Deconstructing EU Federalism Though Competences

Loïc Azoulai, François-Xavier Millet, Lena Boucon

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DEPARTMENT OF LAW

Deconstructing EU Federalism through Competences

EUI Workshop Proceedings – 14 June 2011

LOÏC AZOULAI, LENA BOUCON, ANNEGRET ENGEL, ANNA KOCHAROV, DENNIS-JONATHAN MANN, FRANÇOIS-XAVIER MILLET, JACOB ÖBERG

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Abstract

This paper is a collective endeavour to depart from the traditional view that a clear-cut separation of powers between the European Union and its Member States is one of the main features and one of the main safeguards of the European quasi-federalism. On the one hand, it is an effort to show the deep intertwining of EU and national powers in the actual course of European integration. On the other hand, it is an attempt to discover new legal and political safeguards to the development of EU federalism.

Keywords

European Union Law – Division of powers – Competences – Retained powers – Subsidiarity – Proportionality – Constitutional Identity – American and European Federalism

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INTRODUCTION

Loïc Azoulai

This Working Paper is the outcome of a workshop held at the EUI on June 14th, 2011 on the initiative of two researchers of the Law Department, Lena Boucon and François-Xavier Millet, with my support and in the presence of several EUI researchers and of Bruce Ackerman, professor of Law and Political Science at Yale University, Bruno de Witte, professor of European Law at Maastricht University and part-time professor at the EUI Robert Schuman Centre and Miguel Poiares Maduro, professor of European law at the EUI. It has been given a title which might sound like a slogan: *Deconstructing EU Federalism…* This was meant not only to bring the "French theory touch" into a project mainly oriented at investigating EU federalism in a comparative context, but also reflects a thoughtful working hypothesis.

A Working Hypothesis

As formulated by the two initiators of our meeting, the workshop was aimed at challenging the so-called traditional view that "a clear-cut separation of powers between the European Union and its Member States is supposed to be one of the main safeguards of federalism". Federalism refers to a mode of political organization where two distinct levels of governance – the federal/supranational and the national – coexist and are protected. Under a federalist mode of organization, the main issue is how to differentiate intrinsically interdependent political and legal orders. A traditional response resides in the allocation of powers. Federal law and federal courts seek to enforce mechanisms whereby the efficiency of the federal structure is ensured while "core" state powers are protected from federal influence and state interests are incorporated in federal political institutions. It is submitted that, in deploying such mechanisms, the EU has failed to protect the autonomy of national powers. The picture is one of the deep intertwining of EU and national powers. Therefore, if European federalism is to be safeguarded, new mechanisms should be sought.

The catalogue of competences and the new procedures introduced by the Lisbon treaty (such as the introduction of subsidiarity review by national parliaments or the existence of opts-outs procedures in the area of freedom, security and justice) are not the solution; they are rather part of the problem. The activation of these clauses inevitably creates the suspicion that the dynamics of European integration and the sense of a loyal membership to the Union are endangered. As argued by A. Kocharov, the new subsidiarity review procedure tends to "reverse the presumption in favour of Union action", [1] but the same can be said of the procedures examined by A. Engel. Ex-ante methods aimed at setting clear-cut frontiers to the EU enumerated powers have proven to be ineffective in protecting the Member States' legitimate scope of action. An alternative approach could look to techniques of differentiation developed in the course of the exercise of EU and state powers. As a matter of fact, fundamental state interests are better protected ex-post, through a variety of techniques – for example by introducing the disruptive concept of "constitutional identity" in the framework of the interpretation of EU law, by varying the degree of the proportionality test applied to states' justifications or even by acknowledging the very ambiguity of the language developed by the legal and political actors in European integration. The time is ripe to recognize, systematize and evaluate each of these practices and discourses.

It is this hypothesis that the papers included in this volume develop, each with its own style and inflection. It was discussed at length during our lively workshop. It is now submitted to the readers. In

[1] See Anna Kocharov's paper.

what follows, I would like to illustrate the value of it by paradoxically departing from one of its premises.

How Traditional is the Division of Powers Approach?

One of the merits of the approach proposed in this volume is to bring out a theme which has been underdeveloped in EU legal studies and practices. The approach drawn in allocation of powers terms is not as "traditional" as it might have been assumed in the presentation of our workshop. As has been noted, *"Until the end of the 1990s, there had been astonishingly little research on the system of the Communities' competences. Legal literature on competence issues had almost exclusively focused on Article 235 EEC Treaty"*.[2] Arguably, this lack of conceptualization is due to the structure of the EC treaty which did not specify the categories of competences conferred on the Community. The European Community was supposed to operate on the basis of the broad objectives and the specific provisions provided for by the treaty.[3] EC competences were derived from a list of aims and means allocated to the Community and on the basis of the link that may be established between a purported action and the achievement of the common/internal market.[4] EC action was certainly not justified on the basis of a specific subject matter having been entrusted to the Community.

This may not be the only explanatory factor however. Intertwined with the EC's appeal for aims and treaty objectives to foster "positive integration" are the legal doctrines "constitutionalizing" certain provisions of the Treaty. These are provisions promoting "negative integration", that is, forbidding national measures and practices incompatible with the EU's objectives, particularly free movement and competition law. Given that the treaty was not merely an international agreement among sovereign states, treaty provisions serving the objective to establish a common market had to be construed broadly and authoritatively, in a similar fashion to constitutional provisions within a national legal order. As a result of the functioning of the common market being of direct concern to the peoples of Europe, those rules could be converted into rights directly conferred on individuals. The centrality of the language of rights has superseded the language of the division of powers in the realm of EU law. EU rights have two distinctive features. First, they are functionally broad in their scope and not sector-specific[5]. The protection of these rights is supposedly triggered by any cross-border situation that relates to the establishment of the common market. When successfully invoked, the application of treaty-based individual rights is largely indifferent to the delineation of competences between the EU and its Member states. In fact, the reach of EU "constitutional" law extends well beyond the range of EU legislative competences. [6] Second, EU rights are reflected in specific obligations imposed on Member states. The overarching language of rights forces Member States to justify their actions in terms of policy interests or fundamental rights. Justifications based on the protection of a "core" national competence are banned from the realm of EU constitutional law. As has constantly been held by the Court, the purpose of the justification process "*is not to reserve certain matters to the exclusive jurisdiction of the Member States; it merely allows national legislation to derogate from [free movement provisions] to the extent that this and remains justified to achieve [a*

[2] A. von Bogdandy & J. Bast, *The Federal Order of Competences*, in A. von Bogdandy & J. Bast (eds.), *Principles of European Constitutional Law* (2009) Hart Publishing, 275.

[3] See R. Schütze, *The European Community's Federal order of Competences – A Retrospective Analysis*, in M. Dougan é S. Currie (eds.), *50 years of the European Treaties – Looking back and thinking forwards* (2009) Hart Publishing, 63.

[4] K. Lenaerts & P. Van Nuffel, *European Union* Law (2011) Sweet & Maxwell, n° 7-013.

[5] See See S. Weatherill, *Competence and Legitimacy*, in C. Barnard & O. Odudu (eds), *The Outer Limits of European Union Law*, (2009) Hart Publishing), (2009) at 24 and Opinion of Advocate General Kokott in Case C-192/05, *Tas-Hagen* [2006] (§ 34).

[6] Consider, by way of illustration, Case C-415/93 *Bosman*, Case C-415/93 [1995].

legitimate objective]".[7] As a result of the process of constitutionalization, the issue of the division of competences seems to have been removed from the interpretation of EU law. Referring to the mainstream case-law of the Court, one can hardly escape the conclusion that "*There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community"*.[8]

The Return of Federal Competences Theory

In this context, it may come as a surprise to observe a return to the theory of the federal order of competence. The political and social context of distrust towards further integration and federalization of Europe is certainly favourable to such return. In truth, it is a return only in appearance. Some early decisions of the Court were already framed in these terms. The famous *ERTA* judgment illustrates how arguments based on competences may arise as an unexpected resource in the resolution of a case. In this decision pronounced in March 1971, the Court developed the "implied powers doctrine" according to which the powers vested in the Community to implement a common policy must necessarily extend throughout the international order through the acknowledgement of an exclusive competence to assume contractual obligations towards third countries. As has been accurately noted by P. Eeckhout, "*The Court could easily have adopted a different approach"*, one based on the rule of primacy of EU norms over the international law obligations of Member States.[9] The Court, instead, chose to base its ruling on a model of allocation of powers, so as to avoid potential conflicts of EU norms and international obligations assumed by Member States. In July 1974, the Court issued the *Casagrande* judgment. [10] The problem was totally different from the one raised in *ERTA*, and yet, the Court used the same line of argument. The question was whether it was legitimate for Member States to refuse to award an educational grant to the child of a European migrant worker. In response to the argument put forward by the German authorities that education policy is within the exclusive powers of Member States, the Court developed a new doctrine akin, though different, to the US Supreme Court "doctrine of pre-emption". It stated that the fact that the exercise of the Community's powers affects areas which do not fall within the scope of the Community's competences should not be held as limiting those powers, especially where there is the necessity of enforcing one of the main objectives of EU law (here the principle of non-discrimination between nationals and migrant workers and their families). Again, this case could have been settled on different grounds, referring to the primacy of the general principles of EU law, as occurred in later decisions. However, this again would have amounted to the acknowledgement of a conflict between EU and national law. It seemed more appropriate to the Court to present the solution in terms of the legitimate exercise of a Community competence. Both decisions were instrumentally justified by the necessity of ensuring the implementation of the EU's objectives. Both referred to the allocation of powers to the EU, avoiding the language of the constitutionalization of EU law. Both entailed the "absorption" of national powers and national measures into the broadened scope of the Community's competences.[11] In these cases, in resolving the conflict of jurisdiction question, the balance tipped clearly in favour of EU federal competences. Implicit in the reasoning are structural arguments that the EU forms a "coherent whole" – a federation – and that Member States are committed to the common interests that the federation represents, even in areas that come within the scope of their "retained" powers.

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7 Case 72/83 Campus Oil [1984] § 32.

8 K. Lenaerts, Constitutionalism and the many faces of federalism, (1990) 38 American Journal of Comparative Law, at 220.

9 P. Eeckhout, Bold Constitutionalism and Beyond, in M. Poiares Maduro & L. Azoulai (eds.) The past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty (2010) Hart Publishing, at 219.

10 Case 9/74, Casagrande [1974].

11 On the idea of absorption, see J.H.H. Weiler, The Constitution of Europe. "Do the New Clothes Have an Emperor?" And Other Essays on European Integration (1999) Cambridge University Press, at 47.

The current assertion of the federal competences theory in political and legal discourse is obviously of a totally different kind. It is meant to favour a more balanced allocation of powers. It argues for the necessity of protecting sensitive national interests and the integrity of the different political communities of which the Union is composed, whilst at the same time promoting the efficiency of the process of integration. The new article 4 inserted in the Treaty on European Union by the Lisbon Treaty, in its different dimensions, illustrates this point perfectly. Article 4 speaks a new language, the language of "Respect". It embeds three kinds or respect. First, the respect for the competences not conferred upon the Union, which are to remain with the Member States, provided however that, thanks to the "flexibility clause" maintained in the treaty (article 352 TFEU [former 308 EC]), there is no imperative call for the Union to take action.[12] Second, the respect for the national identities of Member States which, read in conjunction with the preamble and article 2 of the treaty, creates a complex picture whereby the EU respects the national identities of Member States provided that Member States are respectful of the fundamental values of the EU.[13] Third, the respect for Member States' essential functions that the Court has somewhat echoed and anticipated in its case-law referring to Member States' "retained powers".[14] By the 2000s, when developing its case-law expanding the scope of application of EU law to areas of "retained powers", the Court started to recognise state justifications based on Member States' competences in their national territories. The impingement of EU law on core states competences is thus compensated by the acknowledgment of the essential functions of States as autonomous political actors and guarantors of national collective goods and assets. Moreover, this has led the Court to develop new techniques of assessment by relaxing the standard of scrutiny and the proportionality test in sensitive areas.[15]

"Ambiguity" and "contestedness", the basic characteristics of EU federalism according to Dennis-Jonathan Mann, are everywhere in these formulations.[16] Part of the deconstruction work is to analyse the context in which this shift in language and methods has occurred. How have the concepts of competences, allocation of competences and respect for national competences/identities been legitimized and built as a discourse directly applicable to EU legal problems, next to the long-standing prevailing discourse on the constitutionalization of EU law? What are the assumptions conveyed by this discourse? What difference does it make to approach European federalism and European integration through mechanisms of coordination/competition/contestation of powers? It would be mistaken to move too quickly from the "old-fashioned" division of powers doctrine to the "new" safeguards to EU federalism. Much of the discussion on these new safeguards, indeed highly promising, might well be seen as a "return" and a by-product of the division of powers doctrine which proved to be less than "traditional" and in fact rather new in the realm of EU law. Deconstruction has a disruptive effect on well-structured discourses, including on discourses which claim to be deconstructive.

[12] Article 352 TFEU requires the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, to take appropriate measures to attain one of the objectives set out in the Treaties if those Treaties have not provided the necessary powers.

[13] See the contribution of François-Xavier Millet.

[14] See Lena Boucon's paper in this volume.

[15] See Jacob Öberg's contribution.

[16] See Dennis-Jonathan Mann's analysis.

PART I

THE TRADITIONAL DIVISION OF POWERS DOCTRINE: A SATISFACTORY SAFEGUARD TO EU FEDERALISM?

SUBSIDIARITY AFTER LISBON: FEDERALISM WITHOUT A PURPOSE?

Anna Kocharov

A Rascal-Monkey, Donkey, Billy Goat and Bear
Agreed in a Quartet to share.
They found some scores, viola, bass, two violins
And sat down in a lea beneath a linden tree
To charm the world with art.
They struck their strings, and sawed with all their heart.
No luck. “Arrete, my fellows, stop!” shouts Monkey, “Wait!
How can the music play when you're not sitting straight?
You, Bearie, opposite viola move your bass,
As primo, I'll sit opposite secundo's face
And then some music will take place.
We'll make the hills and forests dance!”
They took their seats and started the Quartet,
And once again it came to nyet.
“Hold on! I know the secret!”
Shouts Donkey, “It is bound to come out fine
If everyone sits in a line.”
They followed Donkey's plan and settled in a row;
But even so, the music would not go.
More fiercely than before they argued then
About who should be sitting where.
A nightingale, in passing, chanced the noise to hear.
At once, they turned to her to solve their problem.
They pleaded, “Please, spare us some time
To make of our quartet a paradigm:
We have our instruments and scores,
Just tell us how to sit!”
“For making music, you must have the knack
And ears more musical than yours,”
The nightingale comes back,
“And you, my friends, no matter your positions,
Will never be musicians!”

Ivan Andreevich Krylov, *The Quartet* (1811)

Abstract

This paper explores the division of powers between the Union and Member States in the field of common immigration policy, discussing the application of the principle of subsidiarity in the framework of fluid objective-setting. Subsidiarity review by national parliaments could make a crucial contribution to policy development if this review goes to the substance of the proposed legislative acts. The new procedure reverses the presumption in favor of Union action, inverting the division of powers between the national and Union levels.

Keywords

Division of powers, Common immigration policy, Subsidiarity

Three Visions of Subsidiarity

Subsidiarity, just like the competence over immigration, was introduced into the EC / EU Treaties with the Maastricht Treaty reform in 1993; the Amsterdam Treaty both extended competence over immigration policy and added a protocol on the application of the principle of subsidiarily; finally, both subsidiarity and competence over immigration were amended significantly in the Lisbon Treaty: EU immigration law moved in its entirety under the qualified-majority voting with full involvement of the EP and full powers of the ECJ, while subsidiarity review was extended to include national parliaments. This parallel is not a mere coincidence. As Union competences expanded into the new policy fields, including immigration, and as more policy areas became subject to the qualified-majority voting thereby introducing the risk of individual Member States being outvoted in the Council, Member States wanted to ensure that shared competences of the Union would still leave space for national action. This section outlines three primary functions of subsidiarity in EU law, which can be summarized as follows:

i. A counter-majoritarian instrument to balance (a) the expansion of Union competences and (b) the passage to qualified-majority voting;
ii. An instrument of legitimacy (and legitimation) of Union law through (a) consultations with stakeholders beyond the European institutions and (b) (comparative) institutional analysis;
iii. A policy-development instrument in as much as subsidiarity analysis requires clear identification of policy objectives and problems to be addressed.

The primary function of subsidiarity is to determine whether a given regulatory action falling within the area of shared competences is to be adopted on Union or Member State levels. Article 5 EC Amsterdam, transposed nearly word-to-word into Article 5 TEU Lisbon, institutes a presumption in favor of action at a lower level of authority[17]:

> […] in areas which do not fall within its exclusive competence, the Union shall act only if and in so far 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*[18], but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

However, the Protocol on subsidiarity attached to the Lisbon Treaty[19] introduces a new procedure for rebutting compliance with the principle of subsidiarity, which counterbalances the presumption in favor of Member State action. Under this procedure:

[17] See also second paragraph of Article 1 TEU.
[18] This phrase has been added in Lisbon, italics by author.
[19] Protocol No 2 on the application of the principles of subsidiarity and proportionality

> Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act [...] send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity.[20]

Whenever, as a result of this procedure, the majority of national parliaments take the position that the proposal does not comply with the principle of subsidiarity, the proposal must be reviewed.[21] The institution proposing the draft does not have to amend or withdraw it but must, in any case, reason its action in terms of subsidiarity. It strikes that rebutting an alleged compliance with the principle of subsidiarity is not easily done, as the time (eight weeks) is short while the number of parliaments that need to issue a reasoned opinion is high. The balance struck by this procedure depends on the quality of the reasoning of the institutions and the willingness of the ECJ to engage into substantive subsidiarity review.[22] The ECJ is given jurisdiction in actions for infringement of the principle of subsidiarity.[23] However, considering that to this day the ECJ did not strike down a single measure for non-compliance with subsidiarity as such,[24] this change in the procedure could amount to a reversal in the competence presumption in favor of Union action.

Independently of whether the presumption favors Union or Member State action, subsidiarity institutes a nexus between the inability of the Member States, acting individually, to achieve the policy objective of the proposed legislative act[25] on the one hand and legality of Union action on the other. Grounding the legality of Union action (the existence of Union competence) in its objectives indicates that the focus of subsidiarity test is not on the action itself – the legislator has broad discretion as to the choice of policy goals – but on the *problem* which EU regulation is tailored to solve. Subsidiarity analysis thus forces the legislator to clearly articulate the problem addressed by legislative intervention and the reason(s) why the Union would be best equipped to offer a solution. Without specifying the reason for having a Union policy in the first place, subsidiarity test is impossible. Subsidiarity can thus be viewed both as a tool of policy development and as contributing to the functioning of the law itself: to enhance the predictability in human relations through rationalizing – and thus reasoning – rules. Both these functions are facilitated by Protocol No 2: its Article 2 stipulates an obligation of the Commission to "consult widely" before proposing legislative acts, which should ideally lead to better policy-development, while Article 5 of the Protocol sets out an obligation for the Commission to make "a detailed statement" that would explain how the proposal complies with the principle of subsidiarity. Unfortunately, Article 5 later reiterates the old protocol on subsidiarity with reference to qualitative and quantitative indicators without mentioning that these should be applied to the problem that is being solved: an obvious observation?

How to determine which problems a Member State can regulate itself and which require joint (Union) action? Two examples ensue. First, an individual Member State cannot address problems, the effective solution of which requires jurisdictional reach beyond its own territory.[26] Regulating the use of

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[20] Article 6 Protocol number 2

[21] Article 7(3) Protocol number 2: after Lisbon, all CIP measures are adopted by ordinary legislative procedure.

[22] This will be examined below.

[23] Article 8 Protocol No 2. Also limits on the jurisdiction of the ECJ in the CIP matters, ex-Article 68 EC, was removed with Lisbon.

[24] Some authors note that the Court "effectively equates the test of subsidiarity with the test of competence thus removing all independent legal value from the former", see Takis Tridimas, *The Rule of Reason and its Relation to Proportionality and Subsidiarity* in Annette Schrauwen (ed.) *Rule of Reason: Rethinking another Classic of European Legal Doctrine*, Europa Law Publishing 2005.

[25] Protocol No. 30 on the application of the principles of subsidiarity and proportionality annexed to the Treaty of Amsterdam (10.11.1997) OJ C340, p. 105

[26] G. A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and in the United States*, 94 COLUMBIA L. REV., p. 381 (1994); R. P. Alford, *Subsidiarity and Competition: Decentralized Enforcement of EU Competition Laws*, 27 CORNELL INT. L. J., p. 272 (1994) citing M. Wilke and H. Wallace, SUBSIDIARITY: APPROACHES TO POWER-SHARING IN THE EUROPEAN COMMUNITY (1990) Royal Institute of Int. Affairs, Discussion Paper No. 27

international waterways or the protection of rare animal species who migrate across national borders constitute the most immediate examples of problems that cannot be regulated by a state acting alone. Second, when the national political process fails to represent the interests of stakeholders located outside the national democratic structures (e.g. because they are nationals of another Member State and thus cannot vote), the regulatory acts affecting those interests need to be shifted to Union level in order to ensure balanced representation of all Union citizens (as opposed to nationals of only one Member State) – and therefore to enhance their acceptance of the enacted rules. A classical example would be restrictions on inter-state trade posed by a protectionist tariff enacted by state A, which benefits producers of state A and damages producers of state B, as well as the consumers of state A; a joint action is needed because producers of state B and consumers of state A are under-represented in state A's political process, making it impossible for state A to overcome the bias towards its producers.[27] Beyond an issue of market efficiency, this is a matter of the acceptance of the rules enacted by state A by the producers of state B, i.e. by different categories of Union citizens. In both cases the Member States cannot offer a solution by acting individually: there is a "collective action problem".[28]

A more controversial question is whether the Union should intervene in wholly internal situations, i.e. to secure the proper representation of consumers in state A. While the intentions for this could be most noble,[29] intervention of the EU into internal situations undermines democratic systems of the Member States, on which the Union institutions are in turn based: claiming that the governments of Member States cannot represent and legislate for their peoples questions the legitimacy of all Union action because the Union acts through the Council, where the national governments are represented, and through the EP, the members of which are elected at national levels. It is thus impossible to claim that the Union may intervene "to correct" purely internal situations without automatically undermining the democratic legitimacy of the Union itself: if the national governments do not represent their peoples acting individually then how can they represent their peoples acting collectively? In line with this reasoning, the ECJ has repeatedly ruled that in situations involving transborder elements, intervention at Union level is required to protect the interests of individuals and businesses – yet, the Court repeatedly refused to interfere in purely internal situations.[30] By identifying whether the case has the so-called "Community dimension", the Court is implicitly engaging in *ex post* subsidiarity review by answering the same question as the one posed to the legislator during the *ex ante* subsidiarity assessment: whether the problem at issue requires Union action (has a "Community dimension") or whether it can be deferred to the national level.

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[27] Neil Komesar *Imperfect Alternatives. Choosing Institutions in Law, Economics, and Public Policy*, Univ. of Chicago Press 1994

[28] M. Kumm, *Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union*, ELJ Vol. 12, No 4, July 2006, pp. 522-24.

[29] Consider, for instance, the Family Reunification Directive, with obliges each Member State to grant immigrants rights within their respective territories (no inter-Member State element) – thus preventing Member States, at a later stage, from withdrawing these rights. Either the national governments, elected by the peoples of Europe, thereby admitted their incapacity to regulate rights of immigrants acting each within its own jurisdiction – thus begging the question of how a power that does not exist at the national level can be transferred to the Union level – or the national governments act on a premise that their peoples are not to be trusted (in the future) on voting for a government that can regulate rights of immigrants – which begs the question of why these same peoples should be trusted to have elected the acting governments in the first place.

[30] Unlike the Council and the EP, the ECJ does not derive its legitimacy from democratic representation but rather from the rationalizing value of its decisions and from its capacity to correct distortions that extend beyond a single Member State. In order to be effective (and not mere paper) decisions of the Court need to be accepted (and so followed) by the national courts, national governments and the individuals – an indirect version of democratic legitimacy which thus conditions the Court in its judgments.

An Abridged Biography of Common Immigration Policy

Two rounds of Treaty reform shaped the development of immigration as a separate branch of EU law. The Treaty of Amsterdam introduced a separate legal basis for regulating third-country nationals (TCNs) under a new Treaty Title, the area of freedom, security and justice (AFSJ).[31] Article 63 EC empowered the Council to adopt:

> [...]
>
> 3. measures on immigration policy within the following areas:
>
> (a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion,
>
> […]
>
> 4. measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.

This open-ended wording provided a broad legal base and immediately stirred many interpretations.32 TCNs could now be regulated in EC law without any link to the internal market.[33] The "communitarization" of immigration policy was done only half-heartedly. Not only did the new Treaty Title contain reservations on national competence[34], exemption from the Community method for adoption of secondary acts[35] and a limitation on the jurisdiction of the ECJ[36] but the formulation of the Treaty Articles themselves strikingly differed from previous provisions of the Treaties and the external agreements relative to regulating the individual: they did not contain rights for the individuals (nor made any mention of them) but for the states, acting together (Article 63 EC) or separately (penultimate paragraph of Article 63 EC and Article 64 EC), to regulate the individual. It was not a deregulating or liberalizing power but a legal basis to introduce regulation, whether liberalizing or not.

The Lisbon Treaty finalized the shaping of EU immigration policy and distinguished it not only from the internal market but also from the common policy on asylum, subsidiarity and temporary

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31 For an excellent overview of the history of the introduction of Title IV EC see, inter alia, K. Hailbronner, *European Immigration and Asylum Law under the Amsterdam Treaty* [1998] CMLR 35. On the preceding Treaty amendments see A. Evans, *Third-Country Nationals and the Treaty on European Union* [1994] EJIL 5; J. Niessen, Overlapping Interests and Conflicting Agendas: The Knocking into Shape of EU Immigration Policies [2001] EJML 3; J. Apap, *Shaping Europe's Migration Policy New Regimes for the Employment of Third Country Nationals: a Comparison of Strategies in Germany, Sweden, the Netherlands and the UK* [2002] EJML 4; A. Baldaccini and H. Toner, *From Amsterdam and Tampere to the Hague: An Overview of Five Years of EC Immigration and Asylum Law*, in A. Baldaccini, E. Guild, H. Toner (eds.) *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy* [2007] Hart Publishing

32 E. Guild, *Discretion, Competence and Migration in the European Union* [1999] EJML 1; K. Groenendijk, *Citizens and Third-Country Nationals: Differential Treatment or Discrimination?* in J.-Y. Carlier and E. Guild (eds.) *The Future of Free Movement of Persons in the EU* [2006] Bruylant; K. Hailbronner, *Immigration and Asylum Law and Policy of the European Union* [2000] Kluwer Law Int. p. 107; J. W de Zwaan, *EU Asylum and Immigration Law and Policy: State of Affairs in 2005*, in J. W. de Zwaan and F. A. N. J. Goudappel (eds.) *Freedom, Security and Justice in the European Union: Implementation of the Hague Programme* [2006] TMC Asser Press

33 Prior to the introduction of immigration competence under the AFSJ, the Community could regulate TCNs directly (i.e. without any link to nationals or companies of Member States) under the internal market Articles 39 with 310, 49, 137(1)(g), 94 and 308 EC - yet this option was consistently rejected. On one of the early unsuccessful legislative initiatives under Article 94 EC, see Council Resolution of 21 January 1974 concerning a social action programme, OJ C 013 , 12/02/1974 pp. 1- 4

34 Penultimate paragraph of Article 63 EC and the exception as regards maintenance of law and order in Article 64 EC

35 Article 67 EC: EC law on legal immigration was to be adopted by unanimity in the Council and only consultative role of the EP.

36 Article 68 EC

protection.[37] From being a flanking measure to the abolition of internal borders, immigration is now a separate Union policy, the common immigration policy (CIP),[38] a wording reminiscent of the CAP and the CCP. Will the new policy be just as far-reaching?

The CIP is a shared competence of the Union and Member States, and the potential powers of the EU under this policy were expanded. Replacing Article 63(3) and (4) EC, Article 79 TFEU provides for joint powers of the Council and the EP, acting by co-decision procedure, to legislate in the following areas:

> (a) "the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;
>
> (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States"[39]

The Union's powers now comprise not only "standards on procedures" for the issue of residence permits as former Article 63(3)(a) EC, but also other matters related to the issue of permits, i.e. conditions for their acquisition.[40] "Freedom" of movement and residence across the Union is expressly mentioned, although not directly enforceable. On the other hand, the Treaty makes an express reservation as regards access to economic activities by TCNs[41]:

> "This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed."[42]

This phrase limits the legal base and the scope of the new common policy, while at the same time clearly differentiating the CIP from the internal market, where Member States lost their powers to regulate migration of workers. However, in other aspects of the CIP regulation the divide between Union and Member State competences is not set in the Treaties directly (by en express limit on competences) nor indirectly (by directing the exercise of powers towards any specific *finalité*). This poses a new challenge for subsidiarity assessment and for drawing the dividing line between the Union and Member State powers.

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[37] The two policies are now separated into two different Treaty articles, 78 and 79 TFEU accordingly. Persons benefiting from international protection constitute a unique group of migrants insofar as Member States and the Union have obligations in international law as regards these people, who are thus regulated differently from other migrants. The international obligations of the EU and its Member States, in particular under the ECHR and the 1958 Geneva Convention, are recognized in the EU Fundamental Rights Charter and Article 78(1) TFEU and are thus already binding on the Union and its Member States.

[38] Article 79 TFEU

[39] Article 79(2) TFEU

[40] Theoretically, it could even be argued that the Directives on legal immigration adopted so far are ultra vires in as much as they go beyond merely procedural aspects and concern, e.g. conditions for acquisition of residence permits. Expansion of competences under Lisbon Treaty mends this "defect".

[41] This reservation, now in the Treaty, is rooted in the rejection of the 2001 proposal for a Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM(2001) 386 final. The reason given for introduction of EC rules on admission of third-country workers in the 2001 Proposal was that "[r]egulation of immigration for the purpose of exercising […] economic activities is a cornerstone of immigration policy and the development of a coherent Community immigration policy is impossible without [it]". However, the Member States demonstrated a lack of interest in recognizing Community competence in admission of third-country workers and in allowing switching between the statuses. This led to the Proposal's withdrawal. See Bernard Ryan, *The EU and Labor Migration: Regulating Admission or Treatment?* in A. Baldaccini, E. Guild, H. Toner, *Whose Freedom, Security and Justice?* [2007] Hart Publishing, p. 500

[42] Article 79 TFEU, last point

CIP: What's the Problem?

The AFSJ – and the CIP under it – is vitiated from birth by an unprecedented lack of objectives, making it stand out from other EU competences as "singularly less specific"[43]. Indeed, neither in the immigration chapter, nor in Title IV EC which contained it, could there be found any problems to be resolved by Community action in the field of immigration policy. Although the AFSJ was linked to the common Community goals listed in Article 2 EC, *de facto* EU immigration law did not follow these objectives but was rather shaped by the political compromise in the Council, which still acted in this area by unanimity.[44] The Lisbon Treaty reform did not address this ambiguity. Article 79 TFEU re-states the major objectives of EU immigration policy as formulated by the European Council over the preceding decade. The Union's immigration policy should ensure "efficient management of migration flows"[45], "fair treatment" of legally resident TCNs[46], and prevent illegal immigration.[47] It is not apparent from these objectives why transfer powers to the European level. Does Article 79 TFEU imply that national immigration policies are so interrelated that individual Member States are not capable to manage immigration and regulate rights of TCNs? Have they not been doing this up until the Amsterdam Treaty – and even now?[48]

The absence of objectives *per se* is not a problem for the purposes of subsidiarity review if this review is construed as a collective action problem or "structural bias in democratic process".[49] Objectives serve to identify which problem or bias the EU legislative measure is tailored to solve. Absence of objectives in the Treaty simply means that the problems to be solved by EU immigration law should be defined on a rolling basis by the European Council and by the legislator when drafting EU directives. The former is a requirement under the new Treaty, which is a mere restatement of previous practice.[50] The latter is a requirement under Protocol No 2 on the application of the principles of subsidiarity and proportionality, attached to the Lisbon Treaty, which states that (a) the Commission should consult widely before proposing legislation and give reasons for its proposals[51] and (b) draft legislative acts should be accompanied by a detailed justification with regard to the principles of subsidiarity and proportionality.[52] Beyond a mere procedural obligation, in the areas of shared competences characterized by the absence of problem-defining objectives, these requirements should ensure that both national parliaments and the ECJ are in the position to identify the problem that gives rise to EU regulatory competence. It would be tempting to conclude from this that the Treaty simply relegates identification of goals to lower and more flexible level instead of fixing them in the Treaty.

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[43] E. Guild and H. Staples, *Labor Migration in the European Union*, in P. DeBruycker (ed.) THE EMERGENCE OF A EUROPEAN IMMIGRATION POLICY (2003) Bruylant, 214

[44] G. Papagianni, *Institutional and Policy Dynamics of EU Migration Law* (2006) Martinus Nijhoff, pp. 197-262

[45] Pre-Lisbon sources of this objective include: The Hague Programme (13.12.2004) Council doc. 16054/04; Council Conclusions (14.12.2007) Council doc 16616/1/07; European Pact on Immigration and Asylum (24.12.2008) Council doc. 13189/08.

[46] Pre-Lisbon sources of this objective include: Tampere European Council Presidency Conclusions (15&16.10.1999) SN 200/99; on the integration – fair treatment nexus see European Pact on Immigration and Asylum (24.12.2008) Council doc. 13189/08.

[47] On the link between temporary legal immigration and the fight against illegal immigration see e.g. Council Conclusions (21/22.06.2007) Council doc. 11177/1/07, p.4, point 17.

[48] EU law specifically recognizes that Member States can keep in place their nationals admission rules – as long as they implement EU rules in parallel. See Article 79(5) TFEU, Article 13 Directive 2003/109/EC, Article 3(4) Directive 2009/50/EC.

[49] M. Kumm, *Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union*, ELJ Vol. 12, No 4, July 2006, pp. 522-24.

[50] Article 68 TFEU: "The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice." This was already happening sine the Amsterdam Treaty - see numerous Council Conclusions.

[51] Article 2 Protocol No 2 Lisbon Treaty

[52] Article 5 Protocol No 2 Lisbon Treaty

This lower level is itself layered and includes, first, the European Council, second, the EU institutions, third, the national parliaments, and lastly the ECJ when reviewing adopted acts.

Since the introduction of competence over immigration in the Amsterdam Treaty, the Council and the Commission developed three strings of objectives to justify compliance with the principle of subsidiarity:

a. Establishment of a common policy – mobility between Member States – internal market;
b. Schengen and abolition of internal borders – fight against illegal migration – effective cooperation with third countries;
c. Fair treatment of third-country nationals – distortion of migratory flows – international competitiveness.

These objectives shape EU immigration policy and serve to determine the competence split during subsidiarity review. We shall now examine how this works in practice.[53] For the sake of space and sharpness of argument, I will focus exclusively on legal immigration, although the CIP includes also the fight against illegal immigration.

Establishment of a Common Policy – Internal Market

Although apparently circular, the argument that the convergence of national immigration policies *per se* is a precondition for EU immigration policy has been extensively used to justify EU immigration law.[54] When attesting compliance with the principle of subsidiarity of the first EU proposal on legal immigration, the objective of "harmonization of legal framework at Community level" was not qualified further.[55] On examination of the legal basis for the proposal, the European Parliament followed case law of the ECJ,[56] concluding that generic harmonization fell outside Community powers and was contrary to the principle of subsidiarity:

> The differences noted by the Commission between the Member States' rules [in the area of immigration policy] do not in themselves prove any need for harmonisation. Only the Member States can guarantee the flexibility geared to the national, regional and sectoral requirements of the labour market. [A]pproximation of legislation would be necessary only if any third-country national admitted to a Member State were permitted to work in any Member State.[57]

Alternatively, the Council opinioned on that occasion that the provisions concerning access to and conditions of employment of TCNs who reside legally in the territory of the EC could be adopted only

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[53] National parliaments do review subsidiarity of the CIP measures despite what could be inferred from Article 69 TFEU, which provides: "National Parliaments ensure that the proposals and legislative initiatives submitted under Chapters 4 and 5 comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality." This Article is one of the general provisions relating to the entire AFSJ. The powers to regulate immigration are contained in the Chapter 2 of this Title. It is thus logical to ask whether, by reasoning *a contrario*, the Treaty drafters implied that, as regards other Chapters of Title V TFEU, including the immigration chapter, national parliaments do not exercise subsidiarity review.

[54] F. Pastore, *Visas, Borders, Immigration: Formation, Structure, and Current Evolution of the EU Entry Control System*, in EUROPE'S AREA OF FREEDOM, SECURITY AND JUSTICE, p. 122 (N. Walker ed. 2004 Oxford). Harmonization is even more meaningless when not all the Member States participate (UK, Ireland, and Denmark opted out from EC measures on legal immigration) and those who do are allowed to maintain their national systems alongside the new common rules (*ex multis* Article 13 Directive 2003/109/EC).

[55] Recital 14, Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM(2001) 386 final. Recital 6 mentioned the objective of reinforcing competitiveness of the Community to recruit third-country workers globally but did not contain any transnational elements.

[56] Case C-376/98 Tobacco advertising

[57] Report of the European Parliament on the Commission proposal for adoption of a Council directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities (23 January 2003) A5-0010/2003 final, PE 311.015, p. 39

on the basis of Article 137(1)(g) EC inasmuch as they did not imply a right for such persons to circulate freely within the Community.[58] Arguing *a contrario*, according to the Council legal service, for a directive to be adopted under the CIP, there must be an element of mobility of TCNs between Member States.

The Commission introduced the element of mobility in the Long-Term Residents Directive. In addition to integration[59] and a generic call for harmonization,[60] the new objective consisted in determining the "terms for the exercise of rights of residence in other Member States" which would "contribute to the effective attainment of an internal market" and "constitute a major factor of mobility on the Union's employment market". The European Parliament, notwithstanding its opinion on the 2001 Proposal, completely ignored the new transnational element and refused to examine subsidiarity, stating merely that this principle "need not be brought into play here, since by definition common measures need only be adopted at Community level".[61] Thus, according to the European Parliament, the principle of subsidiarity was no longer applicable to EU immigration law! The European Parliament retained this position when considering proposal for the Family Reunification Directive, altogether failing to examine Community competence and making no mention of the principles of subsidiarity and proportionality.[62] The situation, however, was not much different from the 2001 Proposal: transnational aspects and mobility are absent from the directive, while its main objective is the "integration of third-country nationals in the Member State", clearly confining action to pure national level.[63] Once again, the directive justifies subsidiarity by an abstract call for harmonization without explaining further which common action problem the directive would solve.[64]

National parliaments have exhibited a varying degree of diligence in subsidiarity review of the CIP directives. Some, notably Italy, Portugal and Spain, invariably support the argument in favor of a common policy without much effort to examine its substance.[65] These parliaments agree with the Commission that the demand for some types of workers is shared across Member States, which in itself points to the necessity of Union action. One parliament, instead of examining subsidiarity, even suggests that failing to act under Article 79 TFEU "would contradict provisions and objectives of the Treaty".[66] Others, such as Germany, Latvia and Lithuania, engage in substantive review of the provisions of the Proposals without, however, finding subsidiarity concerns.[67] In their review of the Proposal on for a Directive on Seasonal Workers, France, Austria, and the UK point to the insufficiency of the Commission's statements on the compliance with the principle of subsidiarity both

[58] Opinion of the Council legal service (12.11.2002) doc. 14150/02

[59] Recitals 4 and 12 Directive 2003/109/EC

[60] Recital 24 Directive 2003/109/EC

[61] Report of the European Parliament (30.11.2001) A5-0436/2001 final

[62] Report of the European Parliament (24.03.2003) A5-0086/2003 final

[63] Recital 4 Directive 2003/86/EC. NB: integration in one Member State only, the Member State of residence.

[64] Recital 16 Directive 2003/86/EC

[65] Opinions of the Italian, Portuguese and Spanish parliaments on the proposal for a Directive on Seasonal Workers (COM(2010) 379 final) and the opinions of Italian and Portuguese parliaments on the proposal for a Directive on Intra-Corporate Workers (COM(2010) 378 final), available on www.ipex.eu .

[66] Opinion of the Saeima European Affairs Committee on the subsidiarity and proportionality check for the final wording of the proposal for Directive of the European Parliament and of the Council COM(2010) 379 on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, 14 October 2010.

[67] See, on the Seasonal Workers Proposal, German Bundesrat: Empfehlung 13.09.2010 Drucksache 442/1/10 and Beschluss 24.09.2010 Drucksache 442/10; Latvian Saema: Opinion of the Saeima European Affairs Committee on the subsidiarity and proportionality check for the final wording of the proposal for Directive of the European Parliament and of the Council COM(2010) 379, 14.10.2010; Lithuanian Saimas: Committee of European Affairs Conclusion regarding compliance with the principles of subsidiarity and proportionality of the proposal to adopt the directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, 08.10.2010.

in terms of reasoning[68] and in terms of data[69] on which this reasoning is based. These national parliaments point at the inconsistency between, on the one hand, the statements of the Council acknowledging differences between the national labor markets,[70] recognized through Article 79(5) TFEU, and the assumption of the Commission that some categories of workers are equally in demand across Member States.[71] Surprisingly, no institution noted that "[s]ince Member States alone (without co-ordination or a central institution) can never achieve the best balance in terms of uniformity, it is not legitimate to review the exercise of regulatory powers accorded to them under the Treaty by means of a uniformity test."[72]

Abolition of Internal Borders and Fight against Illegal Migration

This is perhaps the only objective one could infer from the text of EC Treaty itself, as amended in Amsterdam: EU immigration policy was somehow tied to the abolition of internal borders.[73] Ex-Article 61 EC announced the establishing of "an area of freedom, security and justice" which was not defined further anywhere in the Treaty. The first part of ex-Article 61 EC made reference to Community measures on asylum, free travel area, and crossing of external borders[74] in conjunction with the "measures aimed at ensuring the free movement of persons in accordance with Article 14". Ex-Article 14 EC provided for the progressive establishment of the internal market as an area without internal borders in which free movement of persons is ensured in accordance with the EC Treaty. Did this mean that the AFSJ should counterbalance the side-effects of the abolition of internal borders or, on the contrary, incorporate TCNs into the free movement of persons?

The first article of new Title V TFEU "Area of Freedom, Security and Justice", successor to Title IV EC, proclaims that the Union as a whole – as opposed to merely the Schengen area – shall constitute an AFSJ.[75] However, the second point of this article links EU immigration policy to the absence of internal border controls – and thus back to the Schengen space.[76] Legal immigration remains corollary to the abolition of internal borders, which would be a logical conclusion if there were free movement for residence of TCNs in the EU: this would necessitate EU regulation of the first entry into the Schengen space and the legal status of migrants. Were TCNs allowed to move freely between Member States and choose the state of residence to their liking, this would be a classical collective action problem of the free-movement-of-workers type. Whether this problem should be resolved by common admission rules or by mutual recognition is another question.[77] However, TCNs do not enjoy free

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[68] Point 7, reasoned opinion of the EU Committee of the Austrian Federal Council; Meeting of the French Senate, 13 October 2010 Justice et affaires intérieures.

[69] Opinion of the UK House of Commons, European Scrutiny Committee, 13 October 2010, available on www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428-iii/428iii12.htm (last accessed 07.09.2011)

[70] European Pact on Immigration and Asylum (24.12.2008) Council doc. 13189/08, pp. 4-5

[71] See for example Explanatory Memoranda to the proposals for the Blue Card Directive, COM(2007) 637 final, and Seasonal Workers Directive, COM(2010) 379 final.

[72] M. Poiares Maduro, *We the Court* (1998) Hart publishing, p. 171

[73] The name itself of the original Title IV EC supports this conclusion: "Visas, Asylum, Immigration and other Policies Related to Free Movement of Persons".

[74] Articles 62(2) and (3) and 63(1)(a) and (2)(a) EC

[75] Article 67 TFEU

[76] This is not the case for other EU policies under the AFSJ, e.g. criminal law and access to justice, Article 67(3) and (4) TFEU, although the opt-outs of the UK, Ireland and Denmark in relation to EU immigration law have been extended to include the entire AFSJ, thus implying a link between the ASFJ and Schengen.

[77] The latter is the solution employed for EUNs, where citizenship of the Union recognizes Member State decisions to grant or withdraw nationality. In 2007, the Commission examined the possibility of introducing "a residence card valid throughout the Union" for compliance with the principles of subsidiarity and proportionality; having cited the "possibility to accede to 27 labour markets" as "an incentive for [highly-qualified workers] in their decision of entering the EU economy" which could "only be granted through Community action" going as far as "a common understanding on the

movement rights in EU law,[78] making collective action problem not readily apparent. Without EU-wide right of residence, an immigrant crossing an internal border from one Member State to the other and residing there without authorization for longer than three months falls into illegality and thus under the rules on illegal immigration. This, however, does not explain how regulating legal migration can solve the problem of illegal migration (other than by legalization of irregular migrants), as suggested by the Council and the Commission.[79]

When examining subsidiarity under Protocol 2, the Spanish, Italian, and Portuguese parliaments, simply restated the assumed link between abolition of internal borders and legal immigration without going into the merits of this assumption.[80] Italian Senate bluntly stated that the directive on intra-corporate transferees belongs to the body of law regulating illegal migration, not mentioning the reasons leading to this conclusion.[81] Austrian, Dutch, Polish and UK parliaments, on the other hand, question suitability of a directive on legal immigration to solve the problem of illegal immigration.[82] In its reply to this concern, the Commission reiterated that "the Schengen area without internal borders requires common minimum rules in order to reduce the risk of overstaying and irregular entries that may be caused by lax and diverse rules on the admission of seasonal workers" without further explanation.[83] The Commission then advanced an additional argument of external relations, stating that "remov[ing] obstacles to legal migration" would "strengthen[...] the commitment of third countries to tackling irregular migration".[84] While the Italian and Spanish parliaments accepted this argument unquestionably,[85] the parliaments in opposition to the proposal missed the opportunity to examine this statement in more detail. The Polish parliament does not mention it altogether, the Austrian and Dutch parliaments merely state the insufficiency of this argument, alone, to justify

(Contd.)

admission" – the Commission concluded seven pages later that a residence card valid throughout the Union "would not be consistent with the principles of subsidiarity and proportionality", see Commission Staff Working Document SEC(2007) 1403, pp. 20 & 27. This reasoning notwithstanding – or perhaps thanks to it – no subsidiarity issues over the proposal were raised in the Council (except for a few reservations raised by some Member States in relation to social security matters), see Council Working Party on Migration and Expulsion (08.05.2008) doc 8249/08, interinstitutional file 2007/0228 (CNS)

[78] Both EU immigration law and the internal market. Cases 238/83 Meade (1984) ECR 02631, C-230/97 Awoyemi (1998) ECR I-06781; A. Kocharov, *What Intra-Community Mobility for Third-Country Workers?*, ELRev 6, December 2008, pp. 913 – 926; S. Iglesias Sánchez, *Free Movement of Third Country Nationals in the European Union? Main Features, Deficiencies and Challenges of the new Mobility Rights in the Area of Freedom, Security and Justice* (Nov. 2009) ELJ 15(6), pp. 791–805

[79] Council Conclusions (21/22.06.2007) Council doc. 11177/1/07, p.4, point 17; *A Common Immigration Policy for Europe: Principles, actions and tools*, COM(2008) 359 final, p. 7; *Study on the links between legal and illegal migration* (4.6.2004) COM(2004) 412 final

[80] As regards the proposal for a directive on Seasonal Workers, see Cortes Generales 14 de octubre de 2010.—Serie A. Núm. 355, pp. 2-3; Camera dei Deputati, documento finale approvato dalla commissione (doc. XVIII, n. 31) 25.11.2010; Written Opinion COM(2010)379 Assembleia da República, European Affairs Committee, 27.09.2010 available on www.ipex.eu.

[81] Senato della Reppublica, resoluzione approvata dalla commissione lavoro e previdenza sociale sull'atto comunitario N. *COM (2010) 378 definitivo* sottoposto al parere motivato sulla sussidiarietà(Doc. XVIII, n. 53)

[82] On the Seasonal Workers Proposal: reasoned opinion of the EU Committee of the Austrian Federal Council; UK House of Commons, European Scrutiny Committee, 13 October 2010; Letter 23452 of 14 October 2010 from the Dutch House of Representatives to the Vice-President of the European Commission; Opinion of the Senate of the Republic of Poland of 21 October 2010. In its reply to the national parliaments on this point, the Commission acknowledges that the proposal addresses the issue of illegal migration only indirectly, see point IV.B of the reply.

[83] Commission reply to the opinions concerning subsidiarity received from national parliaments on the proposal for a directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment. Admission rules are already regulated in Article 21 Regulation 810/2009/EC (the Schengen Borders Code).

[84] Explanatory memorandum to the Proposal for Seasonal Workers Directive

[85] The European Union Policies Standing Committee of the Italian Chamber of Deputies, doc. XVIII n. 31 of 25 November 2010; informe 9/2010 de la comisión mixta para la Unión Europea, Cortes Generales 14 de octubre de 2010.—Serie A. Núm. 355.

subsidiarity,[86] while the UK House of Commons points to the fact that Article 79(5) TFEU prevents the Union offer legal immigration venues in negotiations with third states in as much as admission of third-country workers falls under the exclusive competence of Member States. Both the national parliaments and the Commission fail to appreciate the inadequacy of an internal directive that regulates all TCNs independently of their nationality as a bargaining tool in negotiations with third states, which are interested in obtaining special concessions for their own nationals only.

Distortion of Migratory Flows and Fair Treatment of TCNs

Another alleged EU-level problem requiring joint action is the necessity to "establish a level playing field within the EU".[87] This is a double-edged objective tainted by a profound internal contradiction. The "level playing field" concerns *elimination of competition between Member States*[88] in terms of (1) lowering production costs by exploiting third-country workers and, vice versa, (2) attracting the best third-country workers by offering them more rights.

Elimination of exploitation of third-country workers resulting from their unequal rights with Union citizens – and thus elimination of "unfair" competition between the two[89] by guaranteeing "fair treatment" of TCNs – would eliminate the unfair competition between Member States' manufacturers some of whom could otherwise reduce costs by employing TCN workers with lower rights.[90] This is a classical internal market problem that requires collective supranational action, which satisfies subsidiarity test. However, this would only be the case in the circumstances where EU law ensures an adequate level of rights for third-country workers, which, according to many national parliaments[91] and scholars,[92] is not the case. Indeed, only *equal* treatment as a directly effective right can eliminate competition between the producers based on lower working conditions for TCNs; *fair* (as opposed to *equal*) treatment established by means of a directive (and thus with no direct horizontal effect) does not allow for effective redress by third-country workers against their employers.

Although a minimum set of rights may prove beneficial to individual immigrants in some circumstances,[93] the mere fact that a measure is perceived as overall beneficial *for the immigrant* cannot substitute the need to justify the transfer of powers further away from *Union citizens*. In terms

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[86] This turns counter to the opinion of the ECJ in Cases 12/86 Demirel (1987) ECR 03719 and C-246/07 Commission v Sweden

[87] Proposal for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638 final

[88] Commission *Communication on immigration, integration and employment*, COM (2003) 336 final, p. 16

[89] Commission reply to the opinions concerning subsidiarity received from national parliaments on the proposal for a directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment.

[90] Meeting of the French Senate, 13 October 2010 Justice et affaires intérieures.

[91] For the latest on the Seasonal Workers Proposal see see the opinions from Austria, France, and Germany; a similar conclusion on the Blue Card Directive from the Finnish Parliament, Statsrådets skrivelse till Riksdagen om ett förslag till rådets direktiv om villkor för tredjelandsmedborgares inresa och vistelse för högkvalifice rad anställning, 27 December 2007.

[92] On the level of rights protection in some of the adopted CIP directives see S. Boelaert-Suominen, *Non-EU Nationals and Council Directive 2003/109/EC on the Status of Third-Country Nationals Who Are Long-Term Residents: Five Paces Forward and Possibly Three Paces Back* (2005) C.M.L.Rev. 42; S. Peers, *Implementing Equality? The Directive on long-term resident third-country nationals* (2004) EL Rev. 29; L. Halleskov, *The Long-Term Residents Directive: A Fulfilment of the Tampere Objective of Near-Equality?* (2005) EJML 7

[93] It was widely accepted to be the case for Family Reunification Directive, when the EP did not engage in subsidiarity assessment nor brought up this argument before the ECJ, see Case C-540/03 EP v Council and supra fn 43. Although criticizing the low level of rights guaranteed to TCNs, the overwhelming majority of national parliaments seem to recognize rights protection *per se* as a valid argument capable of justifying the transfer of powers; for a major criticism of this view see the opinion of the UK House of Commons, European Scrutiny Committee, 13 October 2010, on the Seasonal and Intra-Corporate Worker proposals.

of comparative institutional analysis, "[i]f the interests regulated by a national measure are equal in the different Member States, then there is no suspicion of over-representation of national interests or under-representation of the interests of nationals of other Member-States"[94] and Member States are well suited to regulate the matter. It could even be argued that by setting minimum rights of third-country workers below those of Union citizens EU law implicitly authorizes rather than curbs potential dumping which may result from the employment of third-country workers on this level of rights. Acknowledging Union competence where it is exceeded for measures that are perceived as beneficial undermines credibility of the European institutions should they wish to challenge EU act the day it is perceived as unwanted.[95] For the directives on legal immigration, only the UK House of Commons considered these arguments.[96]

Elimination of competition between Member States refers to a situation where different national entry and residence conditions for third-country workers cause competition between the national immigration systems (for best qualified workers), which competition distorts TCNs' migration choices; this, according to the Commission, triggers the need for a common EU admission system.[97] It is not difficult to find contradictions between seeking to raise the rights of TCNs on the one hand and avoiding the competition between Member States which results in granting TCNs more rights, on the other.[98] These two problems are mutually exclusive so one cannot help wondering how a single instrument can aim to solve both. Competition between national immigration systems also loops back to the opposite concern, that of becoming a magnet for TCNs who have been admitted by other Member States, which could result from too attractive conditions for "unwanted" TCNs (welfare shopping); this is effectively the second string of objectives linked to the abolition of internal borders, analyzed above.

Elimination of competition between Member States internally should be distinguished from joining forces externally to compete with traditional immigration countries for "wanted" immigrant workers.[99] The Commission presents this objective as a deregulation issue, whereby "the obstacles encountered [...] in relation to the complexity and diversity of [national] rules" could act as a deterrent in the capacity of the EU to attract third-country workers and business.[100] This would be the logic similar to

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[94] M. Poiares Maduro, *We the Court* (1998) Hart publishing, p. 174

[95] Case C-540/03 European Parliament v Council, OJ C 47, 21.02.2004

[96] UK House of Commons, European Scrutiny Committee hearing 13.10.2010, record available at www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428-iii/428iii12.htm (last accessed 07.09.2011)

[97] Proposal for Blue Card Directive, COM(2007) 637 final, p. 7. The objective of elimination of competition between Member States is contrary, in its conception, to the logic of the internal market and could be challenged on economics grounds. As international competition for the best migrant workers leads to "non-cooperative action taken by fiercely competitive jurisdictions", the countries seek to emulate and exceed their rivals' immigration offer, leading to "a significant policy convergence among rival economies". Thus, competition will actually result in convergence rather than differentiation, which would annihilate the need for EU-level regulation. See A. Shachar, *The Race for Talent: Highly-Skilled Migrants and Competitive Immigration Regimes* (2006) NY Univ. L. Rev. Vol. 18 April 2006, p. 156-157. Competing destinations are thereby forced to match each other's immigration rules, leading to convergence of their immigration policies in the long run. See N. T. Duncan, *International Labor Competition: Explaining the Timing of Immigration Policy Convergence*, Paper presented at the MPSA Annual National Conference (Apr 03, 2008) www.allacademic.com/meta/p268242_index.html (23.02.2010)

[98] The opinions of the UK House of Commons and Dutch parliament on the seasonal workers proposal, www.ipex.eu

[99] The Hague Programme (13.12.2004) Council doc. 16054/04, p. 10; European Pact on Immigration and Asylum (24.12.2008) Council doc. 13189/08, p. 5; Green Paper on an EU Approach to Managing Economic Migration (2005) COM(2004) 811 final, p. 4; Policy Plan on Legal Migration (2005) COM(2005) 669 final; European Commission SPEECH/07/526 by Commissioner Frattini, Lisbon, 13.09.2007; Explanatory Memorandum to the Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, 23 October 2007, COM(2007) 637 final, pp. 2 and 7; Recital 6 Directive 2005/114/EC, Recital 17 Directive 2005/71/EC, Recital 7 Directive 2010/50/EC

[100] Explanatory memorandum to the proposal for a directive on Intra-Corporate Transferees, COM(2010) 378 final, p.2 Similar reasoning is found in the explanatory memorandum to the Blue Card Proposal, COM(2007) 637 final, p.2

EU action in the field of external relations[101] as happened already prior to the introduction of Title IV EC in the context of worker provisions in mixed external agreements, when TCNs were regulated in EC law without any need for them to move between Member States.[102] The need to ensure that the Community acts as a single entity on the international arena is a strong supranational element that calls for a joint action even in situations purely internal to one Member State. This is perhaps the strongest argument in favor of Union action, provided that this action does introduce uniform admission procedures without too many optional clauses. Some national parliaments mention this argument in their subsidiarity review of the proposal on intra-corporate transferees without, however, going into its detailed assessment.[103] Others highlight the problem of attracting skilled workers as a major issue yet doubt whether EU immigration law offers added value in this regard.[104] Either way, this objective does not seem to receive the prominence it deserves.

Discussion: Federalism through Subsidiarity?

This analysis is illustrative of the difficulty with the subsidiarity review experienced by the European institutions in the absence of problem-defining policy objectives. Not only did the institutions fail to examine subsidiarity in a coherent manner, but they exhibited an overall lack of understanding of *what* should be examined. This could be partially due to the widespread perception of subsidiarity as a counter-majoritarian instrument at the disposal of the Member States who are outvoted in the Council[105] – and hence the reluctance of the institutions to venture into the concept, especially in the presence of common accord to pass a certain directive. However, this vision ignores the essence of subsidiarity as a principle protecting the proximity of the legislator to the citizen, democratic legitimacy and accountability of the legislative process,[106] as well as the potential of this principle to contribute to policy development.

The passage to qualified majority voting for all CIP measures made in the Lisbon Treaty cannot be expected to perform a miraculous cure to the CIP's lack of purpose. If anything, the European Parliament may be less likely to question subsidiarity of the CIP measures now that it can influence their content. From this perspective, national parliaments could turn out more suited to conduct substantive subsidiarity review and thus make a crucial contribution to the development of EU law and strengthening its legitimacy. Well-reasoned opinions on subsidiarity could help the European institutions develop a coherent policy with a clear European added value. The EU institutions need to take this review seriously and properly address the concerns expressed by national parliaments by clarifying the Union's objectives and making subsidiarity arguments more convincing.[107] However, complexity and inconsistency of the arguments proposed by the Commission in favor of Union action under the CIP, the very short period established by the Protocol for issuing reasoned opinions,[108] the

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[101] E.g. Case C-246/07 Commission v Sweden

[102] Case 12/86 Demirel (1987) ECR 03719

[103] E.g. Parecer COM (2010) 378 Final, Asembleia da República, Comissão de Assuntos Europeus and Relatório (28.09.2010) Proposta de Directiva do Parlamento Europeu e do Conselho relativa às condições de entrada e residência de nacionais de países terceiros no quadro de transferências dentro das empresas, Comissao de trabalho, seguranca social e administracaop pública, Asembleia da República

[104] Statsrådets skrivelse till Riksdagen om ett förslag till rådets direktiv om villkor för tredjelandsmedborgares inresa och vistelse för högkvalifice rad anställning, attachment Arbetsministeriets promemoria (Finland, 27.12.2007)

[105] A. Estrella, *The EU Principle of Subsidiarity and Its Critique* (2002) Oxford, pp. 156-158

[106] G. De Burca, *The Quest for Legitimacy in the European Union* [1996] Modern Law Review 5

[107] Unlike the contradictory reply from the Commission to the opinions concerning subsidiarity received from national parliaments on the proposal for a directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, e.g. points III.E and IV.A. It is however to be hoped that the Commission with take these arguments into account in its subsequent proposals, in line with its past practice.

[108] E.g. meeting of the French Senate, 13 October 2010 Justice et affaires intérieures.

absence of an obligation to amend proposals after negative opinions of the national parliaments,[109] and the varying degree of trust of national parliaments in their own democratic systems,[110] may undermine the capacity and willingness of national parliaments to examine subsidiarity in substance.

Without adequate investment into the resources necessary to develop coherent and policy objectives, subsidiarity review along the classical EC law criteria is difficult to pursue; instead, the decision to act at Union as opposed to national level may fall victim to political passions in the Council and the Parliaments. Leaving policy objectives and subsidiarity unresolved may change the manner of establishing the federal equilibrium in the EU in unpredictable ways; it could also create increasing difficulties for the ECJ each time the Court must assess the "Community element" of a case in order to decide whether to rule on the case or not. With multiple players, meager resources and incoherent policy goals, the subsidiarity orchestra may need more than a change in review arrangements.

[109] Article 7 Protocol 2 (Lisbon) on subsidiarity and proportionality established an obligation to review but not necessarily amend the draft.

[110] Interestingly, many of the parliaments that examined subsidiarity in substance for CIP directives come from the same Member States the citizens of which, according to the 2004 Eurobarometer survey, exhibited most satisfaction with national democratic process, among them Austria, Germany, France, Finland, the Netherlands and the UK, the only exception being Spain (where, however, the recent wave of economic problems could undermine the trust in national democratic process – to be confirmed), see http://ec.europa.eu/public_opinion . Thus, positive opinions on subsidiarity of national parliaments could simply mirror distrust in the national political process, which in itself cannot fulfill requirements of Article 5 TEU.

DECONSTRUCTING FEDERALISM THROUGH RETAINED POWERS OF STATES: THE EUROPEAN COURT OF JUSTICE MIDDLE GROUND APPROACH ANALYZED IN THE LIGHT OF THE AMERICAN FEDERAL EXPERIENCE

Lena Boucon*

Abstract

The ECJ case law based on the free movement provisions and relating to fields such as direct taxation, social security and personal status differs from traditional internal market cases. The common point of such decisions resides in the peculiarity of the disputes addressed to the Court. Indeed, they systematically involve Member States' powers that are either not transferred to the European Union or for which the European constitutional arrangements do not allow the European Union to fully exercise its concurrent powers. Retained powers of states are, as such, subjected to an original and a specific legal framework. This paper shows that the ECJ approach is somehow schizophrenic since, contrary to the American Supreme Court, it has not done a clear choice between a dual or a cooperative interpretation of European federalism.

Keywords

Dual/Cooperative federalism, Retained powers of Member States, European Court of Justice, American Supreme Court

Introduction

A few years ago, R. SCHÜTZE published a book entitled *From Dual to Cooperative Federalism. The Changing Structure of European Law*[111] in which he contends that European federalism is nowadays moving on from dual to cooperative federalism. In his view, Europe's exclusive powers, as well as those of the Member States, are gradually declining while a form of European cooperative federalism is emerging and even constitutionalized[112]. He supports his claim by taking many concrete examples[113]. And yet, he does not refer to the European Court of Justice case law involving retained powers of Member States, such as direct taxation, social security and personal status. This case law comprises a certain range of decisions that are based on the free movement provisions and that differ from traditional internal market cases. The common point of such decisions resides in the peculiarity of the disputes addressed to the Court. Indeed, they systematically involve Member States' powers that are either not transferred to the European Union[114] or for which the European constitutional

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111 R. SCHÜTZE, *From Dual to Cooperative Federalism. The Changing Structure of European Law*, Oxford University Press, 2009.

112 Through the principle of subsidiarity (See R. SCHÜTZE, *op. cit.*, at 241-265) and complementary competences (See R. SCHÜTZE, *op. cit.*, at 265-286).

113 Among them Article 352 TFEU (the so-called 'flexibility clause') and Articles 114 and 115 TFEU (former Articles 94 and 95 relating to the power to harmonize national legislations in the internal market field).

114 See e.g. social security powers: Article 168§7 TFEU provides that "Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and

arrangements do not allow the European Union to fully exercise its concurrent powers[115]. Retained powers of states are, as such, subjected to an original and a specific legal framework. The aim of the present paper is therefore to give particular focus to this issue and to assess whether the Court's approach is closer to a dual or a cooperative interpretation of federalism by comparing it with the American Supreme Court case law.

The comparison of the European Court of Justice and the American Supreme Court respective case laws will be based on the assumption that, as J. H. H. WEILER puts it, "a set of constitutional norms regulating the relationship between the Union and its Member States, or the Member States and their Union, has emerged which is very much like similar sets of norms in most federal states. There is an allocation of powers, which as has been the experience in most federal states has often not been respected; there is the principle of the law of the land, in the EU called Direct Effect; and there is the grand principle of supremacy every bit as egregious as that which is found in the American federal constitution itself"[116]. Regarding he specific issue relating to the allocation of powers, it is noteworthy that the American and European constitutions share significant structural similarities. Among them, both the American Congress and the European Union are subjected to the enumerated power principle[117], according to which all powers not granted to the central governments remain within the states[118]. In addition, since in each case the judiciary asserted itself as the exclusive interpreter of the constitution, the Supreme Court and the European Court of Justice soon became the exclusive arbiters of constitutional disputes involving the division of powers.

In particular, they have been faced with disputes involving the collusion between central government powers and retained powers of states. The latter are powers that can be abstractly defined as powers falling exclusively within the states and exercised, as a matter of principle, discretionarily. They are exclusive in the sense that the states are, *de jure* or *de facto*, the sole entities entitled to exercise them. As for their discretionary character, it stems from the fact that there is no, or very little, European legislation regulating specifically their exercise. Retained powers of states are subjected, in both the European and American legal order, to specific legal statuses and frameworks. On the one hand, when the European Court of Justice has to rule on cases that involve retained powers of Member States, it follows an original approach, which differ from traditional internal market cases in several respects. First, it almost systematically uses formulae in which it acknowledges that certain subject matters fall exclusively within the Member States – social security, taxation, personal status, etc. – while claiming at the same time that they must nonetheless comply with European law when exercising such powers. Second, it bases the applicability of European law to these fields on the effects produced by state

(Contd.)

medical care. The responsibilities of the Member States shall include the management of health services and medical care and the allocation of the resources assigned to them."

[115] See e.g. direct taxation: Articles 114 (which sets out the general procedure applicable to the approximation of national legislations which have as their object the establishment and functioning of the internal market and which involves the 'majority rule') and 115 TFEU respectively provide that "Paragraph 1 shall not apply to fiscal provisions" and "Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market. "

[116] J. H. H. WEILER, 'Federalism Without Constitutionalism: Europe's *Sonderweg*', in: K. NICOLAÏDIS and R. HOWSE (eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford: Oxford UP, 2001), at 56.

[117] Art. I, Sec. 8, cl. 3 of the American Constitution: "The Congress shall have power… to regulate commerce with foreign nationals and among the several States"; Art. 5§1 of the EU Treaty: "The limits of Union competences are governed by the principle of conferral."

[118] Amend. X of the American Constitution: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"; Art. 5§2 of the EU Treaty: "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

regulations[119]. Last but not least, at the justification stage, the Court admits singular justifications, some of which aim to protect economic interests[120] while others tend to protect purely national interests[121]. As a result, this approach allows the Court to substantially broaden the scope of EU law applicability. In addition, it invites Member States to develop an original line of argument to defend their regulations, especially at the justification stage. The situation is, on the other hand, slightly different in the American legal order. Until the first half of the twentieth century, the Supreme Court made a dual interpretation of the dormant Commerce Clause[122]: it sought to clearly distinguish state and federal powers, on the ground that they were mutually exclusive. Since then, it has followed a different approach and has interpreted the dormant Commerce Clause according to a cooperative vision of federalism. The regulation of interstate commerce no longer falls within the exclusive powers of Congress, which means that states may, under certain conditions, operate concurrently with Congress. As a result, the Supreme Court's scrutiny now primarily focuses on the question of "*How* are reserved powers of states exercised?" at the expense of the division of power issue.

Since American federalism moved from the dual to the cooperative model, the analysis of the American Supreme Court regarding the dormant Commerce Clause will help to better understand the current approach of the European Court of Justice. Above all, it will allow to identify the nature of European federalism and to assess whether R. SCHÜTZE's claim that it is moving towards the cooperative model is empirically verified or, on the contrary, refuted as far as Member States' retained powers are concerned. Thus, the present paper aims to demonstrate, through a comparative analysis of the European and American federal experiences, that the American Supreme Court and the European Court of Justice have both set out limits on the theoretical free exercise of states' retained powers. With regard to the European Court of Justice approach, it appears that since the Court recognizes the existence of separate spheres of powers, its approach may be formally compared with that of the Supreme Court during American dual federalism. However, a deeper scrutiny of its case law also shows that because it limits the exercise of Member States' retained powers, its approach may also be compared with American cooperative federalism.

Defining Terms: Dual Federalism v. Cooperative Federalism

Before comparing the American and European legal orders, it is necessary to briefly define the dual and cooperative models of federalism. Regarding the first concept, it has been defined in the American context as "a concept of separate state and federal governments operating in distinct spheres with little significant overlap or significant 'sharing' of authority"[123], where "each of the two sovereignties has its own exclusive area of authority and jurisdiction, with few powers held concurrently"[124]. E. S. CORWIN has famously described its four axioms as follows:

> 1. The national government is one of enumerated powers only. 2. Also, the purposes which it may constitutionally promote are few. 3. Within their respective spheres the two centers of government

[119] The effect-based approach is generally developed at the restriction stage.

[120] According to settled case law, the Court subjects the recognition of justifications to the fact that they do not aim to protect individual national economic interests.

[121] It is generally admitted that justifications embody European, and not national, interests.

[122] Dormant Commerce Clause cases correspond to cases in which the American Supreme Court assesses whether states' regulations are contrary to the Commerce Clause despite the absence of Congress regulation.

[123] H. N. SCHEIBER, "American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives," *University of Toledo Law Review* 9 (1975), at 626.

[124] D. J. ELAZAR, *The American Partnership* (Chicago: Rand-McNally, 1966), at 22.

> are 'sovereign' and hence 'equal'. 4. The relation of the two centers with each other is one of tension rather than collaboration.[125]

Thus, the main feature of dual federalism resides in the idea that it is possible to identify two separate spheres of powers: one that belongs exclusively to the States and another that belongs exclusively to the general government. In each of these spheres, the centers of government may exercise their powers in their own way, without taking into account the interests of the other center.

Cooperative federalism is generally contrasted with dual federalism. Unlike the latter, the cooperative model does not assume that the spheres of federate and federal powers are mutually exclusive. On the contrary, under this model, the powers of states and of the central government are viewed as being deeply intertwined: "the National government and the States are mutually complementary parts of a single governmental mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the problem in hand"[126]. Accordingly, the cooperative model constitutes an alternative to the "rigid 'parallel function' theory of dual federalism"[127]. In this regard, M. H. REDISH has suggested labeling it as 'interactive federalism':

> "a term more neutral than 'cooperative' and one that recognizes the inevitable intertwining of the state and federal systems as they both go about the business of governing. At times, this interaction will be combative in nature, where the governing decisions of one sovereign differ from the other's and threaten the social and economic policies sought to be advanced by the other's decisions. Yet, at other times the actions of the respective sovereigns will be supplementary or complementary to each other, combining to meet the same problem in different but not conflicting ways. At still other times the problems facing government will call for some form of cooperative action – either through direct joint action, or more indirectly, through the exchange of information, ideas and experience. There is no reason to believe that combative and cooperative federalism are mutually exclusive; both are manifestations of the dynamic interaction of the state and federal systems."[128]

Thus, dual and cooperative federalism models substantially differ from one another. The former is based on the assumption that the federal balance can only be preserved if powers are strictly and rigidly divided. Conversely, the latter is based on the idea that powers are intertwined and, therefore, that each level of government may regulate the same subject matters. Accordingly, the fundamental issue is no longer '*Who* has the power to exercise their powers?' but '*How* are powers to be exercised?'

The Formal Recognition of Separate Spheres of Powers

The present part of the paper focuses on the 'dual dimension' of the European Court of Justice case law in which retained powers of Member States are involved. To this end, it will be assessed to what extent the European Court of Justice approach can be compared with the US Supreme Court cases that were decided when American federalism was describes as 'dual'. The first section begins by demonstrating how the European and American Courts have recognized the existence of separate spheres of powers within their respective legal orders. The second focuses more particularly on the criteria on which they have based the distinction between state and central powers.

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[125] E. S. CORWIN, "The Passing of Dual Federalism", *Virginia Law Review* 36 (1950), at 4.

[126] *Idem*, at 19.

[127] M. H. REDISH, *The Constitution as Political Structure*, Oxford University Press US, 1995, at 29.

[128] *Idem* (Emphases added).

The Recognition

This section will first describe the American Supreme Court approach from 1787 through the first half of the twentieth century, the period where American federalism was interpreted according to a dual vision of federalism. It will then be compared with the current European Court of Justice case law.

The Supreme Court Approach

The American Supreme Court was called upon, from its earliest decisions, to settle disputes between the national and states governments regarding the division and the exercise of powers. This gave the opportunity to the Court to define the main features according to which American federalism was to be implemented. Opinions differ as to the basis on which the Court developed its first judicial theories regarding federalism. Some authors contend the Court genuinely respected the intentions of the Framers[129]. Others are of the view that "it does not appear that the Constitution on its face dictates the dual federalism model"[130]. The fact remains, however, that the Supreme Court initially opted for a dual interpretation of American federalism. Indeed, in *McCulloch v. Maryland*, Marshall stated for the first time[131] that,

> "[i]n America, the powers of sovereignty are divided between the Government of the Union and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."[132]

This quotation clearly shows that, in Marshall's mind, divided sovereignty implies dual federalism. Powers are strictly divided and belong to two mutually exclusive spheres. It also suggests that each center of government exercises its powers freely and independently from the other center. Accordingly, the idea of 'peaceful' or 'fruitful' interaction between the two spheres is excluded; this corresponds to Corwin's fourth axiom that described the relation between such spheres as 'one of tension'. Chief Justice Marshall reiterated his position in *Gibbons v. Ogden*, the first case involving the power to regulate interstate commerce[133]. He defined it as an *exclusive* congressional power: "[i]t is the power to regulate, that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. (…) If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government"[134]. Once again, he made a dual interpretation of American federalism, by excluding any idea of concurrent power to regulate interstate commerce that could be shared between the national government and the states. He clearly distinguished it from "[t]he acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens"[135]. The notion of 'police powers' gradually became a "linguistic means

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[129] H. N. SCHEIBER, *op. cit.*, at 624-628.

[130] M. H. REDISH, *op. cit.*, at 30.

[131] R. K. NEWMYER, *The Supreme Court under Marshall and Taney* (American History Series. Wheeling: Harlan Davidson, 2006), at 41: "For the first time, the Court had to determine the scope of congressional powers and their relation of the powers of the states".

[132] *McCulloch v. Maryland*, 17 U.S. 316 (1819).

[133] R. K. NEWMYER, *op. cit.*, at 49: "For the first time in its history, the Court had a chance to clarify the meaning of the commerce clause and to coordinate federal and state power in this area".

[134] *Gibbons v. Ogden*, 22 US 196, 197 (1824).

[135] *Idem* at 208.

of drawing the line between state and federal activities"[136]. In *Willson v. The Blackbird Creek Marsh Company*[137], for instance, Marshall decided that health, safety and the protection of public order were part of the 'reserved powers' of states, which meant that they were fully sovereign while exercising them – provided that this exercise did not interfere with congressional powers[138]. Thus, this first series of rulings marked the initial steps towards the enshrinement of dual federalism. As Lenaerts has put it, "[t]he State was regarded as being sovereign, with full powers within *its* sphere, *i.e.*, possessing to their full extent all the powers *not* transferred to the Union by explicit grant or by necessary implication"[139]. Consequently, such line of reasoning compelled the Court to identify, on a case-by-case basis, which matters fell within the national government or, alternatively, within the states. This approach endorsed by the Supreme Court prevailed until the 1930s.

The European Court of Justice approach

Similarly, the European Court of Justice was called upon, from the early days of the European Union, to decide cases relating to the issue of the division of powers between the European Union and its Member States. As far as the retained powers of Member States are concerned, the European judge has always rejected the absolute dual vision of federalism Marshall sustained in *McCulloch v. Maryland* or *Gibbons v. Ogden*. Even if the European Court has never formally denied the existence of separate spheres of powers in which the European Union and the Member States respectively operate, it has repeatedly taken the view that interferences and mutual influences between such spheres are conceivable. For instance, in the *De Gezamenlijke Steenkolnmijnen in Limburg* case, decided in 1961, the Court stated that certain Treaty provisions could "enable the jurisdiction of the Community to impinge on national sovereignty in cases where, because of the power retained by the Member States, this is necessary to prevent the effectiveness of the Treaty from being considerably weakened and its purpose from being seriously compromised". The reference to 'the jurisdiction of the Community' and to 'national sovereignty' indicates that the Court recognizes the existence of two separate spheres. However, as P. PESCATORE has noted, "here the Court shows that the sovereignty of the Member States is affected beyond the scope of the exclusive powers that have been transferred to the Community"[140]. In another case, which also concerned a conflict between retained powers of Member States – the monetary policy (this case was decided in 1969) – and the powers of the Union, the Court expressly claimed that "the exercise of reserved powers cannot therefore permit the unilateral adoption of measures prohibited by the Treaty."[141]

Consistent with this initial approach, the European Court of Justice continues to recognize that Member States may operate within a distinct sphere of powers. This is supported by the fact that,

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[136] P. KENS, "The Source of a Myth: Police Powers of the States and Laissez Faire Constitutionalism, 1900-1937", 35 *Am. J. Legal Hist.* (1991) at 74.

[137] *Willson v. The Blackbird Creek Marsh* Company, 2 Peters 245 (1829). See also *Brown v. Maryland*, 12 Wheaton 419, 443 (1827): "the power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains and ought to remain with the states".

[138] *Willson v. The Blackbird Creek Marsh* Company, 2 Peters 245 (1829): "The act of the Assembly of the State of Delaware by which the construction of the dam erected by the plaintiffs was authorized shows plainly that this is one of those many creeks passing through a deep level marsh adjoining the Delaware, up which the tide flows for some distance. The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come in collision with the powers of the General Government, are undoubtedly within those which are reserved to the States."

[139] K. LENAERTS, "Distribution of Powers in American Federalism. The Negative Implications of the Commerce Clause", 30 *Jahrbuch des Öffentlichen Rechts der Gegenwart* (1981), at 576.

[140] P. PESCATORE, in E. MCWHINNEY & P. PESCATORE, (eds.), *Federalism and Supreme Courts and the Integration of Legal Systems*. (Heule-Bruxelles-Namur, Belgium, Ed. UGA, 1973), at 10: "La Cour montre ici que la souveraineté des États membres est affectée au-delà du domaine des matières transferees de manière exclusive à la Communauté".

[141] Case 11/69, *Commission v. France*, [1969] ECR 523.

nowadays, as soon as a dispute involves retained powers of states, the Court systematically uses formulae, in which it acknowledges that specific powers fall within the scope of retained powers of Member States. The two examples drawn from the social security and taxation powers are good illustrations of the Court's approach. As regards the former, the Court systematically states that:

> "Whilst it is not in dispute that Community law does not detract from the power of the Member States to organise their social security systems, and that, in the absence of harmonisation at Community level, it is for the legislation of each Member State to determine the conditions in which social security benefits are granted, when exercising that power Member States must comply with Community law, in particular the provisions on the freedom to provide services"[142].

As regards the latter, the Court systematically recalls that:

> "although direct taxation falls within their competence, Member States must nonetheless exercise that competence consistently with Community law."[143]

These formulae show that the idea of separate spheres of powers is not absent from the Court's reasoning when it deals with retained powers of Member States: In the eyes of the Court, there exist, at least formally, distinct spheres of powers for which the States can solely exercise powers to the exclusion of the European Union. These formulae are not just rhetorical; they also find concrete resonance in the Court's decisions. It is true that the Court recognizes that European law may sometimes limit the free exercise of retained powers ('Member States must nonetheless exercise that competence consistently with Community law'). However, its approach does not challenge their existence. Indeed, the Court is indifferent to the question of '*who* exercised a power?': it has never denied Member States their ability to exercise their retained powers. Instead, it focuses exclusively on '*how* Member States' exercise their retained powers?'. This means that the Court rejects implicitly a possible European action: when Member States do not comply with European Union law, it is not because they have occupied the European field, but rather because their have not properly exercised their powers. This idea is confirmed by the fact that the Court often imposes adjustment requirements on Member States[144]. Accordingly, in the same way the American Supreme Court used to recognize that some matters were to fall within the states' spheres of powers by considering them as being almost states' powers '*per se*', the European Court of Justice acknowledges, nowadays, that a certain range of Member States' powers belong to them exclusively.

The Criteria for Distinction

The enforcement of dual federalism requires that the Courts, as 'umpires of the federal system'[145], set out judicial criteria for distinguishing the different spheres of powers. This is all the more important that such spheres are subjected to distinct legal frameworks. For instance, states' police powers under the American dual model of federalism implied that states could exercise them discretionarily and that the central government was precluded from intruding into such spheres – and *vice versa*. As for the European legal order, when the European Court of Justice recognizes that certain subject matters fall within the sphere of retained powers, this means that Member States, as a result, must develop a specific line of arguments to justify their measures.

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[142] See e.g. Case C-372/04, *Watts*, [2006] ECR I-4325.

[143] See e.g. Case C-446/03, *Marks & Spencer* [2005] ECR I-10837.

[144] See e.g. the field of social security. The Court has recalled several times that "although Community law does not detract from the power of the Member States to organize their social security systems and decide the level of resources to be allocated to their operation, the achievement of the fundamental freedoms guaranteed by the Treaty nevertheless inevitably requires Member States to make adjustments to those systems. It does not follow that this undermines their sovereign powers in the field" (Case C-372/04, *Watts*, *op. cit.*, at 121 (Emphases added)).

[145] P. A. FREUND, "Umpiring the Federal System", *Columbia Law Review*, Vol. 54, n°4, (1954), at 561.

The autonomous definition of retained powers of states

Both American states and European Member States have tried to preserve their own sphere of powers in order to prevent too many encroachments from the central government by claiming that certain subject matters fall *per se* within their retained powers and that they should be entitled to an absolute freedom while exercising such powers[146]. In reply to this line of arguments, the Supreme Court and the European Court of Justice have both rejected the idea that the states could themselves decide which subject matters were to fall within their retained powers. Even under the Taney Court in the United States, which placed a major emphasis on the notion of police powers, it was solely for the Court to qualify a police power. Indeed, although it stated that "all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered nor restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified and exclusive", E.S. CORWIN has noted that "it did not signify that the States, acting through either their legislatures or their courts, were the final judge of the scope of these 'sovereign' powers. This was the function of the Supreme Court of the United States, which for this purpose was regarded by the Constitution as standing outside and over both the National Government and the States, and vested with authority to apportion impartially to each center its proper powers in accordance with the Constitution's intention"[147]. Similarly, the European Court of Justice also defines autonomously the content of the retained powers of Member States. Even though it has never comprehensively defined this concept, it has identified, on a case-by-case basis, via its formulae, which subject matters fall within the states' sphere of powers. The Courts' autonomous assessment of the scope of states' retained powers has a significant impact on the enforcement of federalism. Indeed, if they were to allow the states themselves to decide over which subject matters they have exclusive jurisdiction, this would seriously undermine the uniformity of federal law. As a result, each of them could independently define the content of its retained powers and consequently encroach on the central government powers.

The Supreme Court approach

The American Supreme Court developed significant doctrines during the 19th century, and until the beginning of the 20th century, in the attempt of drawing a line between national and states spheres of powers. First, the Taney Court referred to the concept of 'police powers' of states to identify the matters for which the states had exclusive jurisdiction. Like the Marshall Court, it initially turned to a 'commerce/police' test[148] by looking at the purpose[149] of a state regulation to decide whether it aimed to regulate commerce or, conversely, to regulate the state police. Never did the Taney Court elaborate a comprehensive definition of the notion of police powers. Rather, it defined it as follows: "it is not only the right, but the bounden and solemn duty of a State, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation"[150], admitting that police powers were "nothing more or less than that power of government inherent in

[146] This is the whole purpose of the States' Rights Doctrine, as developed by Calhoun during the 19th century in the United States.

[147] E. S. CORWIN, *op. cit.*, at 15.

[148] E. A. YOUNG, "Dual Federalism, Concurrent Jurisdiction, and the Foreign Affaires Exception", *The George Washington Law Review*, Vol. 69, 2001, at 147.

[149] E. A. YOUNG, *op. cit.*, at 148, K. M. SULLIVAN & G. GUNTHER, *Constitutional Law* (Foundation Press, University Casebook Series, 2001) at 242.

[150] *New York v. Miln*, 11 Pet. 102, 139 (1837), in which the Supreme Court "sustained a New York statute requiring the master of a vessel arriving in the port of New York from any point out of the state to report the names, residences, etc., of the passengers" (G. GUNTHER, *Constitutional Law* (Foundation Press, University Casebook Series, 2001) at 218).

every sovereignty to the extent of its dominion, the power to govern men and things"[151]. The first years of the Taney Court were characterized by "little clarity or agreement"[152] among the Justices. Some of them saw the regulation of interstate commerce as an exclusive power of Congress; thereby only state regulations of 'police' – unlike the regulations of 'commerce' – were constitutional. Taney followed a more balanced approach, according to which states could regulate commerce if their measures were not in conflict with the Constitution or a law of Congress[153]. The Court eventually tried to reach a compromise between the exclusive and concurrent doctrines in *Cooley v. The Board of Wardens of the Port of Philadelphia*[154]. A different subject-matter test[155] emerged, based on the distinction between national and local subjects: "Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation"[156]. The *Cooley* rule has sometimes been described as 'selective exclusiveness': It allowed states to regulate commerce, but only to the extent that they would regulate local aspects of interstate commerce and as long as Congress had not exercised its power. Accordingly, *Cooley* recognized that commerce power was in some way *concurrent*. However, this does not mean that the Court gave up its dual approach. E. A. YOUNG has pointed out that, "[t]his inquiry (…) still contemplates a world of subject-matter enclaves. Some subjects are exclusively 'national'; others are 'local in nature' and therefore left to the states"[157]. The pursuit of the identification of a borderline between the national and states spheres of powers led the Court to develop a final test, this time based on the direct or indirect effects of the state regulations[158]. Even though states regulations were upheld if their effects on commerce happened to be merely indirect, such way of reasoning is also based on a dual interpretation of American federalism. Referring to the direct-indirect distinction, Young contends that "[t]he Court's distinction sought to maintain exclusive spheres for state and national authority by insisting on the viability of boundaries despite the interdependence of different markets and activities"[159]. This is confirmed by the fact that, when interpreting the Commerce Clause, the Supreme Court continued to refer to the concept of police powers[160]. In *Southern Railway Co. v. King*, for instance, the Court recounted that "[i]t has been

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[151] *The License Cases*, 5 How. 504, 462 (1847).

[152] G. GUNTHER, *op. cit.*, at 218.

[153] In the *The License Cases*, *op. cit.*, Taney stated that "The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet, in my judgment, the State may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress".

[154] *Cooley v. The Board of Wardens of the Port of Philadelphia*, 12 Howard 299 (1851).

[155] E. A. YOUNG, *op. cit.*, at 147.

[156] *Cooley v. The Board of Wardens of the Port of Philadelphia*, *op. cit.*

[157] E. A. YOUNG, *op. cit.*, at 147.

[158] See *Southern Railway Co. v. King*, 217 US 524 (1910) and *Seaboard Air Line Ry.v. Blackwell*, 244 US 310 (1917) and Corwin 175-209

[159] E. A. YOUNG, *op. cit.*, at 148. See also E. S. CORWIN, *The Commerce Power Versus States Rights*, (Princeton University Press, 1936) at 208: "[t]he distinction is one of *kind*, not of *degree*; and this is so (…) because the purpose of this distinction is to maintain the States in *exclusive* possession of the power to regulate productive industry, and *especially the power to regulate the relationship of employer and employee in such industry*".

[160] See *Henderson v. New York*, 92 US 259 (1875): "certain powers necessary to the administration of their internal affairs are reserved to the States, (…) among these powers are those for the preservation of good order, of the health and comfort of the citizens, and their protection against pauperism and against contagious and infectious diseases, and other matters of legislation of like character (…). This power, frequently referred to in the decisions of this Court, has been, in general terms, somewhat loosely called the police power"; *New Orleans Gas Co. v. Louisiana Light Co.* 115 US 650 (1885):

frequently decided in this Court that the right to regulate interstate commerce is, by virtue of the federal Constitution, exclusively vested in the Congress of the United States. The states cannot pass any law directly regulating such commerce. Attempts to do so have been declared unconstitutional in many instances, and the exclusive power in Congress to regulate such commerce uniformly maintained. While this is true, the rights of the states to pass laws not having the effect to regulate or directly interfere with the operations of interstate commerce, passed in the exercise of the police power of the state, in the interest of the public health and safety, have been maintained by the decisions of this Court"[161].

It follows from these developments that, throughout the 19th century and until the beginning of the 20th century, the Supreme Court sought to elaborate judicial tests that would allow for a clear distinction between state and national powers. If it is true the Court gradually endorsed more flexible tests than the first commerce/police distinction, the Court ultimately aimed to isolate exclusive spheres for the benefit of states or, alternatively, of Congress. The Supreme Court upheld any state regulation if it fell within the internal police power of the state, was purely local or had no direct effect on interstate commerce.

The European Court of Justice approach

Unlike the Supreme Court, the European Court of Justice has never attempted to give a comprehensive definition of the notion powers retained by Member States. Neither has it developed a specific test to identify the matters that fall exclusively within such powers. In other words, the Court simply states that a certain range of powers fall within the retained powers of Member States, without substantiating its position by demonstrating why such powers are subjected to a specific status.

At first glance, it could be argued that, in accordance with the enumerated power principle, any power that has not been conferred to the European Union remains within the Member States. This is the case, for instance, of the rules governing a person's surname[162]. However, the criterion derived from such principle is inadequate to explain the whole approach of the Court. To quote the examples mentioned above, it appears indeed that the Treaty empowers the Union to operate, to a certain extent, in the fields of social security[163] and taxation[164]. Regarding the latter example, the Union has already used its powers and has adopted several directives in the field of direct taxation[165]. Why, then, does the Court subject such powers to a specific and distinctive legal framework instead of considering them as shared powers between the Union and the Member States? At least two hypotheses may be put forward. First, the Court's decision to develop a distinctive approach when subject matters such as

(Contd.)

"there is a power, sometimes called the police power, which has never been surrendered by the States, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is conceded in all the cases".

[161] *Southern Railway Co. v. King*, 217 US 524 at 531, 532

[162] Case C-148/02, *Garcia Avello*, [2003] ECR I-11613 at 25: "Although, as Community law stands at present, the rules governing a person's surname are matters coming within the competence of the Member States, the latter must none the less, when exercising that competence, comply with Community law".

[163] Art. 153§1 c) TFEU: "With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (…) c) social security and social protection of workers" and Art. 153§4: "The provisions adopted pursuant to this Article: — shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof".

[164] Art. 115 TFEU: "Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market".

[165] See http://ec.europa.eu/taxation_customs/taxation/gen_info/index_fr.htm.

social security or direct taxation are at stake may be explained by the fact that, as the Court recognizes itself, there is very little harmonization at the European level in these fields. Furthermore, it is often hard to implement the Union's action: Suffice to think of the many years of negotiations that were necessary to adopt the Directive on Patients' Rights in Cross-border Healthcare[166] or of the unanimity rule regarding direct taxation. This context requires that the Court be cautious: deregulating these fields could seriously undermine Member States' autonomy. The second hypothesis that can be formulated is linked to the former and the notion of 'essential State functions' as mentioned in the Treaty on the European Union[167]. For L. AZOULAI, "'retained powers' are collective goods that the state administers to ensure social cohesion on its territory. This justifies that, in all of these areas, the state is empowered to act unilaterally, to the exclusion of the bodies of the European Union"[168]. To conclude, it may be argued that the European Court of Justice has not developed a comprehensive approach regarding the distinction between retained powers of States and the other spheres of powers. Accordingly, the notion of retained powers remains unclear since the definition of its contend and scope mostly depends on the Court's discretion to subject certain domains to a specific legal framework and not to the traditional approach that it has developed in other fields of the internal market.

The previous developments have attempted to show that the current European Court of Justice approach comprises, to a certain extent, a dual dimension as regards federalism. Indeed, the Court seems to take into account, at the starting point of its reasoning, the existence of separate sphere of powers, one of which being composed of the retained powers of Member States and being, as such, subjected to an original legal framework. Accordingly, it shares a certain range of similarities with the approach developed by the Supreme Court during the first era of American federalism. The main divergence between the two approaches lies in the fact that the European Court of Justice, unlike the Supreme Court, has never defined the notion of retained powers of Member States. Neither has it developed a specific test to distinguish these powers. However, not only does the European Court approach comprise a dual dimension. The Court shows at the same time a strong tendency to make a cooperative interpretation of European federalism, according to which the exercise of Member States' retained powers must comply with European law requirements.

The Recognition of EU Law Intrusions into Member States' Retained Powers

The evolution of American federalism experienced a tipping point during the first half of the twentieth century, when the Supreme Court reversed its previous dual interpretation of the dormant Commerce Clause by replacing its formal approach with a balancing-test approach. This is one of the factors that gave rise to the enshrinement of American *cooperative* federalism. The European Court of Justice also shows a trend towards an interpretation of European federalism from a cooperative perspective, in particular when it states that Member States must comply with European law even when they exercise their retained powers – such approach being reflected throughout the Court's cases. To sum up, both

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[166] Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare.

[167] Art. 4§2 TEU: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State" (emphasis added).

[168] L. AZOULAI, "La formule des compétences retenues devant la Cour de justice de l'Union européenne. Le drame de la justification", *To be published*: " La Cour semble s'approcher ici de ce qui, dans le traité, est nommé sans être défini, à savoir *« les fonctions essentielles de l'Etat »* (…) les « compétences retenues » sont les biens collectifs que l'Etat est chargé de gérer en vue d'assurer la cohésion sociale de la population sur son territoire. Voilà ce qui justifie que, dans tous ces domaines, l'Etat se voit reconnaître un pouvoir d'agir unilatéral, excluant l'intrusion des organes de l'Union." (Footnotes omitted).

the American Supreme Court and the European Court of Justice nowadays follow a similar path, characteristic of cooperative federalism.The present developments aim to shed light onto the fact that the European Court of Justice approach, when it deals with retained powers of Member States, is far from being purely dual regarding federalism. To this end, it will be once again compared with that of the American Supreme Court.

The Supreme Court Approach

The Supreme Court highly formal approach that derived from the *Cooley* rule started to be more and more criticized as from the 1920s. In a dissenting opinion, Justice Stone considered that "the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value". Referring to the *Cooley* distinction between direct and indirect interferences, he added that "it is clear that those interferences not deemed forbidden are to be sustained, not because the effect on commerce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines."[169] Stone thereby proposed to introduce a new approach, based on the balancing of state and national interests, that would replace what R. A. SEDLER has called the 'allocation of powers' approach[170]. The Supreme Court eventually abandoned the *Cooley* doctrine. Its modern decisions "have generally abandoned any attempt to apply categorical distinctions between exercises of 'police' and 'commerce powers, between 'local' and 'national' subject matters, or between 'indirect' and 'direct' effects."[171] In other words, the Court has departed from its dual vision of federalism and gradually turned to a cooperative interpretation of the dormant Commerce Clause. Today, it may strike down state regulations on three grounds: 1) they overtly discriminate against interstate commerce; 2) they are facially neutral, but they have in fact protectionist effects; 3) they unduly burden interstate commerce despite the fact that they are facially neutral[172]. Under the latter test, the Supreme Court follows a balancing of interests approach, as defined in *Southern Pacific Co. v. Arizona*[173]: "matters for ultimate determination are the nature and extent of the burden which the state regulation of interstate trains, adopted as a safety measure, imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference."[174]

It follows from these considerations that, nowadays, the Supreme Court accepts that states can regulate interstate commerce when Congress has not legislated if they do not discriminate, do not have protectionist effects and do not unduly burden commerce. As E. A. YOUNG noted, "[t]he abandonment of dual federalism has been most obvious – and probably least controversial – in the context of the dormant Commerce Clause. (…) we see a general prohibition on state regulation that *discriminates* against out-of-state business, regardless of subject matter. This sort of anti-discrimination principle is

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[169] *Di Santo v. Pennsylvania*, 273 US 34, 44 (1927).

[170] R. A. SEDLER, "The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure", 31 *Wayne L. Review* (1985) at 921.

[171] K. M. SULLIVAN & G. GUNTHER, *op. cit.*, at 245.

[172] *Idem.*, at 245.

[173] *Southern Pacific Co. v. Arizona*, 325 US 761 (1945).

[174] *Ibid.*, at 770-71. The *Southern Pacific* reversal only concerns state regulation. See *Complete Auto Transit, Inc v. Brady* 430 US 274 (1977) as for taxation.

a doctrine of *concurrent* power"[175]. Regarding the balancing of interests approach[176], for instance, the Supreme Court has summarized it as follows: "[where] the statute regulated even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [If] a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[177] As a result, the Court now "requires state governments to regulate in an even-handed way, without limiting the subject matter upon which their regulation can operate"[178]: accordingly, the Court no longer prevents the states from regulating interstate commerce[179]. Instead, it places limitations upon the exercise of their powers: if they do not comply with the anti-discrimination rule, the Court will strike down their measures. But, if they adapt their regulations to the dormant Commerce clause requirements, they will be empowered to regulate interstate commerce. Conversely, the move from dual to cooperative federalism also had the effect of recognizing that Congress can legitimately intrude into chat was considered until then the reserved powers of states. As a result, the Supreme Court no longer seeks to draw the line between separate spheres powers in the way it used to under the dual model of federalism. Both the states and Congress have jurisdiction over certain same subject matters and can consequently exercise their powers concurrently. Accordingly, the Supreme Court cooperative interpretation of federalism concerns just as well the division of powers as the exercise of powers.

The European Court of Justice Approach

The second part of the present paper has shown that the European Court of Justice formally distinguishes the sphere of powers of Member States from that of the European Union. However it also claims that Member States must nonetheless comply with European law requirements when they exercise their retained powers. Accordingly, the recognition of an exclusive sphere for the benefit of Member States does not imply that they can enjoy an absolute freedom when exercising their retained powers. First, states' measures adopted in the exercise of retained powers are subjected to the same tests as measures adopted in the exercise of shared powers. Therefore, the European Court of Justice strikes down any Member State regulation that discriminates – be it overt or facially neutral. Furthermore, when faced with non-discriminating measures that have restrictive effects on the free movement principle, it also develops a balancing test approach. This test comprises three steps: first, the Court assesses whether state regulation amounts to a restriction to one of the four fundamental freedoms; if so, it secondly allows Member States to justify their measures by showing that they pursue legitimate aims; finally, if the Court accepts such grounds, it verifies that the measure is necessary and proportional. Thus, the European Court has developed similar tests to the contemporary tests of the Supreme Court. Second, when the Court concludes that a national regulation amounts to a restriction, it requires that Member States adapt their legislation in accordance with European law. The

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[175] E. A. YOUNG, *op. cit.*, at 150.

[176] See R. A. SEDLER, *op. cit.*, at 949: "the analysis in determining the permissibility of state regulation affecting interstate commerce [is not] based on a characterization of the nature of the regulation, but on an equal appraisal of the 'competing demands of state and national interests'." (Footnotes omitted)

[177] *Pike v. Bruce Church, Inc.*, 397 US 137 (1970).

[178] E. A. YOUNG, *op. cit.*, at 150.

[179] It should be underlined here that the move from the dual to the cooperative model had maybe an unexpected effect. R. A. SEDLER, *op. cit.*, at 952, indeed noted that "[in] the application of its new approach to the permissibility of state regulation affecting interstate commerce, the Court had in effect expanded the power of the states to regulate interstate commerce, so long as the regulation was non discriminatory. Where the regulation was discriminatory, expressly of in its essential effect, the Court continued to hold it unconstitutional."

example derived from cases concerning social security is in this respect significant. Regarding transborder healthcare, the Court places obligations of adjustment upon the states that are very burdensome. Referring to the condition to obtain prior administrative authorizations before being entitled to benefit from transborder healthcare that many Member States used to impose on their residents, the Court stated for instance that "in order for a prior administrative authorization scheme to be justified even though it derogates from such a fundamental freedom, it must, in any event, be based on objective, non-discriminatory criteria which are known in advance, in such a way as to circumscribe the exercise of the national authorities' discretion, so that it is not used arbitrarily (…). Such a prior administrative authorization scheme must likewise be based on a procedural system which is easily accessible and capable of ensuring that a request for authorization will be dealt with objectively and impartially within a reasonable time and refusals to grant authorization must also be capable of being challenged in judicial or quasi-judicial proceedings."[180] Consequently, the Court subjects Member States to substantial requirements – they must ensure that prior authorizations are based on objective and non-discriminatory criteria – as well as procedural requirements – they must set up a system of judicial review. As to the type of cooperative federalism that the European Court of Justice endorses, it may be argued that its approach tends to correspond to what Redish calls 'combative federalism', "where the governing decisions of one sovereign differ from the other's and threaten the social and economic policies sought to be advanced by the other's decisions"[181]. Indeed, here, Member States welfare policies, such as healthcare systems, based on the territoriality principle, restrict the European competing interest derived from the free movement principle. In setting limits on the theoretical free exercise of Member States' retained powers, the Court of Justice ensures that the European interests are not imperiled.

Accordingly, the recognition of distinct spheres of powers does not mean, in the eyes of the European Court, that they are mutually exclusive. First, the Court acknowledges that they may come into conflict. Second, to settle such jurisdictional disputes, the Court does not seek to assess which of the European Union or the Member States is competent to regulate a subject matter – it constantly rules that Member States have exclusive jurisdiction. Instead, it attempts to reconcile competing state and European interests by focusing on how Member States exercise their retained powers. And it is precisely at the stage of the exercise of powers that the Court recognizes that European interests may intrude into Member States' powers. This amounts to make a cooperative interpretation of European federalism. Indeed, not only does the Court attempt to distinguish between national and European spheres of powers. It also seeks to coordinate such spheres by enshrining European law intrusions into Member States' retained powers. The result of this judicial trend is similar to that of the contemporary Supreme Court case law: retained powers of European and American states are more and more intertwined with those of the central government. However, the European and American approaches differ in at least one fundamental respect. Although the Supreme Court admits that the cooperative between the central and state governments concerns both the division and the exercise of powers, the European Court of Justice has, so far, only balanced competing national and European interests at the stage of the exercise of powers. In this sense, its approach can probably be best described as 'a middle ground approach'.

[180] Case C-157/99, *Smits Geraets & Peerbooms*, [2001] ECR I-5473 at 90.

[181] M. H. REDISH, *op. cit.*, at 29.

Conclusion: The Middle Ground Character of the European Court of Justice Approach

As a way of conclusion, it should be underlined that, as far as retained powers of Member States are concerned, the European Court of Justice approach stands halfway between the dual and cooperative models of federalism. It may therefore be described as 'a middle ground approach'. It is true that its scrutiny over Member States' measures consists primarily in setting limits on the exercise of retained powers, which is consistent with the cooperative model of federalism. And yet, it also shares a range of similarities with the dual model of federalism. Indeed, one of the main differences that distinguish the European and American Courts' respective approaches lies in the fact that since the Supreme Court moved towards the cooperative model of federalism, it has recognized that the states may also regulate interstate. It has this acknowledged that the power to regulate interstate commerce is a concurrent power. However, at no stage does the European Court of Justice sustain that the Member States and the European Union share powers regarding the subject matters recognized as falling within national spheres of powers. In its eyes, retained powers of Member States remain distinct from the internal market. The example derived from *Watts* is in this respect significant:

> "Although Community law does not detract from the power of the Member States to organize their social security systems and decide the level of resources to be allocated to their operation, the achievement of the fundamental freedoms guaranteed by the Treaty nevertheless inevitably requires Member States to make adjustments to those systems. It does not follow that this undermines their sovereign powers in the field."[182]

This quotation synthesizes the twofold approach of the Court towards federalism. On the one hand, Member States have 'sovereign powers' in the sense that they have the sole jurisdiction to exercise the power to organize social security systems. On the other hand, they must cooperate while exercising their powers in order to take into account European interests, i.e. the rights derived from the free movement principle. What are, then, the implications of such an approach for European federalism? It seems that the Court's approach, taken as a whole, seeks to achieve the right federal balance by protecting the authority of the European Union as well as that of the Member States. Indeed, the formal recognition of separate spheres of powers, even if somehow artificial, probably aims to counterbalance the quite intrusive judicial balancing test. However, in my view, the Court's attempt to distinguish spheres of retained powers has several problematic aspects. The fact that it does not define the notion of retained powers and that it does not identify them through a comprehensive test leads to a lack of consistency: How can it be explained that a certain range of powers is subjected to a specific legal framework? The Court of Justice indeed uses a high degree of judicial discretion when it decides on a case-by-case basis which subject matters fall within Member States' retained powers. The cooperative dimension of its approach causes some problems too. The examples of social security and taxation show how substantial the control of the Court is. When setting limits on Member States' regulations, it almost turns into a legislator by giving detailed and meticulous instructions to Member States. To conclude, it may be sustained that the European case law involving retained powers of Member States constitutes an original way of ever more integrating national systems, in more and more various fields, and in accordance with European interests. Consistent with its previous approach, the European Court of Justice has been showing its ability to constantly complete the European integration with new means – and old tools – in order to now extend the scope of European law to sovereign matters such as direct taxation, social security and personal status.

[182] *Watts*, *op. cit.*, at 121 (Emphases added).

RETAINED DISTINCTIVENESS IN THE INTEGRATED THIRD PILLAR: SAFEGUARDING MEMBER STATES' COMPETENCES IN THE EUROPEAN CRIMINAL LAW SPHERE

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Abstract

The incorporation of former third pillar provisions into the realm of supranational EU law under the TFEU has not led to an entire abolishment of intergovernmental features within the area of freedom, security and justice. Instead, the Treaty of Lisbon has preserved some of its distinctive characteristics in Title V TFEU in favour of Member States' competences. However, non-Title-V provisions may still encroach upon those provisions available under Title V TFEU and thus jeopardise the latter's application. Thus, in order to safeguard Member States' competences from such a scenario special protection mechanisms may have to be established which can preserve the distinct character of EU criminal law after Lisbon.

Keywords

Title V TFEU, Criminal law, Legal basis litigation, Member States' competences, Case C-130/10

Introduction

For more than one and a half decades, EU law was shaped by the artificial concept of a three-pillar structure, introduced in 1993 with the Treaty of Maastricht. During the time of its existence, the pillar structure was amended twice, once by the Treaty of Amsterdam[183] and once by the Treaty of Nice[184]. Throughout its existence, the system was flawed with certain deficiencies concerning uncertainty and inconsistencies in legal basis litigation; competence overlaps between the pillars, i.e. between the Community and the Member States; as well as a certain lack of clarity surrounding the distinction between the concepts of the European Community and the European Union.[185] At first glance, it seems as if these problems have now been solved since the pillar structure has finally met its fate by formally being abolished under the Treaty of Lisbon. However, having a closer look at it, such a conclusion would be rather overhasty. The merger of the pillars does not in itself solve this kind of issues.

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183 For an interesting discussion on the changes introduced by the Treaty of Amsterdam, see O'Keeffe, D. and Twomey, P. (Eds.), (1999). Legal Issues of the Amsterdam treaty. Oxford, Hart Publishing.

184 Further discussion on the changes introduced by the Treaty of Nice can be found in Andenas, M. and Usher, J.A. (Eds.), (2003). The Treaty of Nice and beyond: Enlargement and constitutional reform. Oxford, Hart Publishing.

185 Compare Von Bogdandy, A. (1999). "The Legal Case for Unity: The European Union as a Single Organization with a Single Legal System." Common Market Law Review **36**: 887-910; De Witte, B. (1998). The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral? The European Union after Amsterdam: a legal analysis. T. Heukels, N. Blokker and M. Brus (Eds.). The Hague, Kluwer Law International; and Pechstein, M. and C. Koenig (2000). Die Europäische Union. Tübingen, J.C.B. Mohr (Paul Siebeck).

In general, it has been observed that with the introduction of the Treaty of Lisbon the Union has gained further competences, without any retrocession of Union competences to the Member States.[186] In particular, this can be seen concerning the incorporation of the third pillar into the general framework of the former first pillar. At the same time, and in order to make the Union more democratic, qualified majority voting has been extended throughout the Treaties as well as an enhanced influence of the European Parliament. It will be argued that, regardless of the fact that the area of freedom, security and justice has been formally incorporated into the TFEU under the new Title V, the area of criminal law has not been fully integrated and thus remains distinct from the other parts of the TFEU. The aim of this paper is therefore to identify and examine the special character of Title V TFEU. This is particularly significant since the preservation of differences between the previous policy areas may result in further legal basis litigation problems as well as a certain risk of competence overlaps. Further, with no protection mechanisms in place, Union law could continue to expand its influence by encroaching upon the intergovernmental characteristics which have been preserved in Title V TFEU, thus violating the integrity of Member States and ultimately rendering such provisions nugatory. This paper thus seeks to identify possibilities of safeguarding Member States' competences in the EU criminal law sphere as a result of a retained distinctiveness in the integrated third pillar after the introduction of the Reform Treaty.

To this end, this paper will first examine the integrated third pillar after Lisbon as regards the degree to which the provisions hereunder have remained distinct from the majority of TFEU provisions. Under the former first pillar, the courts have developed general principles in order to determine the correct legal basis for a proposed measure, such as the 'centre of gravitiy' theory or the *lex specialis derogat legi generali* principle. These principles may now be applied to the entire TFEU including Title V which could generate insufficient results concerning the protection of the special character of the provisions in the criminal law area. Thus, it will be argued that certain protection mechanisms may have to be established by the courts in order to remedy this situation. The second part will discuss such mechanisms and will illustrate how Member States' competences can be safeguarded under the new treaty framework. However, uncertainties as to the exact delimitation of competences will remain unless and until the Court of Justice takes an early opportunity to clarify the relationship between Title-V and non-Title-V provisions of the TFEU in the interest of legal certainty in this area. Finally, some concluding remarks will summarise the findings in this paper.

The Integrated Third Pillar after Lisbon

With the introduction of the Lisbon Treaty and after a transitional period of five years,[187] the existing third pillar provisions of the European Union will be fully integrated into the Treaty on the Functioning of the European Union (TFEU), i.e. the former first pillar. This entails certain implications on the actual relationship between the different sets of provisions which are now being dealt with under a single framework. On the face of it, it appears as if general legal basis principles established under the first pillar now apply for the integrated area of criminal law as well as a unified set of legal instruments and legislative procedures. However, this would be a rather oversimplified picture of the reality. Instead, it is argued here that Title V TFEU has to a certain extent received a rather special role within the Lisbon Treaty.

[186] Folz, H.-P. (2009). Die Kompetenzverteilung zwischen der Europäischen Union und ihren Mitgliedstaaten. Der Lissabonner Reformvertrag: Änderungsimpulse in einzelnen Rechts- und Politikbereichen. U. Fastenrath and C. Nowak. Berlin, Duncker & Humblot GmbH.

[187] Art 10(3), Protocol on Transitional Provisions, Treaty of Lisbon.

The purpose of this section is thus not to provide an analysis of all the changes which mark the transition from the former pillar system[188] before Lisbon into the integrated system of a merged first and third pillar after Lisbon. Instead, specific issues shall be discussed which are evidence of the special status of third pillar provisions and their preservation of intergovernmental characteristics in the Reform Treaty. To this end, this section will first look at the nature of the competence in Title V as compared to other parts of the TFEU Treaty. Second, there will be an analysis of the legal instruments available. Third, the differences in the legislative procedures will be discussed.

The Nature of the Competence

While under the previous treaty framework third pillar competences have mainly been reserved for Member States, the integrated third pillar after Lisbon has lost its intergovernmental character. Despite the fact that there is still a certain degree of Union protection in order to ensure "an area of freedom, security and justice without internal frontiers",[189] the Lisbon Treaty applies shared competences between the Union and the Member States not only in former first pillar matters but also extends them to the new Title V TFEU.[190] This means that while the third pillar has previously been protected from supremacy, direct effect[191] and pre-emption, this has changed under the Lisbon Treaty. Shared competences between the Union and the Member States imply that Union law under Title V TFEU is capable to interfere with national laws in this area and may even repress Member States' competences under certain circumstances.[192]

With the thus accumulated competences under the TFEU the Union is now able to exercise a broader range of powers specifically conferred on it. In addition, Article 352 TFEU (ex Article 308 EC) can be applied to serve as a residual provision if the provisions under the area of freedom, security and justice do not provide the necessary powers. Such a practice has previously been held to go beyond the scope of Article 308 EC since this provision was considered to be applicable to EC powers only which did not include third pillar competences.[193] However, with the integration of the third pillar such a restriction as to the scope of Article 352 TFEU concerning the application to former third pillar matters has ceased to exist. It could thus be argued that this development represents a threat which could ultimately jeopardise Title V TFEU provisions.

On the other hand, while the third pillar has previously suffered from the expanding application of the Community method and the protection thereof by the use of Article 47 (Amsterdam) TEU,[194] such practice may even be reversed in future cases. With the integration of the third pillar into the realm of the newly defined European Union, general legal basis principles apply, such as the *lex specialis*

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[188] For an extensive study of the former third pillar system, see Peers, S. (2006). EU Justice and Home Affairs Law. Oxford, Oxford University Press.

[189] New Art 3(2) TEU, see also Art 67 TFEU.

[190] Art 4(2)(j) TFEU. According to Art 2(2) TFEU Member States may thus exercise their competence unless the Union has already taken action or decided to cease exercising such power. See also Protocol (No 25) on the exercise of shared competence and Declaration 18 in relation to the delimitation of such competences, both being annexed to the Treaty of Lisbon.

[191] However, an indirect effect of third pillar measures was confirmed in Case C-105/03, Criminal proceedings against Maria Pupino, [2005]: ECR I-05285.

[192] Craig, P. (2010). The Lisbon Treaty: Law, Politics, and Treaty Reform. Oxford, Oxford University Press, at page 338.

[193] See, by analogy, concerning the second pillar, joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, [2008]**:** ECR I-06351, at paras 200 and 201.

[194] See Case C-170/96, Commission of the European Communities v Council of the European Union (Airport Transit Visa), [1998]**:** ECR I-02763; Case C-176/03 Commission of the European Communities v Council of the European Union (Environmental Crime), [2005]**:** ECR I-07879; Case C-440/05 Commission of the European Communities v Council of the European Union (Ship-Source Pollution), [2007]**:** ECR I-09097.

derogat legi generali principle. If the Court of Justice thus considers a provision under Title V TFEU more specific than another competing but more general provision (e.g. Article 114 TFEU), the former could serve as a legal basis for a proposed measure rather than the latter. One could assume that this could potentially widen the scope of provisions under the former third pillar which could be applied more frequently after Lisbon. However, even if this is highly desirable, such an outcome is rather unlikely before the Court of Justice due to the rather limited application of the *lex specialis derogat legi generali* principle.

However, despite the explicit statement in Article 4(2)(j) TFEU that the competence to regulate in the area of freedom, security and justice shall be shared between the Union and the Member States, some provisions under Title V TFEU indicate that there may be a derogation from this general rule. For example, this is the case in Article 82(2) TFEU which provides for 'minimum rules' to be established, explicitly entitling Member States to adopting or maintaining more stringent measures. Similarly, Article 83 TFEU also refers to 'minimum rules' and, although there is no explicit statement as to whether Member States are allowed to adopt stricter rules, such a meaning could well be implied. Under the old legislative framework this was a clear indicator for the existence of complementary competences. However, under the Lisbon Treaty 'complementary' competences are being confined to a 'supporting' nature[195] and any minimum harmonisation rules thus have to be considered to characterise shared competences.[196] This classification of competences under the new treaty framework has been criticised on the grounds that this leads to an increased number of so-called "competence cocktails", i.e. different types of competences within one policy area,[197] which may have rather dramatic consequences for legal basis litigation.

Legal Instruments

Under the old framework, third pillar legal instruments were different to those under the first pillar. While Article 249 EC provided that the first pillar set of instruments included regulations, directives, decisions, recommendations, and opinions; Article 34 (Amsterdam) TEU allowed for the adoption of common positions, framework decisions, decisions, and conventions under the third pillar. This differentiation between first and third pillar instruments has been abolished with the introduction of the Treaty of Lisbon. The entire set of third pillar instruments has disappeared and has been replaced with the instruments already available under the first pillar before Lisbon. Any instruments adopted under the new Title V TFEU now have to be in accordance with Article 288 TFEU which is similar to the former Article 249 EC. The latter has been amended slightly as regards the binding effect of decisions: According to the new Article 288 TFEU decisions shall, as a general rule, be binding in its entirety unless such decisions are addressed to someone specific in which case they shall be binding only on them. As regards the nature of the instruments available, the Lisbon Treaty distinguishes between legislative acts (Article 289 TFEU), delegated acts (Article 290 TFEU), and implementing acts (Article 291 TFEU).[198]

Legislative Procedures

Under the old Treaty framework, provisions on third pillar matters allowed for specific legislative procedures, different to those under the first pillar. The co-decision procedure was regularly adopted for first pillar measures (Article 249 EC); the Commission was equipped with a monopoly to submit

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[195] Art 6 TFEU.

[196] Art 2(6) TFEU.

[197] See Schütze, R. (2008). "Lisbon and the federal order of competences: a prospective analysis." European Law Review **33**(5): 709-722.

[198] This applies to regulations, directives, and decisions.

proposals subsequently to which the Council was acting by a qualified majority (Article 251(2) EC). In contrast to this, an initiative under the third pillar could also be made by any Member State upon which the Council was acting unanimously (Article 34 (Amsterdam) TEU); it was required to merely consult the European Parliament (Article 39 (Amsterdam) TEU). With the introduction of the Treaty of Lisbon the so-called 'ordinary legislative procedure' has been introduced according to which legislative regulations, directives, and decisions shall be implemented (Article 289(1) TFEU). The co-decision procedure now constitutes the rule, while consultation shall be sufficient only in specific circumstances (so-called 'special legislative procedure', Article 289(2) TFEU). Under the 'ordinary legislative procedure' the Commission retains its monopoly for proposals (Article 294(2) TFEU) which is further supported by Article 293(1) TFEU providing that such proposals can only be amended by unanimous Council decisions save those exceptions listed in the provision. Qualified majority voting is being applied regularly (Article 294 TFEU).

With the integration of the third pillar into the TFEU under Title V, it could generally be assumed that the 'ordinary legislative procedure' applies equally to the provisions under this Title. However, it can be observed that certain exceptions are incorporated into the provisions under Title V which allow for derogation from the 'ordinary legislative procedure'. According to Article 76 TFEU any measure concerning judicial cooperation in criminal matters as laid down in Chapter 4, concerning police cooperation as specified in Chapter 5, as well as the administrative cooperation after Article 74 TFEU may not only be adopted on a proposal from the Commission (Article 76(a) TFEU) but also on the initiative of a quarter of the Member States (Article 76(b) TFEU). Thus, the Member States have managed to retain a certain degree of their right of initiative as regards these former third pillar measures without leaving it entirely up to the Commission to bring in proposals. It can further be observed that the 'ordinary legislative procedure' is far away from constituting the regular procedure for provisions under Title V TFEU. Instead, the 'special legislative procedure', as way of derogating from the 'ordinary legislative procedure', can be applied accordingly.[199] Under this 'special legislative procedure' the Council shall act unanimously, while it is usually sufficient to merely consult the Parliament. It has been claimed by Hofmann that with the introduction of the 'ordinary legislative procedure' far less legal basis problems will occur.[200] This reasoning may only partly be supported here. While it could true that the introduction of the 'ordinary legislative procedure' can bring about a greater unity for the legislative procedure amongst former first pillar provision, this does not apply to the integrated third pillar provisions. Instead, Title V TFEU could still be considered as distinctive in comparison to the other provisions under the TFEU. Therefore, legal basis problems are still likely to occur.

Despite the European Parliament's increased influence in the legislative procedure after Lisbon as regards the integrated third pillar, national parliaments retain certain responsibilities. In particular, national parliaments are responsible to ensure that proposed measures under Chapters 4 and 5 of Title V TFEU comply with the principle of subsidiarity (Article 69 TFEU). Another peculiarity of Title V provisions is the limited jurisdiction of the Court of Justice. Although the former Article 35 (Amsterdam) TEU has been abolished, the new Article 276 TFEU still provides for an exceptional treatment of Chapters 4 and 5 of Title V as regards operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States which can escape from scrutiny by the Court of Justice.[201] It has been pointed out by Ladenburger that these provisions can be seen as a balance between the need to abolish the

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[199] Arts 77(3), 81(3), 83(2), 86(1), 87(3), and 89 TFEU.

[200] Hofmann, H. (2009). "Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality." European Law Journal **15**(4): 482-505, at page 488.

[201] On a detailed analysis concerning the Court's jurisdiction under the former system, the transitional period and under the Lisbon Treaty after the transitional period, see Peers, S. (2008). "Finally 'Fit for Purpose'? The Treaty of Lisbon and the End of the Third Pillar Legal Order." Yearbook of European Law **27**: 47-64, at pages 48-62.

"institutional weaknesses of the [former] Third Pillar" and the desire to maintain "some particularities of an area traditionally perceived as close to the concept of sovereignty of the national state."[202]

A further specificity of the provisions under Title V TFEU is the availability of emergency brakes and opt-outs which do not exist in most of the other TFEU provisions. Articles under Title V which allow for an emergency brake include Articles 82(3) and 83(3) TFEU enabling the Member States to suspend the 'ordinary legislative procedure' on the grounds that the proposed measure affects the criminal justice system fundamentally.[203] Opt-outs are possible under Articles 86(1) and 87(3) TFEU which permit a certain amount of Member States being in favour of a proposed measure to go ahead with its adoption, while others do not. This facilitates differential integration[204] in the area of freedom, security and justice. Thus, it can be argued that it is in the interest of Member States to adopt measures on the basis of those Title-V provisions which leave it up to them to choose whether to participate or not. In particular, those Member States which would otherwise be outvoted in the Council, like for example Great Britain,[205] can benefit from such provisions which provide for opt-outs and could oppose the application of other provisions under the TFEU.[206] These exceptions are further evidence of the special character of Title V within the TFEU. The allegedly integrated third pillar has thus maintained a certain degree of distinction in legislative procedures in order to protect the integrity of the Member States in the area of freedom, security and justice.

This shall be illustrated with a hypothetical example in legal basis litigation: Assuming that a third of the Member States proposes the adoption of a regulation establishing a European Public Prosecutor's Office from Eurojust in order to combat crimes affecting the financial interests of the Union according to Article 86 TFEU. The Parliament, however, refuses to give their consent to the Council to adopt the measure under Article 86 TFEU, arguing that such a measure should rather be adopted on Article 325 TFEU[207] in accordance with the 'ordinary legislative procedure' after consulting the Court of Auditors (Article 325(4) TFEU). In this hypothetical legal basis conflict the general legal basis principles which have been established under the first pillar will have to be applied as a result of the integration of the third pillar provisions under Lisbon. Most likely, the Court will apply the 'centre of gravity' theory. By emphasising the importance of Article 325 TFEU as a legal basis for the proposed measure the centre of gravity can easily be found in favour of the more general TFEU provision to the detriment of the criminal law competence, thus deterring Member States from their possibility of enhanced cooperation. Under these circumstances, it could be argued that the application of general legal basis principles on the provisions of the integrated third pillar could potentially have the effect of rendering certain Title V provisions nugatory due to their specific character.

The only protection may flow from the *lex specialis derogat legi generali* principle which, however, could be considered as inferior to the more successfully applied 'centre of gravity' theory. In addition,

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[202] Ladenburger, C. (2008). "Police and Criminal Law in the Treaty of Lisbon: A New Dimension for the Community Method." European Constitutional Law Review **4**: 20-40, at page 31.

[203] On a detailed discussion on emergency brakes under the integrated third pillar provisions after Lisbon, see Peers, S. (2008). "EU criminal law and the Treaty of Lisbon." European Law Review **33**(4): 507-529, at pages 522-529.

[204] On a general discussion on differential integration, see Thym, D. (2006). "The political character of supranational differentiation." Ibid. **31**(6): 781-799.

[205] See e.g. Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice.

[206] It goes without saying that such rules on differential integration shall not be over-used but rather applied responsibly by the Member States, as it has been pointed out by Herlin-Karnell that "too much flexibility will lead to too much complexity", Herlin-Karnell, E. (2008). "The Lisbon Treaty and the Area of Criminal Law and Justice." European Policy Analysis **3**: 1-10, at page 7.

[207] Providing for measures to be adopted "in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies."

it could be argued that a provision can only be considered as *lex specialis* if it is compared with a more general legal basis, such as Article 114 TFEU or Article 352 TFEU. As a result, the *lex specialis derogat legi generali* principle cannot protect a Title V provision from other provisions under the TFEU than those just mentioned. Considering the eagerness of the European Commission to introduce new harmonising measures in the field of criminal law, it can be anticipated that the principle will soon be tested before the Courts. Another possible derogation from the application of Article 114 TFEU may flow from the fact that criminal law provisions now already provide an option for harmonisation themselves.[208] This may thus reduce the application of Article 114 TFEU to the area of freedom, security and justice,[209] and therefore also the need to recall the *lex specialis derogat legi generali* principle. This, however, stands in contrast to the intergovernmental feature of mutual recognition between Member States in criminal matters which has been preserved in the integrated third pillar.[210] The Lisbon Treaty is thus trying to strike a balance between cooperation mechanisms and harmonisation of criminal laws and to incorporate both in the TFEU.

As has already been pointed out by White, this may prove to be rather problematic.[211] Cooperation between Member States acknowledges their national identities to a greater extent, leaves them with a high discretion of choice, and does not prejudice their action. It can thus be argued that criminal law "reflects a piece of the national legal culture and is therefore a symbol of state sovereignty."[212] Harmonisation mechanisms on the other hand, are being imposed from the Union on the Member States by a superior act which is directly effective, thus national differences will become blurred. However, it may also be argued that mutual recognition could be seen as a concealed harmonisation in the long term: While one Member States takes a judicial decision, others will have to follow and adjust their laws, eventually leading to a harmonised approach in that field. The question which thus arises is whether it is an inevitable development that mutual recognition mechanisms will ultimately be substituted by harmonisation. On any account, it can be observed that mutual recognition in a specific area leads to a certain level of harmonisation therein: Although the actual terms are defined by the initiating Member State taking a leading decision, other Member States are obliged to recognize this decision and to comply with it. Peers even argued that a basic requirement for mutual recognition should be the existence of a minimum level of harmonisation or at least the comparability of substantive laws in criminal matters. According to him, the tension between the two approaches can only be solved by a European Public Prosecutor "who will work according to fully harmonized rules on procedure and substantive law."[213]

Safeguarding Member States' Competences

A general Community competence to harmonise in the area of criminal law was consistently denied by the Courts,[214] however, subject to certain exceptions. In the early *Casati* case, the ECJ pointed out that "criminal legislation and the rules of criminal procedure are matters for which the Member States are

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[208] Arts 67(3), 81(1), 82(1) and 83(2) TFEU.

[209] Herlin-Karnell, E. (2008). "The Treaty of Lisbon and the Criminal Law: Anything New Under the Sun?" European Journal of Law Reform **10**: 321-337, at page 336.

[210] Arts 67(3), 67(4), 70, 81(1), 81(2)(a), 82(1) and 82(2) TFEU.

[211] White, S. (2006). "Harmonisation of criminal law under the first pillar." European Law Review **31**(1): 81-92, at page 91.

[212] Vervaele, J. A. E. (2008). "The European Community and Harmonization of the Criminal Law Enforcement of Community Policy." Tiedemann Festschrift, at 7. Conclusion.

[213] Peers, S. (2004). "Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?" Common Market Law Review **41**: 5-36, at page 34.

[214] E.g. by means of general harmonisation provisions, such as Articles 94, 95, and 308 EC.

still responsible."[215] This appears to suggest certain flexibility for subsequent cases, leaving an option for a possible transferral of such responsibilities into the sphere of Community competences. The Court further made it clear in *Casati* that

> Community law also sets certain limits in [criminal law] as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons.[216]

This was affirmed in *Cowan*, in which the Court held that national "legislative provisions may not discriminate against persons to whom Community law gives the right to equal treatment or restrict the fundamental freedoms guaranteed by Community law."[217] The Court, reaffirming the general rule of Member States' responsibility, held that criminal law may indeed "be *affected* by Community law",[218] however, remained silent as to the actual scope of such an EC interference.

With the entering into force of the Treaty of Lisbon, the pillar structure has been abolished and the competences under the former third pillar have been brought within the ambit of supranational EU law. The same principles which have been established under the former first pillar in legal basis litigation could now apply to the provisions in the area of freedom, security and justice. This would even allow for the adoption of a dual legal basis for a measure which pursues a twofold objective since the new Article 40 TEU is not explicitly applicable to the area of the integrated third pillar. Thus, it could be argued that by abolishing the pillar structure the Treaty of Lisbon has also abolished the former difficulties which occurred in the course of the extension of former Community powers and the therefore arisen legal uncertainty as regards the delimitation of competences in cross-pillar matters. However, it could also be argued that due to the specific status of Title V TFEU, and its differences to other provisions under the TFEU as has been discussed above,[219] this area also needs special protection mechanisms in order to ensure its integrity and proper application of the provisions therein. As has been pointed out by Peers, this is not to return to an entirely intergovernmental character of the criminal law sphere as was the case before Lisbon.[220] Instead, this is meant as a modest attempt to divert from the rather absolute picture showing the flawlessly integrated third pillar, which certainly is not the case.

The first case concerning a legal basis dispute between a Title-V and a non-Title-V provision of the TFEU has already been brought before the Court of Justice.[221] Here, the Parliament seeks to have Council Regulation (EU) No 1286/2009[222] annulled on the grounds that it has been based on an incorrect legal basis. The with this Council Regulation amended measure, Council Regulation (EC)

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[215] Case 203/80 Criminal proceedings against Guerrino Casati, [1981]**:** ECR 02595, at para 27, emphasis added.

[216] Ibid, at para 27, second sentence.

[217] Case 186/87 Ian William Cowan v Trésor public, [1989]**:** ECR 00195, at para 19.

[218] Case C-226/97 Criminal proceedings against Johannes Martinus Lemmens, [1998]**:** ECR I-03711, at para 19, emphasis added. See also more recently Case C-61/11 PPU, Criminal proceedings against Hassen El Dridi, alias Karim Soufi, [2011]**:** ECR I-00000, at para 53.

[219] See also Ladenburger, C. (2008). "Police and Criminal Law in the Treaty of Lisbon." European Constitutional Law Review **4**: 20-40, at pages 31-37; Peers, S. (2008). "EU criminal law and the Treaty of Lisbon." European Law Review **33**(4): 507-529.

[220] Peers, S. (2011). "Mission Accomplished? EU Justice and Home Affairs Law after the Treaty of Lisbon." Common Market Law Review **48**: 661-693, at pages 692 and 693.

[221] Case C-130/10, European Parliament v Council of the European Union**:** OJ C 134/126.

[222] Council Regulation (EU) No 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban**:** OJ L 346/342.

No 881/2002,[223] was originally based on the triple legal basis of Articles 60, 301 and 308 EC. The new Council Regulation has now been based on Article 215 TFEU (ex Article 301 EC) only. The Parliament has intervened arguing that the correct legal basis should have rather been Article 75 TFEU (ex Article 60 EC) which falls under Title V TFEU. Previously, these two provisions had the same procedural requirements involving the Council acting by a qualified majority on the Commission's proposal. This allowed for a joint legal basis. However, the new provisions under the TFEU have procedural differences which may not permit a combined legal basis and which may have led the Parliament to bring this action before the Court: While Article 75 TFEU involves the Parliament to the extent that it can define the framework for measures falling under this provision jointly with the Council, Article 215 TFEU only provides for an obligation to inform the Parliament of the decisions taken by the Council. Another peculiarity is that Article 215 TFEU requires a joint proposal by the Commission and the High Representative. Article 75 TFEU on the other hand does not envisage the latter's involvement in the legislative process.

The differences between the two provisions in question concerning their substance are as follows: Article 75 TFEU may be applied as a legal basis for "measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains" in order to fight terrorism and other organised crime as set out in Article 67 TFEU.[224] In contrast to this, Article 215 TFEU concerns the adoption of restrictive measures "for the interruption or reduction, in part or completely, of economic and financial relations".[225] Action under both provisions may be directed against natural or legal persons, groups or non-State entities. However, the overarching aim of Article 215 TFEU seems to target "relations with one or more third countries",[226] which is not the case with Article 75 TFEU. In its judgment, the Court of Justice could apply the 'centre of gravity' theory, thus looking at the aim and content of the proposed measure before making a decision for either of the provisions. It is explicitly stated in the proposed measure that the "purpose of Regulation (EC) No 881/2002" and thus also of Council Regulation (EU) No 1286/2009 itself "is to prevent terrorist crimes, including terrorist financing, in order to maintain international peace and security."[227] Further, the Council Regulation provides in the replaced Article 2 for the freezing of funds and not making available of such funds concerning all persons, groups or entities listed in the annex.[228] This indeed seems more congruent with the objectives set out in Article 75 TFEU rather than Article 215 TFEU. Applying the former instead of the latter provision as a legal basis for the proposed measure would further pay tribute to the specific nature of the area of freedom, security and justice.

It may, however, also be plausible for the Court to consider the proposed measure in the light of the CFSP objective flowing from the Council Common Position 2002/402/CFSP.[229] Both Regulations have been based upon this Common Positions which allows for the European Community[230] to take

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[223] Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan: OJ L 139/139.

[224] First indent of Art 75 TFEU.

[225] Art 215(1) TFEU.

[226] Art 215(1) TFEU.

[227] At recital 11 of the preamble of Council Regulation (EU) No 1286/2009.

[228] Art 1(2) of the Council Regulation (EU) No 1286/2009.

[229] Council Common Position (2002/402/CFSP) of 27 May 2002 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organisation and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP**:** OJ L 139/134.

[230] The European Community has now been replaced and succeeded by the Union, new Art 1 TEU, third indent.

the necessary action.[231] Since this Common Position was based upon Article 15 (Amsterdam) TEU, thus falling within the CFSP area, any subsequent Regulation would have to have Article 215 TFEU as its legal base since Article 75 TFEU does not provide for the necessary 'cross-pillar' link. However, it still remains questionable whether this can be considered as the 'centre of gravity' rather than the objective to fight terrorism. Further, it is established in the case law that an amending measure does not necessarily have to be based on the same legal base as the amended measure.[232] Lastly, the provisions falling under Title V TFEU could be considered to be more specific than other more general legal bases not falling under this area. Thus, if the Court does not reach a conclusion as regards the correct legal basis by merely applying the 'centre of gravity' theory it could additionally apply the *lex specialis derogat legi generali* principle. This could potentially favour Article 75 TFEU which could be considered a *lex specialis* to Article 215 TFEU. However, as has been argued above, it is questionable whether a provision such as Article 215 TFEU could be considered as a more general provision in comparison to Article 75 TFEU since the principle may help to derogate only from general legal bases such as Articles 114 and 352 TFEU. Therefore, unless the Court declares the entire area of freedom, security and justice to be specific enough in order to trigger the application of the *lex specialis derogat legi generali* principle as a general rule to protect Title V provisions, this principle cannot be applied in the current case and, as a result, cannot protect any criminal law provisions from a potential encroachment.

Thus, if the application of such general principles does not bring about the required solution in legal basis disputes between Title-V and non-Title-V provisions of the TFEU, or if the area of freedom, security and justice therefore suffers from encroachment, the need will arise for special protection mechanisms for the integrated third pillar. This may be justified with the distinct character which has been identified for the provisions in Title V TFEU,[233] which, in turn, would uphold the continued validity of the Court's statements in *Casati* and subsequent cases that certain responsibility for criminal law matters should remain with the Member States. It could thus be possible that the Court establishes a new principle specifically aimed at Title V provisions. This could be done in the shape of a non-affection rule similar to the one provided in the new Article 40 TEU for provisions in the area of common foreign and security policy. The result of such a non-affection rule would be a clear delimitation between EU criminal law and other areas under the TFEU as well as a possible splitting of measures in borderline cases. Admittedly, the new Article 40 TEU cannot be applied directly as it only concerns the relationship between CFSP and TFEU provisions. However, the Court may nevertheless establish a similar rule along these lines as regards the area of freedom, security and justice if it turns out that this would better guarantee the effectiveness and preservation of the distinctive character of the provisions available under Title V TFEU.

Conclusion

As has been observed, the Treaty of Lisbon has not achieved to fully integrate the former third pillar into the realm of supranational EU law. The picture of a homogeneous legal system under the TFEU cannot be supported here. Instead, the area of freedom, security and justice has preserved some of its former intergovernmental features which are evidence of its specific character. While the set of legal instruments has been adjusted to the one under the former first pillar, the nature of the competence and in particular legal procedures can be identified to shape this distinctive character of Title V TFEU. This includes the application of a 'special legislative procedure', the involvement of national parliaments, Member States' rights of initiative, emergency brakes, opt-outs, as well as mutual

[231] Recital 9 of the preamble, Art 2(2) and Art 3 of the Council Common Position 2002/402/CFSP.

[232] See Case C-131/87, Commission of the European Communities v Council of the European Communities, [1989]**:** ECR 03743.

[233] See discussion above.

recognition mechanisms in criminal matters; neither of these elements can be found anywhere in the TFEU except for Title V. It can be assumed that such peculiarities have been included in Title V TFEU with the intention to protect the integrity of Member States and their distinctive role in the legislative process in criminal law matters. Therefore, by preserving a certain degree of distinctiveness for the area of freedom, security and justice and thus providing it with a special status within the TFEU, the Lisbon Treaty still grants Member States a preferential treatment in this area.

This paper has further argued that the application of general legal basis principles may not be sufficient in order to ensure the effectiveness and proper application of Title V TFEU provisions. While the 'centre of gravity' theory may be politically prejudiced or even random in border-line cases, the *lex specialis derogat legi generali* principle can only be applied under certain circumstances. Further, general provisions, such as the residual competence under Article 352 TFEU, could serve as a legal basis for a measure concerning criminal matters for which no such power is provided for in Title V TFEU, thus resulting in a continued expansion of supranational EU law into the area of freedom, security and justice. Title-V provisions are therefore endangered to suffer from encroachment from other non-Title-V provisions under the TFEU unless specific protection mechanisms are being established which can safeguard Member States' competences in the EU criminal law sphere. It has been suggested in this paper that a possible protection mechanism may be established in the shape of a non-affection rule, similar to the one provided in the new Article 40 TEU, which could be specifically targeted at Title V TFEU. This would lead to a better delimitation of competences between the area of freedom, security and justice and the other areas provided for in the TFEU. Further, this practice could result in a splitting of measures in cases where no single legal basis can be agreed upon. Overall, a clear answer from the Court of Justice in this case will be highly appreciated in the interest of legal certainty in criminal law matters.

PART II

NEW SAFEGUARDS TO RECONSTRUCT EU FEDERALISM

NATIONAL CONSTITUTIONAL IDENTITY AS A SAFEGUARD OF FEDERALISM IN EUROPE

François-Xavier Millet*

Abstract

As a matter of fact, vertical division of powers does not seem to give full satisfaction as a safeguard of federalism in the European Union, especially given the fact that it is superseded by the unity-oriented idea of integration. Here will be tested the hypothesis under which respect for national constitutional identity could qualify as a new safeguard of the balance between unity and diversity, thereby enhancing federalism together with constitutionalism in Europe.

Keywords

Federalism, Competences, Constitutional identity, Constitutionalism

Federalism is one of these blurred concepts of public law that are highly difficult to grasp. Most people will have only intuitions about its meaning; they will fail explaining what it is exactly about. Such a gap could probably remain unproblematic if the concept at stake was a minor one. However it is not. We seem indeed to be witnessing a large-scale phenomenon that could be referred to – in a slightly excessive fashion – as "federalization of the world". There is in fact an increasing trend to advocate and set up federal-like solutions for a broad range of situations. For now we may just think of the calls for fiscal federalism in Italy or the setting up of a federal regime in Iraq. In many respects, federalism seems to be nowadays the ideal political form. In this context, scholars have to tackle the issue by examining what federalism actually means and implies. Several factors have contributed to the present state of uncertainty as to the messy concept of federalism. This situation derives from the overuse and often misuse of the federalist language. A fair understanding of federalism is indeed fraught with difficulties pertaining to its focus, its perception and its methodology.

First of all, federalism is confronted with its multiple functions and focuses. It pursues indeed different aims which range from economic efficiency, accommodation of cultural diversity or vindication of state rights to limiting power and creating a community of feelings. Its focus would then evolve between the individual and the polities as federalism can be grasped both from an individualistic or holistic perspective, depending on whether it is inspired by a liberal or a communitarian philosophy.

Secondly, federalism has also to face perception-related difficulties. The mere word drags indeed different meanings from one country to another. We all know how much the "F-Word" is taboo in the EU context. Its very use was already extremely controversial at the time of the foundation of the United States: the so-called "Federalists" were actual proponents of a strong central authority whereas those who were in favour of strong state rights were named "Anti-Federalists".[234] The same strict dichotomy strikingly also applies in the EU although federalism is essentially about unity *and* diversity. That is the reason why it is hard today to use a discredited narrative which is embroiled in partisan quarrels. In any scientific debate on federalism, the scholar will therefore always have to raise a disclaimer in order to escape accusations of ideological bias.

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[234] Rightly, Shapiro prefers distinguishing nationalists (« those who advocate strong central authority ») and federalists (« those who advocate substantial diffusion of authority between the national governments and the states ») (David L. Shapiro, *Federalism : a Dialogue*, Nortwestern University Press, 1995, pp. 10-11).

Thirdly, there is a general lack of epistemology of federalism[235] whereas there is a pressing need to have one. In fact, we tend to rely on *a priori* or historically-rooted definitions to apprehend the "federative phenomenon"[236] without asking whether such an approach is adequate to grasp a concept which is so elusive and unstable in several regards. Not only does that impoverish and constrain the thought on federalism, but it questions the very relevance of an institutionally-oriented definition of a phenomenon that might be better understood as a process.

From this set of hurdles originates a situation of path dependency that prevents us from an accurate understanding of federalism, especially in the EU context. It turns out therefore to be necessary to deconstruct federalism, that is to get rid of the numerous preconceived ideas about federalism by relying on Descartes' *doute méthodique* or Derrida's theory or rather practical epistemology. According to the latter, there is no direct relation between signifier and signified and the meaning of the signifier does not result from *a priori* categories but is the outcome of experience. We should therefore make *tabula rasa* of our preconceptions and discover meanings in an inductive manner. When it comes to federalism, we suggest examining first legal arrangements to ascertain its features.[237] Our reasoning will be based on a single and straightforward assumption that is supposedly the common und unchallengeable thread of federalism: federalism is about striking a fair balance between unity and diversity. Several leading scholars insisted on what may be seen as the backbone of federalism. According to Daniel Elazar, "*federalism has to do with the need of people and polities to unite for common purposes, yet remain separate to preserve their respective integrities. It is rather like wanting to have one's cake and eat it*".[238] The same idea was conveyed by Pierre Pescatore for the EC: "*federalism is a political and legal philosophy which adapts itself to all political contexts (…) wherever and whenever two basic prerequisites are fulfilled: the search for unity, combined with genuine respect for the autonomy and the legitimate interests of the participant states"*.[239] Therefore, genuine technical and political safeguards of federalism will need to account for the tension between unity and diversity.

I will examine through these lenses the emerging narrative of national constitutional identity in the European legal space. As a matter of fact, it seems as if vertical division of powers does not give full satisfaction as a safeguard of federalism in the European Union, especially given the fact that it is superseded by the unity-oriented idea of integration. I would like to test the hypothesis under which respect for national constitutional identity could qualify as a new safeguard of the balance between unity and diversity. I will eventually examine the lessons that follow in terms of federalism and constitutionalism in the EU.

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[235] Among the few books devoting a substantial first part to methodology, see Jean-François Gaudreault-DesBiens, Fabien Gélinas (dir.*), Le fédéralisme dans tous ses états. Gouvernance, identité et méthodologie/The states and moods of federalism. Governance, identity and methodology*, Bruylant, 2005 (in particular Jean-François Gaudreault-DesBiens, Bruno Théret and Vicki Jackson's contributions).

[236] Georges Scelle, *Précis du droit des gens. Principes et systématique*, 1932, rééd. CNRS, 1984, p. 187.

[237] Already following this approach, Guy Héraud, *Les principes du fédéralisme et la fédération européenne. Contribution à la théorie juridique du fédéralisme*, Paris, Presses d'Europe, 1968, pp. 14-19.

[238] Daniel J. Elazar, *Exploring Federalism*, University of Alabama Press, 1987, p. 33. See also Kalypso Nicolaidis, « Constitutionalizing the Federal Vision ? » in A. Mennon, M. Schain (ed.), *Comparative Federalism : The European Union and the United States in Comparative Perspective*, Oxford UP, 2006, 59, p. 64 ; also « The Federal Vision, Levels of Governance and Legitimacy », in Kalypso Nicolaidis, Robert Howse, *The Federal Vision : Legitimacy and Levels of Governance in the United States and the European Union*, Oxford UP, 2001, 1, p. 27 : « unity of purpose, diversity of place and belonging ».

[239] Pierre Pescatore, « Foreword » in Terrance Sandalow & Eric Stein (ed.), *Courts and Free Markets. Perspectives from the United States and Europe*, Oxford UP, 1982. Also Armin Von Bogdandy, « The European Union as a supranational federation. A conceptual attempt in the light of the Treaty of Amsterdam » (2000) *Columbia Journal of European Law*, 6, p. 27.

Division of Powers as a Rather Unsatisfactory Safeguard of Federalism in the EU

Acknowledging the fact that vertical division of powers is one of the classical features of federal polities, the EU treaties now present a clearer catalogue of competences. In the light of the US experience and with regard to the structure of the EU, such a list will however be hard to enforce.

Division of Powers after Lisbon

Most accounts on federalism set out two main safeguards, namely participation of local entities to the decision-making process[240] and autonomy[241] through division of powers.[242] Built as a functional polity, the EC did not initially bother about division of powers. It was meant to reach broadly-defined objectives. To that end, the European institutions did not hesitate to use and overuse the different available instruments. In fact, the issue of division of powers has started becoming salient only since Maastricht but the dramatic shift took place in the past decade in the follow-up to the Declaration of Laeken attached to the treaty of Nice. Heads of States and Governments then required among other things a clear division of powers between the supranational and the national levels.

Following the recommendations of the Group on Complementary Competences within the Convention, the Constitutional Treaty and later the Lisbon Treaty anchored the principle of conferred competences (art. 4 § 1 TEU; art. 5 § 1 and 2 TEU; art. 6 TEU) and distinguished three types of competences (art. 2 TFEU), namely exclusive competences of the EU, shared competences and complementary competences. Like most federal systems based on conferral of powers, the treaties do not expressly provide for competences reserved to Member States: although article 4 § 2 TEU states that that "*the Union shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security*", it does not explicitly grant powers to the Member States; in addition, it would be inaccurate to talk about reserved competences when it comes to areas where "*the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States*" (art. 2 § 5 and art. 6 TFEU). At best, these are "retained" powers on which EU law will have an impact. In any case, by clarifying the issue of competences, the Lisbon Treaty has made a valuable effort in order to safeguard unity and autonomy for all political actors. However, it is doubtful that the Court of Justice will start enforcing the relevant provisions any time soon.

Enforcement Difficulties in the Light of the American Experience and of the EU Integrationist Ideal

Enforcement of the provisions regulating division of powers in the EU may turn out hard to enforce for reasons peculiar to federalism (as illustrated by the US example) as well as for reasons peculiar to EU integration.

Comparative analysis shows that division of competences is not always stringently enforced in federal polities. In the United States, under the Tenth Amendment to the Constitution, "*the powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively or to the people*". Despite this provision dating back to 1791, the Supreme Court has proved reluctant to strike down pieces of federal legislation adopted under the Commerce Clause

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[240] Insisting on that in a seminal article, Herbert Wechsler, « The Political Safeguards of Federalism : The Role of the States in the Composition and Selection of the National Government » (1954) *Columbia Law Review*, p. 543.

[241] Referring to *loi de participation* and *loi d'autonomie* inherent to the « federative phenomenon », see Georges Scelle, *op. cit.*, pp. 198-200.

[242] See Koen Lenaerts, « Constitutionalism and the Many Faces of Federalism », (1990) 38 *American Journal of Comparative Law* 2, p. 205 ; Daniel J. Elazar, *American Federalism : A View from the States*, Harper and Row Publishers, 3e ed., 1984, p. 2.

which would be impinging on the states' sphere of autonomy. It did so for the first time in forty years in 1976 in the famous *National League of Cities* case.[243] Since the New Deal policy and up to this date, the Supreme Court had taken a very extensive stance on the Commerce Clause, thereby allowing the Congress to legislate in matters – especially social matters – which may have been primarily regulated by the states. In this decision taken shortly after the advent of the federalist-minded Burger Court – as opposed to the human rights-minded Warren Court, the Supreme Court hold unconstitutional, as violating the limitations imposed on the scope of the federal commerce power by the Tenth Amendment, national legislation making the 1938 Fair Labour Standards Act provisions for overtime pay applicable to virtually all state and local employees. Some five years later, the Court refined its case-law and came up with four requirements that had to be fulfilled in order for a State not to be subject to federal legislation based on the Commerce Clause:[244] among them, federal acts could not regulate areas pertaining to attributes of state sovereignty or directly impinge upon states' power to freely organize activities corresponding to traditional governmental functions. It seems as if the Supreme Court was at that time quite eager to enforce the Tenth Amendment even at the expense of social breakthroughs.

However, this attempt was rather short-lived as the Court reversed its case-law in 1985 in the landmark *Garcia* ruling.[245] In this case, the abovementioned Fair Labour Standards Act was again at stake. The question – this time dealing with minimum wage – was whether employees of a local public transportation company would benefit from the federal legislation. Relying on the *Hodel* test, the employer argued that transportation came under the category "traditional state function" and, therefore, that the company would not fall within the scope of application of the federal act. Yet, the Supreme Court strongly criticized the state sovereignty approach and decided to jettison the recently-designed test. Interestingly enough, the Supreme Court did not only ground its judgement on the lack of objective criteria to determine what would qualify as a "traditional state function" but it also emphasized the futility of *a priori* definitions of state sovereignty, especially in a context where federal law and institutions have become so prominent. The Court concluded that

> "any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of the basic limitation [that the Constitution imposes to protect the States] and it must be tailored to compensate for possible failings in the national political process rather than to dictate a sacred province of state autonomy". [246]

Still, such an approach is quite striking as it entirely disregards *a priori* division of powers as being an inadequate safeguard of federalism. It is all the more noteworthy that, before the Civil War, "dual federalism" and "state rights" used to be paramount in the US as a consequence of the American conception of separation of powers. Any average undergraduate law student knows that, as opposed to Europe, a rigid separation of powers prevails in the US. That does not only hold true for the horizontal dimension but it does also for the vertical one. Still nowadays, the Supreme Court shows respect for the states by enforcing the Anticommandeering rule[247] or ensuring state sovereign immunity.[248] It even

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[243] *National League of Cities v. Usery* 426 US 833 (1976) (state-rights-minded Justice Rehnquist delivering the opinion of the Court).

[244] *Hodel v. Virginia Surface Mining* 452 US 264 (1981).

[245] *Garcia v. San Antonio Metropolitan Transit Authority* 469 US 528 (1985). See Andrzej Rapaczynski, « From Sovereignty to Process : The Jurisprudence of Federalism after *Garcia* » (1985) *Supreme Court Review*, p. 341 (noting that *Garcia* reveals the absence of a theory of federalism on the part of judges and calling for one).

[246] In emphasizing political guarantees of federalism, the supreme judges were probably inspired by Herbert Wechsler.

[247] *New York v. United States* 505 US 114 (1992) ; *Printz v. United States* 521 US 898 (1997). Under this rule, federal agents cannot ask the states to enforce federal norms which are to be implemented only by the Federal State. Calling for a looser, less dualistic approach to Anticommandeering, see Vicki C. Jackson, « Federalism and the Uses and Limits of the Law : *Printz* and Principle ? » (1989) 111 *Harvard Law Review*, p 2180 ; Roderick Hills Jr., « The Political Economy of Cooperative Federalism : Why State Autonomy Makes Sense and « Dual Sovereignty » Doesn't » (1998) *Michigan Law Review* 96, 813 .

hold in 1995 that the Congress could not have relied on the Commerce Clause in order to adopt the Gun Free School Zones Act that made a federal offence "for any individual to possess a firearm at a place that the individual knows is a school zone".[249]

The way the Supreme Court now tends to frame its argument is quite telling. It seems to be reluctant to ground its decisions on the Tenth Amendment or state sovereignty and prefers reasoning in terms of limitations to the use of the Commerce Clause or to Congress's powers. This inversion is in my view illustrative of the fact that what used to be the exception has become the rule: division of powers may still be enforced to a certain extent in the US without it being any longer an actual safeguard of federalism.

As to the European Union, it seems structurally at odds with an effective enforcement of distribution of competences: the EU is placed in a situation of path dependency in this respect. First of all, in the past, the ECJ has struck down a piece of EU legislation on one occasion only, in the tobacco cases.[250] In a way, that is no surprise in a functional polity which used to be – and is still – organized around objectives. Unlike other federal polities such as Germany (art. 93 I 4 Fundamental Law) or Switzerland (art. 189 Constitution), we still cannot find any provision in the Lisbon treaty empowering the ECJ to enforce the division of powers between the Member States and the European Union. Secondly, as opposed to the US, there has never been such a thing as dual federalism in Europe because of the integrationist *telos* of the EU. The EU has to face structural constraints that impede it to sanction effectively vertical division of powers. These constraints have to do with the parent ideas of integration, "ever closer union", integrative federalism and *acquis communautaire*. The mere concept of integration underlines indeed a centripetal force[251] leading to the grant of new powers to the European Union, such an attribution of competences being meant to be definitive as emphasized by the *Costa v. Enel* ruling.

It would not be very useful here to present in detail the numerous devices that have been used by the ECJ in order to create new powers for the EU and to broaden the scope of application of EU law beyond the strict ambit of EU competences. The very extension of EU powers – better known as "creeping competences" – seems virtually so limitless that a high-profile scholar and practitioner of EU law even stated that there was "*simply no nucleus of sovereignty that the Member State can invoke as such against the Community*".[252]

It is however plain that while division of powers is theoretically speaking an adequate safeguard of diversity, the EU gives more weight to integration, i.e. to a safeguard of unity.[253] With the latter principle pulling into another direction and despite the recent evolutions of the law, it is hard to see how division of powers can become – in the short run at least – an adequate safeguard of federalism in the EU as it is not strong enough to counterbalance integration in order to reach some kind of equilibrium. Last but not least, one should not be mistaken by the subsidiarity principle. It is by no way a means of vesting powers to the Member States but it is merely a flexible tool regulating the

(Contd.)

[248] *Alden v. Maine* 527 US 706 (1999).

[249] *United States v. Lopez* 514 US 549 (1995).

[250] See Koen Lenaerts, « L'encadrement par le droit de l'Union européenne des compétences des Etats membres », in *Chemins d'Europe. Mélanges en l'honneur de Jean-Paul Jacqué*, Dalloz, 2010, p. 421.

[251] According to an important neofunctionalist, integration is « *the process whereby political actors in several, distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess and demand jurisdiction over the preexisting national states* » (Ernst Haas, *The Uniting of Europe : Political, Social and Economic Forces 1950-57*, Stanford UP, p. 16).

[252] Koen Lenaerts, *op. cit.*, 1990, p. 220.

[253] Armin Von Bogdandy, « Constitutional Principles », in Armin Von Bogdandy, Jürgen Bast (ed.), *Principles of European Constitutional Law*, Modern Studies in European Law, Hart Publishing, 2005, p. 3.

exercise of *EU* competences aiming at ensuring efficiency of political action. We must then look at alternative safeguards that could strike a balance between unity and diversity.

Respect for Member State Constitutional Identity as an Alternative Safeguard of Federalism

In the context of the European Union, if division of powers is not the adequate tool for preserving federalism, we may wonder which alternative safeguards are available. The whole European project seems to be unity-oriented to such an extent that one might doubt finding adequate substitutes. However, we have observed in the past ten years the emergence of a new and rather unusual narrative in the European legal space, which may turn out to be an efficient and effective political and judicial safeguard of federalism embracing both unity and diversity.

A New Narrative in the European Legal Space

A new discourse known as "constitutional identity" is gradually emerging both in the EU and in some domestic legal orders, such as France, Germany or Poland. Initially referring to a European identity founded on Habermassian constitutional patriotism, it has started being applied to the Member States by national courts but also, to a lesser extent, by the ECJ. Even if the concept is still undetermined, it seems to include all national rules, values and principles of constitutional significance deemed worth of respect by contradicting EU norms.

The narrative of constitutional identity can be traced back to the national identity clause featuring in the Treaty on the European Union since Maastricht. Originally, article F § 1 EU (which became art. 6 § 3 EU in Amsterdam) was quite straightforward mentioning that the EU should respect the national identities of the Member States. Falling outside the scope of competences of the ECJ, the Luxemburg Court referred to it only once when it described the preservation of national identity as a "*legitimate aim*".[254] Under the Lisbon Treaty, "constitutional" identity has started to take shape as article 4 § 2 EU now reads: "The Union shall respect the equality of Member States before the Treaties as well as their *national identities, inherent in their fundamental structures, political and constitutional*, inclusive of regional and local self-government ». It is most likely this convoluted wording – which, incidentally, was taken from the Constitutional Treaty – that led the French, German and Polish constitutional courts[255] to coin the concept of constitutional identity. In a way, that was quite cunning on their part as they relied on a EU notion that transpires from the treaty in order to set a limit to the action of the very EU institutions. We will see further down the implications for the EU.

Interestingly, the ECJ itself seems to be incrementally resorting to art. 4 § 2 EU even though the very concept of constitutional identity has been only used by a few advocate generals. First, in the *Sayn-Wittgenstein* judgment,[256] the Court referred to "national" identity as some second order reason to restrict freedom of circulation in virtue of the prohibition of nobility titles by the Austrian Constitution. In *Runevic-Vardyn*,[257] the Court decided that protection for Lituania's national official language flowed from article 4 § 2 EU. Second, the narrative of constitutional identity was put forward by a handful of advocate generals in their opinions. The most elaborate version is to be found in

[254] Case C-473/93, *Commission v. Luxemburg* [1996] ECR I-3207.

[255] Conseil constitutionnel, case n° 2006-540 DC, 27 july 2006, *Law on copyright and related rights in the information society*, *Rec.* 88 ; BVerfG, 2 BvE 2/08, *Lissabon-Urteil* of 30 june 2009 ; Polish Constitutional Tribunal, K 32/09, *Lisbon-judgment* of 24 november 2010.

[256] Case C-208/09, *Sayn-Wittgenstein* [2010] (not reported yet).

[257] Case C-391/09, *Runevic Vardyn* [2011][(not reported yet).

Miguel Poiares Maduro's opinion in the *Michaniki* case.[258] After explaining that respect for constitutional identity dated back to the origins of the European construction, he called for qualified respect of the most important principles of domestic constitutions subject to a proportionality test. Thirdly, even where the notion of constitutional identity is absent, the ECJ does anyhow take into account national constitutional provisions, although it usually bypasses the hurdle by delivering a decision formally based on other grounds.

Even though "constitutional identity" will most probably not always have the same meaning in EU law and in domestic law, what is crucial in an account on the safeguards of federalism is that the same expression is being used in both spheres. It could qualify therefore as a gateway between both legal orders and could then be apt to safeguard federalism, i.e. to reach a balance between unity and diversity.

A Political and Judicial Safeguard of Federalism in the EU

When it comes to the EU, the subsidiarity principle is usually seen as the best candidate in order to safeguard federalism.[259] I take here the view that respect for constitutional identity of the Member State is better equipped for this purpose.

Even if the subsidiarity check was substantially improved in Lisbon, we still may have doubts as to its effectiveness. First of all, its scope is limited to shared competences. Therefore, it should theoretically not impact on EU exclusive competences nor, a *fortiori*, on the scope of application of EU law. Secondly, numerous hurdles should be overcome before the decision is taken of brushing aside a draft EU legislative act for breach of subsidiarity: one third of national parliaments have to raise such a breach in a reasoned opinion sent to the EU institutions. It is ultimately up to the Commission to withdraw, amend or maintain the text.[260] Thirdly, subsidiarity as it is designed seems to be more concerned with economic efficiency, rational choice and – to a certain extent – democratic legitimacy than with respect for specific national characteristics. Such a respect does not indeed necessary entail the exercise of a competence by the Member States while subsidiarity is essentially about that. Furthermore, a *specific* feature cannot be effectively taken into account by a control mechanism which requires a qualified minority of national parliaments.

Against this background, respect for national constitutional identity is more apt to be a political and judicial safeguard of federalism. To start with, its scope is quite broad. Indeed, il flows from the very wording of article 4 EU that it virtually encompasses all areas of competences of the European Union, including exclusive competences. It will therefore regulate the exercise of EU powers. Moreover, it can be seen as an interpretive principle in the broad scope of application of EU law, requiring constructions of EU norms in conformity – or at least compatibility – with constitutional identity.[261] It will therefore be put forward not only against secondary EU acts but equally against primary law and domestic implementation measures.

As a political safeguard, it can be raised at different stages of the decision-making process. We can very well imagine a Member State Government raising claims pertaining to constitutional identity

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[258] Case C-213/07, *Michaniki* [2008] ECR I-9999.

[259] For instance George A. Bermann, « Taking Subsidiarity Seriously : Federalism in the European Community and the United States » 94 *Columbia Law Review* 331 (1994) ; Giuseppe Martinico, « Dating Cinderella : On Subsidiarity as a Political Safeguard of Federalism in the European Union » (2011) 17 *European Public Law* 4, p. 649.

[260] See protocol n° 2 on the application of the principles of subsidiarity and proportionality (attached to the Lisbon Treaty).

[261] Advocating such an interpretation, Bruno de Witte, « Droit communautaire et valeurs constitutionnelles nationales », *Droits* n° 14, 1991, 87, 95-96.

during negotiations of a secondary norm in the Council.[262] Constitutional identity would then serve as a legal version of the Luxemburg compromise. As a judicial safeguard, the ECJ is likely to enforce it after entering into dialogue with the other main actors of identity, namely national courts. Such a dialogue is made necessary by the dual use of the concept of constitutional identity. Unilateral claims would not make sense as they would undoubtedly lead to a conflict. Therefore, I contend that constitutional courts have been using the latter concept with a cooperative purpose.

Now, we might object that respect for constitutional identity will only serve diversity and not unity and, therefore, will not qualify as a genuine safeguard of federalism. Here comes the crux of the argument on constitutional identity as a safeguard of *both* unity and diversity. As paradoxical as it may seem, it would not be only a way of enhancing diversity in the EU but it would contribute to find a fair balance. Indeed, constitutional identity will serve unity in a formal and a substantive way. As to the formal side, it can be considered as a full-fledged principle of EU law. It is already part of it and it does not disrupt the whole European project (cf. idea of "Europeanization of counter-limits") even if it probably qualifies an absolute approach to primacy. Speaking in substance, "constitutional identity" is not merely national identity as reflected by the domestic constitution. From an EU perspective, it is much more about elements of identity serving the whole constitutionalist project which especially transpires from the statement of founding common values in article 2 EU. Those values relating to human rights, dignity, democracy and the rule of law set an hermeneutic framework comparable to homogeneity clauses in federal states, within which national constitutional identities can blossom. Incidentally, such an approach turns out to be absolutely in line with post-modern conceptions of constitutionalism. It leads us to rethink the European Union as a federal union *with* constitutionalism.

Which Lessons for the Legal Nature of the EU: Federalism *with* Constitutionalism?

Constitutional and EU scholarship has recently have come up with new theories elaborating on the legal and political nature of the EU. A strand of academics have extensively written on "constitutional pluralism"[263] or have attempted at building up a theory of the federation distinct from traditional theories of federal states or confederations.[264] Trying to build a theory from the practice, I contend that a full-fledged recognition of respect for constitutional identity in the EU could have far-reaching consequences for the nature of the European Union as that would strengthen both its constitutional and federal dimensions.

The EU as a Constitutional Union

Prima facie, we might argue that enhancing constitutional identity would take place at the expense of constitutionalism and would benefit intergovernmentalism. It is striking that most accounts on European constitutionalism stress unity-oriented principles to describe it and, therefore, to set apart constitutionalism and intergovernmentalism. They will invariably address primacy and direct effect,

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[262] This could very much happen in the wake of a reasoned opinion of their own Parliament in the exercise of the subsidiarity check where it would smuggle in constitutional identity considerations.

[263] MACCORMICK N., « Juridical Pluralism and the Risk of Constitutional Conflict », *in Questioning Sovereignty. Law, State and Nation in the European Commonwealth*, Oxford University Press, Oxford, 1999, p. 97 ; WALKER N., « The Idea of Constitutional Pluralism », *Modern Law Review*, 2002, vol. 65, n° 3, p. 317 ; WEILER J. H. H., « Fédéralisme et constitutionnalisme. Le Sonderweg de l'Europe », *in* DEHOUSSE R., *op. cit.*, p. 151 ; POIARES MADURO M., « Contrapunctual Law : Europe's Constitutional Pluralism in Action », *in* WALKER N. (dir.), *Sovereignty in Transition*, Hart Publishing, 2003, p. 501 ; KUMM M., « The Jurisprudence of Constitutional Conflict : Constitutional Supremacy in Europe before and after the Constitutional Treaty », *European Law Journal*, 2005, vol. 11, p. 262.

[264] Olivier Beaud, *Théorie de la Fédération*, Léviathan, PUF, 2007 ; Christoph Schönberger, « Die Europäische Union als Bund. Zugleich ein Beitrag zur Verabschiedung des Staatenbund-Bundesstaat Schemas », *Archiv des Öffentlichen Rechts* 129 (2004), p. 81 ; Christoph Schönberger, *Unionsbürger : Europas föderales Bürgerrecht in vergleichender Sicht*, Mohr Siebeck, 2005.

effet utile, the rule of law and protection of fundamental rights. It seems as if the autonomy of the EU legal order would be enhanced if the EU were to declare its independence from the Member States.

In my view, such an approach reflects a one-sided conception of constitutionalism. It embodies to a large extent the voluntaristic and centripetal approach specific to French and American constitutionalism: building up a people through the universal ideals of the rule of law.[265] Yet, such a conception is probably outdated since the demise of the Constitutional Treaty which seems to have put an end to the revolutionary idea of the "constitutional moment", the constitutional "grand soir". Nevertheless, that does not mean that constitutionalism in Europe has been buried for good, the former concept having always taken different forms.[266]

When it comes to the EU, we can identify a specific type of constitutionalism which, in a way, has seemingly drifted from its Franco-American form to a more British aspect. First of all, there is no single document called "Constitution of the European Union" but a great deal of constitutional norms making up a "composite constitution"[267] or a *Verfassungsverbund* as German scholars would put it. According to Ingolf Pernice, "*Europe already has a "multilevel constitution": a constitution made up of the constitutions of the Member States bound together by a complementary constitutional body consisting of the European Treaties* ».[268] Unlike the competing notion of *Staatenverbund*,[269] this concept adequately describes the fact that the European Union does not have only to rely on Member States' enforcement machinery (*puissance publique*) but also on the Member States constitutions in order to ensure its functioning and its legitimacy. Obviously, it does not indistinctly recognize all provisions of the domestic constitutions but it will take into account the most crucial and significant ones: not only does EU law formally do so when it comes to constitutional identity, but also when it comes to treaty revisions or protection of fundamental rights (see art. 53 Charter). Secondly, the EU has gradually become a constitutional polity through fundamental rights. Initially missing in the EU treaties, the ECJ started to protect them as general principles of EC law. In the Amsterdam Treaty, their status was significantly enhanced as they became "founding principles" of the EU and were subject to a sanction mechanism in case of serious breaches. The EU has now a specific and enforceable Charter of fundamental rights. Thirdly, with the recognition of national constitutional identities, the EU would mix common and specific constitutional traditions. Yet, we know that, across the Channel, constitutionalism is the result of incremental sedimentation of traditions. In the European case, it is still unclear whether state constitutions are to be then interpreted only in a backward-looking manner. The answer is probably no as it would otherwise hallow entrenched conceptions of identity that may be at odds with the European ideals.[270]

One might object that constitutional identity could still run against constitutionalism in its liberal acceptation, i.e. a set of values and principles aiming at ensuring limitation of power through law. Such a possibility is most accurately expressed in German with the words "*konstitutionnelle Verfassungsidentität*". This expression clearly conveys the feeling that the identity of the Constitution could be unconstitutional in a way. What about the new Hungarian Constitution? What about Turkey after its eventual accession to the EU if its Constitution still needs reforming? That is the reason why,

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[265] For a comparative analysis of French and American constitutionalism as opposed to the German and British versions, see C. Möllers in Von Bogdandy, Bast, *op. cit*., 2005.

[266] See Matej Avbelj, « Questioning EU constitutionalisms », (2008) 9 *German Law Journal* 1, 1.

[267] Leonard F.M. Besselink, *A Composite European Constitution*, Europa Law Publishing, Groningen, 2007.

[268] Ingolf Pernice, « Multilevel Constitutionalism and the Treaty of Amsterdam : European constitution-making revisited ? » (1999) *CMLR* 36, 703, p. 707.

[269] This concept used by the Federal Constitutional Court refers to an institutionalised association or union between States. Unlike *Verfassungsverbund*, it stresses the importance of sovereignty and politics rather than the constitutions, the law and the citizens. See Christoph Schönberger, *op. cit*., p. 118.

[270] Calling for non-traditional interpretations of state constitutions in the US, Paul W. Kahn, « Interpretation and Authority in State Constitutionalism » (1993) 106 *Harvard Law Review* 1147.

in accordance with its post-modern definition, constitutional identity has to be truly constitutional from the EU perspective. This certainly opens up threats of conflicts in the European legal space as respect for state identity is subject to respect for the common constitutional values set out in article 2 TEU. It is however the price to pay so that constitutional identity can enhance constitutionalism together with federalism in the EU.

The EU as a Federal Union

In a context where constitutionalism is strengthened through constitutional identity, what kind of federalism does the latter account for? In my view, it strikes a middle ground between liberal and communitarian philosophies and tends to set aside traditional concepts such as sovereignty and vertical division of powers.

First, respect for constitutional identity of the Member States cannot be entirely understood from either an individualistic or a holistic point of view. Against the first perspective, its identity dimension will naturally underline the specific past and present features of a community. Against the second perspective, its constitutional dimension will naturally underline the place of the individual. In fact, constitutional identity will be about the *homme situé*[271] and is therefore very much in line with theories of liberal nationalism[272] and the like.[273] Although the unity component of federal States is usually very strong, it is noteworthy that they sometimes take into consideration the constitutions of their member states not only in the case of a better protection of human rights[274] but also in order to take into account some of their specificities, notably in religious and moral matters.[275] This accounts for diversity of belonging in federal polities and it should therefore *a fortiori* inspire the EU.

Second, I also claim that a European Union founded on constitutional identity brushes aside the issue of sovereignty. In EU law, words definitely matter since the construction of a new legal order needs symbols to enhance its legitimacy and find some roots.[276] Now, it is striking to note that the narrative of sovereignty is absent on the European plane whereas it is still paramount in domestic law and international law. We can easily understand such an astounding silence since (absolute) sovereignty has always been blamed by the founding fathers for encouraging warfare. The sovereignty rhetoric is therefore not particularly welcome in Europe. Yet, does the narrative of constitutional identity smuggle in sovereignty through the back door? I see both concepts as essentially different. On the one side, sovereignty still tends to be associated with absolute power, primacy of politics over law, of the collective over the individual. On the other side, constitutional identity carries opposite values: limitation of power, reign of law, primacy of the individual over the group. This is entirely in line with constitutionalism but also with liberal-national federalism.

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[271] Althusius'theory already took the *homme situé* as a starting point. See Chantal Millon-Delsol, *L'Etat subsidiaire. Ingérence et non-ingérence de l'Etat : le principe de subsidiarité aux fondements de l'histoire européenne*, Léviathan, PUF, 1992, pp. 47f.

[272] The main exponent of this theory being David Miller in *On Nationality*, Oxford UP, 1997.

[273] I think especially of Kymlicka and its liberal approach of collective rights being actually rights of individuals belonging to a certain community (Will Kymlicka, *Multicultural Citizenship*, Oxford UP, 1997). We can also refer to Joseph Weiler's republican conception of rights which take into account societal interests (« Fundamental rights and fundamental boundaries : on the conflict of standards and values in the European legal space », in WEILER J.H.H., *The Constitution of Europe. « Do the new clothes have an emperor ? » and other essays on European integration*, Cambridge UP, 1999, 102).

[274] In the US, see *Pruneyard Shopping Center v. Robins* 447 US 74 (1980) (Justice Rehnquist delivering the opinion of the Court).

[275] In the US, cf. case law on obscenity : *Miller v. California* 413 US 15, 37 (1973) ; *Paris Adult Theater I v. Slaton* 413 US 49 (1973).

[276] For instance about the European « Constitution », M. Poiares Maduro, « The Importance of Being Called Constitution. Constitutional authority and authority of constitutionalism » (2005) 3 *I.CON* 2-3, 332.

Several authors have insisted on the fact that sovereignty and federalism collided.[277] Most of them did so on the basis of Bodin's absolute and indivisible conception of sovereignty. They saw a mere technical or formal incompatibility where there is arguably a structural problem. Carl Friedrich – whose theory of federalism, inspired by Althusius, I entirely subscribed to when it comes to understanding the EU – stressed on its part the antinomy between federalism and unity-oriented, hierarchy-minded sovereignty: *« there is federalism only where a set of political communities coexist and interact as autonomous bodies united in a common order that is itself autonomous. There can be no sovereign in a federal system. In such a political order, autonomy and sovereignty are mutually exclusive (…). No one has the « last word »* ».[278]

The reader may object that we could equally deconstruct sovereignty in order to make it fit with federalism.[279] I actually doubt it since the interpretation of sovereignty has to face textual and etymological constraints. I hold the view that sovereignty will necessarily be therefore a concept referring to political ultimate power, eventually exercised in a revolutionary or semi-revolutionary way by one person or a group of people that decide to call the shots. The European Union does then exist only to the extent that sovereignty is not akin to its very definition. Against this background, the new narrative of constitutional identity embodies a paradigmatic shift that admirably matches with what the EU is meant to be about: ensuring peace through law and trade, not politics.

By the same token, the erosion of the distribution of competences underlines new practices of federalism calling for new theoretical approaches.[280] In a pluralist legal space characterized by intertwined and overlapping legal orders, we can hardly revive a dualist approach[281] and we should instead rely on new remedies. Nowadays, it is extremely difficult to determine ex ante *who s*hould exercise a competence X or Y and legal tools such as subsidiarity are highly valuable to the extent that they guarantee flexibility ex post. The key issue nowadays is *how* to exercise the competence X or Y. It is here interesting to note some parallel moves: on the one hand, the Union is to exercise its powers with due regard and respect for constitutional identity of the Member State; on the other hand, the Member States should exercise their own powers with due regard and respect for EU law as illustrated by the retained powers.[282]

Both situations clearly show that there is a need for mutual loyalty in the European legal space. Comparing the US, the EU and Germany, Daniel Halberstam distinguished between an entitlements approach and a loyalty approach.[283] The former *"takes a federal constitution as granting each level or unit of government a set of regulatory tools that may be used without regard to whether the exercise of these powers serves the system of democratic governance as a whole »* while the latter « *insists that each level or unit of government must always act to ensure the proper functioning of the system of*

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[277] See Jean-Philippe Feldman, *La bataille américaine du fédéralisme, John C. Calhoun et l'annulation (1828-1833),*Léviathan, PUF, 2004 ; Olivier Beaud, « Fédéralisme et souveraineté. Notes pour une théorie constitutionnelle de la Fédération », (1998) 1 *Revue du droit public* 83 ; Thierry Chopin, *La République « une et divisible ». Les fondements de la Fédération américaine,* Plon, 2002.

[278] Carl J. Friedrich, *Constitutional Government and Democracy : Theory and Practice in Europe and America*, Ginn and Company, 1950.

[279] See the numerous attempts at theorizing « shared sovereignty » whereas we should just discard the word to describe the EU as the same idea could be conveyed for instance by « shared power ».

[280] Already, Carl J. Friedrich was speaking of « *the beginning of the end of the traditional legal notions related to problems of sovereignty or distribution of competences and institutional structures* ».

[281] Dualist federalism is in our view an expression of dualism between legal orders. It does not fit any longer the new relationships between orders.

[282] See Lena Boucon's contribution in this volume.

[283] Daniel Halberstam, « Of Power and Responsibiity : The Political Morality of Federal Systems » (2004) 90 *Virginia Law Review* 3, 731.

governance as a whole ».[284] In the context of the European Union, the entitlements approach seems to coincide largely with the division of powers doctrine whereas the loyalty approach fits particularly well our thesis. Interestingly, Halberstam's stated preference for loyalty over entitlements echoes very much the *Cilfit* case[285] where the ECJ made clear that interpretation of EU law should be conducted "in the light of the provisions of community law *as a whole*". Such a conception underlines the fact that the EU and the domestic legal orders cannot be regarded either in a dualistic or in a monistic-like hierarchical way: there is a European legal space in which every judge, be it national or supranational, is part of a community of interpreters who are required to take into account the existence of competing principles and rules, above all those embodying the identity of the respective legal orders.[286]

For those who yearn for order, it would certainly be more satisfactory to adopt a dualist approach. However, this is no longer possible, nor even appropriate. Even the national judges for whom division of powers was paramount have started minimizing it, the best illustration being Germany. In fact, in its Maastricht ruling, the Federal Constitutional Court had insisted that it would not refrain from striking down EU acts that would be deemed *ultra-vires*. If it repeated its stance in its Lisbon judgement, the Court qualified it to a large extent in the *Honeywell* ruling[287] under which a breach of Member States competences on the part of the European bodies will be punished only it is sufficiently qualified and leads to a structurally significant shift to the detriment of the Member States.

The late evolutions in EU law seem to confirm Carl Friedrich's earlier prophecies on nascent forms of federalism which can lead both to integration and differentiation. As he himself anticipated it, such a differentiated integration will not take place through an *a priori* vertical division of powers but, pragmatically, through mutual respect in the very exercise of those powers.

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[284] *Ibid*. pp. 732-734.

[285] Case 283/81, *Cilfit* [1982] ECR I-3415.

[286] Miguel Poiares Maduro, « Interpreting European Law : Judicial Adjudication in a Context of Constitutional Pluralism », 1 *EJLS* 2. In the wake of Ronald Dworkin, some scholars have elaborated on this phenomenon under the "integrity" label. See Samantha Besson, « From European Integration to European Integrity : Should European Law Speak with Just One Voice » (2004) 10 *European Law Journal* 3, 257 ; Pavlos Eleftheriadis, « Pluralism and Integrity » (2010) 23 *Ratio Juris* 3, 365.

[287] BVerfG, 2 BvR 2661/06, 6 July 2010.

THE PRINCIPLE OF PROPORTIONALITY, FEDERALISM AND JUDICIAL REVIEW IN THE LAW OF FREE MOVEMENT

Jacob Öberg*

Abstract

The subject matter of this paper is to unravel the 'federal' nature of proportionality in Union law. Does the principle of proportionality work as a safeguard of federalism or is it merely a legal tool for the Court to further market integration beyond the limits of the Treaty? If federalism refers to how powers are balanced and allocated between the central government and its constituent parts, i.e. the Union and its Member States, the simple answer to this question is that the principle of proportionality imposes limits on the regulatory freedom of the Member States in forming their national policies. In order to provide a more comprehensive response to this question this paper closely reviews the case-law of the CJEU and analyses how different standards of proportionality review may influence the allocation of power between the Member States and the Union.

Keywords

Proportionality, Restriction to free movement, Fundamental rights, Sensitive national policies, Public morality

Introduction

In the seminal article on proportionality drafted by Gráinne de Burca, the author argues that where a (member state) 'measure is seen to be primarily within the competence of the state, the Court is likely to be reluctant, unless a very important Community interest is adversely affected, to examine the proportionality of the national measure too closely'.[288]This assertion of de Burca concerning the underlying reasons behind the Court of Justice of the European Union's (the 'CJEU' or the 'Court') standard of proportionality review reveals the 'federalist' dimension of proportionality and the subject matter of this paper, which is to unravel the 'federal' nature of proportionality in Union law. Does the principle of proportionality work as a safeguard of federalism[289] or is it merely a legal tool for the Court to further market integration beyond the limits of the Treaty? If federalism refers to how powers are balanced and allocated between the central government and its constituent parts, i.e. the Union and its Member States, the simple answer to this question is that the principle of proportionality imposes limits on the regulatory freedom of the Member States in forming their national policies. [290] In order to

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[288] See De Burca, G 'The Principle of Proportionality and its application in EC law' (1993) 13 YBEL 105, p. 112.

[289] Federalism is in this respect understood as furthering both unity and diversity in the application of Union law. See Tridimas, T, *General Principles of EU law* (OUP, 2006), pp. 240-241.

[290] See Lennaerts, K 'Federalism and the rule of law: perspectives from the European Court of Justice', 33 Fordham Int'l L.J. 2009-2010, pp. 1338-1388**,** at p. 1339 and 1386; Craig, P and De Burca, G, *EU Law-Text, cases and materials* (OUP, 2008), p. 719.

provide a more comprehensive response to this question it is however necessary to closely review the case-law of the CJEU and analyse how different standards of proportionality review may influence the allocation of power between the Member States and the Union.

Prior to this, it is nevertheless useful to restate the 'proportionality test' as this is framed by the Court. According to the Court's standard formula, restrictions to the fundamental freedoms must: i) be justified by imperative requirements in the general interest,ii) be suitable for securing the attainment of the objective which they pursue (the suitability test), iii) not go beyond what is necessary in order to attain it (the least restrictive measure test, 'LRM'[291]), iv) be applied in a non-discriminatory manner and not constitute arbitrary discrimination, v) and take into account equivalent restrictions that may have been imposed by other Member States.[292] This proportionality formula appears to be a formal legal classification which says very little on how proportionality review is undertaken in a specific case concerning an alleged infringement of the free movement rules by a Member State or a private party.[293] Proportionality is in fact very context-depended in that its actual scope or meaning is conditioned on the specific circumstances of the case.[294] Proportionality as a legal classification is used to categorize a large number of cases concerned with the balancing of private and public interests and the balancing of Union interests and Member State interests.[295] These cases have sometimes very little in common and may concern completely different areas of law. The only common denominator is that they involve a proportionality assessment. Instead, the relevant matter is with what level of intensity the CJEU applies the 'suitability' test and the 'LRM' test and what factors are decisive when the Court determines the intensity with which it will undertake the proportionality test.[296]

What is meant by rigorous proportionality review? Even though it is admitted that judicial review of restrictions to the fundamental freedoms takes place on a sliding scale between very marginal review and extremely close scrutiny of the Member States' choice, I will in order to clarify the discussion in the paper, broadly distinguish between 'rigorous' or 'lenient' proportionality review in the law of free movement. [297] A 'rigorous' application of the proportionality test implies that the CJEU closely reviews whether the measure undertaken by the Member State is genuinely suitable for achieving the stated legitimate objective and if so, whether the Member State undertook the least restrictive measure for intra-community trade in order to achieve the stated legitimate objective.[298]In this regard, the Court may even go so far as to suggest alternative measures which according to it are equally appropriate for achieving the stated legitimate objective and thus take on the role as judicial policy maker.[299] As exemplified by the *Caixa Bank* case, the CJEU closely considered whether the French prohibition on the use of sight accounts was the least restrictive measure to achieve the objectives of consumer protection and the encouragement of medium and long term saving. The Court found that the

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[291] See Tridimas, *supra* note 289, pp. 209-212; Harbo, TI, *The function of proportionality analysis in European law*, Thesis submitted with a view towards obtaining a degree of Doctor of Laws of the European University Institute, 26 January 2011, p. 38.

[292] See Case C-55/94, *Gebhard*, [1995] ECR I-1931, paras. 37-38; C- 434/04, *Ahokainen and Leppik*, [2006] ECR p. I-9171, Opinion of Advocate General Maduro, para 31.

[293] See De Burca, *supra* note 288, p. 106.

[294] See Tridimas, *supra* note 289, p. 137 and 140; De Burca, *supra* note 288, p. 113.

[295] See Tridimas, *supra* note 289, p. 138.

[296] See Craig, P, *EU Administrative Law*, (OUP, 2006), p. 657 and pp. 704-711; De Burca, *supra* note 289, p. 105 and 111.

[297]See De Burca, G, *supra* note 289, p. 111 and 113; Craig, *supra* note 296, at p. 657.

[298] See Gerrards, J, 'Pluralism, Deference and the Margin of Appreciation Doctrine', *European Law Journal* 2011, vol. 17-1, pp. 80-120, at p. 88; De Burca, *supra* note 288, pp. 139-141.

[299] See Case C-104/75, *De Peijper*, [1976] ECR 613, paras. 24-28; Case C-178/84, *Commission v Germany*, [1987] ECR 1227, paras. 35-36, 51. See Chalmers, D, Davies, G, Monti, G, Tomkins , A *European Union Law*, (CUP, 2006), pp. 845-846.

prohibition was contrary to the free movement of services since it considered that this prohibition was disproportionate in relation to the objectives of protecting consumers and the encouragement of medium and long term saving. [300] 'Lenient' application of proportionality implies on the other hand implies that the CJEU gives the Member States discretion when choosing the less restrictive measure without closer scrutiny or engages in very marginal review without applying the LRM test .[301] As exemplified by the *Santa Casa* case the CJEU will thus only intervene if the measure chosen by the Member State is manifestly disproportionate, given the facts of the case, for achieving the stated objective.[302]

In the attempt of establishing a relationship between proportionality and the federalism conception, it is recognised that a rigorous application of the principle of proportionality by the Court is susceptible of furthering the fundamental freedoms at the cost of national regulatory freedom.[303] Lenient application of proportionality in relation to national measures restricting the fundamental freedoms is on the other hand liable to lead to a preservation of Member State powers to regulate the national market in the area concerned to the detriment of the fundamental freedoms.

This paper intends to analyse why the CJEU undertakes a rigorous review of proportionality in certain cases and wherefore the CJEU carry out a less rigorous proportionality review in other cases in the law of free movement. It will also be discussed how proportionality is applied to impose restrictions on the Member States' regulatory freedom and to what extent a specific standard of proportionality review maintain respectively undermines national discretion in deciding on how their national market should be regulated. The paper unfolds as follows. The first section of the paper will discuss under what circumstances that the CJEU undertakes a strict review of proportionality. This section also endeavours to explain the underlying reasons behind the CJEU's rigour review of proportionality in this type of cases. The second section of the paper examines under what conditions and why the CJEU apply proportionality in a lenient manner giving discretion to the Member States' policy choice. This section will particularly review cases concerned with sensitive national public policies and national fundamental rights concerns. The final part of the paper, will summarize the findings of the paper. As to the limitations of the paper it is recognised that the case-law on proportionality and fundamental freedoms is substantial and hence it has not been possible to review all cases. Instead of attempting to cover all cases, a selective but in-depth approach has been the chosen methodology. Consequently I have endeavoured to select cases which are controversial or arguably, because they were decided by the Grand Chamber of the Court, had a large impact on the development of the CJEU's case-law.[304]

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[300] See Case C-442/02, *CaixaBank France*, [2004] ECR I-8961, paras. 21-23.

[301] See de Burca, *supra* note 288, p. 112, 127 and 148; Tridimas, *supra* note 289, pp. 214-220; Harbo, *supra* note 291, p. 39 and 46-47.

[302] See Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International*, [2009] ECR p. I-7633, paras. 66-67, 69-71; Case C-124/97, *Läärä*, [1999] ECR p. I-6067, paras. 35-37, 39 and 42.

[303] See Maduro, M. P., *We the Court: The European Court of Justice and the European Economic Constitution*, (Hart, 1998), pp. 108-109; Tridimas, *supra* note 289, p. 207.

[304] See Skouris, V, ' Self-conception, challenges and Perspectives of EU Courts' in Ingolf Pernice, Juliane Kokott and Cheryl Sanders (eds), *The Future of the European Union Judicial System*, (Nomos 2006)

Judicial Review of Restrictions to Fundamental Freedoms: The Federalist Dimension of Proportionality

Strict proportionality review- Union regulation of the area concerned, markedly discriminatory effects on firms and citizens endeavouring to exercise their fundamental freedoms and no sensitive national public policy at stake

As a point of departure, it is recognised that restrictions to the fundamental freedoms are, as a rule, reviewed closely in the law of free movement. This is not surprising given that the four freedoms constitute the cornerstones of Union law and the European integration project.[305] Thus, the CJEU tend to analyse closely whether the national restriction to the fundamental freedom at stake is suitable for achieving the stated objective and if that is the case, the Court subsequently apply the LRM test without giving discretion to the Member States in forming their policies.[306] The cases discussed in this section, *Laval*[307] and *Caixa Bank*, are both illustrating examples of a rigorous review of both the justification offered by the defendants and the proportionality of the restriction to the fundamental freedoms.

Laval – strict justification review in the field of posted workers

I will commence my examination with discussing the *Laval* case, since this is a recent expression of the Court's stringent assessment of the 'suitability' test. The case was essentially concerned with the issue whether collective actions undertaken by Swedish trade unions, aiming to require a non-domestic service provider to sign a collective agreement which provided for more worker protection than Swedish mandatory legislation and the Posting Workers Directive[308], and which simultaneously intended to require the non-domestic service provider to enter into pay negotiations with the trade unions, was contrary to the Treaty rules on free movement of services. The relevant factual background was that, Laval un Partneri Ltd ('Laval'), a company incorporated under Latvian Law and with registered office was in Riga (Latvia), had, in early May 2004, posted several dozen workers from Latvia to work on Swedish building sites. The works were undertaken by a subsidiary company, L&P Baltic Bygg AB ('Baltic Bygg'). The work included the renovation and extension of school premises in the town of Vaxholm, in the Stockholm area. Laval, had signed, in Latvia, collective agreements with the Latvian building sector's trade union but was not bound by any collective agreement entered into with any Swedish trade union. In June 2004, contacts were established between a representative of Laval and of Baltic Bygg on the one hand, and, on the other, a delegate of local trade union branch No 1('Byggettan') of the Swedish building and public works trade union ('Byggnadsarbetareförbundet'). Negotiations were commenced with Byggettan with a view to concluding a tie-in to the collective agreement for the building sector, signed between Byggnadsarbetareförbundet and the Swedish building employers' association ('the Byggnadsarbetareförbundet collective agreement'). Byggettan also required that Laval should guarantee the Latvian workers an hourly wage of SEK 145. However, no agreement was reached.[309]Subsequently, collective action by Byggnadsarbetareförbundet and Byggettan was initiated on 2 November 2004 following advance notice of a blockade of all work at all Laval construction

[305] See Craig, *supra* note 296, at p. 704.

[306] See Gerrards, J,' Fundamental rights and other interests - should it really make a difference?', in: E. Brems (ed.), *Conflicts between Fundamental Rights*, Antwerp, (Intersentia 2008), pp.655-690, at p. 684.

[307] See Case C-341/05, *Laval un Partneri*, [2007] ECR I-11767.

[308]See Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1). ('PWD').

[309] See Case C-341/05, *Laval un Partneri*, paras. 27-30.

sites. As from 3 December 2004, the Swedish electricians' trade union (Svenska Elektrikerförbundet) ('the SEF') joined in as a solidarity action. All electrical work being carried out on the Vaxholm building site was thus halted. After the work on that site had been interrupted for some time, Baltic Bygg became the subject of liquidation proceedings and the Latvian workers posted by Laval to the Vaxholm site returned to Latvia. [310] In December 2004, Laval commenced proceedings before the Arbetsdomstolen (Swedish Labour Court) seeking inter alia a declaration as to the illegality both of the collective action by Byggnadsarbetareförbundet and Byggettan, and of the solidarity action by the SEF. Arbetsdomstolen referred to the CJEU the issue whether the collective actions undertaken by the Swedish trade unions, were contrary to Article 12 EC and Article 49 EC. [311]

In terms of the restriction, the CJEU held that the right of trade unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign a collective agreement- certain terms of which depart from the legislative provisions and establish more favourable terms and conditions of employment as regards the matters referred to in the PWD, and other matters not referred to in there–constituted a restriction on the freedom to provide services.[312]The CJEU thereafter considered the justification and stressed that the right to take collective action for the protection of the workers of the host State against possible social dumping could constitute an overriding reason of public interest, which in principle could justify restriction of one of the fundamental freedoms guaranteed by the Treaty. However, as regards the specific obligations, linked to the signing of the collective agreement for the building sector, which the trade unions sought to impose on Laval and Baltic Bygg by way of the contested blockading action, the CJEU found that this obstacle could not be justified with regard to such an objective. [313]As regards the negotiations on pay which the Swedish trade unions sought to impose, by way of the contested collective actions against Laval and Baltic Bygg, the CJEU opined that Community law certainly did not prohibit Member States from requiring such undertakings to comply with their rules on minimum pay by appropriate means. However, the CJEU found that the collective actions could not be justified in the light of the public interest objective, where the pay negotiations which the contested collective action sought to require Laval enter into formed part of a national context characterised by a lack of provisions, of any kind, which were sufficiently precise and accessible that they did render it impossible or excessively difficult in practice for Laval to determine the obligations with which it was required to comply as regards minimum pay. Consequently, the restriction was contrary to Community law.[314]

If we enter into a more detailed scrutiny of the *Laval* case, it can first be discussed whether this case really was about proportionality or whether this case was primarily concerned with the scope of the justification invoked by the trade unions. In my opinion, it appears that the case is predominantly concerned with the justification and the basic issue whether collective actions, serving to impose conditions not provided for by Swedish mandatory legislation, on foreign employers can be justified in the light of the legitimate objective of protecting posted workers. *Laval* is however relevant from a proportionality perspective in the sense that it demonstrates how the Court applies the suitability test and how strictly it scrutinize whether certain measures from private actors, namely collective actions, are considered suitable for attaining the legitimate objective of protection of workers.

[310] *Ibid.*, paras. 33-38.

[311] *Ibid*., paras 39-40.

[312] *Ibid.*, para. 99.

[313] *Ibid.*, paras. 103, 107 and 108.

[314] *Ibid.*, paras. 109-110.

The CJEU's approach must be considered as a 'rigorous' justification review for two reasons.[315] Firstly, the CJEU did not consider, within the scope of the proportionality test, whether the Latvian workers were subject to similar or essentially similar requirements in Latvia as to minimum wage and collective agreements, as was suggested by Advocate General Mengozzi. [316] If the Court had examined the protection provided by the Latvian collective agreements and found that the protection provided by the Latvian collective agreements were substantially lower than the protection provided for by Swedish statutory legislation and the Swedish collective agreements, it could be argued that the Court should have considered the collective actions as justified in order to protect Latvian workers.[317]Secondly, the CJEU did not even consider whether the objective pursued by the Swedish trade unions, protection of Swedish workers, could have been achieved by any less restrictive measures. Since there were no mandatory Swedish rules on minimum pay it is possible to agree with Advocate General Mengozzi that the collective actions serving to establish a minimum pay was indeed suitable for the protection of Latvian workers and to avoid social dumping to the detriment of Swedish workers.[318] Nevertheless, the Court did not accept this approach whereas it found that the collective actions, pursued with the intent to require Laval to sign all the terms of the 'Byggnads collective agreement prior to enter into pay negotiations, was not an appropriate means for securing the protection of workers. Since the collective action at stake was not suitable for the protection of workers it was not even necessary for the Court to consider less restrictive measures.[319]

It is further noticeable that that the trade union's justification was not assessed in the light of the free movement of services and Article 49 but assessed primarily in the light of the PWD.[320] The rigorous review of the trade union's justification can therefore primarily be explained by linking it to the implications following from the PWD and the absence of national minimum rules on wages.[321]In this respect, it is argued that the PWD in essence is a Directive which primarily intends to enhance the cross-border provision of services.[322] In this respect, the PWD must be considered as a concrete manifestation of the principles expressed in Article 49 EC. This assertion is based not only on the aim of the Directive but also on the fact that the dual legal basis for the Directive was found in the Chapter of the Rome Treaty concerning free movement of services and establishment, namely 57(2) and 66 EC (now after amendment Article 53(1) TFEU and Article 62 TFEU).[323] It is therefore logical that the restriction imposed by the collective actions are interpreted in the light of the PWD whereas PWD provides a clear limit on what restrictions that Member State can impose on the cross-border provision of services.[324] Thus, the PWD gives detailed normative guidelines on how restriction to the free movement of services protected by Article 49 EC should be assessed. The PWD basically implies that

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[315] See Deakin, S 'Regulatory Competition after Laval'**,** (10) Cambridge Yearbook of European Legal Studies, pp. 581-609, at p. 609.

[316] See Case C-341/05, *Laval un Partneri*, Opinion of Advocate General Mengozzi, paras. 263-264, 272-273, 282; Barnard, C, *Substantive Law of the EU* (OUP, 2007), pp. 378-379; Craig and De Burca, *supra* note 290, p. 820; Azoulai, L "The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization", *Common Market Law Review*, vol. 45, n° 5, October 2008, p. 1352; Chalmers et alia, *supra* note 299, pp. 840-844.

[317] See Case C-341/05, *Laval un Partneri*, Opinion of Advocate General Mengozzi, para. 273;Deakin, *supra* note 315, pp. 586-587.

[318] See Case C-341/05, *Laval un Partneri*, Opinion of Advocate General Mengozzi, paras. 255-262.

[319] See Azoulai, *supra* note 316, at p. 1352

[320] In this regard it may be noted that the Court is very focussed on discussing the scope of the PWD and its consequences for the justification review: See paras- 63-85, 108-11. See also Deakin, *supra* note 315, pp. 595-596, 599.

[321] See Barnard, *supra* note 316, p.478.

[322] Recitals 1-6 of the PWD. See Deakin, *supra* note 315, pp. 597-599.

[323] See Case C-341/05, *Laval un Partneri*, Opinion of Advocate General Mengozzi, paras. 58 and 145.

[324] *Ibid.*, at para. 149.

the host state can impose their mandatory rules on foreign employers and that the host state can impose collective agreements on foreign employers if the collective agreements have been made universally applicable.[325] When it comes to the protection of workers, the PWD's focus is on posted workers and their terms and conditions of employment, and not on workers in the host state and their protection against social dumping.[326]The Court's approach to the justification offered by the Swedish trade unions is also based on a very restrictive interpretation on how collective actions can serve the protection of workers. Protection of posted workers is in this regard considered by the Court as accomplished if the foreign undertaking respects the host state's core of minimum rules provided for by the PWD.[327]

Based on these premises, the obvious inference is that the PWD therefore prohibit the imposition of conditions and requirements for the protection of posted workers in matters which are not covered by the PWD.[328] Given that that the 'Byggnads' collective agreement had not been made universally applicable pursuant to the PWD and given that the 'Byggnads collective agreement', imposed obligations on Laval, which went further than the PWD, e.g. additional pecuniary obligations in the form of an obligation to pay additional insurance premiums, building supplements and a premium for pay review, the Court deemed the collective actions serving to impose this collective agreement as clearly disproportionate.[329] Further, whereas Sweden lacks rules on minimum pay, and whereas the pay negotiation obligations which the collective actions served to impose were not provided for by Swedish mandatory legislation and whereas the pay negotiation obligations did not constitute requirements on 'minimum pay', the Court came to the conclusions that these obligations also were disproportionate.[330]

Caixa Bank France- strict application of the LRM test in the field of financial services

Another illustrating example of a rigorous review of proportionality is the *Caixa Bank* case which concerned the issue whether French legislation which prohibited a credit institution from remunerating sight accounts in their own currency was contrary to the free movement rules. Having established that the French legislation constituted a restriction to the freedom to provide services, the CJEU considered whether this restriction could be justified. The French Government argued that that the prohibition on remuneration of sight accounts was justified on the basis of consumer protection and the encouragement of medium and long-term saving and that the prohibition was necessary for maintaining the provision of basic banking services without charge.[331]The CJEU did not consider the argument proposed by the French Government convincing and held that although consumer protection, invoked by the French Government, was a legitimate objective that could justify restrictions from the fundamental freedoms, the prohibition at issue even supposing that it ultimately presented certain benefits for the consumer, constituted a measure which clearly went beyond what was necessary to attain that objective. Even if the Court recognised that the removal of the prohibition against sight accounts entailed for consumers an increase in the cost of basic banking services, the

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[325] Case C-341/05, *Laval un Partneri*, paras. 73-80.

[326] See Joined Cases C-369 & 376/96, *Arblade* [1999] ECR 1-8453**,** para. 35; Case C-341/02, *Commission v Germany* [2005] ECR 1-2733, para. 24; Case C-341/05, *Laval un Partneri*, para. 57.

[327] Sciarra, S ' Viking and Laval: Collective Labour Rights and Market Freedoms in the Enlarged EU' *(*2007-8), 10 Cambridge Yearbook of European Legal Studies, 541, at p. 576.

[328] Case C-341/05, *Laval un Partneri* , paras. 80- 81 and Opinion of Advocate General Mengozzi, paras. 286-307.

[329] Case C-341/05, *Laval un Partneri* , paras. 20 and 83; Achtsioglou, E 'What future for trade union rights after the recent case law of the European Court of Justice?' (IREC, 2010, Workshop 4), 12. Available at <http://www.fafo.no/irec/papers/EftychiaAchtsioglou.pdf. > Last accessed at 28th September 2011.

[330] Case C-341/05, *Laval un Partneri*, paras. 69-71; Azoulai, *supra* note 316, p. 1352.

[331] Case C-442/02, *CaixaBank France*, paras. 19- 20.

possibility might be envisaged that consumers were allowed to choose between an unremunerated sight account with certain basic banking services remaining free of charge and a remunerated sight account with the credit institution being able to make charges for banking services previously provided free, such as the issuing of cheques. In relation to the justification based on encouragement of medium and long-term saving, the CJEU observed that, while the prohibition of remuneration on sight accounts was indeed suitable for encouraging medium and long-term saving, it nevertheless remained a measure which went beyond what was necessary to attain that objective.[332] The French legislation prohibiting remuneration of sight accounts was thus disproportionate and contrary to Article 43 EC.

Why is *Caixa Bank* an instructive example of rigorous proportionality review? Even if the CJEU admitted that the French legislation was a suitable means for protecting consumers, it considered that there were less restrictive measures to achieve this objective, namely providing consumers with a choice between remunerated and unremunerated sight accounts. As to the encouragement of long-term saving, Advocate General Tizzano suggested that measures such as the setting of a maximum ceiling on interest rates on sight accounts or the creation of incentives for medium- and long-term investments were adequate alternatives for encouraging long term saving.[333]The CJEU did however take an uncompromising stance and simply found that the prohibition against the use of sight accounts was disproportionate in relation to the pursued objective, without justifying why that prohibition was disproportionate.

Consolidated analysis of Laval and Caixa Bank- what are the common reasons for strict justifications review?

If we are trying to make a consolidated analysis of *Laval*[334] and *Caixa Bank* there are two common explanations why the CJEU was engaged in a rigorous proportionality/justification review in these cases. First, the rigorous proportionality review in *Caixa Bank* and *Laval* can be explained by the fact that the measures imposed by the French Government and the Swedish trade unions had very adverse effects on the affected undertakings.[335] In the case of *Caixa Bank*, the French measure deprived Caixa Bank of its competitive advantage over French undertakings in the provision of financial services in the French market.[336] In *Laval*, as stated above, the collective action by the Swedish trade unions effectively implied that Baltic Bygg and Laval were completely stopped from performing any work at the worksite and subsequently entailed that Baltic Bygg went into bankruptcy.[337] In addition, the collective actions entailed that the Latvian workers lost their temporary employment in Sweden[338]. Secondly, it is argued that that the intense review of proportionality in *Caixa Bank* and *Laval* can be explained based on the assumption that the restrictions in these cases were of a particularly 'protectionist' nature in that they constituted indirectly discriminatory measures harming foreign undertakings more than domestic undertakings.[339] It is reasonable to assume that the CJEU regarded the national measures in *Caixa Bank* as measures designed to insulate its own producers and undertakings from foreign competition and the measures from the trade union in *Laval* as a means to

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[332] *Ibid*., paras. 21- 23.

[333] See Case C-442/02, *CaixaBank France*, Opinion of Advocate General Tizzano, para. 102.

[334] See Barnard C,'Viking and Laval: An Introduction', (2007-8) 10 Cambridge Yearbook of European Legal Studies 463, at p. 491 regarding the reasons for the strict review in *Laval*.

[335] See De Burca, *supra* note 288, p. 148

[336] See Case C-442/02, *Caixa Bank France*, paras 12-14.

[337] See Case C-341/05, *Laval un Partneri*, paras. 37-38.

[338] See Case C-341/05, *Laval un Partneri*, Opinion of Advocate General Mengozzi, para. 256.

[339] See Baquero Cruz, J, *Between Competition and Free Movement: the Economic Constitutional Law of the European Community*, (Hart Publishing, 2002), p. 123; Craig, *supra* note 296, p. 706; De Burca, *supra* note 288, p. 133 and 148.

protect the trade union's established position on the Swedish labour market, domestic workers and domestic undertakings to the detriment of non-domestic service providers and non-domestic workers.[340]

Lenient Proportionality Review

Measures infringing the fundamental freedoms in a policy area where the Member States' derogation from the fundamental freedoms is related to fundamental rights and constitutional identity concerns

This section discusses the basic tension between market freedoms and fundamental rights. In this regard, is submitted that *fundamental rights* as a valid justification from derogating from the fundamental freedoms must be concerned with the core aspects of fundamental rights; i.e. individual autonomy, democracy and human dignity.[341] In addition, if a Member State's derogation shall be considered as a fundamental right it needs to be protected by the national constitutions and the relevant international human rights instruments.[342]

Since the case is the most recent expression of the CJEU's sensitivity to national fundamental rights concerns it is appropriate to illustrate the fundamental rights case-law with the *Wittgenstein* case. The case was concerned with whether the Austrian law on the abolition of nobility which prohibited Austrian nationals to bear any title of nobility, was contrary to the Union rules on citizenship. [343]The appellant in the case, Illonka Sayn Wittgenstein, an Austrian citizen, was born Ilonka Kerekes in Vienna in 1944 ('Mrs Sayn Wittgenstein'). In October 1991, her surname was however recorded as 'Havel, née Kerekes' due to an adoption under German law by a German citizen, Lothar Fürst von Sayn-Wittgenstein, which was formalised by decision of the Kreisgericht (District Court) Worbis (Germany). When she wished to have her new identity registered with the authorities in Vienna, those authorities wrote to the Kreisgericht Worbis in January 1992 for further particulars and that court subsequently issued a supplementary decision specifying that on adoption her birth surname became 'Fürstin von Sayn-Wittgenstein', the feminine form of her adoptive father's surname. The Viennese authorities thereupon issued Mrs Sayn Wittgenstein with a birth certificate on 27 February 1992, in the name of Ilonka Fürstin von Sayn-Wittgenstein. [344]On 27 November 2003, the Austrian Verfassungsgerichtshof (Constitutional Court) nevertheless gave judgment in a case whose circumstances were similar to those of Mrs Sayn Wittgenstein and ruled that the Law on the abolition of the nobility precluded an Austrian citizen from acquiring, through adoption by a German citizen, a surname composed of a former title of nobility.[345]Sometime after that judgment, the registration authorities in Vienna took the view that Mrs Sayn Wittgenstein's birth registration was incorrect and consequently, on 5 April 2007, they notified her of their intention to correct her surname in the birth register to 'Sayn-Wittgenstein'. On 24 August 2007, despite her objections, they confirmed that

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[340] Craig and de Burca, *supra* note 290, p. 551. Regarding protectionist effects of trade union actions, see Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union*, [2007] ECR p. I-10779, opinion of Advocate General Maduro, paras. 68 and *71*.

[341] See Gerrards, *supra* note 306, p. 671.

[342] See Case C-112/00, *Schmidberger*, [2003] ECR p. I-5659; paras.69, 71, 76, 79-80, Case C-36/02, *Omega*, [2004] ECR, I-9609, paras. 32-34; C-244/06, *Dynamic Medien*, [2008] ECR I-505 , paras 39-41; Case 208/09, *Sayn Wittgenstein*, judgment of 22nd December 2010, nyr, para 82, 89; Gerrards, *supra* note 306, pp. 672, 690.

[343] Gesetz über die Aufhebung des Adels, der weltlichen Ritter- und Damenorden und gewisser Titel und Würden) of 3 April 1919 (StGBl. 211/1919), in the version applicable to the main proceedings (StGBl. 1/1920; 'the Law on the abolition of the nobility'). It has constitutional status under Article 149(1) of the Federal Constitutional Law (Bundes-Verfassungsgesetz).

[344] Case C-208/09, *Sayn Wittgenstein*, paras. 20-23.

[345] *Ibid*., paras. 24-25.

position. Her administrative appeal against that course of action having been dismissed, Mrs Sayn Wittgenstein sought to have the decision overturned by the Verwaltungsgerichtshof (Constitutional Court, Austria) arguing that it would be an interference with her rights of freedom of movement to require her to use different surnames in different Member States.[346]The Constitutional Court subsequently referred the case to the CJEU for a preliminary ruling.

The CJEU found that the refusal, by the authorities of a Member State, to recognise all the elements of the surname of a national of that State as determined in another Member State, in which that national resides, and as entered for 15 years in the register of civil status of the first Member State, was a restriction to the exercise of the Union rules on citizenship.[347] The CJEU thereafter considered the justification and held that in the context of Austrian constitutional history, the Law on the abolition of the nobility, as an element of the Austrian national identity, should be taken into consideration when a balance was struck between legitimate interests and the right of free movement of persons recognised under Union law.[348] The CJEU then held that the justification based on the constitutional status of the Law on the abolition of nobility was related to public policy and that objective considerations relating to public policy were capable of justifying, in a Member State, a refusal to recognise the surname of one of its nationals, as accorded in another Member State. The CJEU stressed that the specific circumstances, which may justify recourse to the concept of public policy, may vary from one Member State to another and from one era to another. The Austrian Government argued that the Law on the abolition of the nobility constituted implementation of the more general principle of equality before the law of all Austrian citizens. The CJEU reaffirmed, by referring to the Charter of fundamental rights that the Union legal system undeniably sought to ensure the observance of the principle of equal treatment as a general principle of law and that there was no doubt that the objective of observing the principle of equal treatment was compatible with Union law.[349]The CJEU further held that it was not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question was to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted were not excluded merely because one Member State had chosen a system of protection different from that adopted by another State.[350] The CJEU then referred to Article 4(2) TEU, and emphasised the Union's obligation to respect the national identities of its Member States, which included the status of the Austrian State as a Republic. The CJEU concluded that by refusing to recognise the noble elements of a name, the Austrian authorities responsible for civil status matters did not go further than was necessary in order to ensure the attainment of the fundamental constitutional objective pursued by them and the restriction was consequently proportionate.[351]

Wittgenstein firstly pronounces that, the protection of fundamental rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods. The Wittgenstein judgment further follows the path of the case-law in *Schmidberger*, *Omega*, and *Dynamic Medien* and the ruling consequently reinforces the perception that in cases where the Member States' justification from derogating from the fundamental freedoms is related to a genuine fundamental rights concern, the CJEU is ready to confer the national authorities with a broad discretion as to decide whether a less

[346] *Ibid*., paras. 27-30.

[347] *Ibid*., para. 71.

[348] *Ibid*., paras. 83-84.

[349] *Ibid*., paras. 87-89.

[350] See also Case C-384/93, *Alpine Investment*, [1995] ECR I-1411, para.51.

[351] See Case 208/09, *Sayn Wittgenstein*, paras 91- 93.

restrictive measure could have been adopted to achieve the pursued objective.[352] The *Wittgenstein* judgment also reinforces the *Omega* rationale in that it displays the Court's willingness to accept that Member States can invoke the necessity to respect fundamental rights as respected in their constitutions, to broaden their margin of appreciation under an express Treaty derogation of public policy.

The reasons for lenient proportionality review in these cases is that the CJEU perceives that genuine fundamental rights concern is a matter of sensitive national policies, philosophical, moral and constitutional concerns.[353] Fundamental freedoms shall not compromise those political values which are essential to protecting human dignity, autonomy and equality.[354] The Court have thus indicated, as mentioned above, that it may review proportionality less closely if the derogation is related to human dignity (*Omega*), principle of equality (*Wittgenstein*), freedom of assembly (*Schmidberger*), and the protection of child/human dignity (*Dynamic Medien*) . It may thus be argued that Member States are free to take measures to protect the central interests, symbols and values of their societies in the legal frame of 'fundamental rights' and that the Court in such cases only engages in marginal review.[355]

If we revert to the discussion above in *Laval*, it is interesting to contrast this ruling with the rulings in, *Schmidberger*, *Omega* and *Wittgenstein* given that all these cases concerned the balancing of fundamental freedoms with fundamental rights, given that the fundamental right invoked by the defendants was recognised as a fundamental right in Union law and had constitutional protection in the Member State concerned and despite this the CJEU adopted a more intense review of proportionality in *Laval* than in the other cases.[356] In my opinion, the different standard of proportionality review can be explained on the basis of the factual circumstances of the cases and the nature of the invoked justifications.

Firstly, in *Schmidberger*, *Omega* and *Wittgenstein*, the national practice or rule was related to a genuine fundamental right concern. It is doubtful whether this was the case in *Laval* as it seems that the Swedish trade unions primarily was concerned with protecting their position on the Swedish labour market and the protection of domestic workers and undertakings.[357]The Court thus seems to perceive that the collective actions at stake did not serve to achieve the legitimate objective of protection of posted workers. In this regard, it was however argued by the Swedish trade unions that the enforcement of the fundamental freedoms infringed the 'essence' of their right to take collective action, particularly given that the collective actions undertaken by the Swedish trade union was considered legal by the Swedish authorities and the Swedish Labour Court.[358]

As discussed above, the free movement rules and proportionality do not imply that trade union's right to take collective action is negated.[359] From the viewpoints of collective autonomy of trade unions and

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[352] See Case C-112/00, *Schimdberger*, paras. 82, 85-90, 92-93 ; Case C-36/02, *Omega*, paras. 31, 37, 38*;* C-244/06 *Dynamic Medien*, paras. 44, 45 and 49; Kokott, J and Sobotta, C, ' The Charter of Fundamental Rights of the European Union After Lisbon', EUI Working Paper AEL 2010/6. Available at <http://cadmus.eui.eu/bitstream/handle/1814/15208/AEL_WP_2010_06.pdf?sequence=3>. Last accessed at 29th of September 2011, p.9; Tridimas, *supra* note 289, pp. 338-339; Craig, *supra* note 296, pp. 515-516.

[353] See Craig, *supra* note 296, p. 516; de Burca, *supra* note 288, pp.127-128 and 147.

[354] See Chalmers et alia, *supra* note 299, p. 833.

[355] See G Straetmans' Note on Case C-124/97, Läärä and Case C-67/98, Zenatti', (2000) 37 CLM Rev, 991, 1002-5.

[356] See Lennaerts, K & Gutiérrez-Fons, J.A (2010) 'The Constitutional Allocation of Powers and General Principles of EU Law', 47 *CML Rev* 1629, at p. 1666; Novitz, T, 'Human Rights Analysis of the Viking and Laval Judgments', (2007-2008) 10 Cambridge Yearbook of European Legal Studies 525, at p.548.

[357] See Craig and De Burca, *supra* note 290, p. 550.

[358] See Case C-341/05, *Laval un Partneri*, Opinion of Advocate General Mengozzi, para.61 ; Craig, *supra* note 296, pp. 513-517, 679-681 regarding Article 52 of the Charter and the concept of infringing the 'essence' of a right.

[359] See Novitz, *supra* note 359, at p. 560.

federalism, free movement and proportionality essentially entails that trade unions need to consider whether collective actions have excessive negative effects for foreign undertakings, imposes duplicate requirements which the service providers are already bound by in the home Member State or whether the collective agreements which the collective actions intend to impose on foreign undertakings does go further than the mandatory rules of the host state.[360] In this regard, it is not difficult to foresee circumstances where collective actions would be considered perfectly legal under the proportionality test. First, there should be a limit in time and scope of the collective action. In *Laval*, the collective actions seemed to be of unlimited nature and the scope of the action was substantive given that also SEF joined in for a solidarity action. *Laval* was consequently stopped from performing work anywhere in Sweden.[361] It is argued that a collective action which for example only lasted for a week or did not in fact stop the foreign undertaking from performing work is much more likely to be considered proportionate. It is also reasonably to foresee a situation where the collective actions only served to require the non-domestic undertakings to accept the minimum rules in the host country as required by the PWD or a pre-existing collective agreement regarding the minimum rates of pay. Such a collective action is more likely to be considered proportionate than a collective action serving to impose obligations which clearly goes further than the host state's minimum rules for the protection of posted workers and collective actions that serve to impose pay negotiations on the foreign employer wherein the outcome of the negotiations is completely unpredictable. In sum, it the enforcement of the fundamental freedoms in *Laval* did not infringe the "essence" of the right to take collective action[362].

Secondly, *Laval* was concerned with a policy area that had been subject to Union legislation by means of the PWD whereas this was not the case in *Schmidberger, Omega and Wittgenstein*[363]. Despite that the PWD is not a substantive harmonisation measure as it does not harmonise working conditions, the PWD provides for a maximum harmonisation in relation to what rules that can be imposed a foreign employer.[364] As mentioned above, the PWD and the absence of national minimum rules had a decisive impact on the Court's ruling and standard of proportionality review in *Laval* whereas the PWD and the free movement rules prohibit the imposition of conditions and requirements for the protection of posted workers in matters which are not covered by the PWD.[365]

Constitutional identity, different values of fundamental rights and proportionality

There is a further difference between *Schmidberger, Omega, Wittgenstein* on the one hand and *Laval,* which may have contributed to the different standard of proportionality review. This difference is concerned with the controversial concept of constitutional identity and the values of the fundamental rights concerned.[366] There is no room here to give an exhaustive discussion on this concept but I will recount the concept as it has been understood in Union law and by the CJEU. The point of departure for the discussion is Article 4(2) TEU which provides that:

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[360] *Ibid*., at p. 554; Case-341/05, *Laval un Partneri,* , Opinion of Advocate General Mengozzi, paras. 280-282, 284; Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union,* Opinion of Advocate General Maduro, paras. 67-68.

[361] See Sciarra, *supra* note 327, at p. 578.

[362] See Case C-341/05, *Laval un Partneri,* Opinion of Advocate General Mengozzi, para. 283; Article 52 (1) of the Charter of Fundamental Rights; see however Achtsioglou, *supra* note 329, p. 16.

[363] See Case C-208/09, *Sayn Wittgenstein,* para. 38.

[364] See Acthsioglou, *supra* note 329, p. 15; Deakin, *supra* note 315, p. 582.

[365] See Sciarra, *supra* note 327, p. 576.

[366] See Tridimas, *supra* note 289, p. 339; Harbo, supra note 291, pp. 57-58.

> 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government…...'

Based on *Omega*, *Michaniki*[367], *Wittgenstein*, the Court has spelled out quite clearly the limits of Article 4 (2) TEU and under which circumstances the Member State can invoke national constitutional concerns as defense for derogating from the fundamental freedoms. In *Michaniki*, the Court held that a *national constitutional provision* which established a system of general incompatibility between the sector of public works and that of the media had the consequence of excluding from the award of public contracts public works an entire category contractors who were also involved in the media sector on account of a connection as owner, main shareholder, partner or management executive, without affording them any possibility of showing, with regard to any evidence advanced, for instance, by a competitor, that, in their case, there is no real risk of the type referred to above. Therefore the rule went beyond what was necessary to achieve the claimed objectives of transparency and equal treatment and was incompatible with Community law.[368] In *Wittgenstein*, The CJEU did not refer to legitimate objectives when justifying the proportionality of the Austrian rule in *Wittgenstein* but went further and introduced the term 'fundamental constitutional objective'.[369] It may be argued that 'fundamental constitutional objectives' is a more serious concern for the state, than mandatory requirements, which can be invoked when Member States imposes non-discriminatory restrictions to the fundamental freedom. Whereas the Court explicitly referred to Article 4(2) TEU, it is contended that the restriction, if it is to be characterised as furthering a 'fundamental constitutional objective', must mirror the core of the national constitutional identity. But what is meant by a fundamental constitutional objective?

The Greek constitutional rule in *Michaniki* thus being mainly concerned with public procurement law was arguably not concerned with fundamental values of the Greek state or the Greek constitution nor immediate concerns for democracy, individual autonomy or human dignity. Therefore, it did not have any decisive on influence the CJEU's proportionality assessment in providing more discretion to the Member State, when derogating from the fundamental freedoms. In *Wittgenstein*, on the other hand the rule on abolishing nobility names was an expression of the Austrian Republic and its constitutional identity. Accordingly, the Court was ready to give more discretion to the Austrian authorities when it implemented its public policies on use of different surnames. Likewise, in *Omega*, the rule prohibiting sale of 'simulated killing games', was a direct expression of the principle of human dignity which forms the basis of the German Basic law.[370] Therefore, the CJEU found that the national authorities had a wide discretion in implementing their policies on how human dignity should be protected.

Consequently, as argued by Advocate General Maduro in *Michaniki* the case-law implies that more insignificant provisions of national constitutional law – those which do not form part of the constitutional identity of the Member State – may not work as a strong defense when the state is derogating from the fundamental freedoms. Article 4(2) TEU and the Union's obligation to respect the constitutional identity of the Member State do not entail an absolute obligation for the CJEU to defer to all national constitutional rules. In this case, I agree with Advocate General Maduro that the principles of effectiveness and uniform application of Union law entails that the CJEU must be able to review the compatibility of national constitutional rules in the light of the Treaty freedoms. [371] If Member States could, without qualifications, use their national constitutions to derogate from Union

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[367] See Case C 213/07, *Michaniki AE v Ethniko Simvoulio Radiotileorasis*,[2008] ECR p. I-9999.

[368] *Ibid*., paras. 62, 69.

[369] See Case C-208/09, *Sayn Wittgenstein*, para. 93 and Opinion of Advocate General Sharpston, para.65.

[370] See Case C-36/02, *Omega*, paras. 32, 39.

[371] See Case C-213/07, *Michaniki*, Opinion of Advocate General Maduro, paras. 32-33.

law, the supremacy of Union law would be endangered and this would in the end threaten the consistency and foundations for the European legal order.

In *Laval*, it is suggested contrary to Achtsioglou that the Swedish rules on the right to take collective actions cannot be said to constitute an expression of the Swedish constitutional identity[372]. Achtsioglou considers that the right to take collective action is a part of the constitutional identity of Sweden based on *inter alia* the assertion that it is an expression of the Social State Model. I do not believe that her views are entirely persuasive. Even if the right to strike is an expression of the Social State Model this does not imply that the right to take collective actions is a part of the Swedish constitutional identity. The basic reason for this is that classical political individual rights have a stronger constitutional protection than social rights both in the Swedish legal order and in the Union legal order. [373] From a purely national perspective it appears that the right to take collective actions provided for in Chapter 2 Article 14 of the Swedish Constitution can be limited by agreement while laws only can delimit other political rights as the freedom of expression, human dignity or the right to equality.[374] This limitation on the scope of the right is in my opinion a sufficient reason to consider that the 'right to strike' does not enjoy a very strong protection in relation to other classical individual political rights. Even if the Swedish rules on collective actions would from a purely national perspective be considered as a part of the Swedish constitutional identity there are further reasons why the Court in *Laval* was not willing to give the trade unions a broad margin of discretion. Consistent with the argumentation above, the scope of 'constitutional identity' cannot be determined unilaterally by the Member State but must be determined by the Court, taking into account the level of protection to the right granted by international and European human rights instruments. The argument here is that a 'fundamental constitutional objective' or a 'fundamental right' for a state must also be recognised at the European Union level to be successfully defended by the state as a valid derogation from the fundamental freedoms.

It is here argued that the 'right to take collective action' is not a right of such a fundamental character that it gives trade unions discretion in how these rights are enforced against the free movement rules. In both the Community Charter of the Fundamental Social Rights of Workers (CCFSRW**)** and the European Charter of Fundamental Rights (EUCFR) there appears to be a notable distinction drawn between the individual freedom to associate and other aspects of trade union association, such as collective bargaining and the right to strike. The right of the worker to join or refuse to join an association is treated as an unqualified right in both Charters. By way of contrast, rights to negotiate, conclude collective agreements and engage in collective action are made explicitly subject to national laws and practice.[375] For example, Article 28 of the EUCFR does not so much allow scope for exceptional protection of the right to strike, but rather suggests that entitlements under national law may be struck down by the CJEU to the extent that they are inconsistent with the fundamental freedoms. The right to take collective action, as provided by Union law is therefore a right which can be limited both by Union law, i.e. the fundamental freedoms, and by national law and practices.[376] In this regard, it is strongly argued that the choice of method and intensity of judicial review depends on what level of protection the fundamental right or the rule expressing the state's constitutional identity has in international and European human rights instruments and in the national legal order.[377] This

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[372] See Achtsioglou, *supra* note 329, p. 19.

[373] See Novitz, *supra* note 359, pp. 543-548, 561: Gerrards, *supra* note 306, pp. 656-659.

[374] See Chapter 2 Article 12, 20, 21 of the Swedish constitution. This was also recognized by the CJEU in *Laval*: Case C-341/05, *Laval un Partneri*, para 92.

[375] See CCFSRW, Article 13, and Article 28 of the EUCFR.

[376] See Case C-341/05, *Laval un Partneri*, Opinion of Advocate General Mengozzi, paras. 80-81.

[377] See Gerrards, *supra* note 306, p. 656. Regarding protection for freedom of assembly, principle of equality, human dignity and the right of a child: See Article 1, 12, 21 and 28 of the EUCFR; Article 11, Article 14 of the European Convention on

seem to reinforce the perception the right to take collective action is a fundamental right of an inferior value than classical civil and political rights and thus a weaker ground as defense for derogation from the fundamental freedoms.[378] Therefore, the right to take collective action do not mirror 'fundamental constitutional objectives'. This also implies that a defence based on the right to strike is not likely to be accepted by the CJEU as a reason for marginal proportionality review granting a wide margin of discretion to the trade unions when enforcing their rights against the fundamental freedoms.

Fundamental rights, federalism and proportionality

The key conclusion from the case law on fundamental rights, i.e. *Schmidberger*, *Omega, Dynamic Medien and Wittgenstein*, is that the CJEU review national measures infringing the fundamental freedoms less intensively if the former could be defined as a fundamental right or as an expression of the state's constitutional identity.[379] From the federalist lens it may be said that the CJEU have reasserted a pluralistic policy in the fundamental rights case law where fundamental rights and constitutional values of the Member States is placed on par with the fundamental freedoms, provided these rights and values also are protected on Union level.[380]In contrast to the main rule in the law of free movement, proportionality does not, if the national regulation or policy is based on a genuine fundamental rights concern, require that Member States accommodates all their policies and practices to a transnational context nor that they take into account every interest of foreign firms and Union citizens when designing their policies. Nevertheless, proportionality still requires that Member State ensure that such policies do not affect foreign undertakings more than domestic producers and that such policies they are not manifestly disproportionate to the pursued aim. If it is obvious that there exist measures which are less restrictive to intra-community trade and such measures are appropriate to achieve the pursued aim, the Member State cannot successfully invoke fundamental rights to derogate from the Treaty freedoms. [381]

Measures Infringing the Fundamental Freedoms in a Sensitive Policy Area which has not been subject to Union Harmonisation

Sensitive national policies - public order, public morality, national security and public health

In this section, it will be discussed how the CJEU undertakes judicial review of proportionality in the situation where the Member State has imposed a restriction of the fundamental freedoms but invokes a justification, which is based on sensitive public policies. First, I will however discuss the ambiguous concept of 'sensitive national policies'.

In fact, it can be contended that justifications based on national fundamental rights concern or justifications based on constitutional identity which was discussed in the previous section fall within the concept of 'national sensitive policies'. However, in order to clarify the discussion in the paper I have decided to distinguish between justifications based on 'fundamental rights' and justifications based on measures that intend to attain the objectives of 'public order, public morality, national security and public health'. In this regard, the argument can be made that the justifications based on fundamental rights also falls within the scope of 'public morality'. Nevertheless, the distinction between justification based on ' public morality' and 'fundamental rights' can be justified given that

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Human Rights; Article 2, Article 10, Article 21, Article 24 and Article 26 of the The United Nations International Covenant on Civil and Political Rights.

[378] See Novitz, *supra* note 359, p. 543 and 561; Harbo, *supra* note 291, pp. 57-58.

[379] See Kokott, *supra* note 355, p. 9; Tridimas, *supra* note 289, pp. 339-340, 367, Barnard, *supra* note 316, p. 72 .

[380] See Chalmers, *supra* note 299, p. 874; Kokott, *supra* note 355, p. 10; Tridimas, *supra* note 289, at p. 209.

[381] See Chalmers, *supra* note 299, 846.

'public morality' is more concerned with the local national collective view on 'public morality' while fundamental rights justification in the end is concerned with enforcing individual rights such as freedom of expression, equality and human dignity. In this respect, 'public morality' should be understood in a narrow sense aiming at measures which primarily are concerned with protecting the state's view on what services and products that should be banned or regulated due to their offensive or obscene characteristics.[382]

Based on Article 36 of the TFEU, it can be inferred that 'sensitive national policies' essentially can be defined as policies/measures which aim to uphold public morality, public health, national security and public order.[383]In terms of public morality, sensitive national policies are policies where moral, religious and cultural factors play an important role in deciding the policies pursued by the Member State. These are areas which are sensitive ideologically for the state.[384] Moral values differ from state to state and public morality in the current state of European law is clearly an area where there is no consensus among the states. The harmonisation among the Member States in terms of public morality is minimal and that therefore it will be at the best a basic agreement between the states at the European level, leaving considerable scope for divergence between the Member States. Moral values differ from state to state. Consequently, different Member States will take different views on how as to what should be regulated and banned and as to what will threaten its particular concept of public morality.[385]The Member State's choice should not be interfered with merely because there was another measure which a different state might have chosen instead.[386] Within the scope of the conception 'national sensitive policies' are also included measures that serve to ensure that public order and national security is preserved, i.e. the supply of services that are necessary for the government or its territory.[387] Such policies aim to safeguard the government machinery that enables protection of public order and national security.[388]

Due to these considerations, it is not difficult to understand that the Member States feels that the Court should be careful in substituting the judgment of the national legislator in relation to sensitive national policies.[389] This is however not the approach adopted by the Court generally which rather departs from the assumption the rules of the free movement are fundamental rights and that any derogation therefrom will be strictly scrutinized by the Court to see if such derogation is necessary to achieve the purported aim. In this respect, it is argued that national sensitive policies can only be a valid defence if the national rule actually intends to achieve the public national interest in a *consistent* manner.[390] If the national rule discriminates against foreign firms or citizens or is intended primarily to safeguard

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[382] Case C-34/79, *Henn and Darby* and Case C-121/85, *Conegate*. Both cases were essentially concerned with restriction to the importation of obscene products. This gives an understanding on what is meant by 'public morality'.

[383] See: '**Free movement of goods-** Guide to the application of Treaty provisions governing the free movement of goods', European Commission General Directorate Enterprise, 2010, at p. 30. Available at http://ec.europa.eu/enterprise/policies/single-market-goods/files/goods/docs/art34-36/new_guide_en.pdf. See also de Burca, *supra* note 2, pp. 127-146. In addition it appears that protection of animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property, falls within this category. These exceptions are, however, not relevant for the purpose of the following discussion on gambling and alcohol regulation.

[384] See Barnard, *supra* note 316, p. 381.

[385] See De Burca, *supra* note 288, pp. 128-129; Barnard, *supra* note 316, p. 381.

[386] See Case C-41/74, *Van Duyn v Home Office* [1974] ECR 1337, para 18; Case C-34/79, *R v Henn v Darby* [1979] ECR 3975, para. 15. See also Barnard, *supra* note 316, p. 67.

[387] See Case C-72/83, *Campus Oil v Minister for Industry and Energy* [1984] ECR 2727, paras. 34-36, 41 and 51.

[388] See Case C-275/92, *Schindler*, paras. 58 and 61; Barnard, *supra* note 316, pp. 494-495; Chalmers, *supra* note 299, at pp. 834-835.

[389] See De Burca, *supra* note 288 at pp. 111-112.

[390] See Case C-243/01, *Gambelli and others*, [2003] ECR I-*1303* para*. 67;* Chalmers, *supra* note 299, pp. 846-849.

the financial interests of the state it is not likely that that the state successfully can plead the justification on the basis of a sensitive national policy.[391] Even if this sounds like a strict proportionality test it will be seen below that the Court clearly takes into account the nature of the national justification when it reviews proportionality.[392]

Gambling, public morality, public order and proportionality

In this respect, there have been several cases in the field of gambling, an area closely related to public morality[393], where the CJEU have displayed a Member State friendly approach to national measures giving national authorities discretion as to how they implement gambling policies. I will illustrate this point with the *Santa Casa* case, which concerned the issue whether Portuguese legislation[394] that had conferred exclusive rights to operate games of chance in Portugal to a public body, Departamento de Jogos da Santa Casa da Misericordia de Lisboa ('Santa Casa') was consistent with the fundamental freedoms.[395] The background to the dispute was that Bwin International Ltd (Bwin), an on-line gambling undertaking which has its registered office in Gibraltar but no establishment in Portugal, had decided on 18 August 2005 to enter into a sponsorship agreement with Liga Portuguesa de Futebol Profissional (Liga), a private-law legal person, which is made up of all Portuguese clubs taking part in professional football in Portugal, for four playing seasons starting in 2005/2006. This agreement made Bwin the main sponsor of the First Division of Portugal and made it possible for Bwin and Liga to jointly offer gambling services to consumers in Portugal and in other States. Subsequently, in exercising the powers conferred on them by the Decree-Law, the directors of the Gaming Department of Santa Casa adopted decisions imposing fines on Liga and Bwin in respect of administrative offences committed under the Decree-Law, for offering bets and advertising them. The Liga and Bwin brought actions before the national court for annulment of those decisions, invoking, inter alia, that the decisions was contrary to Community law and the Tribunal de Pequena Instância Criminal do Porto (Local Criminal Court, Oporto) subsequently referred the case to the CJEU for preliminary ruling.

Having established that that the Portuguese legislation constituted a restriction on the freedom to provide services the CJEU considered the justification offered by the defendants.[396]The CJEU observed that the legislation on games of chance is one of the areas in which there are significant moral, religious and cultural differences between the Member States. The CJEU therefore held that in the absence of Community harmonisation in the field of gambling, it was for each Member State to determine in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected. The CJEU further stressed that the fact that a Member State had opted for a system of protection which differed from that adopted by another Member State did not affect the proportionality assessment. [397]The CJEU admitted that, the justification invoked by the Portuguese Government, the fight against crime with the purpose of protecting consumer against fraud constituted an overriding reason in the public interest that was capable of justifying restrictions in respect of operators authorised to offer services in the games-of-chance sector.[398] The CJEU acknowledged that the grant of exclusive rights to operate games of chance via the internet to a single

[391] See De Burca, *supra* note 288, pp. 131, 133 and 134; Chalmers, *supra* note 299, pp. 835-836.

[392] See De Burca, *supra* note 288, p. 126. For marginal review see the Court's assessment of the authorization requirement in Case C- 367/89, *Richardt*, [1991] ECR I-4621, paras. 25-26.

[393] See Harbo, *supra* note 291, p. 36.

[394] Decree-Law No 282/2003 of 8 November 2003 (*Diário da República* I, series A, No 259, 8 November 2003).

[395] Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International*, 2009 [ECR] I-7633.

[396] Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International*, para. 53.

[397] *Ibid*., paras. 57-59.

[398] *Ibid.*, paras. 62-63.

operator, such as Santa Casa, which was subject to strict control by the public authorities, could confine the operation of gambling within controlled channels and be regarded as an appropriate means for the purpose of protecting consumers against fraud on the part of operators. [399]As to whether the system was necessary, the CJEU stressed that the sector involving games of chance offered via the internet had not been the subject of Community harmonisation. Portugal was therefore entitled to take the view that the mere fact that an operator such as Bwin lawfully offered services in that sector via the internet in another Member State, in which it was established and where it was in principle already subject to statutory conditions on the part of the competent authorities in that State, could not be regarded as amounting to a sufficient assurance that national consumers would be protected against the risks of fraud and crime. The CJEU concluded that there was no breach of the proportionality principle and that the restriction could be justified on the basis of Article 49 EC.[400]

Santa Casa is a case decided on the basis of a consistent case-law of the CJEU in *Schindler*[401]and *Läärä*[402] and *Zenatti*[403] showing sensitivity for national discretion in the field of gambling. Consistent with *Schindler*, it was emphasised in *Santa Casa* that in the field of gambling the Member States are free to determine in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected and in setting their policy objectives. The Court did also in Santa Casa, consistent with the mentioned case-law, demonstrate its respect for national diversity in by stressing that it is not decisive for the proportionality of the national measures whether a Member State has opted for a system which differs from the other Member States.[404]In the field of gambling it is suggested that Member States have been provided with a margin of discretion by the CJEU to decide whether gambling activities should be totally prohibited, partially prohibited or only restrict them and decide on the design of their authorisation system, as far as the Member State do not manifestly exceed their discretion.[405]When several alternatives are at hand, it lies within the discretionary assessment of the Member State to choose which one, as long as the alternative is not disproportionate in relation to the pursued objective. [406]

In addition, it is material to observe that the home state control principle do not apply within the frame of the proportionality test in the field of gambling. Therefore, it seems irrelevant for the CJEU whether a non-domestic service provider have been subject to a license requirement or authorisation in another Member State, when determining the suitability of the national restriction.[407]Why is the lenient approach undertaken by the CJEU in cases concerning national gambling regulation? In relation to the policy field at stake, it may be argued that the limited judicial review of proportionality could be explained partly by the fact that there is no substantial Union harmonisation in this field.[408] Apart from

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[399] *Ibid*, paras. 65-66.

[400] *Ibid*, paras. 71-73.

[401] Case C-275/92 *Schindler* [1994] ECR I-1039, paras. 58-63.

[402] Case C-124/97, *Läärä*, [1999] ECR I-4683, paras. 13-14, 33, 35-36, 39.

[403] Case C-67/98, *Zenatti*, *[*1999] ECR p. I-7289, paras. 33-34, 37.

[404] Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International*, para. 58.

[405] Case C-203/08, *Betfair*, judgment of 3 June 2010, *nyr*, paras. 59-62; Joined Cases C-316/07, C-409/07 and C-410/07, and C-358/07, C-359/07 and C-360/07, *Stoss and Kulpa*, judgment of 8 September 2010, paras. 74-80; Harbo, *supra* note 291, pp. 32-35.

[406] Case C-124/97, *Läärä*, para 39.

[407] Case C-42/07, *Liga Portuguesa de Futebol Profissional and Bwin International*, para 69*;* Doukas, D' In a Bet there is a Fool and a State Monopoly: Are the Odds Stacked against Cross-border Gambling?', pp. 2-3, 29. Available at http://euce.org/eusa/2011/papers/11a_doukas.pdf.

[408] Case C-203/08, *Betfair*, judgment of 3 June 2010, at paras. 33, 36-37 ; Recital 25 and Art .2 (2) (h) of directive 2006/123/EC of the EP and the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, 36; Harbo, *supra* note 291, p. 41.

the differences in operating systems, there are exceptions to the general prohibition where it exists, and the definition of 'games of chance and gambling' and the scope of the national legislations are not uniform over the Union.[409]Further, national gambling regulation is clearly related to 'public order' and 'public morality'. Gambling legislation often express cultural, moral, religious and societal values as to how consumers should be protected from excessive gambling.[410] Whereas national gambling legislation is intended to protect the Member State's fundamental values and interests the Court give them larger margin of discretion to form such policies.[411]

There are, however, limits to national discretion. In the *Gambelli* case, the Court introduced a requirement that restrictions based on consumer protection and the prevention of fraud and on the need to preserve public order must be suitable for achieving those objectives, in the sense that they must serve to limit betting activities in a consistent and systematic manner. The CJEU is thus ready to declare incompatible with the Treaty manifest excesses of national discretion, which involve obviously discriminatory or disproportionate measures, or alternatively provide national courts with detailed guidelines on how proportionality should be assessed. [412]

Restrictions on selling and importation of liquor, public health, public morality and proportionality

In terms of examining the CJEU's case law on sensitive public policies and fundamental freedoms it is also appropriate consider the field of national regulation on the advertisement sales promotion and selling of liquors and the public health and public morality justification.[413] *Gourmet,* which concerned the issue whether a Swedish legislation entailing a general prohibition of alcohol advertising was compatible with the Treaty, is an illustrative example of a lenient proportionality assessment. *[414]* In this decision, the CJEU held, that the decision as to whether the Swedish legislation was proportionate, and in particular as to whether the objective sought might be achieved by less extensive prohibitions or restrictions or by prohibitions or restrictions having less effect on intra-Community trade, called for an analysis of the circumstances of law and of fact which characterised the situation in the Member State concerned, which the national court was in a better position than the CJEU to carry out.[415]The CJEU therefore opined that the Treaty did not preclude national legislation entailing a general prohibition of alcohol advertising, *unless it was apparent* that, in the circumstances of law and of fact which characterised the situation in the Member State concerned, the protection of public health against the harmful effects of alcohol could be ensured by measures having less effect on intra-Community trade.[416]

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[409] *Study of games of chance in the European Union*, carried out by the Swiss Institute of Comparative Law at the request of the Commission on 14 June 2006, available at http://ec.europa.eu/internal_market/services/docs/gambling/study1_en.pdf, pp. 6-9.

[410] See Joined Cases C-447/08 and C-448/08, *Sjöberg and Gerdin*, judgment of 8 July 2010, *nyr*, at paras. 42-43; Doukas, *supra* note 410, p. 29.

[411] See Straetmans, *supra* note 358, 1002-5.

[412] Joined Cases C-316/07, C-409/07 and C-410/07, and C-358/07, C-359/07 and C-360/07, *Stoss and Kulpa,* judgment of 8 September 2010, *nyr*, para 107; Case C-64/08, *Engelmann*, Judgment of 8 September 2010, *nyr*, paras. 40 and 58; Case C-212/08, *Zeturf*, judgment of 30th June 2011, *nyr*, para. 72; Joined Cases C-447/08 and C-448/08, *Sjöberg and Gerdin*, para. 57; Harbo, *supra* note 291, at pp. 35-36; Chalmers, *supra* note 299, p. 846; Barnard, *supra* note 316, p. 581.

[413] Baumberg, B and Anderson, P 'Health, alcohol and EU law: understanding the impact of European single market law on alcohol policies', Eur J Public Health (2008) 18 (4): 392-398; Harbo, *supra* note 291, pp. 77-90; De Burca, *supra* note 288, pp. 137-146.

[414] Case C-405/98, *Gourmet International Products*, [2001] ECR p. I-1795.

[415] Case C-434/04, *Ahokainen and Leppik*, para 39.

[416] Case C-405/98, *Gourmet International Products*, paras.33, 41 and 42.

Why is *Gourmet* an example of a lenient proportionality review? Even if the CJEU discussed less restrictive measures in *Gourmet*, it is clear that the national measures must be manifestly disproportionate for being declared disproportionate by the national courts ("unless it is apparent").[417] In addition, the Court provided very concise guidelines to the national court as to how they should assess proportionality.[418] Based on the case-law in *Gourmet, Aragonesa* and *Loi Evin*, it appears that in the field of alcohol regulation, the Court is more focussed on reasonableness between the measures and the pursued aim rather than the existence of less restrictive alternative measures and therefore gives discretion to the Member States in applying the LMR test.[419]Thus, in the absence of harmonisation, Member States are free to adopt national measures aimed at preventing people from drinking alcohol, even where these measures have a negative impact on the fundamental freedoms, as far as the restriction is not manifestly disproportionate to its stated objective or implies a substantive adverse effect on the fundamental freedoms.[420]

Why is this soft approach to proportionality undertaken in the field of national liquor regulation? In relation to the policy field at stake it may be argued that the limited judicial review of proportionality could, similar to the case of national gambling legislation, be explained by reference to the fact that there is no Union harmonisation or European consensus in this field. Different Member States have different ways of dealing with abuse of alcohol and in this respect the CJEU is concerned to give the Member States discretion as to how they wish to protect public health and what is required to achieve the level of protection sought by the Member State.[421] In this regard, it is clear from the case-law that the fact that one Member State imposes stricter rules to combat alcohol abuses than another Member State does not mean that the formers' rules are disproportionate.[422]

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[417] See also judgment of EFTA Court in E-4/04, *Pedicel (Alcohol Advertisement),* para. 61.

[418] It should however be recognised that the national court (Marknadsdomstolen) held that the Swedish alcohol legislation infringed the principle of proportionality striking down the national rule, *Konsumentombudsmannen(KO) mot Gourmet International Products Aktiebolag (GIP)*, MD 2003:5.

[419] Joined cases C-1/90 and 176/90, *Aragonesa*, para. 17; Case C-405/98, *Gourmet International Products* paras. 33-34, 41-42; Joined cases C-262/02 and C-429/02, *Commission v France* , [2004] ECR p. I-6569, para. 34;Tridimas, *supra* note 289, at p. 215, Harbo, *supra* note 291, p. 87. See also the case-law from the EFTA Court: E-6/96, *Tore Wilhelmsen AS v Oslo Kommune*, paras. 87, 92, 111*;* and E-4/04, *Pedicel (Alcohol Advertisement*), para. 55,57, 61 .

[420] Joined cases C-1/90 and 176/90, *Aragonesa*, paras. 16 and 18; Joined cases C-262/02 and C-429/02, *Commission v France, ,* paras. 24, 33*;* Case C-434/04, *Ahokainen and Leppik*, para. *33*,Harbo, *supra* note 291, at pp. 88-89; De Burca, *supra* note 288, p. 142.

[421] Joined cases C-1/90 and 176/90, *Aragonesa*, para. 16; E-4/04, *Pedicel (Alcohol Advertisement*), paras. 55, 59.

[422] Joined cases C-262/02 and C-429/02, *Commission v France,* para. 37.

Sensitive national policies, proportionality and federalism

What effects does the national sensitiveness on behalf of the CJEU in the cases concerning gambling regulation and national liquor regulation produce from a federal point of view? [423] In terms of allocation of powers, it is suggested that this approach is likely to preserve diversity in the application of Union law. Member State will therefore be able to maintain their regulatory freedom and choose their own standard of protection without having to take into account the standard of protection in other Member States.[424] Nevertheless, national policy makers need to think 'federal' and make sure that their national policies is appropriate for attaining the public health or the public morality objective and do not have excessive adverse effects on cross-border trade. The CJEU will therefore intervene if national authorities manifestly exceed their discretion, which involve obviously discriminatory or disproportionate measures.[425] In the field of gambling regulation, national legislator need to ensure that their national policies in a systematic and consistent manner contributes to achieve the objectives of protecting consumer, fighting crimes and ensuring public order. As far as the policies are pursued in a systematic manner, does not discriminate against foreign undertakings and not primarily aims to strengthen the state's financial resources, the Member State have a wide discretion in how they form their national policies. In terms of alcohol regulation, it should be recognized that broadly-focused policies have more difficulty in passing proportionality tests, implying that national policymakers should recognize that even a slight targeting of a generally broad policy could make a significant difference.[426] Policies should therefore be targeted on health and social concerns and not on the safeguarding of national financial interests or targeted at protecting domestic undertakings.[427] Proportionality is therefore in these policy fields applied both to protect diversity and unity in the application of Union law and may therefore be a safeguard of federalism. [428]

Strict review of proportionality and federalism

From a federal perspective both *Laval* and *Caixa Bank* are examples of a standard of proportionality review which imposes strict limits on the Member States' and private parties' regulatory freedom. Even though this proportionality standard does not entail that Union competences takes over national competences in the policy area at stake, proportionality requires that national regulators and private parties need to accommodate and evaluate their policies to a transnational context and take into account not only national interests but also interests of firms and citizens from other Member States, when suggesting legislation which have a cross-border effect. [429] Subsequent to *Laval*, trade unions may be required to consider whether the imposition of collective agreements may have serious adverse effects on foreign undertakings intending to provide cross-border services, whether the collective agreements goes further than national mandatory legislation and whether such undertakings are

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[423] See Doukas, *supra* note 410, p. 32.

[424] See Harbo, *supra* note 291, at p. 41.

[425] See Chalmers, *supra* note 299, p. 872; Baumberg and Anderson, *supra* note 416, p. 396,

[426] See Case 152/78, *Commission v France*, [1980], ECR p. 2299; Joined cases C-1/90 and 176/90, *Aragonesa*; Joined cases C-262/02 and C-429/02, *Commission v France*,[2004] ECR p. I-6569.

[427] See De Burca, *supra* note 288, p. 138.

[428] Reich, N 'How proportionate is the proportionality principle*?* Some critical remarks on the use and methodology of the proportionality principle in the internal market case law of the ECJ', paper presented at the Oslo conference on "The Reach of Free Movement", 18-19 May 2011?, p. 23. Available at:

<http://www.jus.uio.no/ifp/forskning/prosjekter/markedsstaten/arrangementer/2011/free-movement-oslo/speakers-papers/norbert-reich.pdf>. Last accessed at 27th September 2011. ; Tridimas, *supra* note 289, p. 240.

[429] See Azoulai, *supra* note 316, p. 1342.

already subject to similar requirements in their home country.[430] The possible effect of *Caixa Bank* is that national regulators in their turn need to contemplate whether a prohibition on certain marketing methods in the financial services sector may affect service providers from other Member States more than domestic producers and whether such restrictions are strictly necessary for the protection of consumers or for the encouragement of long term or medium term saving.

Conclusions

This paper intended mainly to examine two issues:

i. Explain why the CJEU undertakes an intense review of proportionality in certain cases concerning restrictions to the fundamental freedoms and why the CJEU undertakes a less intense review in other cases.

ii. Evaluate if proportionality can provide a safeguard of federalism and to what extent a specific standard of proportionality review influences the national policy maker's regulatory freedom.

On the basis of the undertaken examination several factors have been identified which influence the CJEU's proportionality assessment in the law of free movement. The determination of the intensity of review is done through a complex interplay between these factors and it is therefore necessary to consider the specific facts in every case to decide whether a national measure complies with the Treaty.[431] The relevant intensity-determinative factors are the following.

i. If the measure from the Member State falls within an area which is primarily within the competence of the Member States suggesting that Union legislative measures in the area concerned gives Member States less discretion when derogating from the fundamental freedoms,[432]

ii. the policy area at stake and the nature of the national interest and European interest suggesting that sensitive national policies such as gambling regulation and liquor regulation which are clearly related to public health, public order and public morality may inspire the CJEU to review proportionality less intense, particularly if such measures lies within the primary competences of the Member State,[433]

iii. whether the national rule or private practice genuinely contribute to achieve the legitimate objective invoked by the state or private actor assuming that the CJEU is suspicious to inconsistent national practices which involves indirect discrimination or intends to achieve another objective than the invoked legitimate objective,[434]

iv. whether the Member State can invoke a genuine fundamental rights concern, provided that the right is protected both by the national constitution and the Union legal order, suggesting that

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[430] See Deakin, *supra* note 315, pp. 604-608.

[431] See De Burca, *supra* note 288, pp. 111-112.

[432] See Case C- 434/04, *Ahokainen and Leppik*, Opinion of Advocate General Maduro, para. 26; De Burca, *supra* note 288, p. 112, 147.

[433] See De Burca, *supra* note 288, p.114. The Court's emphasis on national discretion in their proportionality review can also be seen in the case-law concerning other sensitive policy areas. See health care: Case C-238/83, *Duphar, v Netherlands* [1984] ECR 523, para 16. Regarding rules on imports of pharmaceutical products; Case C-266/87, *R V Royal Pharmaceutical Society of GB, ex parte Association of Pharmaceutical Importers* [1989] ECR 1295, para 22. For protection of victims of road traffic accidents, see Case **C**-518/06**,** *Commission of the European Communities v Italian Republic*, [2009] ECR 1-3491, paras. 83-85. For public health, see Case C-531/06, *Commission of the European Communities v Italian Republic*, [2009] ECR 14103, paras. 35-36, 59, 63, 64, 84-87. See also De Burca, *supra* note 288, pp.143-145, 147; Craig, *supra* note 296, pp. 708-710; Barnard, *supra* note 316 at pp. 475-476; Reich, *supra* note 431, pp. 15-16, 26;

[434] See Craig, *supra* note 296, p. 706; Chalmers, *supra* note 299, p. 840.

such a fundamental right concern gives the Member State more discretion when derogating from the Treaty freedoms,[435]

v. the circumstances of the case suggesting that excessive negative effects for the undertakings concerned exercising their free movement or serious protective effects may provide an incentive for the CJEU to review the defence to the fundamental freedoms more closely.[436]

It was firstly argued in the paper that *Laval and Caixa Bank* is evidence that restrictions to the fundamental freedoms as a rule are reviewed closely in the law of free movement. Proportionality is thus mainly applied in the law of free movement to promote the fundamental freedoms at the loss of national regulatory freedom. This does not mean that Union competences will take over national competences and regulate the policy area at stake but rather that national regulators and private parties need to accommodate their policies to a transnational context and take into account not only national interests but also interests of firms and citizens from other Member States, when suggesting legislation which have a cross-border effect.

However, it was subsequently shown that there are several examples in the case-law of the CJEU demonstrating a more lenient review of proportionality which shows concern for national sensitivity and a more pluralistic policy from the CJEU when reviewing national measures in the light of the fundamental freedoms. In contrast to the main rule in the law of free movement, proportionality does not, if the national regulation or policy is based on a genuine fundamental rights concern, require that Member States accommodate all their policies and practices to a transnational context and that they take into account every interest of foreign firms and Union citizens. There are however limits to the national discretion. If the national rule or national practices which are justified on the basis of fundamental rights, have excessive negative effects for the affected undertakings, the CJEU may strike down the national rule or national practice. Consequently, it may be suggested that proportionality has been applied in the fundamental rights case law to safeguard federalism by both protecting national diversity and uniform application of Union law. Proportionality may also be reviewed less strictly if the Member State invokes a genuine justification, such as consumer protection or the fight against fraud and crime, which is related to sensitive policy fields such as public health or public morality. The more lenient approach to proportionality in the cases national liquor regulation and national gambling regulation is to a certain extent amenable to preserve diversity in the application of Union law, implying that Member States are given certain discretion as to how they decide to regulate the national market. There are however limits to national discretion. The CJEU will therefore intervene in case of manifest excesses of national discretion, which involve obviously discriminatory or disproportionate measures. Proportionality in these policy fields is therefore applied both to protect diversity and unity in the application of Union law and may therefore be a safeguard of federalism.

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[435] See Tridimas, *supra* note 289, p. 330; Barnard, *supra* note 316, p. 494; Reich, *supra* note 431, p. 24.

[436] See De Burca, *supra* note 288, pp. 146-147. Rodriguez Iglesias **,** G.C., **'** Drinks in Luxembourg: Alcoholic Beverages and the Case Law of the European Court of Justice', First Annual Lecture 22 March 1999, p 6. Available at <http://www.slynn-foundation.org/lectures.html>; Tridimas, *supra* note 289, pp. 215-216, 223.

CONTESTED COMPETENCES AND THE CONTESTED NATURE OF THE EU: AMBIGUITY AS A DEFINING CHARACTERISTIC OF THE EU AND THE (EARLY) US

Dennis-Jonathan Mann[*]

Abstract

This paper contributes to a growing body literature that uses comparative federalism as a framework to analyze the European Union. The main argument put forward is that, by and large, most previous studies have adhered to an overly formalistic or "positivistic" (in an epistemological sense) concept of federalism. I argue that these studies' narrow focus on, allegedly, "objective" features of federal systems (including the distribution/separation of competences) misses an important essence of the EU's nature—its inherent contentedness and ambiguity. I suggest that shifting focus from the analysis of competences towards the study of discourses and disputes over competences allows for insightful comparisons of the EU with other federal systems. Theoretically and methodologically, I primary draw on insights from political science whereas the discourse I study contains a great deal of legal reasoning.

Keywords

Comparative federalism, Federalism, Contentedness

This paper[**] contributes to a growing body literature that uses *comparative federalism* as a framework to analyze the European Union. The main argument put forward is that, by and large, most previous studies have adhered to an overly formalistic or "positivistic" (in an epistemological sense) concept of federalism. I argue that these studies' narrow focus on, allegedly, "objective" features of federal systems (including the distribution/separation of competences) misses an important essence of the EU's nature—its inherent contentedness and ambiguity. I suggest that shifting focus from the analysis of competences towards the study of discourses and disputes over competences allows for insightful comparisons of the EU with other federal systems. Theoretically and methodologically, I primary draw on insights from political science whereas the discourse I study contains a great deal of legal reasoning.

I will proceed as follows; firstly, I will discuss some of the ways in which federal theory has been used to make sense of European integration. I will then suggest a non-teleological federal framework on the basis of which the debates and discourses over federal competences can be studied. In a second step, I will put this framework into practice. Thereby, I will compare the debate over the *nature of the EU* with the (historic) *nature of the Union* debate in the US. More specifically, I will use the debates over *sovereignty* as a proxy/showcase for the overall debate in both cases. I hold that the essence of EU federalism is to be found in its fundamental contentedness rather than in any objective, clearly definable stature. Finally, in a third part I suggest that the EU's constitutional "state of limbo" need

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not be seen as a flaw or pathology of the EU. I conclude that further research is needed to determine if the contentedness of a federal system can serve as a stabilizing factor and a safeguard against unchecked centralization.

What is the EU and How to Address this Question?

The questions "What is the European Union?" and "What is the end or purpose of European integration?" have been a key focus of scholars trying to make sense of the EU (and its predecessors)[437] ever since the ratification of the Rome Treaties. During this period, an increasingly complex body of literature—"European integration theory" (cf. Wiener & Diez 2009; Pollack 2005; Rosamond 2000)—has been devoted to the study of these questions. However, despite all scholarly efforts for clarification, the academic (as well as the political) debates over the "nature of the beast" (Risse-Kappen 1996) and its finality remain.

My point of departure is that the various theories of European integration offer quite a different—if not opposed—interpretation of the very same empirical "facts". For instance, from an intergovernmentalist (Moravcsik 2001) or an international law perspective, the EU is considered to be (and predicted to stay) an international organization of sovereign states. A federalist perspective, on the other hand, will most likely find that the EU is a nascent federal *state* or at least stress the federal characteristics the EU already possesses (McKay 2001). In either words, there is neither a consensus what the EU is nor a consensus what would be the appropriate framework to study it. Innumerable characterizations for the EU have been proposed—*quasi*-state, *Staatenverbund*, consortio, condominio, regulatory state, market polity, empire, hybrid, multi-level government/governance, *demoi*-cracy, and many more. At the same time, it is widely held that the EU is a system without precedent for which reason the EU is often labeled a *sui generis* system.

It is hardly surprising that the limited success in trying to identify the "true" *nature of the EU* quickly led to *fatigue* with addressing the big questions of European integration theory and to some considering it obsolete (Haas 1975; 1976). Instead, it was proposed to focus on smaller, more manageable areas of research, like looking into specific modes of policy-making. Despite a renewed interest in general theory of European integration from the mid-1980s onwards, the mainstream literature clearly still endorses "going empirical" (Jupille *et al.* 2003: 16) on a smaller scale in order to evaluate the explanatory power of the different theories.

Yet, while going empirical has certainly contributed greatly to our understanding of the inner workings of the European Union, one can hardly argue that we have come closer to any sort of agreement on what the EU in its entirety should be characterized as. From relativist/constructivist perspective (c. e.g. Kratochwil 2007) it is indeed very unlikely that this process of micro-level "testing" of competing theories of the EU will ever transpire into an answer (or an ultimate grand theory) about what the EU is. There are two reasons for this: Firstly, scientific observations can't—at least from such a constructivist epistemology—ever be truly "objective" or independent from theory but are rather greatly influenced by it. Thus, it is not hard to see why an intergovernmental/international law perspective creates fundamentally different results from those based, for instance, on a federal/constitutional perspective, even when both theories are supposedly looking at the very same "objective facts" regarding the EU. Secondly, if we accept that there can't be any "secure knowledge [that could] be based on field-independent and timeless methodological procedures" (Friedrichs & Kratochwil 2009: 702) the process of gathering micro-level knowledge about the EU simply cannot add up over time until we eventually come up with a universally accepted "truth" about what the EU is.

[437] To simplify matters, the term "European Union" will be used also for its predecessors like the European Communities and the European Economic Community. The same applies for the term "EU law" respectively.

Therefore, I propose a shift in focus. Instead of trying to find out what the European Union "really is" I suggest to instead ask whether there might not be other examples of systems with analogous *nature of the Union* debates. I further argue that it is a modified comparative federalism framework, which is the best suited for a comparative study of this sort.

European Integration Theories and the Return of Federal Theory—A Brief Overview

While comparative federalism is certainly not the only framework that allows for a comparison of different *nature of the Union* debates, it certainly one that immediately comes to mind as federal theory operates right at the edge between the domestic (comparative politics/constitutional law) and the international (international relations/international law) dimension of politics and law. At the same time, the term "federalism" still carries a strong (negative) connotation; therefore, some elaboration and conceptual clarification is needed.

Ideas to overcome the so-called Westphalian system and to replace it with a federal arrangement at the European level can be traced back at least to the 19th century (c. Tortarolo 1993: 28 ff.). After the Second World War, federal ideas were again promoted by a so-called "federalist movement", to which many of the founding fathers of the European Union belonged. What united this diverse group of thinkers and politicians was their adherence to a normative understanding of federalism as a tool to replace the existing European nation-states with a supranational (state-like) federation. Another shared assumption of these early federalists—as well as that of later ones like Spinelli (1972)—was that a federal Europe in their view had to start out with a Constitution by the people of Europe, which was seen as a prerequisite for the project rather than the end of a gradual process (Glencross 2009). However, a gradual, sectional approach was eventually chosen for the European integration project, an approach that soon found its "quasi-official" theory in functionalism (Mitrany 1976), later to be refined as neo-functionalism (Haas 1958; cf. Rosamond 2000: 59 ff.).

Yet, it wasn't long until events like de Gaulle's infamous policy of the "empty chair" led to the rise of intergovernmentalism (Hoffmann 1966) as the predominant theory of European integration, as neo-functionalist theories struggled to explain the continuing dominance of the Member State governments in the integration process. As a matter of fact, even its former champions suddenly claimed the "obsolescence" of functionalism if not integration theory as such (Haas 1975). However, after Europe had overcome "eurosclerosis" in the mid-80s, integration theory made a comeback. Today, (liberal) intergovernmentalism and functionalism continue to be at the very core of European integration theory (Wiener & Diez 2009), which remains a vital field of research.

However, for the purposes of this paper, it is a particular revival of federalist thought (rather than the renewed interest in integration theory in general) which is crucial. This novel appeal of applying theories originating from the field of comparative federalism (Burgess 2006) to the EU is on a new perspective that regards the EU polity as a multi-level system of government/governance (Marks *et al.* 1996; Hix 1994) an thereby as a (quasi)-federal entity.

Based on this view it is held that federalism should no longer be rejected as a normative concept (or even a political ideology in disguise) aimed at the creation of the "Federal States of Europe" but that it can rather serve as a powerful "theoretical framework" (Pollack 2005: 28) that allows for a structural analysis of the EU. To be sure, applying federalism to the EU is still fiercely rejected by intergovernmentalists like Moravcsik (2001: 163 f.) who argues that federal theory can't be applied to the EU since "(t)he EU constitutional order is not only barely a federal state; it is barely recognizable as a state at all." Against this, the point has been made that the European Union, although not a state, can *already* be understood as a federal system in a structural sense.[438] From this perspective, the

[438] Along similar lines it has been suggested to distinguish between a "federation"—a federal state—and the principle of "federalism" as a way of organizing a polity (King 1982; Kelemen 2003).

features of the EU polity fits all the criteria comparative federalism generally ascribes to federations (Watts 2008; Riker 1975):

> Powers are divided (even sovereignty is divided, or "pooled" as some argue) between the supranational level and the Member States and—in some of them—the regional level;
>
> EU decisions and—under certain conditions (c. European Court of Justice 1963)—even directives may have a direct effect (*effet direct*) on "EU citizens" and thus establish a direct link of the supranational layer with the people of the EU Member States;
>
> even more apparent than in federal states, the EU Member States (in this sense the sub-units of the EU polity) have retained competences they exercise autonomously;
>
> Member States (the sub-units) are prominently represented (compared to other federal systems, maybe even overrepresented) at the central level through the council and thus participate in supranational-level decision-making;
>
> last but not least, the European Court of Justice is regarded as the "functional equivalent" to constitutional courts in other federal states (Höreth 2008: 51).

The Shortcomings of Current Federal Theory

All in all, this new federal perspective has enabled scholars to apply theories of comparative federalism to the EU in an analytical way while leaving aside some of the normative connotations of the original federalist agenda. Numerous comprehensive comparisons have been carried out since the mid-1980s, with the USA being a (if not the most) popular object for comparison with the EU. Often, these studies have explored the subject multidisciplinarily in an attempt to bring together a political science and (constitutional) law perspective with historical accounts (s. e.g. Cappelletti *et al.* 1986; Howse & Nicolaïdis 2001). Strikingly, all major compendiums of federal systems (Watts 2008; Burgess 2006; Hueglin & Fenna 2006; McKay 2001) now seem to include the European Union, even when otherwise restricted to federal *states*.

Yet, while federal theories have left behind a lot of their normative baggage and have become more widely accepted, the application of federalism to the European Union still suffers from what I refer to as a *teleological bias*. Scholars of federalism today are rarely as naive as to think that federal systems have to start with a "big bang" constitutional revolution, thereby creating some sort of prefabricated federal arrangement that once and for all resolves all issues at stake (Glencross 2009). Instead, especially with regard to the EU, proposals for a (gradual) "federalization" (Trechsel 2005) or "constitutionalization" (Rittberger & Schimmelfennig 2007) of the EU have come to incorporate a lot of the ideas originally attributed to functionalism, particularly a focus on process. However, what remains puzzling is that—despite a supposedly purely analytical conception of federalism—the (nation) *state* appears to remain the point of reference according to which European integration is ultimately judged.

Accordingly—though rarely stated explicitly (but s. Howse & Nicolaïdis 2001: 8 ff.)—it is usually the current US federalism (or other federal systems as they exist today) that the EU is compared to. This type of comparison perceives, for instance, the US as a fully-fledged federal state that was created by a (preexisting) single *demos* ("We, the people...") with the ratification of the US Constitution (Scharpf 2001: 355).[439] In contrast to this narrative, the EU with its gradual and sectoral integration logic is usually regarded as an "unfinished" or partial federation (Hallstein 1979).[440] Surprisingly, this description seems to unite scholars who generally favor further European integration but try to point

[439] This perception of the early US is by no means limited to European scholars. See for instance Elazar (1979: 9): "The United States was, in a real sense, born integrated [...]".

[440] See also Elazar's (1987: 80 ff.) chapter on "Federalism as Means and End".

out (what they perceive as) crucial differences between the USA and the EU (Scharpf 2001) and other scholars, who invoke what Weiler (1995) has coined the "no-*demos* argument" to argue that the EU cannot follow the US example since the existence of a single European people is seen as a precondition for a democratic United States of Europe (GCC 1993; Kirchhof 2003).

Granted, some scholars have recently begun to "take history seriously" and, thus, to compare the European Union not only with today's federal systems but rather with the full *historic* experience of federalism (s. *inter alia* Bellamy 1996; Goldstein 2001). For instance, Fabbrini (2007) and Glencross (2007) have found striking similarities in the structures of what they perceive as the "compound republic" of the *antebellum* United States and today's European Union. Still, given that there is certainly no lack of contemporary literature on US Constitutional history it is quite surprising that, until recently, federal theories of European integration have paid little attention to the US *nature of the Union* debate. Yet, if either a consolidated federal state or a failure of the whole project are seen as the *only* possible outcomes history holds for us, finding analogies with the EU in the past of federal systems again only reaffirms the traditional teleological assumptions. According to such a view, the European Union is an unfinished federal state and will remain to be an odd, *sui generis* case if it doesn't manage to become a "proper" federation.

Towards a Discursive, Comparative Federalism Framework

To overcome the teleological assumptions of many studies resorting to federal frameworks I propose a change. Rather than judging federal disputes by their outcomes (or even focusing solely on present-day federations), I will comparatively analyze historic *nature of the Union* debates in an unprepossessed way. In other words, I will attempt not to let hindsight bias or skew my empirical study. Such a change in perspective of federal theory demands some changes on the epistemological and the methodological level as well. Based on the premise that the European Union is by no means the only historical example of a federal system whose character (or *nature*) is contested, I will use these discourses—and *not* a fixed set of criteria—as the basis for my refined framework of comparative federalism.

So far, comparative federalism is precisely based on structural comparisons that make use of a wide range of typologies (s. for example Erk 2008). As helpful as typologies may be in many contexts, in order to be able to analytically grasp the contestedness of federal structures, they certainly have their limits. The main problem is that for every criterion there is, naturally, only tow answers; yes or no. It follows that even the most sophisticated list of criteria for a federation/confederation typology is of no use when virtually all of the features of the system—or all criteria on the list—are essentially contested. Therefore, a coherent approach is needed that allows the discourses over the federal structures to be moved to the center of attention. Here, meta-theoretical insights drawn from constructivist approaches relying on speech act theory (Kratochwil 1989; Onuf 1989) and discourse particularly qualify. Based on its perspective that humans produce and reproduce their world through the practices of social interaction (Koslowski 1999: 566), a formalistic definition of federalism can be replaced by a broader conception, which acknowledges that federalism is not exhaustively captured by "a particular set of institutions but in the institutionalization of particular relationships among the participants in political life." (Elazar 1987: 12). Looking at *nature of the Union* debates from this theoretical perspective, a number of issues can be raised that would otherwise be incomprehensible.

Still, a constitutional debate as such—an certainly not one as multilayered and complex as one over the *nature of the beast*—cannot simply be analyzed or compared to other discourses *in toto* but rather needs to be operationalized and to be broken down into manageable units. For the broader context of my thesis, I have identified the following key elements to be some of the most important sub-discourses of the overall debate:

> Sovereignty or what unit should have the "final say" is the first (if not the most) essential element that comes to mind when thinking about *nature of the Union* debates.

Disputes concerning the hierarchy of legal and the "final judicial arbiter" can be seen as anther key element (c. Mayer 2000; Ackerman 2005: 163 ff.).

The question of seceding or exiting from a federal arrangement (c. Mann 2010) is also a characteristic discourse within the context of *nature of the Union* debates.

Finally, questions of (federal) citizenship and fundamental rights are linked in manifold ways to the discourse over the *nature* of the respective systems (c. Lacorne 2001; Wouters *et al.* 2009).

In the context of this paper, I will use the key element of *sovereignty* as an empirical showcase. First, I will briefly summarize the well-known EU debate and then turn to the (historic) US case.

Sovereignty in the European Union – Who Are the "Masters of the Treaties"?

The EU controversy focuses on the question of whether the Member States of the European Union are still sovereign or whether some parts of their sovereignty have been transferred to or pooled at the supranational level. While the debate is a diverse one, often highly legalistic and fragmented, two main positions can be identified.

A first view holds that the European Union is a separate legal entity whose existence is autonomous from that of its Member States as EU law has been "detached" from its roots in international law (Ipsen 1972). According to this view, the Treaties as well as primary EU legislation are either believed to already present a "European Constitution" or to be in a phase of "constitutionalization" (Weiler 1999). The European Court of Justice (ECJ) can be identified as the main driving force behind this concept along with the European lawyers who have supported and refined this doctrine. While the ECJ (1963) initially referred to the European Union as "a new legal order of international law", the Court later stressed that what was by then referred to as supranational law had constitutional quality (ECJ 1978). Going even further, the ECJ (1986) "explicitly qualified the European Treaties as a constitution" (Peters 2006: 50).

Two distinct arguments were brought up by the ECJ and European lawyers in substantiating this concept of a European Union autonomous from its constituent parts:

The first argument stresses the quantity as well as the quantity of the competences that have been "transferred" to the supranational EU level, being combined with the extension of qualified majority voting to a wide range of policy fields (Bogdandy 1993: 116 ff.), backed by a legal system that closely resembles the structure and performance of those to be found in classic federal states (Abromeit 1998: 3).

Secondly, the direct effect (*effet direct*) of EU legal acts towards individual European citizens that in turn create individual legal rights—enforceable before national courts—for those individuals.

Applied to the sovereignty *problématique*, this legal concept can be understood as a system in which sovereignty is divided between the supranational and the Member State-level, each of the two to possessing and exercising a set of powers independently from each other (Bogdandy 1993: 116). Accordingly, the Member States can no longer be regarded as being the "masters of the treaties" (or possessing the legal *Kompetenz-Kompetenz*), at least not in those areas in which the European Union has established its own authoritative rights (Ukrow 1995: 95 f.).

Opposing views regarding the question of sovereignty comes in two flavors. The first one resembles a traditional intergovernmental understanding of European integration (Hoffmann 1966; Joerges 1996: 75) and thus deals with the European Treaties solely in the categories of international law. Congruously, the Member States are seen to remain the sovereign entities of the international system as well as the ultimate "masters of the Treaties". Yet, the more interesting variant—which can easily be overlooked or misunderstood—is a concept developed and championed above all by the German

Constitutional Court (GCC).[441] According to this concept, the EU is understood to be "autonomous by recognition", meaning that the European Union—or rather its legal order—is considered as being distinct from domestic and international law. However, this autonomy is not believed to be independent from the Member States but rather thought to be conditional on the national legal orders' recognition. Therefore, the autonomy—and, for that matter, the supremacy—of EU law only exists because (and insofar as) it is sanctioned by the domestic legal orders and the Member States' constitutions in particular (GCC 1993; Kirchhof 1994: 66).

Again applying this view to the sovereignty *problématique*, the autonomous by recognition concept claims sovereignty to still reside will the Member States. While acknowledging that some "sovereign powers" have (temporarily) been transferred to the supranational level, the Members States—remaining the masters of the Treaty—can ultimately revoke these delegated powers and thus retain their full sovereignty (Isensee 1995: 585 ff.; Huber 2001: 220).

The United States—Union of a Single People or Compact of (the) States?

While, as noted above, scholars have started taking into account the complex constitutional history of the US, it is still widely believed that the US example cannot be used as an analogy for European integration since there is, allegedly, a fundamental difference. This widely held concern can be exemplified by the following statement:

> But the great difference between Europe and the US—and for that matter all other federal states—is that the European construct does not presuppose the supreme authority and sovereignty of a single constitutional *demos*. (Howse & Nicolaïdis 2001: 12, original italics).

Indeed, the omnipresent "American way of life" makes it hard to question the notion of a single US American *demos* with a shared identity. Yet, what is often overlooked when referring to this alleged stability and "organic" development of the US federal system (Kommers 1986: 604 f.) is the fact that, on closer inspection, matters look quite different. Many scholars of EU integration will be surprised by the fact that the US were comprised of nor more than eleven States when the Constitution came into force in 1789 and the first US president took office. Furthermore, it will not be an exaggeration to say that the *Declaration of Independence* in 1776, the *Articles of Confederation and Perpetual Union* of 1777 and finally the 1789 ratified *Constitution of the United States* accounted for more than minor changes regarding the relations of the former Thirteen Colonies (Amar 2005: 6 ff.) and can therefore be seen as big steps in a process of gradual integration.

Also, what is often portrayed as homogeneity, common identity or at least a basic coherence throughout the American Colonies might rather be the creation of historians, blinded by the "tricky tool" of hindsight and engaging in "after-the-fact appraisals of how it [the American Revolution] could possibly have turned out so well" (Ellis 2002: 5 ff.). What often gets lost in this narrative that presents the fight for independence as a nationalist movement is the fact that the *size* of the territory and the *heterogeneity* of its people were the main arguments raised by the so-called anti-federalists against the ratification of the constitution (Beer 1993: 237). Admittedly, English existed as a common language, which is indeed an important difference to the EU case,[442] still, only a tiny elite existed on the Union-level (Ellis 2002: 8), a level that was only gradually politicized and democratized, initially with disintegrating effects (Elkins & McKitrick 1993: 257 ff.; Ackerman 2005: 16 ff.).

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[441] This view has become quite popular among other Member States and their highest/constitutional courts as well. For overviews, see Kwiecień (2005) and Mayer (2003: 247 ff.).

[442] However, even this difference can be put into question on the basis of journal entry by John Adams, which—as Cappelletti notes—one would rather attribute to Jean Monnet or Robert Schumann than to one of the Founding Fathers of the US: "Tedious, indeed is our Business. Slow, as Snails. Fifty Gentlemen meeting together, all Strangers, are not acquainted with Each other's Language, Ideas, Views, Designs. They are […] jealous of each other—fearful, timid, skittish." (Quote taken from Cappelleti 1986: XI).

These preliminary considerations about the state of the early US should allow for a better understanding of the rivaling concepts regarding the locus of sovereignty. Here, like in the case of the EU, the diverse views can be divided into two main theories.

The United States as a System of *Divided Sovereignty*

The first of the two concepts can clearly be considered to be the mainstream view of the US (c. US Supreme Court 1995, Justice Stevens, Opinion) and also reflects the established perception of the US by Europeans. According to this view, the United States (under the Constitution of 1789) are considered to be a proper, true federal state based on a single American *demos*. Thus, it is the people as a whole ("We, the people") that are considered to be the only true carrier of sovereignty. Leaving aside the horizontal separation of powers, the American people—according to this theory—have delegated parts of their sovereignty to the federal government while the remaining powers are reserved for the state level.[443]

This concept results in a division of sovereignty ("divided sovereignty") in which the citizens of the US are direct subjects to two distinct, yet fully-fledged legal spheres ("dual sovereignty").[444] Chief Justice Roger B. Taney as well as James Madison have both provided classic definitions for this rather dialectic concept:

> [T]he powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres (US Supreme Court 1859).
>
> [T]he Constitution was made by the people, but as embodied in the several States that were parties to it, [...] one people, nation, or sovereignty for certain purposes [but] not so for others (letter by James Madison to Daniel Webster, as quoted in McCoy 1989: 149).

While all adherents to the theory of divided sovereignty seem to agree on the fact that today's United States are based on a single people, they differ on when and how this unity came about. Arguably the most heroic conception is that of Abraham Lincoln who famously stated that "[t]he Union is older than any of the States; and, in fact, it created them as States" (Lincoln 1953: 434). According to this view, the colonies didn't experience a sovereign existence independently from the Union since they had first been British colonies and subsequently—as a "collective body, which thereby succeeded to the sovereignty formerly held by the king" (Lincoln 1953: 433 f.)—declared their independence jointly (Farber 2003: 30). Under the *Articles of Confederation* Lincoln also saw sovereignty resting in the people as a whole and not with the people of the individual States since "[n]ot one of them ever had a State constitution independent of the Union. Of course it is not forgotten that all the new States framed their constitutions before they entered the Union, nevertheless dependent upon and preparatory to coming into the Union." (Lincoln 1953*:* 433 ff.).

A more widely held view among the divided sovereignty proponents is usually referred to as the transformational view. Rather than dating back the division of sovereignty to the Declaration of Independence, this theory considers the ratification of the Constitution in 1789 as having effectively transformed the *nature* of the United States. The Declaration of Independence's introductory wording "[t]he unanimous Declaration of the thirteen united States of America" serves as evidence that this text was not (yet) based on a single American people but rather represented a form of cooperation between "the good People of these Colonies", as the document refers to them, who are believed to have

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[443] In this context it is highly controversial whether the "reserved powers", enshrined in the Tenth Amendment of the US Constitution, are powers of the State governments ("police powers") or remain with the respective State peoples (c. Farber 2003: 32).

[444] The concept of *dual sovereignty* has gross practical implications, i.e. regarding the "double jeopardy" principle (US Constitution, Fifth Amendment; s. also Amar & Marcus 1995).

retained their sovereignty (Becker 1958: 191). Though already using the words "united States",[445] the right of the aforementioned "to be Free and Independent States" who "have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and do all other Acts and Things which Independent States may of right do" (Becker 1958: 192) is seen as a proof for the States to retain their sovereignty under the Declaration of Independence.

Pointing to the States as parties to the *contract* as well as to an explicit guarantee in the text,[446] the proponents of the transformational view believe sovereignty to still rest with the individual States under the *Articles of Confederation* of 1781 as well. It is only in the 1789 adopted *Constitution of the United States* in which they see a transition to a system of divided sovereignty as the text no longer refers to "the States" but rather to individuals ("the People"). Additionally, the text of the Constitution is believed to underscore this constitutive act by explicitly stating "We the *People* of the United States [...] do *ordain* and *establish* this Constitution" (US Constitution, Preamble, emphasis added).

In a nutshell, what characterizes all divided sovereignty theories is the concept of the federal level being directly based on a single US American people. This *demos* is, however, served by two agents—the State and the federal government—who are both held to have a directly link to the people and to be sovereign within their respective spheres (c. Supreme Court 1819).

States' Rights Doctrine and Compact Theory of the United States

Today, compact theory—and States' rights doctrine as its core element—is a highly contested concept (s. e.g. Sellers 1963: 16 ff.), not least because it has been used by Southern slave states. However, as discussed in the theoretical section above, I seek not to judge theories by their outcomes or by the circumstances of their uses; I rather attempt to focus on the theoretical foundations of the concepts.

To begin with, the term *States' rights* needs some clarification since in the context of compact theory it is not captured by the so-called "reserved powers" (US Constitution, Tenth Amendment) but rather a broader reading of the term that is usually implied. Opposing the notion of a divided sovereignty,[447] compact theory posits the individual States to have a higher, more direct legitimacy than the federal level on the basis of which they then—as will be discussed in great detail when dealing with the key element of the *hierarchy of norms* in my thesis—can *ultima ratio* interpose federal laws by *nullifying* them. The main assumptions of compact theory can be best exemplified by the quotes by John C. Calhoun, the champion of States' rights thought:

I go on the ground that this constitution was made by the States; that it is a federal union of the States, in which the several States still retain their sovereignty (Calhoun 2003b: 434).

> [T]he people of the several States […], taken together, form a federal community;—a com-munity composed of States united by a political compact;—and not a nation composed of individuals united by, what is called, a social compact (Calhoun 2003a: 90).
>
> [I]t is the government of a *community of States*, and not the government of a single State or nation (Calhoun 2003a: 63, original emphasis).

As can easily be seen, compact theory implies that the United States are to be considered a Union of the several people of the States (*State peoples*) rather than a Union based on a single US people. Accordingly, the ultimate, undivided sovereignty is believed to still rest with the individual peoples of the States. It is hard to subsume compact theory under the conventional categories of federal state and confederation. While, especially in the German literature, John C. Calhoun's theory is usually believed

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445 The lower case spelling of the word "united" is believed to be a mere typo (Becker 1958: 185 ff.).

446 "Each state retains it sovereignty, freedom and independence [...]." (Articles of Confederation, Art. II).

447 "Sovereignty is an entire thing;—to divide, is,—to destroy it." (Calhoun 2003a: 81).

to regard the United States under the Constitution of 1789 as a confederation or *Staatenbund* (Usteri 1954: 194), matters are more complex.

Though also referring to Calhounian compact theory as a "confederacy of sovereign states", Farber (2003: 32) claims that this does not imply that what is referred to as a "compact" is meant to be a mere "intergovernmental treaty" between state governments—he suggests that the term State rather refers to the State *people* in this context. Indeed, on closer inspection one finds that Calhoun carefully distinguishes the "federal government" of the US from a conventional, *intergovernmental* confederacy, but also from that of a consolidated, national government (c. Forsyth 1981: 125 ff.). Even though based on a confederacy, the US Constitution of 1789, Calhoun argues, establishes a true government with regard to the powers delegated to it:

> To be more full and explicit;—a federal government, though based on a confederacy, is, to the extent of the powers delegated, as much a government as a national government itself. It possesses, to this extent, all the authorities possessed by the latter, and as fully and perfectly. The case is different with a confederacy; for, although it is sometimes called a government,—its Congress, or Council, or the body representing it, by whatever name it may be called, is much more nearly allied to an assembly of diplomatists […]. (Calhoun 2003a: 91).

The proponents of compact theory base their claims primarily on the so-called Virginia (1798) and Kentucky Resolutions (1799) drafted by James Madison and Thomas Jefferson themselves. Also of no surprise, the fact that the Constitution was ratified in separate state conventions—instead of a single one—is commonly referred to. Less apparent and quite remarkable, States' rights advocates also argue that the Preamble of the Constitution would back up their reasoning. Rather than being the proclamation of a *contrat social* for a single people, the use of the words "We the People of the United States" in the compact theorists' reading is due to the fact that a pragmatic solution was needed to the problem that it was highly uncertain which of the States would be able to ratify the Constitution and become part of the US. Indeed, as Farrand (1940: 190) affirms, earlier drafts of the Preamble still had explicitly mentioned all states. The genesis of the Preamble, backed up by semantic considerations,[448] is thus believed not to be in conflict with compact theory.

In sum, *compact theory* regards the United States a (con)federation *sui generis*,[449] which is based on a compact of the separate people of the states, which thereby establish a government for limited purposes; sovereignty is retained by the parties to this compact, the States (or their people respectively). It is them who—according to compact theory—are the sovereign masters of the US "constitutional treaty".

Concluding Remarks and Prospect

Having analyzed only one key aspect (sovereignty) and only two cases (EU and USA) in this paper, it would certainly be mistaken to already expect seminal findings from these empirics. Even so, the preliminary empirical findings regarding the discourses are quite remarkable—not only where analogies and similar patterns in the debates over sovereignty can be found but also where differences exist.[450] What is most interesting is the fact that discourses about the "locus" of sovereignty and the discussions about the relationship between the (Member) States and the Union evolve out of what *prima facie* seem to be quite different bases; what would appear to be a constitutional document in the

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[448] "In the Constitution, after all, 'the United States' is consistently a plural noun." (Supreme Court 1995, Justice Thomas, Dissent).

[449] "Our system is the first that ever substituted a government in lieu of such bodies. This, in fact, constitutes its peculiar characteristic. It is new, peculiar, and unprecedented." (Calhoun 2003a: 91).

[450] Also, many other potential analogies—like e.g. recurring proposals in both cases to create a separate "Court of Competences"—could not even be discussed here (cf. Goldstein 2001).

US case and an international treaty in the case of the EU. Yet, in both cases we find one opinion that posits the existence of an independent "supra-level", directly linked to the individual citizen as the main proof for a *divided sovereignty*. Again, a rivaling view sees the individual peoples of the (Member) States (to continue) to be the ultimate source of legitimacy and thus considers sovereignty to rest with the individual States in both cases. Here, however, though commonly presented as resembling a confederal/intergovernmental understanding of the US, Calhoun's *compact theory* proved to be much more nuanced. Thereby, even the tentative empirical findings presented in this paper can already give a clear indication of the complexity and contentedness of the *nature* of the (early) US, which is so often portrayed as an uncontroversial case. By analyzing additional key elements and addition cases the overall "patterns of contestedness" should become more refined and nuanced.

On the theoretical side, the findings are quite be promising as well, as the here proposed discursive comparative federalism framework seems to be able to contribute to at least two aspects to the study of the *nature of the EU*. Firstly, the prevailing idea that the EU's unresolved nature and competence claims are an exceptional and necessarily disastrous feature of the European Union can be rebutted (or at least put into perspective) by showing that analogous "states of limbo" are rather the rule than the exception in (early) coming together federations. To that effect, the view that—while acknowledging that some degree of constitutional "ambiguity" might be helpful—federal arrangements are sustainable only, if they (constantly) manage to bind together diverse demands under one shared understanding (Erk 2007; Behnke & Benz 2009) can be questioned.

Secondly, the here proposed perspective allows not only taking into account the blessings of ambiguity but also its risks and limits. Unlike theories such as (radical) legal pluralism (c. *inter alia* Besson 2009) that tend to regard EU legal pluralism as a novel, *sui generis* phenomenon, my framework allows the question the question "how much ambiguity and contestation of its foundational principles can a system take before it runs risk of breaking down?" to be addressed from a comparative, historical perspective.[451]

[451] Note, however, that Schütze (2010) has also recently suggested looking at EU legal pluralism through the lens of the *antebellum* US experience.

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