences bringing Europe towards a “decentralised processes of decision making...within constitutional political structures.”⁴

By its very nature the principle of subsidiarity is highly political and difficult to put into operation. However, a strict political use of the principle of subsidiarity lacking a legal approach is not sufficient to make it effective. The practical function and observance of the principle of subsidiarity in a constitutionalised Union necessitates the existence of multiple legal / procedural checks to EC legislation. At present, subsidiarity as a procedural question has been left to the Court. As it will be discussed below⁵, the Court only monitors EC legislation *ex post*. Due to its hesitancy towards subsidiarity pleadings, the Court has never annulled a measure on the basis of violation of the principle. Thus, commentators have stressed the importance of effective subsidiarity checks not only *ex post* but also *ex ante*, when EC legislation is prepared as a proposal by the Commission. In the recent debate about the EU Constitutional Treaty, the procedural and monitoring aspects of subsidiarity were interconnected. This reflects the realisation of the Convention on the Future of Europe that

⁴ Bohman, J., “The Coming of Age of Deliberative Democracy”, (1998), (6) *Journal of Political Philosophy* 399–423

⁵ See Section B.2. “Monitoring by the Court, or lack of it”

any legal application and monitoring of subsidiarity might be easier to concentrate upon its procedural aspects rather than trying to utilise it as a substantive test. Particularly, the Protocol of the EU Constitutional Treaty, regarding the application of the principles of subsidiarity and proportionality, assigns a unique role to the national parliaments in relation to the evaluation of the level to which the principle is complied with.

The clouds over the definition of subsidiarity and their legal-political implications on the European power vacuum have created a schism of opinions as to the nature of the principle itself. Schilling has characteristically alleged that “a split of opinions has occurred with lawyers coming out in favour of treating the subsidiarity principle as a political principle and politicians coming out in favour of treating it as a legal norm.”⁶ In the case of the Community, subsidiarity does not constitute a *version nouvelle* of the American principle of decentralised federalism but a block to federalism, without representing an expression of it. Until all intergovernmental arrangements have been questioned constitutional lawyers will most likely continue talking about a quasi-federal European polity. The point defended here is that subsidiarity is a part of a package of legal obligations that includes the principle of conferral [Article 5 (1) EC] and the principle of proportionality [Article 5 (3) EC]. According to Estella⁷ “subsidiarity enters the scene only when it is clear that the Community has competence to act...In other words, subsidiarity is a principle regulating the exercise, not the holding, of Community competence.” Toth⁸ adds that subsidiarity “cannot affect the competences granted by the Treaty, nor can it confer new competences on the Community.” In other words subsidiarity can neither be employed to

⁶ Schilling, T., “Subsidiarity as a Rule and as a Principle, or: Taking Subsidiarity Seriously”, (1995), 10/95 Harvard Jean Monnet Working Paper, NYU.

⁷ Estella, A., “The Principle of Subsidiarity and Its Critique”, Oxford University Press, (1997), at pp 91

⁸ Toth, A.G. “Is Subsidiarity Justiciable?”, (1994) 19 (3) European Law Review 268-385

pass any powers upon the Community nor be used by the Community to delegate powers to sub-national levels of government (the peripheries). As to its application, not only does subsidiarity subject Community action to take place only where an objective cannot be achieved by Member States but it also contains a negative obligation on the part of the Member States to avoid acting if this condition is satisfied.

The Amsterdam Protocol No. 30 “on the application of the principles of subsidiarity and proportionality”⁹ added to the function of subsidiarity as a limitation clause for ascertaining the equal distribution of powers between the Community and the Member States. It replaced questions of political choice (at what point and why should the Community interfere) with issues of policy organisation (how to provide a guarantee that the Community does as little as possible). It succeeded in this by drawing the attention of the Institutions taking part in the legislative procedure to substantive aspects, including a list of guidelines to be used in examining whether the principle of subsidiarity is fulfilled (paragraphs 3 and 5) and procedural aspects, including a statement of reasons for legislative proposals (paragraph 4)¹⁰. In other words the ‘Subsidiarity Protocol’ constitutionalised the already existing guidelines “focusing less on the idea of exclusivity and more on the possibilities for sharing competence across different levels of authority through the use of specific types of legal instrument, and emphasising the importance of reasoning and justification of decision-making at least at EC level.”¹¹ Last but not least it touched upon the definitional problem of subsidiarity by pointing in Point (3) that: “the principle of

⁹ See <http://europa.eu.int/eur-lex/en/treaties/selected/livre345.html>

¹⁰ “...the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, whenever possible, quantitative indicators.” See the Commission Proposal for a Directive on the Conditions of Entry and Residence of third-country nationals for the Purposes of Studies, Vocational Training or Voluntary Service, COM (2002) 548 Final

¹¹ De Búrca, G., “Reappraising Subsidiarity's Significance after Amsterdam”, (1999), 7/99 Harvard Jean Monnet Working Paper, NYU

subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court...” Instead it “provides a guide as to how those powers are to be exercised at Community level.”

According to Endo “nothing is absolutely sovereign in the world of subsidiarity. The principle does not view the Member States and the EU as sovereign entities. It is a Europe equipped with multiple levels of governance internally, and viewed as such by those outside the EU”¹². A ‘Subsidiarian Europe’ is founded on the doctrine of limited / attributed powers of the Community (subsidiarity is a further development - one shape so to say - of this). According to Dashwood, subsidiarity and proportionality “are principles controlling the exercise of Community powers; whereas the attribution principle goes to the question of the existence and extent of such powers.”¹³ As the EU only derives its powers and authority from the Treaty, it does not possess a genuine own competence to enlarge unilaterally its powers. This is the crucial difference of the EU in comparison to any sovereign state. The Community does not possess what the Bundesverfassungsgericht ¹⁴ calls *Kompetenz-Kompetenz*, meaning the competence to enlarge its own competences. Instead it is always dependent on the Member States and the amount of powers these are willing to transfer upon the Community. The debate between the the German Constitutional Court and the European Court of Justice (the Court hereafter) has always been a point of reference for academics as regards the balance of Community and national competence.

¹² Endo, K., “Subsidiarity and its Enemies: To What Extent is Sovereignty Contested in the Mixed Commonwealth of Europe?” (2001) EUI Working Paper 2001/24, EUI, Florence

¹³ Dashwood, A. . “The Limits of European Community Powers”, (1996) 21 (2) European Law Review 113

¹⁴ The German Constitutional Court or BVerfG in short.

2. The Position of the German Federal Constitutional Court (BVerfG)

The *Kompetenz-Kompetenz* argumentation was used by the BVerfG in the line of the *Solange Saga*¹⁵ and later in *Brunner*¹⁶ in order to support the point that although EC supremacy is acknowledged in general, Community acts might be subjected to national legal review as soon as matters of national sovereignty, for instance - although not exclusively - fundamental rights protection, are at risk of being infringed by Community measures. Consequently, some Community acts might be '*ultra vires*' and don't exercise binding power in Germany, because the Community has exceeded its competences. If it acts to regulate to an effect that minimises the fundamental rights protection under the Basic Law, it is not entitled to do this under the EC Treaty and therefore it lacks the required competence. To act nonetheless, would mean to create a new competence 'out of no-where'.

In accordance with Articles 23(1), 24(1) of the Basic Law, the National Parliament may pass an act that accepts a loss of governmental power in favour of another body. Under the German Constitution this way of power-transfer is only allowed insofar as it does not challenge the fundamental rules and values set out in the Basic Law. Thus, the German Constitution only provides a delegation of power. The final juridical control rests within the Member State who granted the power to the Community in the first place. However, Articles 23(1) and 24(1) Basic Law refer to '*Übertragung von Hoheitsrechten*' (transfer of sovereign power). The ambiguity of the term 'transfer' (*Übertragung*) leaves room for interpretation. The BVerfG has only indirectly clarified 'transfer' in terms of its relationship to the Court. For instance, in the aftermath of *Solange II*, the two Courts agreed on the consequence of incompatibility of a Community rule with national law. The supremacy of

¹⁵ *Solange I* [1974] BVerfGE 37, 271 / 2 CMLR 540; *Solange II* [1987] BVerfGE 73, 339 / 3 CMLR 225

¹⁶ *Brunner v The European Union Treaty* [1994] BVerfGE 89,155 / CMLR 57

Community law led to a priority application as far as the legal collision reached¹⁷ and not to the invalidity of the national rule. However, this was only true until October 1993, where the BVerfG ruled over constitutional complaints against the Treaty of Maastricht¹⁸.

The ratification of the Treaty of Maastricht was suspended by the German Federal President to await the judgment of the BVerfG. The BVerfG emphasised the importance of the protection of fundamental rights and democratic principles under EC law. To ensure this aim, it assumed that the degree of transference of power should be limited to ensure effectiveness of the protection of fundamental constitutional principles. The BVerfG contended that the transfer of power must not result in 'emptying' the values represented in the German Basic Law such as democracy (Article 38 basic Law enshrines the right to vote) and national sovereignty.¹⁹ This is because the legislative Institutions of the Community are not elected directly by the people of the Member States. Thus, according to the BVerfG, an unrestricted transfer of power from the democratically elected National Parliament to the Community and its Institutions could infringe the right of active influence of governing.²⁰

In order to secure the protection of the fundamental constitutional principles the BVerfG has entered within a 'co-operative relationship' to the Court. This occurs when the BVerfG is reviewing the compatibility of Community law on the grounds of the German Constitution. But how this cooperation between the two courts operates in practice? In general, the Court guarantees through its case law the protection of fundamental rights in all Member States. However, if the Court fails to meet the standards set by the BVerfG then the latter can claim authority to make a final decision in single cases on the grounds of national

¹⁷ Case C-184/89 *Nimz v City of Hamburg* [1991] ECR I-297, 321.

¹⁸ *Brunner v The European Union Treaty* [1994] BVerfGE 89,155 / CMLR 57

¹⁹ BVerfG E 89, 155 (172).

²⁰ Zuleeg, M., "The European Constitution Under Constitutional Constraints: The German Scenario", (1997) 22 *European Law Review* 19, 27.

constitutional law²¹. Thus the BVerfG saw itself in *Brunner* as last instance when it comes to evaluate the constitutionality of EC law under the Basic Law. Had the constitutional complaint in *Brunner* not been ultimately dismissed by the BVerfG, the exclusive authority and competence of the Court over the validity of EC law would have been questioned.

This conflict persisted in the so-called “*EU-Banana-litigation*”. The Court dismissed appeals of German Banana importers and Government against EC Regulation 404/93, stating that fundamental rights had not been infringed. On the other hand, the BVerfG partly upheld the claims and instructed the Administrative Court of Appeal to grant effective protection of Art. 14(1) Basic Law²². It was an order under the influence of the decision in *Brunner*. Regulation 404/93 was said to infringe fundamental rights, because it failed a proportionality testing and violated the obligations under GATT that the Community was bound to under Art. 307 EC²³. Again the last decision was up to the national courts, although not on a constitutional level. In the course of this rather dramatic development, the BVerfG delivered yet another judgement on the Banana-struggle in 2000²⁴. This ruling summarised the legal situation from its point of view and defined concrete limits to the revision of EC law. For the first time the BVerfG spoke of a misinterpretation of the *Brunner* decision by the plaintiff’s attorneys, when they sought relief from the EC quota invoking fundamental rights [Art. 12(1), 14(1) Basic Law] before the BVerfG²⁵. In the end it did not uphold the claims of banana-importers, because they had failed to provide substantial evidence that the

²¹ See BVerfG E 89, 155 (175; 178).

²² [1995] BVerfG, NJW, 950.

²³ Reich, N., “Judge-Made ‘Europe à la Carte’: Some Remarks on Recent Conflicts between European and German Constitutional Law Provoked by the Banana Litigation, (1996) 7 European Journal of International Law 101, 109-110.

²⁴ [2000] BVerfG, NJW, 3124-3126.

²⁵ [2000] BVerfG, NJW, 3124 (3125).

protection of fundamental rights on Community level had deteriorated under the Basic Law's threshold²⁶.

In all above-mentioned judgments of the BVerfG, the protection of fundamental rights has always been the centre point of reasoning. However, in *Brunner* the individual right of Art. 38(1) Basic Law was more or less only the starting point that led to a deeper reflection on the democratic basis of the Community²⁷. The BVerfG came to the conclusion that the principle of democracy that expresses the sovereignty of the people implies the necessity of direct democratic legitimation of institutions exercising governmental power²⁸. This finding applies, according to the BVerfG, also to the European Union. So the Community must not exceed its competences only derived from transfer-acts of national, directly democratically legitimated, parliaments. In so far the Community does not have a so-called "*Kompetenz-Kompetenz*"; it is not able to achieve autonomously more powers than granted by third parties²⁹. This is one of the reasons, why a "Federal State of Europe" does not exist. A state is sovereign and thus may exceed its powers on its own³⁰. The crucial point in the opinion of the BVerfG is that Community legal acts – generally independent of national law and as ruled supreme to them – are therefore believed to be able to break out of those limits. This situation will occur, when Community legislation unjustifiably infringes fundamental rights. As a consequence those acts will be *ultra vires* and are void.

²⁶ [2000] BVerfG, NJW, 3124 (3125).

²⁷ Herdegen, M., "Maastricht and the German Constitutional Court: Constitutional Restraints for an 'Ever Closer Union'", (1994) 31 Common Market Law Review 235, 238; Everling, U., "The Maastricht Judgement of the German Constitutional Court and its Significance for the Development of the European Union", (1994) 14 Yearbook of European Law 1, 5.

²⁸ BVerfG E 89, 155 (184).

²⁹ Herdegen, M., "Maastricht and the German Constitutional Court: Constitutional Restraints for an 'Ever Closer Union'", (1994) 31 Common Market Law Review. 235, 242

³⁰ See Everling, U., "The Maastricht Judgement of the German Constitutional Court and its Significance for the Development of the European Union", (1994) 14 Yearbook of European Law 1, 6.

This string of reasoning does not necessarily obstruct the concept of the EC legal system in the first place. EC law acknowledges the principle of subsidiarity and attributed powers as enshrined in Article 5 EC. The concept of EC law supremacy is in this case not denied, but simply not applicable. According to the BVerfG, only such Community measure may claim supremacy over national law, which was legally adopted in the “sphere of Community”³¹. The astonishing fact about the ruling of the BVerfG still is, that it claims juridical competence in this field for itself, ignoring the Court and the procedure under Article 234 EC³². In doing so, the BVerfG had prepared a field of potential conflict with the Court, as the more recent litigation against EC Regulation 404/93³³ before the national courts has shown. A parallel juridical competence of a national court over Community legislation is likely to destroy the unity of EC law application sooner or later, resulting in uncertainty as to what the law is³⁴. The common ground, the Community is built on, is firstly the legal community. Therefore a European integration is hardly imaginable without a legal unity, which as such can only be established through a unified jurisdiction. It can be argued that the concept of the BVerfG in its last consequence could result in a split up of the EU. In fact, through its jurisdiction the German Constitutional Court showed that to withdraw from the Community in more than one way is theoretically possible³⁵. Theoretically, since the

³¹ De Witte, B., “Community Law and National Constitutional Values”, (1991) 2 *Legal Issues of European Integration* 1 (3).

³² Everling, U., “Will Europe Slip on Bananas? The Bananas Judgement of the Court of Justice and National Courts”, (1996) 33 *Common Market Law Review* 401, 434-435.

³³ Council Regulation (EEC) No 404/93, OJ L 47/1 as regards the arrangements for importing bananas into the Community was amended by Council Regulation (EC) No. 216/2001.

³⁴ See Schermers, H.G., “The Scales in Balance: National Constitutional Court v. Court of Justice”, (1990) 27 *Common Market Law Review* 97, 103.

³⁵ Zuleeg, T., “The European Constitution under Constitutional Constraints: The German Scenario”, (1997) 22 *European Law Review* 19, 29.

Member States remain the 'Masters of the Treaties' ('*Herren der Verträge*')³⁶ they should be able to terminate their membership unilaterally³⁷. Furthermore, as Germany is still a sovereign state, the national Parliament could easily overcome the legitimation of the Community Institutions by cancelling the act of Accession to the Treaties.

The BVerfG has not needlessly used the expression "co-operation" to describe its relationship to the Court. That was presumably to avoid too hard a confrontation between the two Courts. To place national legislation, even though a constitutional one, over Community law would contradict the doctrines of direct effect and supremacy established by the Court and which so far is applied amongst the Member States. This could therefore be considered as a breach of Treaty on behalf of the German Federal Republic. Thus, the BVerfG cannot review every single Community rule in every single case it affects a German citizen or business, which enjoys the guarantee of certain fundamental rights under the German Basic Law as well [Art. 19(3)]. On the contrary, a relationship of co-operation exists and has also been accepted by the Court³⁸. The procedure under Article 234 EC supports this relationship. This leads one to conclude that the revision of EC law by the BVerfG is *ultima ratio* in order to preserve unchangeable constitutional guarantees under Art. 79(3) Basic Law³⁹. Art. 79(3) Basic Law guarantees fundamental principles and rights in the way that any alteration of the constitution in this respect is even out of the reach of

³⁶ Wieland, G., "Germany in the European Union - The Maastricht Decision of the Bundesverfassungsgericht", (1994) 5 European Journal of International Law 259, 263.

³⁷ See Article I-60 of the EU Constitutional Treaty on the voluntary withdrawal of a Member State from the Union. According to it "any Member State may decide to withdraw from the European Union in accordance with its own constitutional requirements."

³⁸ Case 127/73, *Belgische Radio a. o. v SV SABAM* [1974] ECR 51; Case C-234/89, *Delimitis v Henninger Bräu AG* [1991] ECR I-935

³⁹ [2000] BVerfG, NJW, 3124 (3125)

Parliament; meaning practically that there is no legal way to undermine them.⁴⁰ As the parliament-transferred power turns all Community acts into “acts of public power” (“*Akt öffentlicher Gewalt*”) according to Art. 19(4), 93(1) 4b Basic Law and makes them equal to national legislation, the BVerfG has the general competence to review them⁴¹.

However, the jurisdiction of the BVerfG concerning this matter must not be over-interpreted. It would not be an exaggeration to say that the complexity of the legal matter and the choice of words by the BVerfG might have led to a wrong understanding⁴². It is not an established fact that the BVerfG in *Brunner* dissociated itself from the findings in *Solange II*. The Court has only examined the consequences of ‘*ultra vires*’ Community acts in greater detail. One could even argue that the aim of all judgments delivered by the BVerfG was to stress the necessity of effective fundamental rights’ protection on Community level. A point that might have been neglected a bit over the relatively quick and profound changes that stood on the EC political agenda to push integration even further within a small time-schedule (for example, the completion of the Single Market and Monetary Union). Yet, according to the present author, even when the fundamental rights issue seemed to have been resolved through judicial cooperation between the two courts, the question of who possesses the ultimate competence was not directly answered. This is still capable of creating tension in the vertical relation between the Community and the Member States. Both in *Solange II* and *Brunner* the BVerfG claimed to possess this competence, although it put its exercise under the condition that the standard of fundamental human

⁴⁰ Everling, U., “The Maastricht Judgement of the German Constitutional Court and its Significance for the Development of the European Union”, (1994) 14 Yearbook of European Law 1, 5.

⁴¹ BVerfG E 89, 155 (174-5); E 73, 339 (376-7; 386); E 37, 271 (280-2).

⁴² BVerfG E 89, 155 (172).

rights' protection in its essential requirements has 'sunk under the standard of Germany's Basic Law'⁴³.

As a consequence, in the *Banana Cases* the BVerfG held that constitutional complaints, which cannot make credible that such a deterioration of protection before the Court has taken place, will and must not be admitted⁴⁴. After all neither the supremacy of EC law nor the competence of the Court is doubted in principle⁴⁵. Furthermore this point of view also corresponds to the frame set out by Art. 23 (1) 1 Basic Law for Germany's participation in the Community. The German Constitution names the protection of fundamental rights explicitly within this provision and also Art. 79(3) Basic Law demands the safeguarding of these most fundamental values. The BVerfG is legally bound to this. Hence, only the core of sovereignty of the people is said to be preserved⁴⁶. This is a right that by no means can be denied to a state⁴⁷. Under British constitutional law, for instance, there is now doubt that the application of EC law in the country can be immediately stopped by an Act of Parliament⁴⁸. It is interesting that the British reluctance as regards the extent of Community competence is related to the principle of Parliamentary Sovereignty and not the adequacy of protection of fundamental rights. Italy has also a legal "emergency-exit" for

⁴³ BVerfG E 73, 339 (378-381); [2000] BVerfG, NJW, 3124 (3125); [1988] 25 CMLR 201 (203).

⁴⁴ Hoffmeister, F., "Case Law; German Bundesverfassungsgericht Alcan Decision of 17 February 2000; Constitutional Review of EC Regulation on Bananas, Decision of 7 June 2000", (2001) 38 Common Market Law Review 791, 793.

⁴⁵ Weatherill, S., and Beaumont, P., "EU Law", 3rd edition., London, Penguin (2000), 444; Steiner, J., and Woods, T., "Textbook on EC Law", 7th edition., Mayfield, Blackstone, (2000), 105.

⁴⁶ BVerfG E 37, 271 (279/280); E 58, 1 (90); E 73, 339 (374)

⁴⁷ Rodriguez Iglesias, G., "Mackenzie-Stuart Lecture", 10. Feb. 1997, (1998) 1 Cambridge Yearbook of European Legal Studies 1, 13-14.

⁴⁸ Craig P. and de Búrca, G., "EU Law: Text, Cases and Materials", 2nd Edition, Oxford University Press (1998), 253; Frowein, J., "Solange II (BVerfG E 73, 339). Constitutional Complaint Firma W.", (1988) 25 Common Market Law Review. 201, 204.

extreme cases⁴⁹. As a result Art. 23(1) Basic Law can only be interpreted in the way that only a delegation of power is allowed.

One should point out that this healthy tension between the two courts would not be altered by the EU Constitutional Treaty. For instance, the House of Lords Select Committee on European Union has discussed the issue of competence in the light of Article I-29 (1) of the EU Constitutional Treaty. The provision enables the Court to “ensure that in the interpretation and application of the Constitution the law is observed”. Again with reference to the *Brunner* judgment that has not been overruled to the present day, Dr Berrisch concluded:

“...I understand that there are two questions to distinguish here. One question is, if Germany has agreed to the Constitution the Treaty, which becomes the new EU Constitution, they agree implicitly also that the European Court of Justice will have the competence to decide on the competence of the Community, or the Union, whatever it will be called.

The other debate that can come up is whether by agreeing to that, Germany has violated the German Constitution and gave more power to the Union than permissible under the Constitution That would be a question not to be decided by the European Court of Justice but to be decided by the German Constitutional Court. That is how I would view the question. For a number of reasons, I find it very unlikely that, if I look at the new Treaty here, the outcome would be that Germany has given more power to the Community than allowed under the German Constitution.”⁵⁰

Indeed, the EU Constitutional Treaty does not carry the threat of legal uncertainty or disunity of the application of Community law in Germany. As the threshold set by the

⁴⁹ La Pergola, A. and Del Duca, P., “Community Law, International Law and the Italian Constitution”, (1985) 79 American Journal of International Law 598, 599; 610-611.

⁵⁰ House of Lords, Select Committee on European Union, Examination of Witnesses (Questions 60-79), (22 October 2003). Available at <http://www.publications.parliament.uk/>

BVerfG only seeks to provide a core-protection of the rights set out in the Basic Law, the likelihood of an intervention tends to zero⁵¹. Also the citizens are clearly not encouraged to press constitutional complaints, as these would most certainly not be admitted⁵². As shown, the correct application of the criteria set out in the BVerfG rulings does not result in a general exemption in favour of German citizens from the binding provisions of Community legislation, so that the process of integration is never really at risk. The Court rather has outlined the inherent limits of Community power, something that has also been made clear in the EC Treaty (Article 5 EC) and the EU Constitutional Treaty (Article I-11) I. After all, the Community's obligation under the Treaty is to respect its Member States' national identities, and the Member States must assist each other fulfil the Community's objectives. Thus any current or future conflict between the Court and the national courts of the Member States is healthy and illustrates the degree that the Court relies on their cooperation.

3. Division of Competence or Division of Sovereignty?

The definitional crisis of subsidiarity may transform the principle from a tool against excessive intervention to a constraint on European integration the more Member States disagree about common ends and shared standards. On the other hand, resorting to individual rather than common action ensures that some issues of national importance would still remain attached to the state. Social rights, for instance are considered to be '*government obligations*', an area where Member States still to a large extent wish to retain their competence by national regulation. For instance, the UK has a different conception of unfair

⁵¹ Hoffmeister, F., "Case Law; German Bundesverfassungsgericht Alcan Decision of 17 February 2000; Constitutional Review of EC Regulation on bananas", Decision of 7 June 2000, (2001) 38 Common Market Law Review 791, 803.

⁵² See also *Finanzgericht Hamburg* 01/02/2001 – Az. IV 178/95 –; "Banana Regulation does not infringe fundamental rights. No reference to BVerfG made."

dismissal rights that does not reflect the wording of Article 30 of the EU Charter of Fundamental Rights⁵³. Given the short British experience with the Human Rights Act (1998)⁵⁴, any chance of co-existence with a binding EU Charter of Fundamental Rights would be problematic. Legally established social rights at Community level, especially after a possible ratification of the EU Constitutional Treaty, would throw the question of subsidiarity at the Union's table. Supposedly the drafters of the Charter foresaw this argument. This is apparent in Article 51(1) and (2) of the Charter⁵⁵ where respect to subsidiarity is paid explicitly. Equally this was reaffirmed in the Court's case law⁵⁶. Thus alongside the legalisation of the Human Rights Charter or a formal constitutional framework, a uniform, almost federal regime resulting to a blind transference of competences to a supranational level is doubted in face of the subsidiarity question employed to defeat those who hope to increase the federalist lesson of the Community⁵⁷.

Subsidiarity in its orthodox meaning does not imply a diminution of the political value of European integration. The principle itself is a sufficient checking point and prevents the Community's attempts to expand its competences to the Member States' detriment by breaking into reserved national areas. Therefore subsidiarity does not aim to prevent any efforts of the Union's constitutionalisation process but its application, especially in the *British American Tobacco Judgment*⁵⁸, signals a return to orthodoxy where the Community

⁵³ "Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices."

⁵⁴ See Ewing, K., "The Human Rights Act and Labour Law" (1998) 27 *International Law Journal* 225

⁵⁵ It is made explicit that "*the provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law...*"

⁵⁶ Case C-292/97 *Karlsson a.o.* [2000] ECR I-2737

⁵⁷ See Emiliou, N., "Subsidiarity: an Effective Barrier against the Enterprises of Ambition", (1992) 17 *European Law Review* 383

⁵⁸ Case C-491/01 *R v Secretary of State for Health ex parte British American Tobacco* [2002] ECR II-11453

under Article 95 EC “does not enjoy exclusive competence to regulate economic activity on the internal market, but only a certain competence for the purpose of improving the conditions for its establishment and functioning, by eliminating barriers to the free movement of goods and the freedom to provide services or by removing distortions of competition.”⁵⁹ After all, subsidiarity as a dynamic concept should be applied in the light of the objectives set out in the EC Treaty.

Given the impediments that render a final or absolute division of competences impractical, a wide gap of ‘grey’ shared authority within the Union has rendered the procedural tactics of precise power distribution problematical. Probably this is the main reason why the practical implementation of subsidiarity within a positive text was never discussed in detail during the political post-Nice debates. Instead, federalist proposals went as far as suggesting that “to strengthen the clarity of the competence order, the EU competences could be allocated to different competence categories, varying by the intensity of EU activity permitted in the different political fields.”⁶⁰ According to this model, the Court would become the real Constitutional Court of the Union with an extended jurisdiction covering all the acts of the Union. Most of all, federalists insisted on a central control consisting of a parliamentarised European legislation with nucleus sovereignty attached to the Federation. Subsidiarity would constitute a basic ingredient in this model, albeit well hidden behind the Federation’s capacity going, according to Fischer, as far as “*what is absolutely necessary to regulate at European level*”⁶¹. This theory lacked contemplation as instead of closing a long-standing conflict of competence division it only succeed in touching upon one front only to open another, that of division of sovereignty.

⁵⁹ Ibid, paragraph 179

⁶⁰ The Federalist View of the Future of Europe, Initial UEF Contribution to the Convention, Adopted by the Federal Committee Meeting at Palma de Mallorca, 21 April 2002. Available at <http://en.federaleurope.org>

⁶¹ See Lepsius, M.R., “The European Union as a Sovereignty Association of a Special Nature”, (2000) 7/00 Harvard Jean Monnet Working Paper, NYU.

B. THE MONITORING CRISIS

Introduction

In recent years the principle of subsidiarity has undergone an identity crisis. This crisis owes much to the insufficient legal monitoring of its application by the Court, which in any case can only intervene after the adoption of legislation⁶². The Court is more reluctant to annul Community legislation that constitutes part of the *acquis communautaire* and is applied by the Member States' judiciaries. At the same time it is more willing to invalidate a legislative proposal that has no legal consequences at the time of its assessment. In this case, it is more possible for the Court to examine the factual evidence over the Community legislator's proposal that the objective of the proposed legislative act cannot be achieved at national level. Second the marginal role of national parliaments in supranational legislation has gone against the wish for a Union closer to its citizens. "The role of National Parliaments in the European architecture"⁶³, forming the last point of the post-Nice constitutional agenda is based on two assumptions. First, being not entirely involved in Union legislation, the European Parliament is unable to substitute for the role of national legislatures. Second, lacking the most fundamental attribute of national legislatures, the representation of a European demos, its democratic legitimacy appears weak without the backing of national parliaments⁶⁴.

⁶² De Búrca, G., "Reappraising Subsidiarity's Significance after Amsterdam", (1999), 8/99 Jean Monnet Working Paper, NYU

⁶³ The European Convention, Note from Praesidium to The Convention, "The Role of National Parliaments in the European Architecture", 31 May 2002 (03.06), [CONV 68/02]

⁶⁴ See MacCormick, N. (1997a), "Democracy, Subsidiarity, and Citizenship in the `European Commonwealth", 16 Law and Philosophy 331-356.

1. Monitoring by the National Parliaments

(a) Evolution before the EU Constitutional Treaty

The Amsterdam Subsidiarity Protocol may have increased the “determination of relative efficiency”⁶⁵ (Article 5 EC) as a method to agree on supranational or intergovernmental action. Yet, in the absence of a detailed procedure and conditions for such an assessment, it is uncertain how efficiency could be weighed against political reasons or reasons of urgency that would render the application of the Protocol void. Moreover, as already seen in Chapter 5, certain competence provisions in the Treaty (Article 95 and 308 EC) are complicated and too imprecise to allow for a clear and conventional judgement on their scope and consequence. Thus a demand for accurate monitoring of subsidiarity gradually emerged at Community level. Chronologically, first the Nice Declaration 23 on “the Future of Europe”⁶⁶ identified four specific areas where future reform should focus. Competences and subsidiarity as well as the role of national parliaments were included next to fundamental rights and the simplification of the Treaties. Behind this idea for reform rested a collective realisation that a prerequisite for any attempt to reduce the discretionary powers of the Community as a decision-maker is a clarification of certain provisions at the level of the distribution of competences. Hence, the tidier the system of delimitation of competences is, the less subsidiarity conflicts will emerge when competences are exercised.

Additionally, the European Council meeting at Laeken on December 14-15, 2001 investigated the chances of failure of the Community Institutions to act upon the legislative limits imposed by the concept of subsidiarity. The question was how subsidiarity could be

⁶⁵ See Føllesdal, A., “Subsidiarity and Democratic Deliberation” in Eriksen, E.O. and Fossum, J.E., (eds), “Democracy and the European Union - Integration Through Deliberation”, Routledge, London (1999)

⁶⁶ See also De Witte, B., “The Nice Declaration: time for a Constitutional Treaty of the European Union”, (2001) *International Spectator* 21-30, at 29

applied within a transparent division of exclusive, shared and complementary competences. More accurately the concern of the EU Leaders was: “how to establish and monitor a more precise delimitation of competences between the EU and the Member States reflecting the principle of subsidiarity”. The further Declaration to the one annexed to the Treaty of Nice aimed to establish a political and judicial manual on the Union’s competences. Politically, the EU leaders at Laeken supported the idea that more institutions and / or national parliaments need to participate in the legislative process. It is clear, however, that there was no concrete plan of action.

Characteristically the Laeken Declaration states: “A second question, which also relates to democratic legitimacy, involves the role of national parliaments. Should they be represented in a new institution, alongside the Council and the European Parliament? Should they have a role in areas of European action in which the European Parliament has no competence? Should they focus on the division of competence between Union and Member States, for example through preliminary checking of compliance with the principle of subsidiarity?” Judicially, there was an open proposal (later brought up by Working Group I of the European Convention⁶⁷) for widening the list of privileged applicants under the existing Article 230 EC to include national parliaments. This would allow annulment actions to be brought (specifically on grounds of subsidiarity) by national legislatures to the Court of First Instance, now renamed ‘the High Court’ by the EU Constitutional Treaty. A detailed reporting of violations of subsidiarity could enhance the effective application of the principle, especially in cases where the home parliament is at odds with its government’s vote on a measure in the Council. This proposal however did not succeed for reasons

⁶⁷ Mandate and composition [CONV 71/02]; Final report of Working Group I on the principle of subsidiarity [CONV286/02]; Final Report debated at October 3-4, 2002, 9th Plenary Session - see Agenda at [CONV302/02]

explained below in the context of the EU Constitutional Treaty's Protocol on the Application of the Principles of Subsidiarity and Proportionality.

Yet another unsuccessful proposal in the Convention, revisiting the long-standing problem of sharing competences, suggested the establishment of a Parliamentary Committee on Subsidiarity acting as a form of constitutional council⁶⁸. This body would be composed of both national and European Parliament representatives and would be exclusively occupied with the monitoring of the uniform application of the principle of subsidiarity and proportionality in the Council and Parliament legislation. Such a committee would be a reference point for all national and European organs that would receive an informative opinion about whether the Union was acting within the boundaries of its competence. The proposal for the creation of such a body only went as far as to bestow powers of reference. A decision of the Subsidiarity Committee against an act in question could have the power to compel the Council or Parliament to turn down a Commission proposal or state the reasons that would make such an act invalid. In the latter case the whole issue would need to be revisited by the Court, as the best possible institution to scrutinize whether the act in question respects the principle of subsidiarity. The opponents of such a novel approach identified a potential jurisdictional clash between the Committee and the Court. Being a party-led political body, the subsidiarity Committee could possibly act as a third legislative chamber, undermining the fact that the power to scrutinize the Constitution is reserved to the Court.

⁶⁸ [CONV67/1/02]

The Final Report of Group IV on the national parliaments⁶⁹ emphasised the important role of the national legislatures and the European Parliament in the establishment of a 'mechanism for European debate'. The Convention recognised the important role of national parliaments as actors in the Union's legislative process; instruments of control of their national governments regarding European policies and most significantly representatives of the Member States' citizens in the Union's constitutionalisation⁷⁰. The basic argument was that both the European and national Parliaments shall work in cooperation, especially in matters like pollution that have a transnational impact. Given the scale and effects of pollution incidents that either take place in a Member State or occur outside it but have a direct effect upon it or other Member States, makes any unilateral action of national parliaments impossible. This transnational idea of governance to complement national jurisdictions is at odds with the Working Group's suggestions on national control over the Union Institutions. The nationalisation of European decision-making reflects the view that Ministers in the Council act in a hostile way towards the domestic and local interests of national executives. Yet, a shift from supranationalism to pure intergovernmentalism may work against integration. It will possibly substitute the Union's creeping competence with a general freeze in the exercise of those competences, contradicting therefore what has been achieved by the Union.

(b) Subsidiarity in the EU Constitutional Treaty and the Role of National Parliaments

When it comes to the EU Constitutional Treaty, the enforcement of subsidiarity is based on Article I-11 (3) supported by the two protocols on the role of national parliaments

⁶⁹ Final report of Working Group IV on the Role of National Parliaments [CONV353/02]

⁷⁰ See Pernice, I., "The Role Of National Parliaments in the European Union", in Melissas, D., and Pernice, I., (eds), "Perspectives of the Nice Treaty and the Intergovernmental Conference" in 2004 'Nomos', Baden Baden, (2001)

and on subsidiarity and proportionality, annexed to the Constitutional text. Article I-11 of the EU Constitutional Treaty states the fundamental principles of the Union that govern the distribution of competences. It starts with the principle of conferral in paragraphs (1) and (2)⁷¹ under which the Union exercises only those competences that are conferred upon it by Member States. Within these limits, the principles of subsidiarity and proportionality apply. The following paragraph (3) on subsidiarity does not provide a definition of the principle but rather affirms the current Article 5 EC wording as to how subsidiarity should function in the Union:

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

This provision is thus designed to block any Union attempts at centralised integration by way of shifting competences to the supranational level, apart from occasions where the explicit conditions for the exercise of Community competence are met.

The EU Constitutional Treaty introduces a new subsidiarity control mechanism. Article I-11 (3) refers to the Protocol on the Application of the Principles of Subsidiarity and Proportionality that subjects the application of the principle of subsidiarity and proportionality to a new monitoring (early warning) system. There national parliaments are entrusted with an additional task next to influencing and scrutinising their national

⁷¹ 1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.

executives. They become actively involved in European legislation through inspecting directly the work of European Institutions applying to all legislative proposals under co-decision and falling under the category of shared competence⁷².

The Institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in the Protocol.

In short, the Protocol states that national parliaments are to be informed about all new Commission initiatives at the same time as the Union legislator. They are given a time limit of six weeks to send to the Presidents of the European Parliament, the Council of Ministers and the Commission a reasoned opinion stating why they consider that the proposal does not conform to the principle of subsidiarity. If one third of the votes consider that a proposal does not comply with the principle of subsidiarity, the Commission must review its proposal. It can then decide whether to maintain, amend or withdraw the proposal. The involvement of national parliaments appears a crucial step in the clarification and redistribution of competences at European level by ensuring, early in the legislative process, that the principle of subsidiarity is not violated by the Union's casual attempts. Also in view of the fact that qualified majority voting will outmanoeuvre the national veto over consultation in the EU Constitutional Treaty, the immediate responsibility of governments towards their parliaments declines. The new mechanism of early warning could be used to counterbalance this development, since the parliamentary monitoring of subsidiarity allows for immediate pressure and scrutiny of the European legislative process.

⁷² This also includes wide policy proposals (e.g. Green Papers, White Papers, the Commission's annual work programme)

The question however remains: how much can the 'early warning system' do? Theoretically, the new system is proposed to allow a national parliament or a chamber of a parliament to contest a legislative proposal with regard to its compliance with the principle of subsidiarity. Realistically, after the ratification of the EU Constitutional Treaty, it will be impossible to block - on subsidiarity grounds - any form of undesired legislation passed under qualified majority in the Council. Quite the opposite, under the early warning system, only dubiously justified legislation would be challenged by national legislatures. This would be rather problematic once an unwanted measure is based on one of the flexibility provisions. Weatherill⁷³ proposes that "...in two cases the Commission must invite national parliaments explicitly to consider matters from the perspective of competence and subsidiarity. The two cases are proposals advanced under the long-stop provision, currently found in Article 308 EC, and proposed harmonisation measures. This addresses the risk that the provisions may be surreptitiously abused by national executives. Both Articles 95 and 308 EC were, remember, mentioned with explicit suspicion in the Laeken Declaration, and here is a way to provide for extra procedural supervision."⁷⁴

Even as an informative exercise, the early warning system is likely to affect policy initiative and informal practices⁷⁵ as well as influence the relations of national legislatures with the European Parliament. Even though national parliaments will not have the right to veto a legislative proposal, their political views and values – shaped by domestic politics –

⁷³ Weatherill, S., "Using National Parliaments to Improve Scrutiny of EC/EU Action", *Jurist, Thinking Outside the Box Editorial Series*, (2003) Paper 2/2003, available at http://www.fd.unl.pt/je/edit_pap2003-02.htm

⁷⁴ It should be added that there is no exaggeration in Weatherill's words considering that in the early Convention talks there was a radical call for amendment of Article 308 EC conditional on consultation with national parliaments (CONV 32/02, p.4).

⁷⁵ E.g. Conciliation arrangements between the European Parliament and Council. See Maurer, A., "What is next for the European Parliament?" (1999) *Federal Trust Series, Future of European Parliamentary Democracy 2*

would influence the function of the Union as a whole. Additionally it is interesting to consider whether their views portrayed in their questions and warnings towards the Union Institutions will create any kind of obligations to national governments, especially with reference to judicial review on subsidiarity considerations. One should be aware that under the early warning system, subsidiarity constitutes a mere political judgment and not a ground for judicial review. Under the EU Constitutional Treaty, neither national parliaments nor the Committee of the Regions, which are primarily concerned by subsidiarity violations, are entitled to bring a direct action against a Council measure. This is due to the majority opinion of certain members of the plenary debate at Working Group I that Member States would lose their unitary character once national parliaments were given a right to bring direct actions to the Court⁷⁶.

Instead, those parliaments that have drafted a negative position have the possibility to take legal action against the Commission before the Court on the grounds of a procedural subsidiarity infringement. Even there, the Court – in an attempt to preserve the Union’s institutional balance – will rule on the legality of the procedures followed and not on subsidiarity per se. This mirrors its past and current approach⁷⁷. During those proceedings, national parliaments will be represented by their governments, acting on their behalf. Article 8 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality provides:

“The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a European legislative act, brought in accordance with the rules laid down in Article III-365 of the Constitution by Member States, or notified by them

⁷⁶ [CONV331/02], p9; [CONV 630/03], p7

⁷⁷ See below under the headline “Monitoring By the Court, Or Lack of It”

in accordance with their legal order on behalf of their national Parliament or a chamber of it.”

The Protocol leaves some ambiguity as regards the manner under which subsidiarity complaints may be raised before the Court. These must be brought according to the Protocol by the Member States but can be on behalf of their national parliaments according to their legal order. This of course raises two related questions: First, the extent of governments’ obligation to represent their respective parliaments at the Court against their own will. Second, the extent of parliamentary participation to ensure the proper representation of their interests at the Court. Dougan questions: “are domestic rules intended to govern purely procedural issues related to the national parliaments’ rights under Union law to raise subsidiarity complaints; or does the Protocol leave Member States free to decide whether they are prepared to notify subsidiarity issues on behalf of their domestic parliaments at all?”⁷⁸ Such an uncertainty may create controversy within the Member States’ constitutional orders as to how national parliaments should make their decisions and whether or not any government shall be obliged by the decision of its parliament to take legal action against EU legislation. Second, under the Protocol, the relationship between the chambers and the role of regional assemblies is no more left to national parliaments but according to the proposed system it is decentralised, meaning that both have been given a voice. Potential problems may arise when for instance one of the chambers is in opposition to the national government.

Thus, even though for the first time in the history of European integration national parliaments and sub-national units are involved in the European legislative process, it appears that much work remains to get the internal balances right in order to preserve

⁷⁸ Dougan, M., *The Convention’s Draft Constitutional Treaty: A ‘Tidying-Up Exercise’ that Needs Some Tidying-Up Of its Own*”, (2003) 27/2003, Federal Trust Online Constitutional Essay, UK

legitimacy and power under the EU Constitutional Treaty. The author supports the view that given the limitation within the early warning system with regard to national parliaments referring subsidiarity violations directly to the Court, it is fruitless to alter the Union's legislative procedure only to introduce a procedural alteration in the implementation of subsidiarity. The Protocol encourages a further level of democratic scrutiny by national parliaments and sub-national units. This would eventually balance the vertical delimitation of competence, as it would involve the participation of more national actors in EU legislation. Despite that, the Protocol does not contribute to the original aim of the Convention for simplification of decision-making within the Union. Instead it is more likely that the proposed reforms will encourage an invasion of domestic political conflicts into the Union level of decision-making. National leaders could therefore settle on a more appropriate mechanism to ensure that national parliaments are able to efficiently scrutinise the proposals of their governments in the Council.

One should note that despite the fact that the proposals for the reform of subsidiarity were supposed to address the problematic environment of the Union's competence system, they focused in the legitimacy deficit of the Union. A first thought on the participation of national parliaments in EU legislation begins with the expectation of finding a competence solution through enhancing the dialogue between the Union and Member States. Instead of that, one discovers that the proposals for monitoring the application of subsidiarity divert the debate on competences to that of institutional legitimacy. Raunio for instance writes that "the biggest problem with the system is that through making national parliaments direct participants in the EU's legislative process, it goes against the very principle of parliamentary democracy... (where)...the government is accountable to the legislature and

can be voted out of office by it.”⁷⁹ This thesis, however, supports the view that the biggest problem with the early warning system is that its contribution to the greater problem of competences is limited as subsidiarity will not increase legal certainty. The principle itself is left unchanged and tied to the European level. As such it will remain after the ratification of the EU Constitutional Treaty.

2. Monitoring by the Court, or lack of it

Apart from the proposal that wants national parliaments to adopt a monitoring role over the principle of subsidiarity, one should not overlook the potential role of the Court in policing subsidiarity. This role perhaps could have been more effective, had the Court been able to monitor the legislative process within the Council at its outset and not in its outcome. While the former involves questions of material subsidiarity, the second includes issues of procedural subsidiarity. As the position stands, the Court can declare EC legislation invalid or unconstitutional under the EU Constitutional Treaty only after legislation has taken place. Even there it appears that the Court has not been willing to interfere with the EC legislature’s discretion in questions of procedural subsidiarity therefore revealing the nature and limits of its control. The control of procedural subsidiarity has been a hard task for the Court that has not taken advantage of subsidiarity, even in its material form, to check whether the EC legislature is going off track. Unless, therefore, the Court identifies a grave error on the part of the EC legislature it will not review Community legislation on the grounds of subsidiarity. Horizontally, this demonstrates its respect for the other Institutions of the Community but vertically it discourages the Member States from bringing

⁷⁹ Raunio, T., “Towards Tighter Scrutiny? National Legislatures in the EU Constitution”, (2004) 16/04 The Federal Trust Online Papers, UK

subsidiarity cases to Court knowing that the Court will not substitute the legislature's discretion with its own.

According to Article 230 EC the Court has competence to review "the legality of acts adopted by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties." Despite the pressure from the European Parliament, there is no special procedure for submitting issues of subsidiarity at the Court⁸⁰. The Court may thus, under the claim of a Member State that has been outvoted in the Council, annul EC legislation when there is a violation of the Treaty's Article 5 EC in the legislative process. Alternative judicial avenues for a Member State are to make a preliminary reference to the Court under Article 234 EC or to resort to the illegality exception of Article 241 EC. In the post-Maastricht period, subsidiarity theoretically functions as a new ground for the Court to declare EC legislation invalid. In practice, however, Member States seem somewhat reluctant to bring a case before the Court claiming that subsidiarity has been violated.

The Court, on the other hand, has been similarly unwilling to declare a Community measure invalid for contradicting the principle. That is why a small number of cases have appeared before the Court on these grounds and the Court has never ruled in favour of a Member State. Instead it has adopted a cautious or prudent approach. There are two hypotheses for this approach: First, one can translate it as a means of self defence on the part of the Court to preserve its legitimacy, taking into account the low credibility of subsidiarity as a legal principle. Second, bearing in mind the anti-integrationist character of subsidiarity

⁸⁰ For more practical points on how to bring the issue of subsidiarity before the Court see Toth, A.G., "Is Subsidiarity Justiciable" (1994) 19 (3) *European Law Review* 268-285

as “a pause and rethink” device to European legislation, one could argue that the Court does not wish to jeopardise its pro-integrationist political agenda. Indeed, in its early case law on subsidiarity, the Court seemed quite reluctant to carry out something more than a procedural assessment of compliance with subsidiarity⁸¹. For instance, in the *Working Time Directive Case*⁸² it denied the British claim against the Council seeking annulment of the Directive on the basis that it was adopted under the wrong legislative basis of Article 118a instead of Article 100 or Article 235 EC. The British argument was that the Community action was not grounded on the basis of the subsidiarity principle. The Court however said that “... once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonise the conditions in this area while maintaining the improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes Community-wide action.” According to Wyatt and Dashwood⁸³ “that seems hardly sufficient, given that the relevant Treaty provisions clearly contemplate the possibility of pursuing those same objectives through actions at Member States level.”

Further in the *Deposit Guarantee Schemes Directive Case*⁸⁴, a case concerning a German challenge to the adoption of Directive 94/19 harmonising national laws on deposit guarantee schemes, the Court decided likewise. It stated that “... it is apparent that, on any view, the Parliament and the Council did explain why they considered that their action was in conformity with the principle of subsidiarity and, accordingly, that they complied with the obligation to give reasons as required under Article 190 (now 253 EC) of the Treaty. An

⁸¹ De Búrca, G., “The Principle of Subsidiarity and the Court of Justice as an Institutional Actor”, (1998) 36 (2) *Journal of Common Market Studies* 217-235

⁸² Case C-84/94 *UK v. Council* [1996] ECR I-5755

⁸³ Wyatt, D., and Dashwood, A., “European Union Law”, 4th ed., Sweet and Maxwell, (2000), p. 162

⁸⁴ Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405

express reference to subsidiarity could not be required. On those grounds, the plea of infringement of the obligation to state reasons is unfounded in fact and must therefore be rejected.”⁸⁵ The conclusion one can draw from these decisions is that as far as material subsidiarity has not been violated; procedural subsidiarity (i.e. a statement in the Directive’s Preamble of the reasons that led the EC legislature to adopt the measure in question) is given a secondary importance.

In both, the *Working Time Directive* and the *Deposit Guarantee Schemes Directive* cases, the Court did not emphasise the need for the subsidiarity principle to be referred expressly in Community legislation. This, however, does not imply that lack of reasoning as regards the principle cannot provide grounds for annulment under the broad scope of Article 190 EC (now 253 EC)⁸⁶. This direct link of subsidiarity with Article 190 EC (now 253 EC) was the basis of the German argument in *Germany v Parliament and Council*⁸⁷. The fact that the German argument was more articulated than the British one in *UK v. Council*⁸⁸, forced the Court to make a detailed assessment on whether the Directive’s Preamble justified Community action from the side of subsidiarity. Advocate General Leger’s⁸⁹ comments on the proper application of the principle also aimed to create a link between procedural subsidiarity and Article 190 EC (now 253 EC): “how useful...it could be, for the purpose of ensuring proper application of the principle of subsidiarity for the obligation to state reasons laid down in Article 190 of the Treaty to be enforced with particular rigour

⁸⁵ Para 7 of the Judgment

⁸⁶ “Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and as such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to the Treaty”.

⁸⁷ Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405

⁸⁸ C-84/94 *UK v. Council* [1996] ECR I-5755

⁸⁹ Advocate General Leger in Case C-84/94; *Common Market Law Reports* Vol.77 1996 pp.671-723 (1996) 3 CMLR 671 “It does not seem to me that the relevant authorities have ignored the requirement to state reasons in view of the exclusive competence of the Community, the Council and the Parliament were not, in my opinion, required to justify the need to apply the principle of subsidiarity.”

whenever the Community legislature takes action to lay down new rules.”⁹⁰ The purpose behind the requirement of subsidiarity-specific reasoning is to enhance democratic accountability in the Community. The Advocate General suggested that all Community measures should therefore indicate “on what basis the authority concerned is acting...even if only to state, where this is the case, that the principle of subsidiarity does not come into play.” The aim of the application of the principle of subsidiarity in the interpretation of EC legislative acts seems logical given that the Community Institutions take into account material subsidiarity when framing EC legislation. The Court’s reluctance to take into account procedural subsidiarity demonstrates that subsidiarity and flexibility cannot restrain its judicial role to uphold Community’s competence to adopt a level of protection for the interest of the Member States’ public, which seems acceptable in the Community⁹¹. Thus, review of the EC legislature’s discretion needs to be limited. An interpretation of every directive in the light of subsidiarity could create a problem when the Community legislates “in an area not falling within its exclusive competence”⁹².

In more recent cases the Court seems more confident about determining substantive compliance of Community legislation with the principle of subsidiarity. This has coincided with the establishment of the Amsterdam Protocol on Subsidiarity. The Protocol has been particularly valuable as regards Article 253 EC that constitutes the most problematic aspect of the Court’s jurisprudence on procedural subsidiarity. Paragraph 9 of the Protocol summarises the Commission’s responsibilities and obliges it to give reasons for all of its proposals with reference to the principle of subsidiarity and to clarify any financing of

⁹⁰ Ibid

⁹¹ See Shaw, J., and Wiener, A., “The Paradox of the European Polity”, (1999) 10/99 Harvard Jean Monnet Working Papers, NYU.

⁹² Case C-188/95 *Fantask A/S v. Industriministeriet (Erhvervsministeriet)* [1997] ECR I-6783

action from the Community budget. This requirement of subsidiarity reasoning, very much like the general reasoning requirement in Article 253 EC, as invoked in *Germany v Parliament and Council* is important to enhancing the legitimacy of Community legislative Institutions. It is intended to compel them to reflect about whether Community action on a certain matter is suitable and to oblige them to speak coherently about the way and the reason they have arrived at a given decision. Looking at the *British American Tobacco case*⁹³, it appears that the Court is also worried about its legitimacy that depends upon the quality of its legal reasoning. This however does not imply a subsidiarity-friendly approach. In the given case it ruled that Directive 2001/37/EC, the objective of which was to eliminate barriers raised by the differences between national laws, was not invalid by reason of infringement of the principle of subsidiarity. The Court looked closely at the objective of the Directive and asked whether the same result could be achieved by the Member States acting individually to eliminate barriers to trade in tobacco products. The Directive concerned the elimination of barriers to the free movement of goods and satisfied the proportionality test (i.e. that the action did not go beyond what was necessary to achieve the objective pursued). Thus the Court ruled that the internal market objective of the Directive called for action at Community level in accordance with Article 95 EC and no violation of subsidiarity was present.

Similarly in the *Biotech Directive Case*⁹⁴ the Council and the Parliament considered the inadequacy of action at national level in the field of the legal protection of biotechnological inventions and recognised the necessity of harmonising certain principles through Directive 98/44 EC. The objective of the Directive, challenged by the Netherlands,

⁹³ Case C-491/01 *R v Secretary of State for Health ex parte British American Tobacco* [2003] 1 CMLR 14

⁹⁴ Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079

was to ensure the smooth operation of the internal market by preventing / eliminating differences between the domestic legislation of Member States in the protection of biotechnological inventions. This according to the Court “could not be achieved by action taken by the Member States alone.”⁹⁵ The Court thus held that “given the scale and effects of the proposed action, the objective in question could be better achieved by the Community.” Advocate General Jacob emphasised that “it is clear from the case-law of the Court that in such circumstances it is not necessary for the legislation to make express reference to the principle of subsidiarity.”⁹⁶ This implies that subsidiarity is relevant insofar as a directive is under consideration. There, according to the Amsterdam Protocol on Subsidiarity the reasons for the proposed act must be explained by the Community’s legislative. It seems that the Court is therefore only concerned with the quality of its legal reasoning fearing that a pro-subsidiarity judgment might go against the development of Community competences and, most importantly, substitute the Council’s discretion for its own wishes.

Nonetheless, as with attributed powers, it is more likely that subsidiarity will influence the interpretation of the scope / content of Community legislation rather than be a basis for its validity or invalidity. In *AvestaPolarit Chrome Oy*⁹⁷ a Finnish court referred questions to the Court concerning the qualification of leftover rock and sand from mining operations as being waste within the meaning of Article 1(a) of the Waste Directive 75/442/EEC, or a by-product which would fall outside the scope of the Directive. The Court held that the area did fall within the Community’s exclusive competence and it took action

⁹⁵ *ibid* at paragraph 32

⁹⁶ Case C-377/98, Opinion of Mr Advocate General Jacobs delivered on 14 June 2001, [2001] ECR I-07079

⁹⁷ Case C-114/01 *AvestaPolarit Chrome Oy* (Judgment of 11 September 2003) ECR I-08725

in accordance to Article 5 EC (i.e. the principle of subsidiarity) as the objectives of the proposed action could be better achieved by the Community than the Member States. However it added that the Community legislature considered it appropriate, while adopting Directive 91/156, that until specific Community rules were adopted on the management of certain categories of waste, Member States could ensure that management outside the framework of Directive 75/442 on the basis of national legislation as far as the level of protection of environment was at least equivalent to that aimed by the Directive. In this case the subsidiarity principle has been transformed into something more than an objective criterion for determining when Community action on an issue can be justified and adopted by the Community's legislative process.

The Court has on the one hand interpreted Community's competences widely but has never annulled a Community legislative measure due to lack of competence. It has only gone as far as annulling Community measures on the basis of an incorrect legal basis, which does not imply that the Community lacked the competence to legislate in the first place. However, as the Community has no formal catalogue of competences everything depends on individual legal bases contained within the Treaty itself⁹⁸. In the German Tobacco Case⁹⁹ the Court looked at Article 5 EC pointing to the fact that Community's powers are restricted to those conferred by the Treaty. It concluded that the EC legislature had gone beyond those limits by regulating tobacco advertising when in fact the case involved no real obstacle to free movement. Therefore, Community competence has limits and the Court upholds those limits, creating thereby a "stable nucleus of Community's competences",

⁹⁸ The importance of the correct legal basis for Community legislation was demonstrated in Case C-300/89 *Commission v Council (The Titanium Dioxide Case)* [1991] ECR I-2867. The Court held that Article 100a was the proper legal basis and annulled the directive adopted on the basis of Article 130s.

⁹⁹ See Chapter 4, particularly the discussion on Case C- 376/98 *Tobacco Advertising* [2000] ECR I-8419

which in itself was important in the constitutionalisation of the Treaty¹⁰⁰ and the drafting of competences within the EU Constitutional Treaty.

Conclusion

The Court, through its Treaty interpretation, confirms that Community Institutions cannot deal with all aspects from law-making to implementation and enforcement of Community measures. The division of competences between the Community vis-à-vis the Member States is (and remains in the EU Constitutional Treaty) vertical with multiple levels reflecting the diverse phases of the regulatory process. In such a system the principle of subsidiarity shall function, in its material form, as a political guideline. As such it will constitute for the Community's legislature a binding commitment for not going beyond what is necessary.

In the EU Constitutional Treaty, national parliaments will ensure a more rewarding form of control applicable to the Union's competence-challenges in the adoption of a particular measure. Through the early warning system, national parliaments would be able to consider a draft from the angle of subsidiarity from the starting point of the legislative process. Their role will therefore be vital to the general application of material subsidiarity and finally to the policing of the flexibility provision of Article 308 EC (Article I-18 in the EU Constitutional Treaty). Yet certain commentators might feel that European leaders have over-estimated what the early warning system can do for the healthy delimitation of competences. Once a national parliament has raised a subsidiarity 'red flag', the Commission would be required to justify it. Once the Commission has responded, the proposal shall continue through the legislative process unless the Commission withdraws it.

¹⁰⁰ See Case 294/83 *Parti Ecologiste 'Les Verts' v. European Parliament* [1986] ECR 1339

National parliaments are not to become co-legislators under the new system. Instead their role would remain “essentially advisory”¹⁰¹.

On the other hand as Bausili¹⁰² suggests “subsidiarity judgements...go beyond legal base considerations, in fact they do not refer to the existence of competence, but entail a substantial political judgement in the adequacy of any level to attain more efficiently and democratically whatever objectives pursued.” The Court needs to play a more active role by employing procedural subsidiarity as a monitoring device for more transparency in the Union. This is particularly significant for three reasons: First, because even after the potential ratification of the EU Constitutional Treaty, the *ex post* monitoring of the principle of subsidiarity will still remain subject to judicial review by the Court. Second, because most legislative proposals, scrutinised by the national parliaments after the ratification of the EU Constitutional Treaty, do not normally create competence problems. Third, because the wording of subsidiarity in the EU Constitutional Treaty [Article I-11 (3)] leaves EU Institutions an ample margin of discretion.

¹⁰¹ Davies, G., “The Post-Laeken Division of Competences”, (2003) 28 (5) European Law Review 686-698

¹⁰² Bausili, A.V., “Rethinking the Methods of Dividing and Exercising Powers in the EU: Reforming Subsidiarity and National Parliaments”, (2002), 9/02 Harvard Jean Monnet Working Paper, NYU

CHAPTER 7

A DIFFERENT EXERCISE OF COMPETENCES:

THE CASE OF ENHANCED CO-OPERATION & CORE EUROPE

Introduction

Enhanced cooperation was introduced in 1997 by the Treaty of Amsterdam that came into force in May 1999. It constitutes a flexible mechanism to accommodate diversity when certain Member States are unwilling or unable to participate in the Union's policy developments. Following the amendments introduced by the Treaty of Nice (2000), a group of no less than eight Member States may use the Treaty framework to develop their cooperation in policy areas under the competence of the European Union. Enhanced cooperation was addressed during the Amsterdam negotiations as a practical solution to advance efficient decision-making in an almost twice enlarged Union with substantial socio-economic diversity. Flexibility, as a method of policy making, has become a trend among the Member States of the Union since the 1996 Intergovernmental Conference¹. However, it is the number of participants / policy makers and the application within the different sectors of Union competence that might create tension between centralist and decentralist views.

The option of enhanced cooperation appears both in the EC Treaty and the EU Treaty² and most recently in the Convention's EU Constitutional Treaty that introduces a

¹ Curtin, D. "The shaping of a European constitution and the 1996 IGC: 'flexibility' as a key paradigm?" (1995), 50(1) *Aussenwirtschaft* 237-256.

² EC Treaty: Articles 11- Procedure for Establishing Enhanced Cooperation; 11a – Subsequent Participation of a Member State. EU Treaty: Articles 27a – 27e Enhanced Cooperation in the Area of the Common Foreign and Security Policy (CFSP); 40 – Enhanced Cooperation in the area of Justice and Home Affairs (JHA); 40a – Procedure for Establishing Enhanced Cooperation (JHA); 40b – Subsequent Participation of a Member State (JHA); 43 – General Principles of Enhanced Cooperation; 43a – Principle of last resort; 43b

broader European Union. Particularly the European Convention has agreed to a major extension of its scope to Common Foreign and Security Policy (CFSP), although its area of application still excludes sectors of exclusive EU competence. This chapter will analyse enhanced cooperation with regard to the first supranational (EC) pillar and subsequently will consider the reforms of the EU Constitutional Treaty, where the pillar structures would cease to exist and the EC would no longer constitute a separate legal entity. It will then examine the implications of enhanced cooperation upon wider political debates about a 'core Europe' and its impact upon the vertical relationship of competence between the Union and the Member States. A number of questions stand: Does enhanced cooperation signals a potential attack upon the supranational structure of the Community by a core of Member States? Is enhanced cooperation synonymous with a 'core Europe', operating under the guise of European Union?

A. EVOLUTION OF ENHANCED COOPERATION

From a competence perspective, enhanced cooperation could be characterised as the child of the crisis of the constitutional foundations of the Community. As Duff points out, "designed to prevent fragmentation of policy within the Union between disparate or even competing groups of Member States, it was necessary to insist on the use of the single institutional framework of the Union."³ From the beginning of the European Economic Community in 1957 it was established that all Member States are equal partners having the same rights and obligations. This partnership was functional in a Community of six Member

– Principle of Openness; 44 – Decision-making Under Enhanced Cooperation; 44a – Cost of Enhanced Cooperation; 45 – Consistency with EU Policies.

³ Duff, A., "Do We Really Need Enhanced Cooperation", Contribution 336 to the European Convention, May 22, 2003,[CONV 759/03],

States. However, gradual enlargement of the Community multiplied the disparities between the old and new Member States to engage collectively in all EEC policy areas. Hence, an agreement whereby a new system would not impose the same obligations to all Member States became essential. The question is whether this realisation, especially at this point of integration, creates a challenge to the Community's stereotypic picture where "*a wonderful harmony arises from joining together the seemingly unconnected.*"⁴ Any disturbance of this harmony would have an effect upon the unity of actors taking initiatives in the exercise of the Union's competences.

Surely, it is difficult to prove that the exercise of enhanced cooperation would threaten the Union's harmony or unity for two reasons. First, enhanced cooperation has never been used in practice. Second, cooperative models have operated in the past within the boundaries of the Union. The first attempt to introduce a relevant cooperative model was with the Exchange Rate Mechanism, established in 1979. This kind of accommodation was aimed to address the British unwillingness to join a new monetary system. Apart from this instant, the history of European integration is full of occasions where certain Member States unearth ways to proceed faster on a given policy area when their neighbours are reluctant or unprepared to do so. Examples can be drawn from the Social Chapter of the Maastricht Treaty⁵, where again the UK decided to opt out and the Schengen Agreement (1995) in relation to border controls, where the UK and Ireland agreed to maintain their own internal border checks⁶. The introduction of the common currency (Euro) in 1999 also constitutes a recent example of such an accommodation, although it represents a substantially different

⁴ Quote by Heraclitus (540 BC - 480 BC). See Scoon, R., "Greek Philosophy Before Plato", Princeton University Press (1928)

⁵ See Barnard C., "EC Employment Law", 2nd ed., Oxford University Press (2000), Chapter 1

⁶ Wiener, A., "Forging Flexibility – the British 'No' to Schengen", (2000) 00/1 Arena Working Paper, Oslo

case of flexibility. There, the UK - along with Denmark and Sweden - decided to opt out from the European Monetary Union (EMU). However, the EMU complies with significant Community principles and its substantive regulations have been agreed by all Member States, both EMU members and non-members.

Following from these developments, there was a growing anticipation within the Community that any initiative for a partnership arrangement should rather occur within the structures and Institutions of the Community rather than outside them. This means that any agreement involving a certain amount of Member States would come under the Community's parliamentary or judicial scrutiny. One should note that before the Treaty of Amsterdam integration of the *Schengen acquis*⁷, internal border controls were primarily based on intergovernmental arrangements. Schengenland, as it is often referred⁸, was mainly established due to the difficulty that Member States met in reaching a collective agreement on internal border controls to monitor immigration and combat international and organised crime. As a result, France, Germany and the Benelux countries decided in 1985 to create between them a territory without internal borders. A protocol annexed to the Treaty of Amsterdam later incorporated the achievements of the Schengen Agreement into the Community framework. This is the first institutionalised example of enhanced cooperation occurring between thirteen Member States and operating under the legal framework of the Union to attain the Treaty objective of free movement of persons.

Subsequent to the Amsterdam IGC (1997) and whilst ratification of the Treaty was proceeding, the Community focused on European enlargement and the third and last phase of EMU. As already said, the occurrence of the single currency can be mentioned as a

⁷ Official Journal L 176 of 10.07.1999

⁸ Kostakopoulou, D., "Is there an Alternative to 'Schengenland'?", (1998) 46 (5) Political Studies 886-902.

persuasive example of the efficient application of flexibility mechanisms (although the EMU and its substantive rules were negotiated in advance by all Member States). Measuring the Union's capacity to act in an enlarged Union, the Treaty of Amsterdam (1997) laid down the general rules and conditions for enhanced cooperation. It created the formal possibility of a certain number of Member States establishing enhanced cooperation between themselves on policy areas covered by the Treaties, using the institutions and procedures of the European Union. France and Germany were among the first to introduce *coopération renforcée* (enhanced cooperation) into the political agenda of the IGC⁹. There, two kinds of questions emerged: First as regards the types of EC policies that would be included and second as to whether a Member State alone could exercise control or block enhanced cooperation through a veto in the Council. In reply to the first question, Member States decided that enhanced cooperation should be restricted only to areas covered by the Treaty. As to the second question, a Member State could rely on the procedural and substantial safeguards of the Treaty to reduce any threat of enhanced cooperation to Community policy making.

The rules governing enhanced cooperation were revisited in the discussions that led to the Treaty of Nice (2000), which set out the rules for accommodating diversity in an enlarged Union. The new provisions introduced at Nice were aimed at ensuring that any initiative for enhanced cooperation would be open to all Member States, dismissing therefore any hypotheses about a *two-tier* Europe. It is visible that the Treaty drafters aimed to disassociate the occasional use of enhanced cooperation with that of a *two-tier* Europe. The difference between the two lies in the maintenance of the relevant policy objectives. In

⁹ Carvajal, J.M.A, "Enhanced Cooperations in the Treaty of Amsterdam: Some Critical Remarks", (1998) 13 Harvard Jean Monnet Working Papers, NYU; Gaja, G., "How flexible is flexibility under the Amsterdam Treaty?", (1998), 35 (4) Common Market Law Review 855-70.

the former case (enhanced cooperation), these objectives would ultimately be reached by all Member States at some moment in time. In the latter case (*two-tier* Europe), there is no safeguard that all Member States are guaranteed full participation in the relevant decisions taken by the leading group of states. There is also the possibility, as we witness later, that the decision process of such a model, might occur outside the *acquis communautaire*, making it therefore impracticable for a state to join in due course. Hence, the Treaty of Nice indicated that any initiative for enhanced cooperation must involve at least eight Member States whilst being open to accept others to join at a later stage. The initiative for action by enhanced cooperation must respect the Treaties and the institutional architecture of the Union as well as promote the objectives and interests of the Union without being exclusive or divisive. Finally, such action cannot take place within the Union's exclusive competence and, where it can be authorised, it must be established that its objectives cannot be attained within a reasonable period through the existing Treaty provisions.

The general conditions set down in Article 43-45 EU, apply to enhanced cooperation established in the areas covered by the EC Treaty. The EC Treaty provides in Articles 11 and 11a EC respectively the precise procedures to this pillar for the establishment of and subsequent participation of Member States in enhanced cooperation. Member States intending to establish enhanced cooperation within the EC Treaty framework shall address a request to the Commission, which may submit a proposal to the Council. The Council shall grant authorisation, acting by a qualified majority on a proposal from the Commission and after consultation with the European Parliament. Moreover, a Council member may also request that the issue be referred to the European Council of Heads of State and Government. Then, the matter is referred back to the Council of Ministers, which may act

by qualified majority since the right of veto granted to the Member States by the Treaty of Amsterdam has been abolished by the Treaty of Nice (2000). When enhanced cooperation relates to an area covered by the co-decision procedure under Article 251 EC, the assent of the European Parliament shall be required. Finally, according to Article 11a EC, the Commission shall decide upon the request of a Member State its subsequent participation in enhanced cooperation. The Commission's contribution within the framework of the EC Treaty is more significant compared to the intergovernmental pillars of CFSP and JHA.

As already mentioned, since its adoption by the Amsterdam Treaty (May 1999), there has not been a single instance where the enhanced cooperation mechanism has been put into use. Shaw contends that this owes to the restrictiveness of the provisions of enhanced cooperation as drafted in the Treaty of Amsterdam: "one point of clear agreement can be found in the post-Amsterdam commentary: the conclusion that the provisions were so restrictively drafted that it was difficult to conceive of the circumstances in which they could be used."¹⁰ For this reason, one can only hypothesise about the impact of the policies passed through this kind of action. Even so, shortly after its establishment, in June 1999 there was an informal proposal to use the enhanced cooperation provision according to Article 11 EC in relation to the European Company Statute¹¹. The proposal involved a directive on the regulation of workers' participation in European Companies. The draft directive was agreed by fourteen Member States with only Spain being reluctant to adopt it due to its non-compliance with the conditions of Article 43 EU and Article 11 EC. Spain argued that the adoption of the European Company Statute by enhanced cooperation would

¹⁰ Shaw, J., "Enhancing Cooperation After Nice: Will the Treaty do the Trick?" in Andenas, M. and Usher, J., (eds.), "The Treaty of Nice and the EU Constitution", Oxford, Hart Publishing, (2002).

¹¹ See Areilza, J.M., "The Reform of Enhanced Cooperation Rules: Towards Less Flexibility?" (2001) 2001/01 Francisco Lucas Pires Working Papers Series on European Constitutionalism, Faculdade de Direito da Universidade Nova de Lisboa.

negatively affect the internal market, creating therefore a barrier to the fundamental economic freedom of establishment.

The Spanish argument was based in the fact that due to the internal market nature of the objective, the proposed directive had to be passed by unanimity under the flexibility provision of Article 308 EC. Had the proposed directive been passed by enhanced cooperation, Spain would have remained outside the partnership. The fact that it had to be adopted by the unanimity requirement of Article 308 EC would protect its interests on trans-European mergers and stop the Community from adopting it. The Treaty of Nice has introduced a new safeguard / condition that very much echoes the Spanish claim in relation to the European Company Statute. Enhanced cooperation must therefore contribute to enhancing the process of integration within the Union and must not undermine the single market or the Union's economic and social cohesion. Furthermore, it must not create a barrier to or discrimination in trade between the Member States and must not distort competition between them. What is more, Spain could have argued that the adoption of the European Company Statute concerns Community competence to close international agreements. The Community has external competence in areas where the EC Treaty has made explicit reference to the competence of the Community to negotiate an international agreement in a given area. However it can also have external competence in cases where the Treaty is silent. There the Community is externally competent as far as it has been competent to act internally¹². In the field of external competence the most significant exclusive competence is Common Commercial Policy (CCP) based on Article 113 EC. If

¹² Case 22/70 *Commission v Council (ERTA)* [1971] ECR 263

we examine the possibility that the adoption of the European Company Statute constitutes an exclusive Community competence, then enhanced cooperation does not operate.

Vetoing the launching of the cooperation that Article 11 (2) EC grants to every Member State is beneficial on an individual level but in the Union of twenty-five Member States it implies a freezing of the integration momentum. What is more, under the Article 43a EU introduced by the Nice Treaty, enhanced cooperation may be undertaken only as a last resort, when the Council has affirmed that the objectives of such cooperation cannot be attained within a reasonable period by applying the relevant provisions of the Treaties. However, according to Article 43b enhanced cooperation shall be open to all Member States when it is established at any given time insofar as the Member State complies with the policies adopted. Additionally, Article 44 EU specifies that acts adopted within the framework of enhanced cooperation shall not form part of the Union *acquis*. Instead those acts shall be applied by the participating Member States and their implementation shall not be impeded by the other Member States. Both points emphasised in Article 43b and 44 EU have been reaffirmed by the EU Constitutional Treaty in Article I-44 (1)¹³ and (4)¹⁴ respectively. However, Article III-420 (1) states that with reference to enhanced cooperation outside the scope of the CFSP, the Commission must confirm whether the Member State

¹³ Member States which wish to establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Constitution, subject to the limits and in accordance with the procedures laid down in this Article and in Articles III-416 to III-423.

Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article III-418.

¹⁴ Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the *acquis* which has to be accepted by candidate States for accession to the Union

meets the conditions for participation or needs to adopt transitional measures¹⁵. In case the Commission refuses twice the subsequent participation of a Member State to enhanced cooperation, the latter may appeal to the Council against that decision in accordance to Article III-420 (1).

1. Launching Enhanced Cooperation in the EU Constitutional Treaty

As to the conditions for launching enhanced cooperation, the EU Constitutional Treaty introduces three important changes. First, according to Article I-44 (2)¹⁶, enhanced cooperation in the EU Constitutional Treaty involves the participation of a third of Member States. This would raise the number of the countries required to launch enhanced cooperation from eight (Treaty of Nice) to at least nine in the current Union of twenty-five. In a continuously enlarged Union, enhanced cooperation would be made difficult to initiate. Under the same provision, authorisation to proceed with enhanced cooperation will be granted by the Council acting by a qualified majority after obtaining the consent of the European Parliament, on a proposal from the Commission. Second, the complex text of the Treaty of Nice has been improved so that there would be no need for a particular proposal for the Union as a whole to be voted by the Council. Instead the Council would focus on the general objectives of the proposed policy of enhanced cooperation. Third, the scope of enhanced cooperation would be extended in the area of CFSP, overcoming therefore the

¹⁵ Any Member State which wishes to participate in enhanced cooperation in progress in one of the areas referred to in Article III-419 (1) shall notify its intention to the Council and the Commission. The Commission shall, within four months of the date of receipt of the notification, confirm the participation of the Member State concerned. It shall note where necessary that the conditions of participation have been fulfilled and shall adopt any transitional measures necessary with regard to the application of the acts already adopted within the framework of enhanced cooperation.

¹⁶ The European decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least one third of the Member States participate in it. The Council shall act in accordance with the procedure laid down in Article III-419.

current limitation of Article 27b EU. The CFSP would require the opinions of the Minister for Foreign Affairs and the Commission whilst the European Parliament's role would remain informative. The limited roles of the Commission and the Parliament would thus resemble current Article 27c EU. Non-participant Member States in enhanced cooperation will take part in Council meetings even though they will not be involved in the decision-making process.

With the adoption of the EU Constitutional Treaty, enhanced cooperation would cover a larger part of the Union's policy areas. Article I-40 of the draft Constitution envisages a form of enhanced cooperation with reference to the Common Security and Defence Policy (CSDP). This again goes against Article 27b EU, which states that enhanced cooperation under Title V must not relate to matters having military or defence character. For some commentators, this would automatically have a substantial impact upon supranational competence. The extension of the scope of enhanced cooperation to all aspects of CFSP could create disparity, especially in Member States that wish to maintain the European Council unanimity restraint. For this reason certain Members of the Convention suggested that enhanced cooperation should involve as many Member States as it is possible. For instance, a contribution for amendment of Article I-43 of the draft Constitutional Treaty (now Article I-44) by Mr. Andriukaitis¹⁷; Ms Kalniete¹⁸ and Mr Kohout¹⁹, to name but a few Members of the Convention, proposed that authorisation to proceed with enhanced cooperation should at least require the agreement of half of the

¹⁷ Andriukaitis, V.P., "Suggestion for Amendment of Article I-43", See European Convention Web-Site at <http://european-convention.eu.int/amendments.asp?content=32999&lang=EN>

¹⁸ Kalniete, S., "Suggestion for Amendment of Article I-43", See European Convention Web-Site (as above)

¹⁹ Kohout, J., "Suggestion for Amendment of Article I-43", See European Convention Web-Site (as above)

Member States. This is to resemble the Nice - eight out of fifteen Member States - position that can be interpreted as half of majority of Member States. Ms Klaniete explains that “the threshold of the Member States initiating enhanced cooperation should be made higher to avoid fragmentation of the Union and unnecessary competence of different structures of the Member States with specific needs and objectives.” From the above contributions one may conclude that the participation of at least half of the Member States in EU policy making via enhanced cooperation would potentially enhance partnership between the Member States and persuade their non-participant neighbours to join early a policy initiative.

According to the author, the flexibility provided by the new rules on enhanced cooperation is not intended for and cannot substitute institutional reform as an immediate way of setting constraints on traditional Community action. In the short term, the new rules on enhanced cooperation may fulfil their immediate goal: that is to accommodate the present political demands for a constitutionalised – quasi federal Union. Thus, enhanced cooperation is an efficient tool for the promotion of the deepening of European integration. However, one needs to be cautious at the same time about the Union’s unity. The extent to which European integration can proceed by rules that are made by and apply to only eight out of the twenty-five Member States brings competence issues to the fore. Enhanced cooperation allows Member States to deviate from the rule of majority voting by resorting to a selective partnership arrangement. In the present situation, the existence of this alternative mechanism implies that national governments, who have lost a great deal of votes in the Council, have more bargaining power in their negotiations with the Commission and the non-participant Member States. Not only that, but even where unanimity applies in a policy area, enhanced cooperation assists a majority of willing Member States to proceed without the need to

satisfy the strict unanimity requirements of the Treaty. From that perspective, it can be suggested that flexible enhanced cooperation hides certain constitutional dangers. For instance, one could argue that its abuse may undermine the principle of solidarity in the decision-making by qualified majority voting in the Council²⁰.

Most important, for the scope of this thesis, enhanced cooperation may operate as a method of governance and ultimately as tool for the redistribution of competence inside the Union. For this reason it would be desirable if the Council and the Commission ensured and monitored the consistency of activities undertaken in the context of enhanced cooperation and the uniformity of such activities with the policies of the Union, and cooperated to that end. Furthermore, enhanced cooperation as a measure of last resort could be considered by the EU Institutions as a principle of EU law subject to judicial interpretation. Article I-44 (2) of the draft Constitution omits this kind of assessment and renders the issue of 'last resort settlement' as a mere Council decision. This could possibly transform enhanced cooperation to a governance method rather than a last resort measure applicable when the function of other relevant provisions of the EU Constitutional Treaty falls short. Hence, despite the importance of enhanced cooperation in a Union of twenty-five Member States, the procedure should remain a safety valve and not a general method of governance. In this manner coherence and unity of EU action could be safeguarded.

The material limitation of collective supranational action may suggest the advance not of a *multi-speed* but of a *two-tier* Europe with a *hard-core* operating beyond the control of the majority of Member States. This, of course, is different to the EMU system, where all

²⁰ De la Serre, F., and Wallace, H., "Flexibility and Enhanced Cooperation in the European Union: Placebo rather than panacea?" (1997) 2 *Notre Europe Research and Policy Paper*

Member States agreed to the possibility of a two-tier Europe in this area²¹. A Europe led by a pioneer group would potentially arrive at a schism between Member States, always depending upon their level of contribution - competence in relation to the inner core of integration. This is a rational concern, considering that decisions taken by that inner core would in due course have to be acknowledged by those Member States who intend to participate in the given policy area. Such a reality would confirm that any aid in the building of an enlarged Community is rather disputed than facilitated by enhanced cooperation. The most cautious would even suggest that the implementation of enhanced cooperation and its position in the EU Constitutional Treaty, threatens the unity of the EU as a legal order shaped by the teleological interpretations of the Court. The policies within enhanced cooperation do not constitute a part of the *acquis communautaire*. Thus, they do not create legal obligations to the Union as a whole. The most critical commentators would witness the parallel establishment of legal policies, binding only to those Member States that have initiated them. In this climate, the core-states to enhanced cooperation would amplify Community policies creating therefore a selective supranational competence block, a 'core Europe'. There according to Chirac speaking in 2000 about the French Presidency's priorities²², the facilitation of the use of enhanced cooperation mechanism would assist in "the creation of a group of countries which would be the front-runners of those which want to take Europe forward..."

²¹ See Regulation 974/98 'on the introduction of the new currency' (3 May 1998) A clause at the end of the regulation states that the norm applies in all Member States, except Protocols 11 and 12 and Article 109K EC (now Article 122 EC). This sets out the criteria for participating in the Euro-zone and the possibility of less than fifteen Member States taking part in this policy.

²² Chirac, J., "Annual Conference of French Ambassadors", (August 28, 2000), Paris

B. FISCHER'S CORE EUROPE

In the present enlarged Union, where it is difficult to reach unanimously a common position in a given policy area, enhanced cooperation emerges as a tool of flexibility and integration between a majority group of Member States desiring to establish cooperation between themselves. German Foreign Minister, Joschka Fischer, has more than once argued that enhanced cooperation is the logical consequence of European enlargement. According to the Minister, standing still in this area would mean stepping backwards²³. Most recently, he proposed the development of enhanced cooperation and closer partnership in the fields of "security, politics, the economy, law, culture and civil society"²⁴. However, Fischer has always been criticised in relation to his classic Humboldt speech given by in 2000. Apart from being relatively recent and therefore reflecting current questions of EU enlargement and constitutionalisation, it represents for commentators the opening act of the unconventional constitutional debate in Europe. Its proximate timing to the conclusions of the Heads of State and Governments at Nice, in conjunction with its morale pointing to a long-term vision of Europe, have functioned as evidence that Fischer's speech constituted a point of inspiration to the formal constitutional debate which matured initially at Community, and later at Convention level.

In his Humboldt speech, the Minister talked of 'reinforced cooperation' as an essential first step for furthering European integration. Thus, closer or enhanced cooperation could be employed so that certain Member States of the Union could engage and progress in

²³ Fischer, J., "Vom Staatenverbund zur Föderation - Gedanken über die Finalität der europäischen Integration"(trans. "From Confederacy to Federation: Thoughts on the Finality of European Integration"), Berlin, Humboldt Universitaet, (May 2000). English version with commentary in Joerges, C., Meny, Y., and Weiler, J.H.H. (eds) "What Kind of Constitution for What Kind of Polity?", EUI, Florence (2000)

²⁴ Fischer J., "40th Munich Conference on Security Policy", (February 7, 2004), Munich

sectors like environmental protection, the fight against organised crime, common immigration and asylum policies as well as the area of CFSP. Fischer used the EMU and Schengen as archetypes of 'reinforced cooperation'. In order to cast away any suspicion that his model of cooperation reflected either the end of European integration as we know it or the beginning of a two-tier Europe he emerged with a new term: the '*centre of gravity*'. The 'Fischer' federalist archetype, also common as *a neo-federalist model*²⁵, encourages the establishment of such a '*centre of gravity*' made by two or three sophisticated countries occupied with pushing the integration momentum forward²⁶.

The most common feature shared among this 'new' school of federalism is its deviation from any form of unilateral intergovernmental approach or classic cooperativist Communitarian method. Thus, even though at first glance one may categorise it as supranationalist due to its bilateral approaches, Fischer's vision represents a rather unique version of supranationalism. Its atypical nature owes a lot to the Nice political background under which it sprung out, which in essence is not very different to the current context regarding the ratification of the EU Constitutional Treaty. Fischer's reference to the Schumann-Monnet rhetoric served to pardon his deviation from the old good methods of Communitarised cooperativism. Instead he proposed that the imminence of European enlargement necessitates the completion of political integration in Europe via a deliberate – almost egoistical – political act. The balance of sovereignty preserved in the cooperative regime between the Union organs and the Member States needs, according to Fischer, to be altered to give away precedence to the supranational entity - federation of Member States as

²⁵ Scharpf, F., "Joint-decision trap: Lessons from German Federalism and European Integration" (1988), *Public Administration* 239-268.

²⁶ Konstadinides, T., "Now and Then: Fischer's Core Europe in the Aftermath of the Collapse of December 2003 Constitutional Talks", (2004) 11 (1) *Irish Journal of European Law*

opposed to the nation state. However, the formation of such a federation cannot emerge all of a sudden. It involves the establishment of a '*centre of gravity*' made out of a group of the most determined Member States who will push the integration momentum forward. If this '*centre*' proves to be unrewarding within the EU framework, then it can always transform to an '*avant-garde*' capable of surviving outside the EU altogether with its own institutions.²⁷

Fischer split the development of the whole course of cooperation into three distinctive stages. Firstly he demonstrated the necessity of the establishment of a '*core*'. A small number of states should, according to Fischer, operate in full cooperation within a range of areas involving environmental protection, common immigration and asylum policies, the fight against organised crime, monetary union and other EU second (CFSP) and third pillar issues. Second, this cooperation would presumably grow to become the renowned *Gravitationskern* (centre of gravity), an open-ended zone most possibly identified in a Franco-German axis. According to Fischer, the establishment of a '*centre*' would eventually turn out to be synonymous to the '*core*' of the federation. The '*core*' of states, enhanced by a European Constitution, would set the federal powers and foresee their representation as a whole through the establishment of an institutional framework either within or outside the EU Treaties. Those two groundwork stages would lead to the third and most important stage, where the '*core*' would enjoy the fruits of its labour through the final establishment of the *Europäischen Bundesstaat* (European federation).

The problem of Minister Fischer's federal model of integration is not so much its exclusivity as the uncertainty of its commencement. At the beginning of his speech, he supported the idea that European enlargement makes EU political reform imminent, but then

²⁷ Olsen, J.P., "How, Then, Does One Get There? An Institutional Response to Herr Fischer's Vision of a European Federation", (2002), 00/22 Arena Working Paper, Oslo

during its course, he declared that such a change should take place in 'ten years' time. One wonders what was his true intention here. Does the apparent inconsistency reflect the notion that European enlargement provides the dominant factor necessitating EU political reform? Is it more accurately a reflection of the Minister's wish not so much that the political finality of European integration arises imminently, but rather that the establishment of a German federation replica within or outside the Union is realised? Another thing that Minister Fischer did not make explicit in his speech at Berlin was that his image of the 'core' of states as members of the federation leaves open questions regarding the status of the periphery²⁸ made by the outsider (existing small and new entrant) States that would not be competent to join the 'open' federation at once. It is difficult to think that the creation of a 'core Europe' albeit open in character will soften the hard-line stance taken by the French and Dutch public during the nervous constitutional referendums of May 29 and June 1, 2005 against the role of the Union and European integration²⁹.

Moreover, although the Foreign Minister spoke grandly of a European Constitution, today he could be criticised for implying the establishment of a mere catalogue of competences (*Kompetenzkatalog*) or quasi-constitution based upon a delineation of powers awarded to supra-national authorities and to national and regional bodies. This could be explained by Minister Fischer taking into account Germany's interest at the time on a future division of competences between the EU, the Member States and the *Länder* or regions. Even so, Minister Fischer avoided the danger of giving examples of how the proposed division of competences should occur within the federation. Neither was the effect of the

²⁸ See Zielonka, J., "Enlargement and the Finality of European Integration" (2000) 7/00 Harvard Jean Monnet Working Papers, NYU

²⁹ See Foreign Policy Centre, Event Report: "The French and Dutch Referendums: Lessons for Britain", The Foreign Press Association, London (June 9, 2005)

Constitution upon subsidiarity illustrated in his speech, but merely hinted at in the legislative structure of the federation consisting of national representatives, possibly an additional subsidiarity body, next to the already existing Community institutional organs.

Minister Fischer's speech was more elaborate about the institutional framework of the federation that would consequently replace the present institutional triangle. He proposed a two-chambered legislative, most likely consisting of the European Parliament operating in tandem with elected national Parliamentarians, possibly drawn from the Council of Ministers. This proposal almost has echoes of intergovernmental themes of governance, as well as echoing the EU Constitutional Treaty's Protocol on the Role of National Parliaments in the EU that ideally supports the monitoring by national representatives of the Union's legislative outcome. At this juncture, Minister Fischer presented supranational and intergovernmental options as equivalent, hinting at post-federation preservation of national sovereignty. As for the executive, he insisted upon a government for the federation whose role would most likely be played by the Commission, chaired by a directly elected President (although a politicised Commission does not reflect the situation in the draft Constitution, where the Union's executive role has almost been taken over by the increasingly competent European Council). This was reiterated in the joint declaration on dual EU Presidencies made by French President Jacques Chirac and German Chancellor Gerhard Schröder (January 14, 2003). The joint declaration constituted a Franco-German compromise, where each of the protagonists would work upon their core interests:

France on its role as a global power and Germany on its purpose as the promoter of democratic legitimacy in Europe.³⁰

C. ENHANCED COOPERATION AND CORE EUROPE

Among the supporters of the expansion of reinforced cooperation is Giuliano Amato. He proposed in response to Fischer's theses that "establishment of a central core of the European Union is undoubtedly necessary to prevent a reduction of the European Union to a mere economic area"³¹. During his lecture at the European University Institute in Florence (2000)³², he portrayed enhanced cooperation as one of the "channels that might lead us toward the political project of a return to Europe". He proposed easier access to enhanced cooperation "between those countries ready to integrate in other new ways" but he was cautious about its use. He concluded by saying that enhanced cooperation "should act as a magnet for further integration and not as a divisive instrument or a source of hierarchisation in a two-speed Europe." This is different to Fischer's vision that goes beyond what is allowed by Article 43 EU. Fischer speaks of an open vanguard that would subsequently allow the rest of the Member States to catch up and join the '*centre of gravity*' as long as the latter has pushed the evolution dynamic far enough. This cannot be compared to the occasional EC Treaty Protocols that grant a partial exception to a Member State from a Union Policy (e.g. Protocol 25 about the UK and the EMU). In this case, the Protocol's exception does not dismiss the security of common action.

³⁰ "Franco-German Declaration on dual EU Presidencies - A seismic shift for the future of Europe?" (15/01/2003), Paper by the European Policy Centre, Brussels.

³¹ See Tohidipur, T., "Expansion of Closer Cooperation as Contra-Indication to the Idea of European Integration: A Critique of Joschka Fischer's Speech and Giuliano Amato's Comment Thereon" (2001) 2 (14) German Law Journal

³² Amato, G., "From Nice to Europe", XXIInd Jean Monnet Lecture, (November 20, 2000), European University Institute, Florence

Fischer's unique version of integration necessitates two prior reforms. First, the improvement of the Union's institutional structures through a complete reordering of the current institutional triangle. Second, the elevation of its democratic legitimacy through the establishment of a federal constitution³³. In the light of Europe's awkward choice for a wholly inclusive but yet static supranational Union (as shaped by the classic Communitarian method) the flexible neo-federalist proposal appears to be an interesting alternative despite its elitist components. Apart from Minister Joscha Fischer, the same desire was also expressed in the Chirac - Schröder joint declaration on the future political leadership of the EU on the 40th anniversary of the Elysée Treaty.³⁴ Seen as a catalyst for the influence of Germany upon France and a point of furthering the debate on the political finality of Europe (and not necessarily a motor of political integration), the Franco-German axis is symbolic of a strong proposal for a federalist centre of gravity³⁵. In front of cold calculations of national interest, ultimately serving the relative preservation and influence of sovereign Member States in the Union during the negotiations and ratification of the EU Constitutional Treaty, Fischer's scenario could be furthered with the advent of *'hard core'* enhanced co-operation.³⁶ As already mentioned, the effects of this principle, generated at Nice to take place among eight Member States, are to be decided by qualified majority. France and Germany, possibly with the backing of the UK, could

³³ Lenaerts, K., "Constitutionalism and the Many Faces of Federalism" (1990) 38 American Journal of Comparative Law 205-263.

³⁴ The Elysée Treaty was signed between the two countries on January 22, 1963 between General de Gaulle and Chancellor Adenauer. See The German Press and Information Office "Joint appeal by President Chirac of France and Federal Chancellor Schröder on the 40th anniversary of the Elysée Treaty", Paris, (22.01.2003).

³⁵ Grapin, J., "Franco-German Friendship: An Indispensable Factor in European Stability", Speech on the Occasion of the 40th Anniversary Celebration of the Elysée Treaty, German School, Washington (January 22, 2003)

³⁶ Philippart, E., "A New Mechanism for Enhanced Cooperation for An Enlarged Union", (March 22, 2003), Contribution to the Research and Policy Group 'Notre Europe', Paris.

therefore activate that decision over the prospective economic policy for the Euro-countries; foreign policy and defence matters.

Yet, the weakness of the Franco-German federalist proposal does not lie in the deviation from the intergovernmental, and the fairly motionless but inclusive supranational methods, but more in the fact that the proposal for a '*centre of gravity*' or '*pioneer group*' is itself sufficient to encourage the maintenance of a semi-inclusive, virtually two-tier Europe. Despite its practicality, such a rationale would reduce the old Communitarian notion of cooperation to a privilege enjoyed only by those acquainted with the competence arrangements of the vanguard. These conditions may further create a split between supranationalists, and bring to the fore a group of small states that abide with an inclusive supranational Union. In other words, an exclusive federalist model will most likely frustrate the idea that small Member States have shaped, as regards the meaning and progression of a European supranational confederation. Moreover, allowing a temporary breakaway of the most economically advanced states from their less developed fellow states is capable of turning European integration into a selective process. Federalists could obviously argue that political finality can be carried out more efficiently by a flexible Franco-German '*core*' rather than a Union seriously occupied with the economic impairments of its newcomers. The neo-federalist stance can be translated as the embodiment of the belief that the end justifies the means even when, at least for a short term, the Franco-German axis will operate almost as a counter-Union. The question is still whether Europe desires that its political finality should occur at the expense or absence of the '*outer ring*' composed of medium, small and applicant states.

The exclusivity of the proposal for a '*core Europe*', albeit temporary, is sufficient to lift up the weaker and less demanding idea of Communitarian enhanced cooperation. Yet as the Communitarian approach has historically failed to lead to a settlement, since Member States tend to identify more with the concept of national competence / sovereignty than European integration, the Franco-German relationship can emerge as a close association based on the shared belief that there is something over and above the interests of the nation state³⁷. But still, it is its elitist character that renders it not reflective of the European public conscience as manifested in the demos of the Member States³⁸. The establishment of an *avant-garde* that would drag speedily the rest of the Member and applicant States to the appealing Aristotelian *telos* of the EU may thus remain reduced to a last resort solution or more possibly to an additional factor of furthering the EU debate about the finality of European integration. Besides, according to Tohidipur "closer cooperation was once permitted, not as an equal instrument to joint activity, but as a 'last resort'. The idea was not to create an *avant garde* of some states only wanting to satisfy their national interests within the European Union while leaving the rest 'outside'. Common development is still to be given the priority. Taking the Fischer proposal seriously means making a rule out of the exception." Besides the course and *telos* of integration is a matter of a political choice: Constitutionalism beyond the state where every Member State lives under a different degree of progress or one where different levels of government operate together in a system of multilevel constitutionalism.

³⁷ Schéré, J., "On the Dual Structure Proposed by the Franco-German Axis: Institutional Chalk and Cheese?" (March 2003) TUFTS University, USA

³⁸ The concept of *demos* has been extensively analysed by J.H.H. Weiler, See Weiler, "Does Europe Need a Constitution? Demos Telos and the German Maastricht Decision" (1995) 1 European Law Journal 219-258

A Federal Union and a Passé ‘Core Europe’

The Franco-German Declaration³⁹ to the Convention, prior to the latter’s presentation of the full draft Constitutional Treaty is symbolic of a common position reached between France and Germany on strengthening the European Parliament and Commission. It displays an attempt to marry the federalist and intergovernmental approaches as to the future institutional structure of the EU. This reveals that the process that was originally set up by the Convention in managing the typical diversity between the intergovernmental and supranational method has gradually led to shifts in opinions and ultimately to joint standpoints. France, which initially expressed a traditional reluctance over the powers handed over to the Commission, arrived at a settlement with Germany for the election of a President of the Commission by the Parliament. On the other hand Germany, which from Fischer’s words seemed for sometime to have departed from the idea of bestowing powers on the Commission also reconsidered its thesis. The arrival of the debate on ‘competences’ at the Convention’s table therefore assisted considerably in producing a consensus between Member States as regards the leadership issue in a constitutionalised Europe that inter alia is required to cope with the institutional makeup of the EU and the balance of power amongst its Institutions.

In such a climate, the fact that the European Council has become an integral and increasingly competent part of the Union, creating therefore more choices as to the future governance of the EU has generated several dilemmas. Valéry Giscard d’Estaing’s plan for establishing a full-time chairman within the European Council has gone in the opposite

³⁹ “Joint declaration by Jacques Chirac, President of the Republic, and Gerhard Schröder, Chancellor of the Federal Republic of Germany” (22.01.2003) Fortieth Anniversary of the Elysie Treaty, Paris, available at <http://www.france.diplomatie.fr/>

direction from the wishes of the Member States, particularly Britain, France and Spain, and to a lesser degree Germany and Italy, for a presidency that would concentrate the EU dynamic in the hands of the national governments. This has generated fear in relation to the way powers would be distributed vertically within the constitutionalised Union. Taking this into consideration, the European Convention established eleven working groups to deal with the main issues concerning the future of the Union. The Groups prepared recommendations that were finally included in the Convention's draft proposal for a future EU Constitutional Treaty presented to the EU leaders at the Thessaloniki European Council (June, 20 2003).

In its final report to the Convention, the Working Group V on "Complementary Competences"⁴⁰ emphasised that "the reference to 'an ever closer Union' in TEU Article 1 should be rephrased or clarified to avoid giving the impression that further transfer of competence to the Union is in itself an aim and objective of the Union". This is partly reflected in the Convention's Praesidium decision to later remove the word 'federal' from its Draft possibly fearing that the term implied an indirect transference of national sovereign powers over to the Union⁴¹. Yet, although optimistic at first glance, the replacement of 'federal' by the 'Community Way'⁴² or 'Community basis'⁴³ has a symbolic or cosmetic rather than an actual effect. Hence although the term 'federal' was removed to make the Convention's Constitutional

⁴⁰ Chairman of Working Group V, "Complementary Competences", Final Report, 4.11.2002, [CONV 375/1/02], Brussels. See more about the Convention and its Working Groups in Chapter 2.

⁴¹ The word 'federal' occurred in the first of the 16 articles. Article 1 (1) stated: "Reflecting the will of the peoples of and the states of Europe to build a common future, this constitution establishes a Union...within which the policies of the Member States shall be co-ordinated and which shall administer certain common competences on a federal basis." The British argument was simply that the federal wording seemed to favour the emergence from the EU of a super-state with the authority to over-rule national policies and laws. Proposals for amendments were widespread within the Convention. See "Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis" (26.02.2003) CONV 574/1/03 REV1; "Reactions to draft Articles 1 to 16 of the Constitutional Treaty - Summary sheets" (21/02/2003) CONV 574/03, "Summary report of the additional plenary session, March 26, 2003" (08.04.2003) CONV 674/03

⁴² [CONV 850/03]

⁴³ As it stands in the latest version of the EU Constitutional Treaty [CIG 87/2/04].

Treaty more appealing to Britons⁴⁴ and other Euro-sceptics, still - although indirectly - it's content may point towards a fairly centralised Union despite the absence of the 'federal' label. Article I-1 of the draft Constitution sets the tone:

Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common.

The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise on a Community basis the competences they confer on it.

Here the word 'Community' replaced the original 'federal' to assuage British concerns. But a commitment to the goal of an 'ever-closer union' is still within the spirit of the EU Constitutional Treaty and will very much determine the way powers are allocated vertically between the EU and the Member States. So even if the term 'federal state' seems awkward due to the well-known lack of a participatory democratic system in Europe, by reason of its nature the Union satisfies a number of other requirements for the creation of a state-like entity recognised by international law. It has a citizenship to complement that of nationality; a clearly defined external frontier accompanied by free movement of its citizens inside its borders and a common system of visa control on foreign nationals who cross them. Institutionally although different from the nation state, the Union still has an executive in the face of the Commission; a legislature shared by the Council of Ministers in conjunction with the European Parliament and an expanding judicial system with the Court of Justice acting

⁴⁴ See Guardian Unlimited, 'Britain and the EU', "Do we Want to be in or out: The British press divides along predictable lines", (Wednesday May 28, 2003)

Available at: <http://politics.guardian.co.uk/eu/comment/0,9236,965381,00.html>

as supreme court complemented by the lower Court of First Instance and other evolving judicial bodies.

But still, neither directly, through the election of a president, nor indirectly through the European Parliament has the citizen the impression that is involved in deciding upon a European system of governance proximate to his/her appreciation. In the German Maastricht Decision, otherwise known as *Brunner*⁴⁵, the individual right of Art. 38(1) Basic Law was relatively the starting point that led to a deeper reflection on the democratic basis of the EU⁴⁶. The BVerfG came to the conclusion that the principle of democracy that expresses the sovereignty of the people implies the necessity of direct democratic legitimation of institutions exercising governmental power⁴⁷. This finding applies, according to the Court, also to the EU. So the Community must not exceed its competences only derived from transfer-acts of national directly democratically legitimated parliaments. In so far the EU does not have a so-called *Kompetenz-Kompetenz* (competence to enlarge its own competences)⁴⁸; it is not able to achieve autonomously more powers than granted by third parties. This exactly is the reason, why a 'Federal State of Europe' does not exist. A federal state is sovereign and thus may exceed its powers on its own.⁴⁹ This is not the case with the Community that draws its authority from the Member States that compose it.

⁴⁵ [1994] 1 CMLR 57

⁴⁶ Herdegen, M., "Maastricht and the German Constitutional Court: Constitutional Restraints for an 'Ever Closer Union'", (1994) 31 Common Market Law Review 235, at 238; Everling, U., "The Maastricht Judgement of the German Constitutional Court and its Significance for the Development of the European Union", (1994) 14 Yearbook of European Law 1, at 5.

⁴⁷ BVerfG E 89, 155 (184).

⁴⁸ Further discussed in the Chapter examining the balance of competences between the EC and the Member States.

⁴⁹ Everling, U., "The Maastricht Judgement of the German Constitutional Court and its Significance for the Development of the European Union", (1994) 14 Yearbook of European Law 1, 6.

Thus, despite its innovation, Minister Fischer's speech is neither capable of changing the way we see the European political finality nor distorting the "prevailing mood in European integration" that Cruz evokes.⁵⁰ Certain matters are left open ended. As already mentioned, there is ambiguity in terms of the appropriate timing for the introduction of the required political change that he proposes. This reduces his proposals to an inspirational point of discussion, rather than a serious model on which to base EU ground reforms. Perhaps the Minister intended it to be this way. At a speech given at London on January 2001 on the occasion of the presentation of the German-British 2000 Award, having stated his beliefs in a milder – less enthusiastic and more realistic tone – Fischer attempted to go back and chase away the demons of his earlier speech at Berlin concluding:

"...let me repeat: my Humboldt University speech was not a call for a European superstate. The EU is an entity sui generis. The European nation states will continue to exist within the Union. But only if we succeed in building an economically and politically integrated Europe with reformed institutions, with the means to act, a Europe that its citizens can understand and that enjoys democratic legitimacy in their eyes, will this European project, this enlarged Europe of 27 or more Member States, have a real future. And only then will Europe be able, both on our continent and in the world at large, to play the important role that we all want it to play in building freedom, peace and prosperity in the 21st century."⁵¹

Once again the Minister avoided stating when this democratically legitimate, economically and politically integrated Europe will emerge, although this time he seemed to suggest that any politico-institutional change should occur prior to enlargement as opposed

⁵⁰ Cruz, "Whither Europe and When: Citizen Fischer and the European Federation" (2000) 7/00 Harvard Jean Monnet Working Papers.

⁵¹ Fischer, J., "Speech on the occasion of the presentation of the German-British 2000 Award - London" (24.01.2001).

to his 'ten year' timeframe specified back at the Humboldt speech. One can feel his anticipation that the Union should have made the most of this pre-enlargement phase by preparing its institutional framework for a larger Community and at the same time carrying out its constitutionalisation⁵². However exciting this may sound, for it implies an updating of the conditionality of the accession criteria⁵³ for the future applicants to include all those adjustments that would make candidates fit to enter into a newly constitutionalised Union, the present context of enlargement and constitutionalisation contradicts such a step. As Fischer himself illustrated in reference to the EU Constitutional Treaty in January 2004 after meeting Poland's Foreign Minister, Włodzimierz Cimoszewicz, "it will not get easier, the quicker it goes, the better for Europe."⁵⁴

Conclusion

In case the ratification of the EU Constitutional Treaty fails, the example of a core Europe as an alternative does not seem to resolve any of the imminent challenges faced by the Union: it neither improves the pre-accession strategy of European Enlargement, nor does it smooth the process of reviving talks and agreeing upon the EU Constitutional Treaty at a later stage. It only confirms the existence of varying speeds of European integration. The likelihood is that there will be more than one '*cores*' operating simultaneously. This matches Fischer's most recent remark in an interview with *Berliner Zeitung* in February 28, 2004 that

⁵² Smith, J., "Enlarging the EU" (2001) 39 *Journal of Common Market Studies*, Annual Review; Zielonka, J. "How New Enlarged Borders will Reshape the European Union", *Journal of Common Market Studies*, Vol 39, No 3,(2001) pp. 507-536.

⁵³ Konstadinides, T., "The Element of Conditionality in the Pre-Accession Strategy of the East and Central East European Enlargement", (May 2004) *Common Law Review*, Common Law Society, Prague

⁵⁴ Mahony, H. "Warsaw and Berlin Continue to Disagree" (15.01.2004) *EU Observer* (www.euobserver.com)

the idea of a '*core Europe*' is '*passé*'⁵⁵. There, Fischer argues that an '*avant-garde*' could exist in certain areas but only 'within the framework of the Constitution'. Since its presentation, the 'Humboldt' optimistic vision of a constitutional and institutional changeover within the EU constantly raises questions about the realism of the type of integration that the Minister had in mind. Thus, it is not accidental that Fischer's speech has continued to be used as a point of reference on the political future of Europe almost five years after it was first delivered

⁵⁵ Available at http://www.germany-info.org/relaunch/politics/eu/eu_archives.html

CONCLUSION

The aim of the present thesis has been to capture the character, dynamic, and the shortcomings of the current system of competences within the EC Treaty and the reforms proposed by the EU Constitutional Treaty for a clearer delimitation of competences. This was achieved through an examination of the nature and development of Community competences within the European legal order and the efforts made through the interesting debate between the European Court of Justice and the national courts about the scope of the Treaty (Tobacco Advertising Case¹) and the so-called '*Kompetenz-Kompetenz*' (or capacity to determine the limits of the powers conferred on the EC, as discussed in Brunner²). Both prove that the allocation of competences in the Community represents a unique example of distribution of competence intended for a multilevel system that although it does not resemble national constitutional democracies, is characterised by pluralism.

The present work used a particular conception of the term 'Community competences', according to their subject or objective. Subject-related competences are linked to the conduct of Community policies while objective-related competences are associated with the achievement of the Community's internal market goals. Through the analysis of the two types of competence and their subcategories, this thesis has endeavoured to point out the importance of having a clearer categorisation without however threatening the flexibility of the current system. The conclusion to be drawn is that any attempt to establish a clear separation of powers between the Community and the Member States in relation to the various levels of competence needs to take into account the existence of the

¹ Case C-376/98 *Germany v. Parliament and Council* (Tobacco Advertising Directive) [2000] ECR I-8419

² *Brunner* (German Maastricht Decision) [1994] 1 CMLR 57, 6 89 BVerfGE 155,

cooperative system of power-separation that exists in the Community. This cooperative system exists both horizontally (within the Institutions themselves) and vertically (between the Community and the Member States). This makes problematic the drawing of clear-cut lines of responsibility along with a strict allocation of internal competence between the Community vis-à-vis the Member States.

This thesis proposes that in a system that is unable to absorb a formal catalogue of competences, it is only possible to identify several generic types of Community competence or general principles governing the relationship with domestic regulatory power. This is exactly what the EU Constitutional Treaty did. The Convention adopted a tidying up exercise as regards the categorisation of the previously scattered Community competences within the EC Treaties. It did not create new competences out of the blue. Thus, according to the author, the most innovative adjustment introduced by the EU Constitutional Treaty merely lie in the classification / codification of the Union's exclusive, shared and complementary competence and the sectors falling into each category, not previously found in the EC Treaties. Yet the author contends: Does the text of the EU Constitutional Treaty answer the challenging academic question of 'creeping competence'? Does it even clarify the post-*Brunner* concerns about the extent of the Union's competence? This thesis has contended that despite the Community's creeping attempts, manifested in the Tobacco Advertising Case, there are limits to Community competence and the Court is ready to uphold those limits. The use of Articles 95 and 308 EC in a way that does not undermine the fundamental principles of attributed powers and subsidiarity, enshrined in Article 5 EC, constitutes the most effective barrier to the creeping expansion of Community competences. However, The Court has restricted the conditions under which the EC Institutions might rely

upon Article 95 EC, especially as a way of overcoming restrictions on EC competence in fields other than the internal market. However, Article I-18 (1) of the EU Constitutional Treaty extends the flexibility clause of Article 308 EC to the former second and third pillars. Does this imply that Union's competence will thus increase to all the policies within Part III of the new Treaty, which includes the CFSP and police and criminal law?

The author argues that the introduction of new legal bases along with the unanimity requirement in the EU Constitutional Treaty strengthens the possibility of recourse to Article I-18 but does not reduce the functionality of this broad competence. Thus the Convention appears to have maintained the Union's capacity to respond to new demands as a problem-solver. However, the lack of protection against a wide use of Article I-18 would contradict the early Community concerns about the phenomenon of 'competence creep' that damages the relations between the Union and the Member States. Such an approach would also undermine the *Bundesverfassungsgericht's* Maastricht decision that the Union's *Kompetenz-Kompetenz* contains the potential for review of Union acts by national courts when the Union's powers extend beyond the scope of the act by which Member States acceded to the Union. Emphasis is therefore placed on the importance of an extra safeguard against the Union's attempts at creeping competence. A legislative procedure involving Parliamentary approval, next to the existing requirement of unanimity against excessive resort to Article I-18 could be desirable. Yet, in the absence of a clear division of competences between the Community and the Member States, the principle of subsidiarity, enshrined in Article 5 EC, shall be the prime constitutional safeguard to national autonomy against excessive Community centralisation. However one should be cautious about its extended use as it could lead to a fragmentation of the integration momentum of the Union.

The thesis argues that by its very nature the principle of subsidiarity is highly political and difficult to put into operation. However, it is claimed that a strict political use of the principle of subsidiarity lacking a legal approach is not sufficient to make it effective. The practical function and observance of the principle of subsidiarity in a constitutionalised Union necessitates the existence of multiple legal / procedural checks to EC legislation. At present, subsidiarity as a procedural question has been left to the Court. Yet, the Court only monitors EC legislation ex post. Due to its hesitancy towards subsidiarity pleadings, the Court has never annulled a measure on the basis of violation of the principle. Thus, the author emphasises the importance of effective subsidiarity checks not only ex post but also ex ante, when EC legislation is prepared as a proposal by the Commission. In the current debate about the EU Constitutional Treaty, the procedural and monitoring aspects of subsidiarity are interconnected. This reflects the realisation of the Convention on the Future of Europe that any legal application and monitoring of subsidiarity might be easier to concentrate upon its procedural aspects rather than trying to utilise it as a substantive test. Particularly, the Protocol of the EU Constitutional Treaty, regarding the application of the principle of subsidiarity, assigns a unique role to the national parliaments in relation to the evaluation of the level to which the principle is complied with (early warning system). This role assigned to national legislatures is vital to the general application of material subsidiarity and finally to the policing of the flexibility provision of Article 308 EC (Article I-18 in the EU Constitutional Treaty). However, the author contends that European leaders have over-estimated what the early warning system can do for the healthy delimitation of competences. Once a national parliament has raised a subsidiarity 'red flag', the Commission would be required to justify it. Once the Commission has responded, the

proposal shall continue through the legislative process unless the Commission withdraws it. Hence, national parliaments are not to become co-legislators under the new system. Instead their role would remain “essentially advisory”.

The vision of the Union, as a confederation of states, for a functional and participative democracy through a new path of constitutional reform requires an explicit authorisation to all actors in civil society to contribute to the development of EU policy. This is the horizontal dimension of subsidiarity: recognising that different competences in society are exercised not only by different levels of government (vertical subsidiarity) but also by different actors. The Laeken Declaration³ stated that there is an increasing awareness from the side of the European citizen that although the system is muddled up, the Union’s interventionist role has expanded alarmingly. This is visible especially in terms of the vertical distribution of competences in the Community. Apart from the confusing Articles 94, 95 and 308 EC no other Treaty provisions clarify the principles governing the allocation of powers between the Union and its Member States. Hence, the need to weigh legitimacy against efficiency, amplified by auxiliary concerns such as subsidiarity is a demanding process, especially given the impending questions in terms of whether the present delimitation of competences (as regards the enforcement of subsidiarity and proportionality and the instruments available to the EU for exercising its competences) matches the Union’s tasks as those are identified in the Convention’s Constitution.

The question remains: How likely is the establishment of the Constitutional Treaty in the coming months? The reality behind signing and ratifying the Constitutional text produced by the European Convention has been contradictory, both in essence and content,

³ Laeken Presidency Conclusions (15.12.2001) SN 273/01

to the polity. Initially, the veto of Poland backed by Spain on the system of voting weights during the December 2003 European Council in Brussels created problems to the negotiation of the draft Constitutional Treaty.⁴ Despite the later agreement on the EU Constitutional Treaty, signed by the twenty-five Member States on October 29, 2004, the recent outcome of the French and Dutch referendums put the future of the EU Constitutional Treaty in uncertainty. Although both incidents created fears as to the momentum of political integration in Europe, the French and Dutch 'no' is not equivalent to the early Spanish and Polish refusals regarding the agreement on the EU Constitutional Treaty. This is because the Spanish and Polish rejections were a political choice concerning a proposed framework introduced by the then draft Constitutional Treaty (double majority voting system). On the other hand, the French and Dutch rejections came from the electorate and were directed against the EU Constitutional Treaty as a whole. Yet, one would raise parallels between the early Polish - Spanish unwillingness to negotiate the Constitutional Treaty and the late French - Dutch choice to vote against it. One would comment that the rejection of the EU Constitutional Treaty represents the anticipation of European leaders and their electorate that European constitutionalisation would make stronger the Union's powers and competence over the Member States, undermining therefore the nature of the nation state and the national democracies that underpin them. The conclusion that can be made from that assumption is that as integration grows so does the game for balance of power between the States.

The sticking points continuing to hold up the proposed Constitutional Treaty are frozen and reaffirm that the establishment of a 'balanced Europe' is more preferable to an

⁴ This was similar to the atmosphere surrounding the signing of the Treaty of Nice (Nice IGC, 2000), which was ratified as late as February 1, 2003.

organisation with a substandard 'federal' appearance. At best, such a decision would assist in preserving a typical balance of competences between Member States vis-à-vis the Union. Otherwise, this thesis argues, we would have to talk about the inevitability of witnessing the formation of a two-speed Europe operating under a unique model of enhanced cooperation. Joshka Fischer described in the aftermath of Treaty of Nice his vision of 'core Europe' capable of surviving outside the EU altogether with its own institutions⁵. This is different to the cooperative model of enhanced cooperation that operates within the boundaries of the Union. On the other hand, European enlargement will negatively contribute towards diminishing the Court's ability to decide comprehensibly. Schepel argues that it will even be "reduced to a deliberative assembly of 20 plus judges under increasing political pressure. Both on a practical level of organisation and composition and on a conceptual level – in comes the 'flexible multilevel constitution' – a lot of work awaits."

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In a future Union, which would still receive its competences from its Member States, the problem of competences would still relate to the fact that the boundaries, which were meant to restrict the areas in which the Union could operate have been pushed beyond their limit. Does or will the EU Constitutional Treaty change this? Under the current rules of ratification, it appears that even if the Constitutional text is re-negotiated, if at least one Member State fails again to ratify it, the EU Constitutional Treaty will still not enter into force. The legal position is that the existing Treaties would still continue to apply, since the provisions of the EU Constitutional Treaty determine their repeal. Alternatively, a new negotiation would possibly occur for certain sceptical Member States on a mutually acceptable solution with certain opt-outs from several provisions of the EU Constitutional

⁵ Olsen, "How, Then, Does One Get There? An Institutional Response to Herr Fischer's Vision of a European Federation", (2002), 00/22 Arena Working Paper

Treaty. Otherwise, it is more likely that the current Treaty position will remain. But even then, we would still speak of a distribution of competences that constitutes the result of a pragmatic political compromise rather than an authentic effort to allocate competences on a rational basis between the main actors of European Constitutionalism.

Given the current efforts of the EU to constitutionalise the supranational polity, two different conclusions can be sketched out. A pessimistic assumption that European constitutionalisation gestures toward the gradual end of concepts attached to sovereignty and territoriality and by extension to the idea behind the nation state where the great majority of citizens are conscious of a common identity. On the other hand an optimistic and more realistic conclusion may imply that the inclusion of unwritten values within a European Constitution aims to stipulate the balance between the vertical and horizontal levels, the EU decision-makers and the nation states along with their peripheries. The second conclusion dismisses any doomsday about the future of Europe, especially as the constitutional defences and checks inherent in the EC Treaty are included in the EU Constitutional Treaty ensuring that the EU will not go beyond its mandate of competences as these have been attributed by the Constitutional text.

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