

**THE EU COMPETENCY CONFUSION: LIMITS,
“EXTENSION MECHANISMS,” SPLIT POWER,
SUBSIDIARITY, AND “INSTITUTIONAL CLASHES”***

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I. INTRODUCTION

A. *The Road to Federalism*

It has been said that the European Union (EU) is the first illustration ever of independent states that peacefully enter into a new state construction and freely give up their own respective sovereignties for the benefit of creating a federate state.¹ The objective of a federate state has gradually ripened throughout the integration process. While the concept of a federation is less arguable, one still may dispute whether the EU has become a “state.” Indeed, the road to federalism has been bridged by small stepping stones that, chained together, build an entire new super-state.

The history of the EU is based on a move towards European unification as evidenced in numerous treaties and organizations created thereby which have culminated in the EU becoming a monetary, foreign, security, and defense union. Today the constitutional basis of the EU rests in the consolidated versions of the 1992 Treaty on European Union and the 1992 Treaty Establishing the European Community² as amended by the 1997 Treaty of Amsterdam and the soon ratified 2001 Treaty of Nice.³

Member States possess no veto power and most questions are decided by qualified majority votes. Unilateral withdrawal is impossible. The EU has acquired exclusive autonomy within ever-increasing areas of common policies. The EU enjoys preemptive power, which means that Member States are deprived of all legislative authority within these subject matters.

After a long history of association limited to free trade agreements under the 1951 European Coal and Steel Community, the 1957 European Economic Community, and the 1957 European Atomic Energy Community; the EU was formed by the Treaty of Maastricht⁴ and modified by the Treaty of Amsterdam.⁵ In 2004, subsequent to the entry of ten new Member States, the 2001 Treaty

1. For a more comprehensive study of whether the EU is an international organization or a “supranational federation” see Armin von Bogdandy, *The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty*, 6 COLUM. J. EUR. L. 27 (2000).

2. The two 1992 treaties are also collectively named the Treaty of Maastricht and are available at http://europa.eu.int/eur-lex/en/search/search_treaties.html.

3. Effective May 1, 2004, available at http://europa.eu.int/eur-lex/en/search/search_treaties.html.

4. The “Treaty of Maastricht” is really two treaties—the Treaty of the European Community, effective Nov. 1, 1999 and new Treaty of the European Union, available at http://europa.eu.int/eur-lex/en/search/search_treaties.html.

5. Effective May 1, 1999, available at http://europa.eu.int/eur-lex/en/search/search_treaties.html.

of Nice laid the platform for institutional changes and a somewhat different decision making structure. Through different rounds of accession treaties, no less than 20 countries have subsequently joined those that originally formed the group of “founding fathers” of the EU.⁶

The original treaties’ main purpose was to introduce “four freedoms:” the free flow of labor, investment, establishment, and services and commodities. Under the Maastricht Treaty, the objective of a common monetary, foreign policy and security policy was achieved and a common defense policy was considered. And, under the 1997 Treaty of Amsterdam, a common outer borderline for asylum and criminal purposes was incorporated and implemented.⁷ Thus, the Common Foreign and Security Policy (CFSP) has taken on an important role in the existence of the EU. The EU itself is based on the CFSP, which may be described as one of the three pillars on which the EU is built, the other two pillars being the other various Communities and the commitment to justice. EU law is a comprehensive system of law that partly preempts and partly is superior to domestic law.⁸ The EU today possesses all the ingredients of a federal legal system and is at least as developed as the United States was in 1820 after a period of only 45 years of independence.⁹

Despite the high ideals of common policies, the EU still struggles to conduct itself as a single entity vis-à-vis foreign policy and security. This also includes defense and stability for the region. Authority for the existence of a CFSP and the European Security and Defense Policy (ESDP) is included in Title V of the Treaty on European Union. Codified in Article J.1, the defense policy has five main principles: 1) to safeguard the common values and fundamental interests of the EU; 2) to strengthen the security of the EU; 3) to preserve peace and strengthen international security; 4) to promote international cooperation; and 5) to develop democracy and the rule of law including human rights.¹⁰ It further states that members “shall support the Union’s external and security policy

6. For some basic issues under the accession treaties, see Peter Orebeck, *The Fisheries Issues of the Second Accession to European Union, Compared with the 1994 First Accession Treaty*, — with an emphasis on the negotiation positions of Latvia and Norway, INT’L J. MARINE & COASTAL L. (forthcoming 2004).

7. See the 1985 Treaty of Schengen between some main EU Member States (not the U.K. or Ireland), available at <http://www.auswaertiges-amt.de/www/en/willkommen/einreisebestimmungen/schengen.html>.

8. See *infra* discussion in section 4B.

9. See *infra* discussion in section 1B.

10. Treaty on European Union, Feb. 2, 1992, Title V, art. J.1(2), available at http://europa.eu.int/eur-lex/en/search/search_treaties.html. [hereinafter EU Treaty].

actively and unreservedly in a spirit of loyalty and mutual solidarity,” requiring Member States to work together to enhance and develop their mutual solidarity.¹¹ A Member State, as per this article, *may not* take any action which is contrary to the interests of the EU or which is “likely to impair its effectiveness as a cohesive force in international relations.”¹² Thus, while the original objective was freedom of trade and open markets, the ultimate goal today is state building and the establishment of a military superpower.¹³ This drastic shift in political focus during the last three decades actualizes questions of power and power sharing.

At present, the EU has exclusive autonomy on all issues covered by common policies. The instrument for unification and approximation is *acquis communautaire*, the common EU law. The unification process is, in some respects, more comprehensive and compulsory than under American federalism. EU legislation has preemptive — and not only *lex superior* — force which forecloses Member States from any form of legislation.¹⁴ Internal EU competency is mirrored by parallel external relations competency that resulted from the case law developed principles of parallelism and implied power. The EU enjoys external competency that matches its internal common policies.¹⁵

Today federalism is still a “hot potato” as illustrated by the first and second drafts of the EU Constitutional Convention. The Constitution is to replace the EU Treaty and the EC Treaty. While the feature of “a federal United States of Europe” was codified in the first round,¹⁶ that reference is lost in the last draft. This is no indication of a dropped federation, but rather this illustrates how controversial the idea has become. Now the EU is a *de facto* federation built on a common monetary policy, foreign and security policy, an upcoming defense policy, and common market policies of trade, customs, transportation, and agriculture. As I will illustrate in this article, very few competencies remain vested with the Member States.

11. *Ibid.* at art. J.1 (4).

12. *Id.*

13. JENS PETER BONDE, AMSTERDAM TRAKTATEN 241 (Vindrose, Denmark 1998). Jens Peter Bonde is a Danish Member of the EU Parliament.

14. *See infra* section 4B.

15. *See, e.g.*, Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585. For the exclusive EU competency *see* Opinion 1/75, *Local Cost Standards*, 1975 E.C.R. 1355, 1363; Opinion 2/91, *ILO Convention 170 on Chemicals at Work*, 1993 E.C.R. I-1061; Case C-268/94, *Portuguese Republic v. Council*, 1996 E.C.R. I-6177 (Cooperation Agreement between the European Community and the Republic of India).

16. The European Convention, The Secretariat: Draft Articles 1 – 16 in the Constitutional Treaty, Conv 528/03, Article 1 *in fine*, Feb. 6, 2003, *available at* <http://european-convention.eu.int>. [hereinafter The European Convention Constitutional Treaty Draft].

*B. Federal State Powers: EU — U.S. Comparative Issues*¹⁷

In comparing the EU and the United States, two issues are raised with regard to institutional growth: first, the federative aspect of the EU; and second, whether the EU has become a state. This introduction will briefly point to the growth of the United States' federal power as an explanatory framework for the growth of the EU federal powers. Is the EU already a federal body that soon will become a state? What lessons can the EU learn from the United States' experiment in federalism? My aim is to clarify the EU federal experience for a non-European reader by comparing it with the early American federal experience and ascension to statehood. I then discuss the likelihood that the EU will develop into a strong federal state and the EU's potential to achieve "superpower" status.

As a starting point, it should be observed that "federalization is a process and not an event."¹⁸ If we were "to judge by the current American model, the present confederal form of [EU] government is seriously flawed" in its loosely defined central authority; "perhaps hopelessly so."¹⁹

However, if we were to judge the [EU] of today by the United States' original form of federal government — not the Articles of Confederation, but the U.S. Constitution of 1789 — then the distinctions are far less clear. When compared to [the United States'] present, highly centralized government, that early U.S. federation also was weak, and its eventual success far from clear....²⁰

Under such a comparison, some scholars have found more similarities with the EU and the early U.S. than differences:

European 'federalism,' while not entirely like that of the United States in either conception or form, can, in different instances, be more and less federal than [our system]. However, it surely is tending in the

17. On the U.S. federal law part of this section, J.D. student Ryan William Blackney at Chicago Kent College of Law has helped with the legal documentation.

18. Thomas C. Fischer, "Federalism" in *the European Community and the United States*, 17 FORDHAM INT'L L. J. 389, 391 (1994).

19. *Id.*

20. *Id.*

same direction as did our ‘federalization’ over the past 200 years, and for similar reasons.²¹

I concur with the prognosis of political observers. In speaking of the new proposed EU Constitution, *The Economist* writes: “the drafters have displayed a worrying appetite for integration for its own sake ...[although] the word ‘federal’ is to be dropped...the more meaningful demand for ‘ever closer union’, implying just that impulse towards European statehood, is now in the preamble....”²²

My prediction is that the EU is becoming a federalist state. Although federalism can exist in a matter of degrees, statehood cannot. Statehood is absolute and identifiable. The U.S. experience shows us that statehood takes time:

[C]ooperation in the world economic environment, with the goal of greater competitive success, leads economic units toward a greater degree of union. The persistent myth that America’s federal “union” sprang full blown from the Constitution...is not accurate. It took a Civil War, an industrial revolution, a severe depression, two World Wars, and much more for true “federalism” [that is — statehood] to creep thoroughly into the fabric of American Constitutional government.²³

Many scholars argue against statehood on the basis that the EU has yet to take over the sovereignty of its Member States.²⁴ However, this issue of sovereignty delegation is not a matter of “if,” but rather of “how much” sovereignty needs to be given up for a federation to become a state. If statehood could only be achieved in the United States if all fifty states had given up *all* of their sovereignty, then the United States could not be seen as a state. Even today, the individual states of the U.S. continue to retain sovereignty in many areas. Rather, the issue is where is the threshold point when enough sovereignty has been given up to constitute the relinquishment of statehood by a Member State to a federal body.

Despite its short life, the EU’s achievements are amazing; yet, the EU is still in a rapidly changing position. When comparing the

21. *Id.* at 392.

22. *Nothing Like Good Enough, So Far*, THE ECONOMIST (May 29, 2003), at 14, available at http://www.economist.com/PrinterFriendly.cfm?Story_ID=1812335.

23. Fischer, *supra* note 18, at 438.

24. JO SHAW, LAW OF THE EUROPEAN UNION 178 (3d ed. 2000).

EU with that of the United States, the tendencies seem increasingly familiar. Most importantly, this comparison shows that the founding fathers of America have dealt with problems similar to the ones that are currently being debated in the EU. Let me briefly point to some similarities on the constitutional plane:

- Similar to the United States, the EU in its function of European Community, is an entity with legal personality on the domestic and the international plane.²⁵ Beginning in 2004, the EU as such, will enjoy legal subjectivity.²⁶
- The EU's legislative force is directed towards natural and juridical persons as well as Member States.²⁷
- The authority of the central government cannot rest on the impulse of its Member States, but must come from "the persons of the citizens."²⁸
- The creation of a common market with external borders for custom purposes. Fischer has argued that Madison's first goal could be achieved in Europe by creating a common market in Europe.²⁹
- The European Court of Justice,³⁰ similar to the U.S. Supreme Court,³¹ enjoys the exclusive power to interpret its laws.
- While the residual jurisdictional rights, those legal rights that remain with constituent states or their citizens,³² formally belong to the states in the United States³³ as well as the EU,³⁴

25. See Treaty Establishing the European Community, art. 3-281, available at http://europa.eu.int/eur-lex/search/search_treaties.html. [hereinafter EC Treaty].

26. See The European Convention Constitutional Treaty Draft, *supra* note 16, at 4.

27. *The Federalist*, No. 16 (Alexander Hamilton) (Jacob E. Cook, ed., 1961). See EC Treaty article 249, as implemented by case law, e.g., the direct applicability of *regulations* (Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 1978 E.C.R. 629), *directives* (Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337) and *int'l law* (Case 104/81, *Hauptzollamt Mainz v. Kupferberg & Cie.*, 1982 E.C.R. 3641).

28. *The Federalist*, *supra* note 27, No. 16. For the EU, see the EU Treaty and the EC Treaty preamble: "an ever closer union amongst the people of Europe." See also article 8(2), The European Convention Constitutional Treaty Draft, *supra* note 16.

29. Fischer, *supra* note 18, at 416-18.

30. EC Treaty art. 220 ff.

31. See *The Federalist*, *supra* note 27, No. 10 (James Madison).

32. Fischer, *supra* note 18, at 420. See also Case 26/62, *N.V. Algemene Transport — en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Admin.*, 1963 E.C.R. 1.

33. "The powers delegated by the proposed Constitution to the Federal Government are few

the highest courts of these entities enjoy the right of defining the outer limits of the EU and U.S. respective competencies. This leads to “creeping federal” jurisdiction.³⁵

- Membership in the EU, like national state membership in the United States, is final and irrevocable,³⁶ which means that no state may unilaterally withdraw from the EU.

Clearly, differences exist as well. When comparing the EU with the federal government of the United States, it is useful to relate some of the state-like competencies that the U.S. federal government has and compare those with the competencies of the EU federal government. In the United States, when the original thirteen colonies undertook to establish a central government, they gave it the following competencies: “raising and supporting armies; conducting foreign relations; printing money; regulating commerce; and levying taxes.”³⁷ On the other hand, in the European Community (EC), when the original six members of the EU decided to delegate competencies to a central authority, they gave this authority virtually none of the competencies that the late 18th century Americans felt necessary to cede to a central government. The EU’s central authority has no central military force and no real authority to raise taxes.³⁸ It is therefore quite notable that “of all of the hallmarks of American federalism contained in the Constitution, only the regulation of commerce [was, from the very start,] common to the two experiments in federalism.”³⁹

Nonetheless, “the power to regulate commerce is no small power” — for the United States has in the 20th century used this power (under the Commerce Clause) to create laws on almost any conceivable topic — “and in this area the Union is at least as federal as the United States.”⁴⁰ What is more important is that “raising and

and defined. Those which are to remain in the state governments are numerous and indefinite.” See *The Federalist*, *supra* note 27, No. 45 (James Madison).

34. Any “competences not conferred on the Union by the Constitution rests with the Member States.” article 8(2) in *The European Convention Constitutional Treaty Draft*, *supra* note 16, at 5.

35. See Fischer, *supra* note 18, at 418.

36. EC Treaty art. 312.

37. Fischer, *supra* note 18, at 396-97; see also *The Federalist*, *supra* note 27, Nos. 42, 44, 45 (James Madison).

38. Fischer, *supra* note 18, at 393. Fischer writes, “In my meetings with European scholars and government representatives, I am often amazed by their knowledge of U.S. political and legal forms. Hence, I believe it is no mistake that — with the American federal model clearly before them — the original six Member States [created a weak central government].” *Id.* at 396.

39. *Id.* at 397.

40. *Id.* at 397-98.

supporting armies; conducting foreign relations; [and] printing money” now are,⁴¹ or will be very soon,⁴² under the auspices of the EU.

C. *The Division of Competency*

One of the statements included among the President’s conclusions of the 2001 Laeken meeting⁴³ conveyed the need for a “better division and definition of competence in the European Union.”⁴⁴ European Parliament member Elmar Brok responded to this call by advocating a division of competency into three categories: the exclusive competences (exclusive to EU), shared competences (shared between EU and Member States), and supporting competencies.⁴⁵ However, Mr. Brok did not consider a fourth category — exclusive Member State competencies. Since Annex I explicitly mentions the possible “creeping expansion” of EU power into the “exclusive areas of competency of the Member States,” this category of competency should be included as well.⁴⁶

Section 2 of this document deals with Member States’ exclusive competency as warranted by the EC Treaty, in other words, the outer limits of EU power. Section 3 focuses on EU geographical “extension mechanisms” — the association agreements, illustrated by the European Economic Area (EEA) Agreement. In section 4 both horizontal and vertical questions related to split competency are analyzed. Section 5 discusses “institutional clashes” between EU institutions — what could be called the protection of prerogatives.

Competency — a notion that is identical with ‘jurisdiction’ — includes legislative, executive, and dispute settlement power. The focus of this article is limited to legislative jurisdiction as demonstrated by case law. “The element of *stare decisis* in EC law has now become so strong that when the Court occasionally changes its mind it makes it clear that it is doing so.”⁴⁷ In that respect, the

41. See the Amsterdam Treaty, art. 105 ff. (monetary policy) and EU Treaty art. 11 – 28 (foreign and security policy).

42. See the amendments under the Amsterdam Treaty, art. 17(1) on defense policy.

43. The EU meeting of member heads of state that launched the Valéry Giscard d’Estain led European Constitutional Convention.

44. Presidency conclusions of 14 and 15 of December 2001, Annex I (SN 300/01 Add 1) at 5, available at <http://www.ecre.org/eu-developments/presidencies/laconc.pdf> [hereinafter Presidency Conclusions].

45. Contribution by Mr. Elmar Brok, member of the Convention: The Competences of the European Union, Conv 541/03 — Contrib 234, Brussels, February 6, 2003, available at <http://register.consilium.eu.int/pdf/en/03/cv00/cv00541en03.pdf>.

46. Presidency Conclusions, *supra* note 44, at 5.

47. SHAW, *supra* note 24, at 249.

prejudicates of EU dispute settlement bodies have a considerable influence.

II. OUTER LIMITS TO EU COMPETENCY?

This section examines two issues. The first is whether EC or EU treaties raise express or implicit borders with respect to EU legislative competency. This is *in casu* a question of whether the EC Treaty Articles 30 or 295 define a boundary for EU legislative competency.⁴⁸ This could also be posed as a question of whether the EU or the Member States (MS) possess “residual rights.” Herein lies the important question of “kompetenz — kompetenz;”⁴⁹ who decides whether EU has exceeded its power? The second issue is whether EC Treaty Article 308 is a kind of plenipotentiary rule that trumps all else. In relation to EC Treaty texts, the issue is whether EC Treaty Article 308 predates Article 5,⁵⁰ or does Article 5 exhaust Article 308?

Under the EU Convention draft Constitution, any “[c]ompetences not conferred on the Union by the Constitution rests with the Member States.”⁵¹ This is also made clear by Annex I to the Laeken declaration.⁵² However, since the European Court of Justice (ECJ) is not allowed to resort to “*travaux préparatoire*” (the preparatory work) in its interpretation,⁵³ too much emphasis should not be placed on the text. As made evident by a somewhat similar expression in the 10th Amendment of the U.S. Constitution,⁵⁴ this phrase does not give any clear warranty against federal “creeping jurisdiction.”⁵⁵ The solution here of course rests in the “kompetenz–kompetenz”⁵⁶ issue, “who has the *ultimate* authority to

48. There are other borders as well, for example, the right of national states to have their own citizenship procedures. See Case C-396/90, *Micheletti v. Delegacion del Gobierno en Cantabria*, 1992 E.C.R. I-4239. This is, however, no example of preemptive legislative rights of Member States since the ECJ explicitly stated that the competence should take due regard of the requirements of EU law. Thus, the court seems to indicate that *lex superior* rules the area of law — which indicate a split power.

49. See Gerhard Wegen & Christopher Kuner, *Germany: Federal Constitutional Court Decision Concerning the Maastricht Treaty*, 33 I.L.M. 388 (1994).

50. This seems to be the position of Jo Shaw. See SHAW, *supra* note 24, at 216.

51. Article 8(2) in The European Convention Constitutional Treaty Draft, *supra* note 16, at 5.

52. Presidency Conclusions, *supra* note 44, at 6.

53. See CLAUS GULMANN & KARSTEN HAGEL-SØRENSEN, *EC LAW 128* (Copenhagen 1988) and LAURIDS MIKAELSEN, *EC COURT OF JUSTICE AND DENMARK 28-9* (Copenhagen 1984) [author’s translation].

54. “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.” U.S. CONST. amend. X.

55. For the comparative aspects, see Larry Cata Backer, *The Extra-National State: American Confederate Federalism and the European Union*, 7 COLUM. J. EUR. L. 173 (2001).

56. A discussion of this principle is available at <http://www.europarl.eu.int/workingpapers>

determine the constitutionality of EC acts?”⁵⁷ Contrary to what many may think, draft EU Constitution Article 8 does not serve the purpose of protecting Member States from EU “take over,” but rather lays the foundation for ultimate ECJ adjudication that trumps national constitutional court efforts to control the outer limits of EU law.⁵⁸ Once Article 8 is ratified, the European Court of Justice will finally become the supreme court of all EU Member States, ending the power struggle with the German Constitutional Court. With this in mind I proceed to the present legal situation.

A. EC Treaty Article 295

Article 295 (formerly Article 222) reserves the power to regulate substantive property laws to the Member States’ legislatures.⁵⁹ On paper, the Member States’ power is exclusive; the “treaty shall in no way prejudice the rules in Member States governing the system of property ownership.”⁶⁰ In legal theory, the position seems to be that “Article 295 was effectively rendered a nullity in relation to intellectual property rights.”⁶¹ As made evident by the following case law, this position is not correct.

Treaty texts should be interpreted within their context. EC Treaty article 30 makes it clear that whenever a Member State takes actions to protect “industrial and commercial property,” it should not “constitute a means of arbitrary discrimination or a disguised restriction on trade.” Apparently Member States’ regulation of property ownership is limited to the free trade objective.

One of the EU’s basic goals is to serve the common market. The provided “*l’effet utile*”⁶² of the four freedoms requires some extensive restraint of the exclusive authority of Member States’ prescriptive competency under Article 295. The specifics are best illustrated by analysis of case law. The following cases deal with the private property delimitation of EU law provisions: *Patent Protection* case,⁶³

/poli/w26/adju_en.htm.

57. ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 174 (Oxford University Press 2000).

58. See, e.g., Wegen & Kuner, *supra* note 49.

59. EC Treaty art. 295.

60. Valentine Korah, *The Interface between Intellectual Property and Antitrust: The European Experience*, 69 ANTITRUST L.J. 801, 805 (2001) (quoting Case 56 & 58/64 *Etablissements Consten SA and Grunding Verkaufs GmbH v. Comm.*, 1996 C.M.L.R. 418, C.M.R. 8046).

61. *Id.* (emphasis added).

62. The French word for the effective implementation of EU law provisions [author’s translation].

63. Case C-350/92, *Spain v. Council*, 1995 E.C.R. I-1985.

Compulsory License case,⁶⁴ *Parke* case⁶⁵ and *Établissements Consten*.⁶⁶ My analysis begins with the latter cases.

Briefly, the *Consten* case raised questions regarding domestic regulation of national industrial property rights and the power of the Commission to prevent improper use of said rights. The contested national trademark provisions — instituted to oppose parallel imports — were allegedly frustrating the *acquis communautaire*⁶⁷ on illegal cartels. In reality, the question for the court was whether Article 295 or Articles 28 ff were *lex specialis* and as such given priority:

Article 222 confines itself to stating that the “treaty shall in no way prejudice the rules in Member States governing the system of property ownership”. The injunction contained in Article 3 of the operative part of the contested decision to refrain from using rights under national trade-mark law in order to set an obstacle in the way of parallel imports does not affect the grant of those rights but only limits their exercise to the extent necessary to give effect to the prohibition under Article 85(1). The power of the Commission to issue such an injunction for which provision is made in Article 3 of Regulation No 17/62 of the Council is in harmony with the nature of the community rules on competition which have immediate effects and are directly binding on individuals.

Such a body of rules by reason of its nature described above and its function, does not allow the improper use of rights under any national trade-mark law in order to frustrate the Community’s law on cartels.⁶⁸

Thus, any domestic law that in its *effect* hinders free competition should be narrowly interpreted, whether or not that area of law is under special protection of EC Treaty provisions. The ECJ’s concern

64. Case C-30/90, *Commission v. United Kingdom of Great Britain & Northern Ireland*, 1992 E.C.R. I-829.

65. Case 24/67, *Parke, Davis & Co. v. Probel, Reese, Beintema-Interpharm & Centrafarm*, 1968 E.C.R. 81.

66. Case 56 & 58/64, *Etablissements Consten SARL v. Commission*, 1966 E.C.R. 299 at 345-46.

67. The French word for the complete set of the current EU law [author’s translation].

68. Case 56 & 58/64, *Etablissements Consten SARL v. Commission*, 1966 E.C.R. 299, at 345-46.

in this issue is whether EU provisions do not affect the *grant* of those rights, but only limit their *exercise* to the extent *necessary* to give effect to the prohibition under competition law. ECJ retains the responsibility of granting property rights to the exclusive competency of Member States. The sphere of ownership acquisition does, however, involve market endowment that is under exclusive EU legislative competency. Treaty competition rules should be given priority, but only to the extent provided for by the rules accommodating free flow of goods. The principle of proportionality defines the limit.

The *Parke* case⁶⁹ also invokes competition rules. This case illustrates the conflict between Article 295 and Articles 81 and 82 (former Articles 85 & 86). Further, ECJ is — *opinio juris* — stating that the “protection of industrial property” belongs to EU regulative power and as such is not reserved for the exclusive competence of Member States. The Court states that the act of granting patented rights is, in the absence of any agreement, decision or concerted practice, prohibited, or in the absence of a dominant position, not covered by competition laws. Consequently, property regulations belong to Member States’ exclusive autonomy as far and as long as trade-related community rules are not invalidated.⁷⁰

This division of *industrial property*, and now also explicitly mentioned *commercial property*, on one side and *other* properties on the other side is highlighted in the *Compulsory License* case. Here the patent holder was encouraged by domestic regulation to produce domestically instead of “out-flagging” production to other EU Member States. The ECJ could find no valid basis for such national regulation under either Article 30 or Article 295, noting “[h]owever, the provisions of the Treaty, and in particular Article 222...cannot be interpreted as reserving to the national legislature, in relation to industrial and commercial property, the power to adopt measures which would adversely affect the principle of free movement of goods.”⁷¹

Here, the ECJ seems to permit Member States’ legislation to cause some minor effects on the free movements of goods, as far as those effects are not adversely affecting the principle. The *ratio decidendi*⁷² does not, however, make clear exactly what kind of influences would be recognized under categories of “industrial and

69. Case 24/67, *Parke, Davis & Co. v. Probel, Reese, Beintema-Interpharm & Centrafarm*, 1968 E.C.R. 55.

70. *Id.*

71. Case C-30/90, *Commission v. United Kingdom of Great Britain & Northern Ireland*, 1992 E.C.R. I-829, I-865 § 18.

72. The rationale of the decision.

commercial property.” The *Patent Protection* case uses identical criteria in its analysis.⁷³ Case law, then, provides the basis for this conclusion: “[i]t follows that neither Article 222 nor Article 36 of the Treaty reserves a power to regulate substantive patent law to the national legislature, to the exclusion of any Community action in the matter.”⁷⁴

Community power is related to industrial and commercial property. National states are barred from producing laws that adversely affect the free movement of such property. Minor influences that do not contradict that principle seem acceptable. As the EU law now stands, property issues outside industrial and commercial EU property seem to belong exclusively to the Member States.

The ECJ will most likely reserve the exclusive competency of *designing* property systems for Member States. This presumably will include the right of each Member State to choose its own property regimes; whether it be public, common, or private ownership. Presumably a Member State will still have the competency to, for example, reserve its dry sand shores beyond the vegetation line for public ownership. At present EU seems to lack competency to interfere with such a decision.

B. EC Article 30

EC Article 30 is recognized as a “safety clause.” Member States are — under strict conditions — entitled to establish national standards. However, the text of Article 30 should be read in the context of its objective. In the first *Simmenthal Case*,⁷⁵ the court stated that the purpose of Article 30 was not to reserve the legislative power to Member States, but to make States responsible for scrutinizing certain areas of society where Member States would be best positioned to implement quick reactions to harmful events.⁷⁶ “Article 36 is not designed to reserve certain matters to the exclusive jurisdiction of Member States....”⁷⁷ This result has been affirmed in later cases. The *Patent Protection Case*⁷⁸ applies this principle to intellectual property law. “It follows that neither Article 222 [now Article 295] nor Article 36 [now article 30] of the Treaty reserves a power to regulate substantive patent law to the national legislature, to the exclusion of any Community action in the

73. Case C-350/92, *Spain v. Council*, 1995 E.C.R. I-1985.

74. *Id.* at I-2011 § 22.

75. Case 35/76, *Simmenthal S.p.A v. Italian Minister for Finance*, 1976 E.C.R. 1871.

76. *See id.*

77. *Id.* at 1886 §14.

78. Case C-350/92, *Spain v. Council*, 1995 E.C.R. I-1985.

matter.”⁷⁹ Thus, EC Treaty Article 30 does not entrust any preemptive regulation rights to its Member States. Since there are no other regulations that explicitly entitle Member States to legislative power, such rights must be sought in case law.

C. Areas of Law Implicitly Excluded

As indicated in Sections A & B, it appears at first glance that the ECJ is simultaneously excluding and narrowing Member States' exclusive rights and thus assisting the EU's "creeping jurisdiction." However, the ECJ does acknowledge "home brewed" outer barriers to EU law. Illustrative of this point is case law pushing the edge of the EC Treaty, *in casu* where the ECJ rejected the argument that Article 308 — the rubber paragraph⁸⁰ — had a bearing on the case. Does the ECJ recognize extra-treaty barriers to EU power; and if so, what are these barriers?⁸¹

The first issue to address is the division between the legislative filling-in of "treaty objectives" of Article 308 and the illegal "step over" that is equal to treaty amendment. Thereafter, I look to "constitutional balance of power remedies" that the court instigates. Illustrative is the *EEA Agreement Opinion 1/91* and the *Human Rights and Fundamental Freedoms Opinion 2/94*.

It has been argued that the court consistently denies the validity of solutions that bring the ECJ into subordination of other courts,⁸² and that the basic motive of the ECJ in this respect is to reserve for itself the ultimate adjudicative power.⁸³ The court does, however, say this is not so:

Where...an international agreement provides for
its own system of courts, including a court with
jurisdiction to settle disputes between the

79. *Id.* at I-2011 § 22.

80. Article 308 has come to be known as the "rubber paragraph" because many legal scholars believe that the ECJ has stretched it in so many directions to allow for the creeping jurisdiction of the EU.

81. Since the ECJ follows the principle of *stare decisis* decisions — the pre-judicates — barriers defined by the ECJ seems to be almost equally strict to the treaty itself.

82. A cheerful comment by Professor Miguel Poyares Maduro, during one of his lectures at the International Seminar on "The Stabilization and Association Process and the Future of Europe" (International University Center Dubrovnik March 1-9, 2003) (on file with author). See, more solemnly, MIGUEL POIARES MADURO, WE THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION 27-30 (1998).

83. As Damian Chalmers points out in his article on the Court of Justice, this would be a rather bad idea, no matter how stringently a court follows the rules of due process and impartiality, it will not be supported by society at large if its decisions are consistently at odds with societal norms. Damian Chalmers, *Judicial Preferences and the Community Legal Order*, 60 M.L.R. 164 (1997).

Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice...in so far as that agreement is an integral part of the Community legal order.

An international agreement providing for such a system of courts is in principle compatible with Community law.⁸⁴

Thus, I acknowledge that case law sets the outer boundaries of EU law and does not merely express political concerns. Later in this article I will address the legal limitations of this case law.

The second issue is the framework and constitutional balance of power under EU law that has been a concern of the ECJ in a number of cases. Relevant questions relate to prerogatives, the balance of powers, and the procedural issues under the treaties. In general, no “step-over” of powers is recognized:

Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights.... Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment.⁸⁵

Thus, provisions amending EC and EU treaties are invalid. The competency is limited to fill-in “entitlement lacunae.”

In the subsequent case law, the “amendments-clause” is scrutinized. The ECJ enjoys sole competency according to EC Treaty article 220. Clearly, ECJ competency may not be traded away without amending the treaty text. This concern is legitimate and made explicit in the *EEA Agreement Opinion of 1991*:

84. Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, 1991 E.C.R. I-6079, I-6081-82 § 3.

85. Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1996 E.C.R. I-1759, I-1789 §§ 34-35.

As far as the Agreement creating the European Economic Area is concerned, the question arises in a particular light. Since it takes over an essential part of the rules which govern economic and trading relations within the Community and which constitute, for the most part, fundamental provisions of the Community legal order, the agreement has the effect of introducing into the Community legal order a large body of legal rules which is juxtaposed to a corpus of identically-worded Community rules....

Although, under the agreement, the Court of the European Economic Area is under a duty to interpret the provisions of the agreement in the light of the relevant rulings of the Court of Justice given prior to the date of signature of the agreement, the Court of the European Economic Area will no longer be subject to any such obligation in the case of decisions given by the Court of Justice after that date....

It follows that...the agreement conflicts with Article 164 of the EEC Treaty and, more generally, with the very foundations of the Community.⁸⁶

Thus, constitutional law restrains the EU from overstepping established prerogatives.⁸⁷ By comparing *Opinion 1/91* — the *First EEA Agreement Opinion* with *Opinion 1/92* — The *Second EEA Agreement Opinion*, outer constitutional borderlines are well defined.

The question is whether the *EEA* court would sustain or hamper the exclusive ECJ adjudication power. It was originally proposed that one function of the EEA Court was to police the legality of decisions made under the EEA Agreement. Decisions, for example, that provided for basic market freedoms like the free flow of goods, labor, services, and capital. The ECJ challenged this function of the new court. Since amendments are not allowed under EC Article 308, this reluctance shows that the ECJ disavowed EEA court power that paralleled ECJ constitutional prerogatives. Thus, the new adjudication system could not be pushed through without changing the EC treaty.

86. Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, 1991 E.C.R. I-6079 § 3.

87. See also *infra* section 4.

The ECJ found a solution to this dilemma in EC Treaty Article 220, which states that the ECJ “shall ensure that in the interpretation and application of this Treaty the law is observed.”⁸⁸ The Court applied this provision in the following way:

[t]o confer that jurisdiction on that court is incompatible with Community law, since it is likely adversely to affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the Court of Justice pursuant to Article 164 [now Article 220] of the EEC Treaty. Under...Article 219 [now Article 292] of the EEC Treaty, the Member States have undertaken not to submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than those provided for in therein.⁸⁹

This opinion begs the question whether the ECJ’s ultimate position is ruled by its desire to subordinate to other courts. Whatever the reason, ECJ found — *opinio juris* — a way to express its denial:

Where, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice, *inter alia* where the Court of Justice is called upon to rule on the interpretation of the international agreement, in so far as that agreement is an integral part of the Community legal order.

An international agreement providing for such a system of courts is in principle compatible with Community law.⁹⁰

However, the Court says such a court system did not rule on the EEA Agreement, because here:

88. EC Treaty art. 220, available at http://europa.eu.int/eur-lex/en/search/search_treaties.html.

89. 1991 E.C.R. at I-6081 § 2.

90. *Id.* at I-6081-82 § 3.

[T]he agreement has the effect of introducing into the Community legal order a large body of legal rules which is juxtaposed to a corpus of identically worded Community rules....

...[T]he agreement's objective of ensuring homogeneity of the law throughout the European Economic Area will determine not only the interpretation of the rules of the agreement itself but also the interpretation of the corresponding rules of Community law....

...[T]he machinery of courts provided for in the agreement conflicts with Article 164 [now Article 220] of the EEC Treaty and, more generally, with the very foundations of the Community.⁹¹

Establishing a system of “double layer” adjudication would require treaty amendments. This could not be pushed through by decisions under EC Treaty Article 308. On a theoretical level the delimitation between valid and invalid amendments is covered by the ECJ in the *Human Rights and Fundamental Freedoms Opinion*:

Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235 [now Article 308]. It could be brought about only by way of Treaty amendment.⁹²

The remaining difficulty, then, is how to define “treaty amendment.” Clearly, treaty prerogatives are “sacred.” New competencies can only be launched through valid legal instruments. The EC Treaty Article 308 is one such instrument. The ECJ, however, places rather strict limits on the “rubber-paragraph.” The “objectives of the Community” are those codified by the EC Treaty. The purpose of Article 308 is — within these objectives — to initiate clear-cut

91. *Id.* at I-6082.

92. Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1996 E.C.R. I-1759, I-1789 § 35.

competencies.⁹³ Outside these objectives, Article 308 is invalid. The ECJ is settling what these objectives are; in the *Human Rights Opinion* the court found that:

No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.⁹⁴ In the absence of express or implied powers for this purpose, it is necessary to consider whether Article 235 of the Treaty may constitute a legal basis for accession.⁹⁵

The ECJ scrutinized the system of human rights under the EC Treaty; it is “well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures.”⁹⁶ One could, therefore, say that *substantially* spoken human rights objectives are part of EU law. *Systematically* and *procedurally* speaking, however, formal changes seem unavoidable. Is this spoiling the Article 308 option? The ECJ thinks so since it would “entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.”⁹⁷

In conclusion, the ECJ stated that the modification of the system would represent a deviation from the EU constitutional order and therefore go beyond the scope of Article 308. Treaty amendment was the only solution. Thus, I draw the conclusion that to measure “objectives of the Community,” not only should substantial issues be examined, but organization, form, and procedural issues should be examined as well.

D. Concluding Remarks: Does Case Law Under EC Treaty Article 308 Predate Article 5?

As illustrated, the ECJ has through case law implemented limitations that do not explicitly follow from textual interpretation. EC Treaty Article 308 could not push this outer constitutional limit beyond treaty framework. Seemingly, the ECJ is reading Article

93. *Id.* at I-1788 § 29.

94. *Id.* at I-1787 § 27.

95. *Id.* at I-1788 § 28.

96. *Id.* at I-1789 § 33.

97. Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1996 E.C.R. I-1759, I-1789 § 34.

308 in the framework of Article 5. In contrast to Jo Shaw,⁹⁸ I would *not* emphasize that the rubber paragraph of EC Treaty Article 308 and case law predate Article 5.

III. THE *ACQUIS COMMONAUTAIRE* “EXTENSION MECHANISMS”

This section focuses on the geographical delimitation of EU law and how association agreements like the EEA agreement are expanding the legal area of EU. Section A focuses on the “extraterritorial application” of the EU. Section B discusses the extension of EU legal instruments through association agreements — illustrated here by the EEA Agreement.

A. *The Extraterritorial Application of EU Law*

Both codified and case law is illustrative of the fact that the EU Treaties do not prevent the application of EU law outside of EU-territory. I do not address here the part of EU law that relates to international law.⁹⁹

EU law has several provisions that deal with extraterritorial application.¹⁰⁰ One provision is EC Treaty Article 49(2), which states that services provisions may be extended to “nationals of a third country who provide services and who are established within the Community.”¹⁰¹ In the same respect, Article 60(2) entitles Member States, “for serious political reasons and on grounds of urgency, [to] take unilateral measures against a third country with regard to capital movements and payments.”¹⁰²

The extraterritorial application of EU law is, however, not limited to instances explicitly mentioned. Extended effects may also

98. SHAW, *supra* note 24, at 216.

99. See, e.g., LORI FISLER DAMROSCH ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 1134 (4th ed. 2001).

100. For a discussion on the EU extraterritorial influences under shipping security and freedom of services, see Peter Orebech, *The Northern Sea Route: Conditions For Sailing According To European Community Legislation With A Special Emphasis On Port State Jurisdiction* (Frithjof Nansen Institute 1995) (shorter version published in *Law and Economics*, 1995) and Peter Orebech, *The Northern Sea Route: Conditions For Participation According To WTO Legislation — With A Special Emphasis On The Non-Discriminatory Treatment Principles Of Most-Favored-Nation — And National Treatment Clauses Under The General Agreement On Trade In Services* (Frithjof Nansen Institute 1996) (also published in *Law and Economics*, 1997).

101. Treaty Establishing the European Community, Mar. 25, 1957, art. 60(2), available at http://europa.eu.int/eur-lex/en/search/search_treaties.html. For more on the interpretation of this provision, see Peter Orebech & Douglas Brubaker, *Implications of GATS/EU Law for The Russian Northern Sea Route and Russian Barents Sea* [hereinafter the EU ARCOP Project].

102. Treaty Establishing the European Community, Mar. 25, 1957, art. 60(2), available at http://europa.eu.int/eur-lex/en/search/search_treaties.html.

follow from an implicit reading of EU law. This is clearly the case under competition law, exemplified by the *Dyestuff* case¹⁰³ and *Euroemballage* case.¹⁰⁴ I will first look at the oldest case related to EC Treaty Article 81(1) – the *Dyestuff* case, where jurisdiction was upheld over concerted trade practices:

The applicant, whose registered office is outside the Community, argues that the Commission is not empowered to impose fines on it by reason merely of the effects produced in the Common Market by actions which it is alleged to have taken outside the Community.

Since a concerted practice is involved, it is first necessary to ascertain whether the conduct of the applicant has had effects within the Common Market.¹⁰⁵

The applicant objects that this conduct is to be imputed to its subsidiaries and not to itself.

The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company.¹⁰⁶

In effect the Telex messages relating to the 1964 increase, which the applicant sent to its subsidiaries in the Common Market, gave the addressees orders as to the prices which they were to charge and the other conditions of sale which they were to apply in dealing with their customers.

In the absence of evidence to the contrary, it must be assumed that on the occasion of the increases of 1965 and 1967 the applicant acted in a similar fashion in its relations with its subsidiaries established in the Common Market.

103. Case 48/69, *Imperial Chem. Indus. Ltd. v. Commission*, 1972 E.C.R. 619.

104. Case 6/72, *Europemballage Corp. & Continental Can Co. v. Commission*, 1973 E.C.R. 215.

105. Case 48/69, *Imperial Chem. Indus. Ltd. v. Commission*, 1972 E.C.R. 619, 661-62 §§ 125-26.

106. *Id.* at 662 §§ 131-32.

In these circumstances the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purposes of applying the rules on competition.

It was in fact the applicant undertaking which brought the concerted practice into being within the Common Market.

The submission as to lack of jurisdiction raised by the applicant must therefore be declared to be unfounded.¹⁰⁷

Since the parent company, Imperial Chemical Industries Ltd. (ICI), was incorporated in London (which in 1969 was outside EEC), EC competition law was given direct extraterritorial application. As this case shows, the fines could easily have been addressed to the domestic subsidiaries regardless of the parent company's location. One important aspect of the Court's conclusion was its indifference to the composition of the "concerted practice." The Court's conclusion applied to *any* concerted practice, whether conducted by a single company composed of multiple subsidiaries or by different entities operated by separate legal persons.

The latter case relates to Continental Can Inc., a company that was incorporated in New York. The issue for adjudication was whether a take-over bid submitted by Continental Can was contrary to EC Treaty Article 82 (abuse of dominant position):

The applicants argue that according to the general principles of international law, Continental, as an enterprise with its registered office outside the Common Market, is neither within the administrative competence of the Commission nor under the jurisdiction of the Court of Justice. The Commission, it is argued, therefore has no competence to promulgate the contested decision with regard to Continental and to direct to it the instruction contained in Article 2 of that decision. Moreover, the illegal behaviour against which the Commission was proceeding, should not be directly attributed to Continental, but to Europemballage.

107. *Id.* at 663 §§ 138-42.

The applicants cannot dispute that Europemballage, founded on 20 February 1970, is a subsidiary of Continental. The circumstance that this subsidiary company has its own legal personality does not suffice to exclude the possibility that its conduct might be attributed to the parent company. This is true in those cases particularly where the subsidiary company does not determine its market behaviour autonomously, but in essentials follows directives of the parent company.

It is certain that Continental caused Europemballage to make a take-over bid to the shareholders of TDV in the Netherlands and made the necessary means available for this. On 8 April 1970 Europemballage took up the shares and debentures in TDV offered up to that point. Thus this transaction, on the basis of which the Commission made the contested decision, is to be attributed not only to Europemballage, but also and first and foremost to Continental. Community law is applicable to such an acquisition, which influences market conditions within the Community. The circumstance that Continental does not have its registered office within the territory of one of the Member States is not sufficient to exclude it from the application of Community law.

The plea of lack of competence must therefore be dismissed.¹⁰⁸

Again, EU competition law had extraterritorial effects. The fact that Continental was fully incorporated outside of EU was no obstacle to the application of EU law. Compared to the U.S. position, which opts for an explicit congressional decision on the issue of legal extraterritoriality, the EU international law doctrine is expansive, non-reciprocal, and case law developed. Professor R.Y. Jennings, who at that time was at Cambridge University¹⁰⁹ and consulted for ICI Inc., expressed concern over whether EEC practice was in accordance with international law: “the contemporary

108. Case 6/72, *Europemballage Corp. & Continental Can Co. v. Commission*, 1973 E.C.R. 215, 241-42 §§ 14-17.

109. He later became a Judge at the International Court of Justice in The Hague.

practice of States is vigorously opposed to...the extraterritorial enforcement of anti-trust laws is not something which can be applied in one direction only.”¹¹⁰ However, the international law argument had little influence on the ECJ. One way of interpreting the Court’s position is that the EU, as a sovereign entity, may prescribe the geographical application of its own law as far and as long as international law does not explicitly bar it from doing so.¹¹¹

B. EEA Agreement

Next, I look at the European Economic Area (EEA) Agreement and its function as a EU law-carrying instrument abroad. To what extent does valid EU law effect European Free Trade Association (EFTA) countries? The EFTA includes Iceland, Liechtenstein, Norway and Switzerland which fall under the auspices of the EEA Surveillance Agency (ESA) and the EFTA Court. Switzerland, however, is not party to the EEA Agreement due to its “no” vote on the 1992 referendum.¹¹² Switzerland is now under the direction of seven different free trade agreements, none of which is supranational.

The first question to ask is whether the EEA Agreement is supranational in any respect and therefore equipped with preemptive force. Next, comes a brief analysis on *de facto* influx of EU law into non-EU member EEA countries.

1. Supranationality?

Two questions occur. First, does the EEA Agreement impede EFTA Member States from amending their own domestic laws? Second, do EU laws enjoy preemptive force in EEA countries?

The first question, whether the EEA Agreement impedes EFTA Member States from amending their own domestic laws, is addressed by EEA Agreement Article 97. Article 97 clarifies that Member States are competent to alter internal legislation.¹¹³ Closer

110. Case 48/69, *Imperial Chem. Indus. Ltd. v. Commission*, 1972 E.C.R. 619, 625.

111. Which is similar to Danish Law Professor Alf Ross’ position in the “Smoking on the streets of Paris” debate on Danish *jurisdictione racione terrae*. I provide the following references for Nordic readers wishing to follow the debate. See ALF ROSS, *CONSTITUTIONAL LAW* § 18 (Nyt nordisk forlag, København 1966); TORSTEN GIHL, *PUBLIC INTERNATIONAL LAW IN OUTLINE* § 136 (1956). *But see* MAX SØRENSEN, *JOURNAL*, COPENHAGEN 443 (1959); TORSEL OPSAHL, *A MODERN CONSTITUTION UNDER SCRUTINY* 282, 289 (J. Legal Science, Oslo 1962) [author’s translations].

112. In a mandatory and decisive referendum (Schweizerische Bundesverfassung, May 29, 1874, art. 121) Nationalrat and Ständerrat voted yes (Nationalrat — with 128 against 58 votes), but despite that, membership plans wrecked due to the negative referendum of Dec. 6, 1992.

113. The EEA Agreement, Jan.1, 1994, art. 97, available at <http://secretariat.efta.int/Web/EuropeanEconomicArea/EEA/Agreement/EEA/Agreement>.

examination uncovers strict limits, such as the requirement that new laws should not discriminate on national basis, a requirement set by the EEA Joint Committee to guarantee “the good functioning of this Agreement.” The amendment procedure regulations are in many instances incorporated into EEA Agreement Protocols and Annexes. As an example, the investment regulations in Annex XII include a ban on amendments reversing liberalization efforts already achieved prior to May 2, 1992, the date the EEA Agreement was signed. Thus, despite its formulation to the opposite, Article 97 is in principle, and in fact, blocking Member States’ amendment rights.

The second question, whether EU laws enjoy preemptive force in EEA countries, relates to contiguous domestic lawmaking within the EEA Agreement framework. There are two questions to answer here. First, what are the decision-making criteria regarding already-established EU *acquis communautaire* at the date of signatory?¹¹⁴ Second, what criteria should be followed regarding laws created after the EEA Agreement came into force (i.e. subsequent to January 1, 1994)?

EEA Agreement Article 7 states that all secondary legislation either referred to or contained in the Annexes to the EEA Agreement, or in decisions of the EEA Joint Committee, are binding upon the Contracting Parties and should be incorporated into domestic law. The transformation process differs from EU regulations to EU directives. In the latter case, only directions and goals are fixed — Member States may, with discretion, establish domestic text that corresponds to the EU directive, pursuant to Article 7(b). However, EU regulations under Article 7(a) should correspond word for word to the EU texts. If no transitional periods are granted, the Member States’ integration of EU law should be completed prior to the EEA Agreement taking effect.

New EU legislation subsequent to January 1, 1994, is incorporated and validated under the rules on decision-making found in Article 99ff. With the exception of the expert-consultation phase, and the Article 81 committee phase under an EC framework program (also involving EFTA), the law-making procedure is not designed to acquiesce to the EFTA. This means that the EU legislation processes found in EC Treaty Articles 251 and 252 are ruling. Here, I am only interested in the subsequent EEA legislation processes.

When an EU act that affects the EEA Agreement is decided, the “go-between-organ” of the EEA, the Joint Committee, is presented

114. EEA Agreement art. 7.

with the new EU legislation. While there are no formal rules giving EU law preemption, the strict obligation to closely follow related EU legislation makes the non-supranational starting point merely a formality.

2. *The Factual Influx Of EU Law*

Just a few words on the *de facto* influx of EU law into non-EU member EEA countries. While the Roman Empire never conquered the Nordic countries,¹¹⁵ Roman law nevertheless gained influence over the centuries. So, how does the EU's influence coincide with Norway's Roman legal history?

One mechanism is displayed by the "inverse Chassis de Dijon principle." Contrary to what one may think, a commodity that is recognized as legal in EEA countries outside of the EU is not acknowledged as such in the Common Market. As we saw in the *Chassis de Dijon Case*:

In the absence of common rules relating to the production and marketing of alcohol...it is for the Member States to regulate all matters relating to the production and marketing...on their own territory....¹¹⁶

There is...no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State....¹¹⁷

Adapted to the EEA situation, products that are legally produced under EFTA country legislation should not face any EU import restrictions. No *EU acquis* hinder such a position. For example, the *Hauptzollamt Mainz v. Kupferberg Case*,¹¹⁸ gave provisions in the EEC – Portuguese Free trade agreement direct effect in the EEC. However, this is not the case under the EEA Agreement. The EU insists that exporters to the EU should follow EU standards as displayed in *acquis communautaire*. Since production standards can hardly be altered depending on whether the product is intended for

115. The Roman Empire had its northern borderline by the river Ejdora (Ejdern) at the town of Rendsburg in Sleswig-Holstein (now part of Germany). See generally http://www.bbc.co.uk/history/ancient/romans/empire_04.shtml.

116. Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649, 662 § 8.

117. *Id.* at 664 § 14.

118. Case 104/81, Hauptzollamt Mainz v. Kupferberg, 1982 E.C.R. 3641.

the EU or other markets, the practiced “inverse Chassis de Dijon principle,” in reality, leads to an EU law influence that overrides the formal influence of compulsory transition. There is, as stated by professor Jennings in the ICI case, no reciprocity — one of the basic ingredients normally found in intergovernmental agreements.¹¹⁹

IV. “SPLIT COMPETENCY” — PERSPECTIVES ON MEMBER STATES’ ROLES

EU competencies are divided both “horizontally” and “vertically.” Horizontal competencies are specifically defined for each substantially different situation (Section A) — everything from agricultural issues to transportation. Vertical competencies are divided within each field of EU law (Section B); for example, Member States’ competencies are decided under the principle of subsidiarity.

A. *Exclusive Powers — Common Policies*

EU common policies are illustrative of areas where the EU enjoys exclusive legislative competency. See, for instance: common commercial policy (EC Treaty Article 133); common transport policy (EC Treaty Article 76); common customs tariff (EC Treaty Article 26); and common agriculture policy (EC Treaty Article 34). If exclusive autonomy is observed, EU legislation produces preemptive norms. Consequently, Member States may no longer validly act. In this section, I shall investigate applicable criteria for existing common policies that do not produce exclusive EU law-making capacity. The exclusive EU competencies initiate preemptive norms that exclude Member State legislative competency.

The basic principle of exclusive EU competency is ruled out in the *European Agreement on Road Transport* case:

[E]ach time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.¹²⁰

119. Case 48/69, *Imperial Chem. Indus. Ltd. v. Commission*, 1972 E.C.R. 619, 625.

120. Case 22/70, *Commission v. Council*, 1971 E.C.R. 263, 274 § 17.

The common policies and preemptive status of EU legislation are only indirectly connected. As stressed by the ECJ, the EU adopts “common rules” according to common policy competencies. The substance of these rules determines whether Member States in their law-making capacity are excluded. The outcome of this analysis is produced by rule orientation and not just logical deductions made under the concept of “common policy” (begriffsjurisprudenz¹²¹):

If these two provisions [EC Treaty transportation rule in Article 3E in comparison with Article 5] are read in conjunction, it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.¹²²

The legislation that implements the common policy is thus decisive. The possible exclusivity of EU legislative competency is premised on the formulations made in the proclaimed community rules. More precisely, what criteria are used to decide which areas are ruled by preemptive norms and which areas fall under the scrutiny of *lex superior*?

B. Exclusive or Split Powers? From Preemptive Norms to Lex Superior

The superiority of EU legislation presupposes that Member States play a role in law-making. As a consequence, the ever-increasing EU exclusive autonomy precludes Member States from any law making. EU legislation is preemptive. Member States may not validly act unless treaties or secondary provisions say otherwise. Per EC Treaty Article 134(2), the Member States’ “urgency clause” found under common commercial policy is illustrative of this issue.

The ruling case specifying the criteria for deciding between exclusive and split powers is *Opinion on the Convention No. 170 of the International Labour Organization concerning safety in the use of chemicals at work [ILO-opinion]*:

The exclusive or non-exclusive nature of the Community’s competence does not flow solely from

121. The school of legal reasoning that applies logical deductions to concepts [author’s translation].

122. Case 22/70, *Commission v. Council*, 1971 E.C.R. 263, 275 § 22.

the provisions of the Treaty but may also depend on the scope of the measures which have been adopted by the Community institutions for the application of those provisions and which are of such a kind as to deprive the Member States of an area of competence which they were able to exercise previously on a transitional basis.¹²³

Thus, the groundbreaking question for any EU legislation is whether it deprives Member States of any competencies previously held. Since there are no general characteristics to apply to this question, discretionary justification must be individually sought in each case. To approach a general solution, one question to ask is whether Member States' involvement would bring an area of law out of the EU's exclusive autonomy. Can we then say anything general here? Remaining competency is possible in at least two instances: first, if financial burdens remain with the Member State, this may affect the preemptive status of the EU provisions (section i); second, if the EU promotes a transitional period which is not "of such a kind as to deprive the Member States of an area of competence." (See section ii).

1. *Financial Burdens*

In accordance with Member States' codified competency, remaining power may occur if involvement causes fiscal burdens, see *Local Cost Standard Clause*¹²⁴ and *Rubber Agreement* case.¹²⁵ In the first case, the ECJ clarified that common policies do not automatically produce exclusive EU autonomy which exhausts Member States' action. The exclusive nature of EU powers is a product of the objective of the policy and of the:

[M]anner in which the common commercial policy is conceived in the Treaty.

[The court found] that the subject-matter of the standard [for credits for financing of local costs linked to export operations]...is one of those measures belonging to the common commercial policy

123. Opinion 2/91, ILO Convention 170 on Chemicals at Work, 1993 E.C.R. I-1061, I-1077 § 9.

124. Opinion 1/75, Local Cost Standards, 1975 E.C.R. 1355.

125. Opinion 1/78, Int'l Agreement on Natural Rubber, 1979 E.C.R. 2871.

prescribed by Article 113 [now Article 133] of the Treaty.

Such a policy is conceived in that article in the context of the operation of the Common Market, for the defense of the common interests of the Community, within which the particular interest of the Member States must endeavour to adapt to each other.

Quite clearly, however, this conception is incompatible with the freedom to which the Member States could lay claim by invoking a concurrent power, so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the Community.¹²⁶

The EU common policies do not automatically produce EU preemptive norms. The discretion of the court seems to rely on the objective of the disputed Member States' regulation; for example, the appearance of a common policy in the treaty and whether a "contra-factual" solution would ruin the efficiency of the common policy. In deciding the case of special Member States' credits for exporters, the court went on to say:

In fact any unilateral action on the part of the Member States would lead to disparities in the conditions for the grant of export credits, calculated to distort competition between undertakings of the various Member States in external markets. Such distortion can be eliminated only by means of a strict uniformity of credit conditions granted to undertakings in the Community, whatever their nationality.

It cannot therefore be accepted that...the Member States should exercise a power concurrent to that of the Community, in the Community sphere and in the international sphere. The provisions of Articles 113 and 114 [now Articles 133 and 134]...show clearly that the exercise of concurrent powers by the Member

126. Opinion 1/75, Local Cost Standards, 1975 E.C.R. 1355, 1363-64.

States and the Community in this matter is impossible.¹²⁷

Interestingly enough, the ECJ did not resort to *begriffsjurisprudenz*, but instead relied on the rule-oriented approach. Common policies, as such, do not automatically lead to norms that exclude Member States' legislation.¹²⁸ However, if, by a contra-factual analysis a potential Member State's competency for export policies would distort external markets, no residual legislative power is retained by the Member States. Thus, the question is whether a Member State's involvement would ruin that position. The ECJ questioned whether financial burdens assigned to Member States under the International Local Cost Standard Agreement could possibly defuse the potentially exclusive EU autonomy. The ECJ thought not; "[i]t is of little importance that the obligations and financial burdens inherent in the execution of the agreement [International Agreement of the Understanding on a Local Cost Standard] envisaged are borne directly by the Member States."¹²⁹

According to the Court, a system of Member States, as *recipients* of legal obligations that incurred financial burdens under international agreements, would not alter the conclusion of exclusive EU autonomy. Is this a valid, general conclusion that would then rule all cases of common policies? Apparently not, according to the Court's opinion in the *Rubber Agreement* case.¹³⁰ The Court ruled that the stabilization of prices for natural rubber by a buffer stock system ruined EU exclusivity. The change in financing directly from Community budget to Member States deactivated the preemptive effects of the international agreement:

In the first case no problem would arise as regards the exclusive powers of the Community to conclude the agreement in question. As has been indicated above, the mechanism of the buffer stock has the purpose of regulating trade and from this point of view constitutes an instrument of the common commercial policy. It follows that Community financing of the charges arising would have to be regarded as a solution in conformity with the Treaty.

127. *Id.* at 1364.

128. *See supra* section 4A.

129. *Id.* at 1364.

130. Opinion 1/78, Int'l Agreement on Natural Rubber, 1979 E.C.R. 2871.

The facts of the problem would be different if the second alternative were to be preferred. It cannot in fact be denied that the financing of the buffer stock constitutes an essential feature of the scheme for regulating the market which it is proposed to set up. The extent of and the detailed arrangements for the financial undertakings which the Member States will be required to satisfy will directly condition the possibilities and the degree of efficiency of intervention by the buffer mechanism whilst the decisions to be taken as regards the level of the central reference price and the margins of fluctuation to be permitted either upwards or downwards will have immediate repercussions on the use of the financial means put at the disposal of the International Rubber Council which is to be set up and on the extent of the financial means to be put at its disposal. Furthermore sight must not be lost of the fact that the financial structure which it is proposed to set up will make necessary, as is mentioned in the documents submitted to the court and reflecting the most recent stage of negotiations, co-ordination between the use of the specific financial means put at the disposal of the future International Rubber Council and those which it might find in the Common Fund which is to be set up. If the financing of the agreement is a matter for the Community the necessary decisions will be taken according to the appropriate Community procedures. If on the other hand the financing is to be by the Member States that will imply the participation of those States in the decision-making machinery or, at least, their agreement with regard to the arrangements for financing envisaged and consequently their participation in the agreement together with the Community. The exclusive competence of the Community could not be envisaged in such a case.¹³¹

So, if the agreement is only about financing, placing the monetary responsibility in the hands of Member States changes the legal classification. Finance, the primary focus of the agreement, and commercial aspects are downplayed. Therefore, it is classified as a

131. *Id.* at 2918 §§ 59-60.

split EU — Member States competency task. This interpretation is made clear in the *Natural Rubber Agreement*:

The court takes the view that the fact that the agreement may cover subjects such as technological assistance, research programmes, labour conditions in the industry concerned or consultations relating to national tax policies which may have an effect on the price of rubber cannot modify the description of the agreement which must be assessed having regard to its essential objective rather than in terms of individual clauses of an altogether subsidiary or ancillary nature. This is the more true because the clauses under consideration are in fact closely connected with the objective of the agreement and the duties of the bodies which are to operate in the framework of the International Natural Rubber organization which it is planned to set up. The negotiation and execution of these clauses must therefore follow the system applicable to the agreement considered as a whole.¹³²

The financing of rubber buffer stock is the nucleus of the entire agreement; it is not an ancillary element. By changing the financial burden from the Community to the Member States, one opts out of the Community-centered competency. Thus, the exclusive competence of the community ceases to exist, and subsequently a system of split powers is all that remains.

2. *Transitional Periods*

Interim periods also deviate from exclusive EU legislative power.¹³³ Under this philosophy, Member States' competency still remains. See, as an illustration, the common fisheries policy, which despite long and hard efforts towards preemptive solutions, still remains under an interim solution. One of the ruling cases is *Cornelis Kramer & Others*:

[I]t should be stated first that this authority which the Member States have is only of a transitional nature...

132. *Id.* at 2917 § 56.

133. An illustration is the common fisheries policies (CFP). See Orebech, *supra* note 6.

...it follows from the foregoing considerations that this authority will come to an end 'from the sixth year after Accession at the latest', since the Council must by then have adopted...measures for the conservation of the resources of the sea.¹³⁴

The Member States' competency comes to an end as scheduled by the termination date set by the EU act. This was made clear in the *Regina*¹³⁵ case:

It follows from...Articles 100 and 103 of the 1972 Act of Accession that the measures derogating from a fundamental principle of Community law, namely non-discrimination, were limited to the transitional period and that the power to bring into force any provisions thereafter was entrusted to the Community authorities....

It cannot be concluded from the fact that the Council failed to adopt such provisions within the period provided for in Article 103 that the Member States had the power to act in the place of the Council, in particular by extending the derogation beyond the prescribed time-limits.¹³⁶

If a transitional period is overdue, no resurrection of Member States' competency is possible even if the EU has failed to act. Member States enjoy no power to fill-in loopholes. See for instance, *Commission v. UK and Northern Ireland*¹³⁷ as referred to in *Officier van Justitie v. J. van Dam & Zonen*,¹³⁸ which states that Member States "may henceforth act only as trustees of the common interest" which does not include tacit or implied powers. This is made clear in the EC court analysis of the validity of national fisheries regulation in the 1979 case:

As this is a field reserved to the powers of the Community,...a Member State cannot therefore, in

134. Joined Cases 3/76, 4/76 & 6/76, Cornelis Kramer & Others, 1976 E.C.R. 1279, 1310 §§ 40- 41.

135. Case 63/83, *Regina v. Kent Kirk*, 1984 E.C.R. 2689.

136. *Id.* at 2716-17 §§ 14-15.

137. Case 804/79, *Commission v. United Kingdom of Great Britain & Northern Ireland*, 1981 E.C.R. 1045.

138. Case 124/80, *Officier van Justitie v. J. van Dam & Zonen*, 1981 E.C.R. 1447, 1447.

the absence of appropriate action on the part of the Council, bring into force any interim measures for the conservation of the resources of the sea which may be required by the situation....¹³⁹

Thus, the Member States' action is rebutted here due to the preemptive force of the bare existence of EU legislative power. Clearly, the national action is impermissible.¹⁴⁰ Member States' legislative power is entirely based on explicit delegation. The one and only title for this competency is: delegation of provisional law-making power.

C. Types of "Split Powers"

1. Harmonization

Acquis communautaire prescribes different types of cooperation between the EU and its Member States. The notion of split power should be qualified. Clearly, only "shared powers" qualify as a basis for the use of the subsidiarity principle.¹⁴¹ "Shared" and "split" powers, as used here, are dissimilar philosophies. Only when the treaty text explicitly delegates Member States and the Community joint responsibility, does the subsidiarity principle have a place. This shared power is only found outside the areas of common policies.

Several instances of the coordinated actions of the EU and Member States occurred under EU and EC Treaty texts; a brief overview follows. There are a wide variety of cases ranging from those illustrating EU domination to those demonstrating a supportive or complementary role. As an illustration of the latter type, see *India Development Cooperation* case:¹⁴²

It should first be observed that it is apparent from Title XVII of the Treaty, [now Title XX]...that, on the one hand, the Community has specific competence to conclude agreements with non-member countries in the sphere of development cooperation and that, on

139. *Id.* For a more complete overview of the lacuna problems, see Peter Orebech, *The Fisheries Issues of the Second Accession to European Union, Compared with the 1994 First Accession Treaty*, — with an emphasis on the negotiation positions of Latvia and Norway, *supra* note 6.

140. See STEPHEN WEATHERHILL, *LAW AND THE INTEGRATION IN THE EUROPEAN UNION* 137 (1995).

141. See EC treaty Article 5(2).

142. Case C-268/94, Portuguese Republic v. Council, 1996 E.C.R. I-6177.

the other hand, that competence is not exclusive but is complementary to that of the Member States.¹⁴³

“Complementary” power in this case means that the EU, if necessary, supports and supplements Member State action. It is understood, however, that EU “competence clearly [is] subordinate to an objective of coordinating...policies defined by each Member State within the sphere of its own competences.”¹⁴⁴ One consequence of the EU subordinate position is that an approximation of laws has no place.

In areas of split competency that give the EU the “first violin,” the legal situation is changed, hence the *lex superior* regime and approximation of law rules.¹⁴⁵ Harmonization competence even stretches into property rights, as long as these rights do not belong to the exclusive competency of Member States, as ruled by EC Treaty Article 295. For example, see the *1994 Opinion on the Agreement Establishing the World Trade Organization, General Agreement in Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*:

It should be noted here that, at the level of internal legislation, the Community is competent, in the field of intellectual property, to harmonize national laws pursuant to Articles 100 and 100a and may use Article 235 as the basis for creating new rights superimposed on national rights....¹⁴⁶

Harmonization competency covers all areas of split power with the exception of areas that belong to EU supplementary (complementary) competence. The *lex superior* principle rules govern areas of property that, strictly interpreted, are part of Member States’ domain.¹⁴⁷ If EU competency is supplemental, Member States may establish their own individual solutions without having to consider EU prescriptions.

143. *Id.* at I-6219 § 36.

144. *Id.* at I-6223 § 51. As an example of such complementary EU competence, see EC Treaty Article 151.

145. *See supra* section 1.

146. Opinion 1/94, Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property, 1994 E.C.R. I -5276, I-5405 § 59.

147. *See* EC Treaty art. 295.

2. *The Obligation of Cooperation*

EU law under the regime of split power builds on principles of cooperation. Some casuistic examples exist throughout the EU and EC treaties, but as made clear by the ECJ, the obligation of coordinated action stretches even wider. As stated in the *1994 WTO-Opinion*, cooperation responsibility embraces the entire gamut of split powers:

[W]here it is apparent that the subject-matter of an agreement or convention falls in part within the competency of the Community and in part within that of the Member States, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfillment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community.¹⁴⁸

As formulated by the court, cooperation in the achievement of common objectives is a non-codified legal obligation. This commitment is implicitly built into the integration purpose of the EU — the endowment of a common platform and understanding. Compare this with the EC Treaty preamble goal of ever-closer cooperation which takes effect outside of common policies. According to the *ILO-Opinion* and later case law,¹⁴⁹ the “obligation to cooperate flows from the requirement of unity in the international representation of the Community.”¹⁵⁰

Clearly, the cooperation requirement may be pursued in different ways. The *FAO* case illustrates that formal “arrangements,” or bilateral EU internal agreements, fulfill the cooperation obligation.¹⁵¹ Cooperation to achieve a unanimous position does not qualify as a kind of shared competency that triggers the principle of subsidiarity.

148. *Id.* at 5420 § 108 (citations omitted).

149. Opinion 2/91, ILO Convention 170 on Chemicals at Work, 1993 E.C.R. I-1061, I-1083 § 36.

150. *See, e.g.*, Case C-25/94, Commission v. Council, 1996 E.C.R. I-1469, I-1510 § 48.

151. Case C-25/94, Commission v. Council, 1996 E.C.R. I-1469, I-1510 § 48.

*D. The Principle of Subsidiarity*¹⁵²

EC Treaty Article 5(2) regulates the vertical allotment of power. The more procedural issues are sorted out in Protocol No. 30 of the Amsterdam Treaty on the Application of the Principles of Subsidiarity and Proportionality.¹⁵³ Two issues are dealt with here: first, the personal competency issue i.e., who is to decide upon the activation of subsidiarity principle; and, second, what is the substantial area covered by that principle?

1. A Political Principle Only?

The first issue that has raised concern is whether subsidiarity is justiciable.¹⁵⁴ Basically, this is a political principle policed by the EU entities.¹⁵⁵ Paragraph 1 of the Protocol states that “[i]n exercising the powers conferred on it, each institution shall ensure that the principle of subsidiarity is complied with.”¹⁵⁶ Even acknowledging the justiciability, whether the ECJ may overthrow EU-made discretion in relation to decision-making is an issue. As stated, “it is submitted that the Court is likely to allow the Community legislature a wide discretion in areas which involve policy choices.”¹⁵⁷ This restrictive ECJ position is canvassed in the *Biotechnology* case¹⁵⁸ where, after citing the EU position as addressed in the directive, the Court found for the EU with the following rationale: “[a]s the scope of that protection has immediate effects on trade, and, accordingly on intra-community trade, it is

152. See generally Grainne de Burca, *Reappraising Subsidiarity's Significance After Amsterdam*, at 31 (Harvard Jean Monnet Working Paper No. 7/99 1999), at <http://www.jeanmonnetprogram.org/papers/99/990701.rtf>; and Reimer von Borrie & Malte Hauschild, *Implementing The Subsidiarity Principle*, 5 COLUM. J. EUR. L. 369, 371 (1999). On the resurrection of the principle see John McCormick, UNDERSTANDING THE EUROPEAN UNION, A CONCISE INTRODUCTION 123 (1999).

153. Amsterdam Treaty, Nov. 10, 1997, O.J. (C 340) 1, available at <http://europa.eu.int/eur-lex/en/treaties/dat/amsterdam.html#0105010010>.

154. See A.G. Toth, *Is Subsidiarity Justiciable?*, 19(3) EUR. L. REV. 268, 285 (1994) (with further references). For an affirmative answer, see Christian Timmerman, *Subsidiarity and Transparency*, 22 FORDHAM INT'L L. J. S106, S114 (1999). But see Allison S. Russell, *Subsidiarity in European Union Law: Member State Morphine for the Painful Loss of Sovereignty*, 11 AUT. INT'L PRACTICUM 67, 71 (1998).

155. *Id.*

156. Protocol No. 30 § 1 to the Amsterdam Treaty on the Application of the Principles of Subsidiarity and Proportionality, Nov. 10, 1997, O.J. (C 340) 1, available at <http://europa.eu.int/eur-lex/en/treaties/dat/amsterdam.html#0105010010>.

157. ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE 551 (Oxford University Press 1999).

158. Case C-377/98, Kingdom of the Netherlands v. Parliament & Council, 2001 E.C.R. I-7079.

clear that, given the scale and effects of the proposed action, the objective in question could be better achieved by the Community.”¹⁵⁹

This is identical to the EU position. When it comes to the question of whether the decision was based on sufficient grounds, the ECJ finds no breach of EU administrative law:

Compliance with the principle of subsidiarity is necessarily implicit in the fifth, sixth and seventh recitals of the preamble to the Directive, which state that, in the absence of action at Community level, the development of the laws and practices of the different Member States impedes the proper functioning of the internal market. It thus appears that the Directive states sufficient reasons on that point.¹⁶⁰

Thus, the community position is strictly followed by the ECJ. Despite the acknowledgement that independent justification has its place under the ECJ, a rather convincing argument must be made before the court will overturn the EU's advocated need for unified action.

The ECJ was similarly restrictive in 1996, by holding that when conducting such a review, one must allow the Council “a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments.”¹⁶¹ The Court's judicial review of the issue of whether the exercise of discretion was voided was limited to the manifest error or misuse of powers, which were not found in this case.¹⁶² Failing to give reasons for a decision would be such an error. In a 1997 judgment the Court stated that:

It is apparent that, *on any view*, the Parliament and the Council did explain why they considered that their action was in conformity with the principle of subsidiarity and, accordingly, that they complied with the obligation to give reasons as required under Article 190 (now Article 253) of the Treaty. An express reference to that principle cannot be required.¹⁶³

159. *Id.* § 32.

160. *Id.* § 33.

161. Case C-84/94, *United Kingdom v. Council*, 1996 E.C.R. I-5793, I-5811 § 58.

162. *Id.*

163. Case C-233/94, *Germany v. Parliament & Council*, 1997 E.C.R. I-2405 § 28 (emphasis added).

2. *The Place of Subsidiarity*

The second question as to what substantial areas are covered by the principle of subsidiarity, invokes the greatest doubt. Part one, Article 5 of the Treaty states:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.¹⁶⁴

This long sentence is not easy to read or understand.¹⁶⁵ Let us take the easiest part first. Surely, the principle of subsidiarity has no place under areas of exclusive EU competence. This includes most areas under the auspices of common policies.¹⁶⁶

The remaining cases involve split competency. Do all cases in this area qualify for the principle of subsidiarity? The first qualification is that the Member States alone cannot sufficiently attain the objectives of the proposed action. This creates a situation of alternative choices where either the EU or Member States may legislate. Actually, the two alternatives are actually: 1) EU or Member States; or 2) EU and Member States in joint action.

The remaining condition occurs when the EU considers “the scale or effects” and finds it better to make the decision itself. If EU so decides, the decision is placed at the federal level. However, the EU *cannot* make the choice freely. EC & EU Treaties limit the discretionary power.¹⁶⁷ The vital question is whether any provision possibly forces the EU not to deviate from a cooperative EU-Member State solution. Since the EU, when the split power is codified, cannot deviate from a solution, only those cases of involving *shared power* are fully ruled by the subsidiarity principle. This position is supported by the Advocate General in the next case which stated that judicial control over the requirements for adopting measures will “address the concerns regarding unnecessary Community action

164. EC Treaty, art. 5.

165. See *Subsidiarity: Backing the Right Horse?* 30 COMMON MKT. L. REV. 241, 244 (1993) (stating that “[t]he concept of subsidiarity is not a hard and fast rule in constitutional law, as comparative studies have demonstrated. It is like quicksand and allows only for short respite”).

166. See *supra* sections 4A & B.

167. See *infra* section 5.

in fields where the Member States also enjoy competence which prompted the insertion of the principle of subsidiarity in the Treaty.”¹⁶⁸

This construction is supported by ECJ in its *1993 ILO Opinion* case. “Shared competency” is reserved for the cases of *obligatory* joint action. “Finally, an agreement may be concluded in an area where competence is shared between the Community and the Member States. In such a case, negotiation and implementation of the agreement require *joint action* by the Community *and* the Member States.”¹⁶⁹ The EU’s obligation is to *consider* use of the subsidiarity principle in instances of treaty-based joint-action provisions. But, compare the notion that competency “cannot be sufficiently achieved by the Member States.”¹⁷⁰ Article 5 does not, however, *provide* that competency belongs at the lower Member States’ level.

The EU may not make decisions on instances of codified joint action at the federal level. Which EC Treaty provisions demand *joint action*? This treaty contains a few examples such as EC Treaty Articles 151, 155, 157, and 165. These are the only instances of the subsidiarity principle requiring the EU to opt for a Member State level decision. The EU enjoys no exclusive discretion as to whether to keep the decision at federal level. Outside of these few treaty-based cases, the EU has full discretion to delege decision-making authority to Member States. As illustrated by the *Bio-technology* case, it is sufficient to demonstrate that the elements of Article 5(2) have been considered.¹⁷¹

V. “INSTITUTIONAL CLASHES” – THE PREROGATIVES OF THE EU INSTITUTIONS

In the early days of the European Economic Community (EEC), “the constitutionalization” of the founding treaties had already become manifest.¹⁷² The ECJ went even further in the *Nold* case, where it stated that secondary Community measures that are

168. Case C-376/98, *Germany v. Parliament & Council*, 2000 E.C.R. I-8419 § 144. The ECJ did not delve into the issue of subsidiarity since it annulled the Directive on the grounds that Articles 95 (ex 100a), 47(2) (ex 57(2)), and 55 (ex 66) each were an inappropriate legal basis. *Id.* § 128.

169. Opinion 2/91, *ILO Convention 170 on Chemicals at Work*, 1993 E.C.R. I-1061, I-1077 § 12 (emphasis added).

170. EC Treaty, art. 5.

171. Case C-377/98, *Kingdom of the Netherlands v. Parliament and Council*, 2001 E.C.R. I-7079.

172. See, e.g., Case 26/62, *NV Algemene Transport — en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der belastingen*, 1963 E.C.R. 1; Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585.

“incompatible with fundamental rights recognized and protected by the constitutions of those states” should be annulled as unconstitutional.¹⁷³ The Court specifically cited “[t]he Grundgesetz of the Federal Republic of Germany and...the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950,” as examples.¹⁷⁴ In the *Wachauf* case, the ECJ stated that secondary EC legislation “would amount to an unconstitutional expropriation without compensation” and is contrary to the “fundamental rights in the Community legal order.”¹⁷⁵

Not only have the founding treaties become constitutional EU law, all fundamental rights found either under Member States’ human rights conventions or constitutions have become part of the EU constitutional system as well. At the beginning of the 1990s, the ECJ stated “[t]he EEC treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law.”¹⁷⁶

This section emphasizes the balance of power and prerogatives as implemented by case law. In this balance, the ECJ acts as constitutional court and “has fashioned a kind of supranational constitution.”¹⁷⁷ The primary focus (Section A) is on the superiority of the EC Treaty over the EU treaty. A secondary issue is whether institutions may pick and chose between provisions authorizing secondary legislation (Section B). If such options exist, the law-initiating Commission may have significant influence on the prerogatives of the Parliament and Council.

A. *The Superiority of the EC Treaty Over the EU Treaty*

While the EC Treaty has existed for a period of 46 years, the EU Treaty is no more than 10 years old. Thus, while the EU is still a concept,¹⁷⁸ the EC has already established its legal personality (EC Treaty Article 281) and achieved an international capacity.

According to EU Treaty (TEU) Article 47, nothing in the treaty shall affect the EC Treaty or any acts modifying or supplementing

173. Case 4/73, *J. Nold, Kohlen- und Baustoffgroß handlung v Commission*, 1974 E.C.R. 491, 507 § 13.

174. *Id.* at 507 § 12.

175. Case 5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, 1989 E.C.R. 2609, 2625 § 11, 2639 § 19.

176. Opinion 1/91, Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, 1991 E.C.R. I-6079 § 1.

177. SWEET, *supra* note 57, at 1.

178. The EU will become a federation of states and consequently enjoy legal personality. See Article 6 of the Draft Treaty Establishing a Constitution for Europe, July 18, 2003, at <http://european-convention.eu.int/docs/Treaty/en00850.en03.pdf>.

it. Clearly, the EC Treaty ranks over the EU Treaty. This priority is also made clear by case law. In the *Airport Transit Visa* case, the ECJ states that:

In accordance with Article L [now TEU Article 46] of the Treaty on European Union, the provisions of the EC Treaty concerning the powers of the Court of Justice and the exercise of powers apply to Article M [now TEU Article 47] of the Treaty on European Union.

It is therefore the task of the Court to ensure that acts which, according to the Council, fall within the scope of Article K.3(2) [now TEU Article 30] of the Treaty of the European Union do not encroach upon the powers conferred by the EC Treaty on the Community.

It follows that the Court has jurisdiction to review the content of the Act in the light of Article 100c of the EC Treaty in order to ascertain whether the Act affects the powers of the Community under that provision and to annul the Act if it appears that it should have been based on Article 100c of the EC Treaty.¹⁷⁹

Lex superior governs these incidents of colliding entitlements. Where EC competencies exist, no EU Treaty entitlements have priority.

B. *The Lex Superior Position of EC Treaty Provisions*

The EC Treaty prevails not only over EU Treaty provisions, but also over all subsidiary EU legislation. The UN Food and Agriculture Organization (FAO) case illustrates the lack of derogation capacity.¹⁸⁰ Briefly, the conflict in the FAO case was that the Council and Commission made a binding “arrangement.” The Commission exercised voting rights in the FAO on fisheries issues that were under exclusive EU competency. A later 1993 Council decision delegated voting rights to Member States “to promote compliance with international conservation and

179. Case C-170/96, *Commission v. Council*, 1998 E.C.R. I – 2763 §§ 15-17.

180. Case C-25/94, *Commission v. Council*, 1996 E.C.R. I-1469.

management measures by fishing vessels on the high seas.”¹⁸¹ Thus, the Council breached the arrangement and the Commission called for an annulment.¹⁸² The Commission claimed that no decision made by agreement or decision to benefit Member States could invalidate the constitutional position clarified by the arrangement.¹⁸³

The ECJ concluded that the arrangement created a duty of cooperation.¹⁸⁴ Consequently, the validity of the arrangement was not nullified. The only question for consideration was whether the 1993 Council decision was in accordance with the Arrangement:

Consequently, by concluding [in Council's decision of 22 November 1993] that the draft Agreement concerned an issue whose thrust did not lie in an area within the exclusive competence of the Community and accordingly giving the Member States the right to vote for the adoption of that draft, the Council acted in breach of section 2.3 of the Arrangement which it was required to observe.

The Council's decision of 22 November 1993 must therefore be annulled.¹⁸⁵

Secondary legislation cannot deviate from the balance of competency as installed by an arrangement that was made according to the institutional balance displayed by the treaty. This is true even if the issue was not explicitly stated since it was not challenged at the onset of the arrangement.

C. *The Compulsory Legal Title*

The EU entitlement system is not entirely optional. EC Treaty Article 7(1) states that “[e]ach institution shall act within the limits of the powers conferred upon it by this treaty.”¹⁸⁶ Despite text indicating a somewhat optional system, the ECJ has established a rigid constitutional system to protect “the institutional balance” primarily because decision-making procedures in the EC Treaty Articles 251 and 252 respectively institute both a strong and weak parliamentary position. One simply cannot ruin the fine balance

181. *Id.* at I-1470 § 2.

182. *See id.* at I-1470 § 1.

183. *Id.* at I-1471 § 4.

184. *Id.* at I-1510 § 49.

185. *Id.* at I-1511 §§ 50-51.

186. EC Treaty art. 7(1).

between institutions by confusing legal authorities and legal appliances. EU institutions may not pick and choose from different valid legal titles because of the consequences this would have on the balance of power. As will be shown later, the *lex superior*, *lex specialis*, and *lex posteriori* doctrines influence this compulsory jurisdiction. Before discussing these principles of colliding norms, we must first look at their interrelation.

1. *The Rank of Lex Posteriori—A National State Constitutional Issue*

The logic of EU law creates EU supremacy “even over...the [national] constitution itself.”¹⁸⁷ For dualistic constitutional orders doctrinal *lex superior* and *lex posteriori* clashes have emerged since, as in Britain, “the only legal limitation to legislative power is that a parliament of today cannot, with legislation, bind a parliament of tomorrow. The doctrine prohibits judicial review of legislation and implies a rigid *lex posteriori* solution.”¹⁸⁸ However, in 1991, the British High Court opted out of the *lex posteriori* supremacy doctrine. Subsequently, Member States yielded to EU law and fell under the realm of *lex superior* principle.

Under EU law, the national state democratic right to rethink a former legal position is sacrificed for the benefit of “common policies and markets.” The federal solution affects Member States in two ways. First, in cases of EU exclusive autonomy, the federal solution terminates national legislative competency in the name of preemptive competency. Second, in split competency situations the remaining Member States’ competency is under the command of EU harmonization policies.¹⁸⁹

2. *ECJ Contra Legem Deviations?*

We sometimes hear comments such as the “ECJ is an activist court.”¹⁹⁰ However, there is little empirical support for this attitude. Perhaps this feeling more often reflects national politicians’ need to blame someone else for not predicting unpopular situations created by new court decisions?¹⁹¹

187. SWEET, *supra* note 57, at 170.

188. *See id.*

189. *See, for example, approximation of law under rules of competition in EC Treaty article 94 ff.*

190. *See, e.g., HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE 51-74 (1986); see also PATRICK NEILL, THE EUROPEAN COURT OF JUSTICE: A CASE STUDY IN JUDICIAL ACTIVISM 1 (1995).*

191. This sentiment can be seen in John Nash’s “Monday Morning Players” which is displayed every now and then. *See also* comments made by former Norwegian Prime Minister

My view is that the ECJ leaves very little room for “activism” and that the Court is clearly rule-oriented. This attitude not only relates to codified law, but also to case law. It closely follows the “*stare decisis*” decisions.¹⁹² The Court’s position mirrors its role as made manifest by EC Treaty Article 230, which states that the ECJ shall review the legality of acts made by EU institutions. Protection of prerogatives is specifically mentioned in the third paragraph of Article 230. Does the ECJ abide by this requirement, or does it in fact deviate from it?

An activist court could not be depicted without the ECJ breaching EU law as strictly interpreted. I have not found any *contra legem* court adaptations. The closest the Court comes occurs in the cases of *Comitology*¹⁹³ and *Chernobyl*,¹⁹⁴ where the Court, at least in these cases, played the lawmaker’s role. In the first case, the EU Parliament, lacking “*locus standi*,” found no remedy for a breach of procedural rules so the case was dismissed. Thus, Parliament was forced to accept that a negligent Commission renounced Parliament’s legitimate legislative role.¹⁹⁵ This ruling was due to the fact that Parliament had no standing under EC Treaty Article 230.¹⁹⁶ Shortly after, however, the court changed its mind. In the *Chernobyl* case, Parliament was granted *locus standi*.¹⁹⁷ It is possible, then, that the ECJ acted *contra legem* in its second decision. The EU parliament took the position that:

A new factor distinguished the present case from Case 302/87.... [T]he Court pointed out that it was the responsibility of the Commission under Article 155 [now Article 211]...to ensure that the Parliament’s prerogatives were respected and to bring any actions for annulment which might be necessary for that purpose. However, the present case shows that the Commission cannot fulfil that responsibility since it chose a legal basis for its proposal which was different from the legal basis which the Parliament considered appropriate.

Jens Stoltenberg (Labor) who blamed EFTA Surveillance Agency (ESA) — and thereby also EFTA Court, which in all disputes that involved Norway had supported ESA — for activist roles downplaying clear EEA-law. (Oslo Newspaper “VG” March 20th 2003, at <http://www.vg.no/pub/vgart.hbs?artid=51776>.)

192. See *supra* note 80.

193. Case 302/87, Parliament v. Council, 1988 E.C.R. 5615.

194. Case C-70/88, Parliament v. Council, 1990 E.C.R. I-2041.

195. See EC Treaty art. 251 & 252.

196. The 1992 Treaty of Maastricht amended this article.

197. Case C-70/88, Parliament v. Council, 1990 E.C.R. I-2041.

Consequently, the Parliament cannot rely on the Commission to defend its prerogatives by bringing an action for annulment.¹⁹⁸

The Parliament advocated a “legal-vacuum-position.” Consequently, it could be said the Court acted not *contra legem*, but rather *praeter legem*, or perhaps even *infra legem*. If the court ruled for Parliament, it would not be playing the role of activist, but more wisely the role of responsible adjudicator. Did the ECJ buy this argument? Having first stated that present legal remedies did not sufficiently guarantee that a measure adopted by the Council or the Commission in disregard of Parliament's prerogatives would be reviewed, the Court assumed its institutional balance responsibility.

In carrying out that task the Court cannot, of course, include the Parliament among the institutions which may bring an action under Article 173 [now Article 230] of the EEC Treaty...without being required to demonstrate an interest in bringing an action.

However, it is the Court's duty to ensure that the provisions of the Treaties concerning the institutional balance are fully applied and to see to it that the Parliament's prerogatives, like those of the other institutions, cannot be breached without it having available a legal remedy, among those laid down in the Treaties, which may be exercised in a certain and effective manner.

The absence in the Treaties of any provision giving the Parliament the right to bring an action for annulment may constitute a procedural gap, but it cannot prevail over the fundamental interest in the maintenance and observance of the institutional balance laid down in the Treaties establishing the European Communities.

Consequently, an action for annulment brought by the Parliament against an act of the Council or the Commission is admissible provided that the action seeks only to safeguard its prerogatives and that it is

198. *Id.* at I-2070 § 6.

founded only on submissions alleging their infringement. Provided that condition is met, the Parliament's action for annulment is subject to the rules laid down in the Treaties for actions for annulment brought by the other institutions.¹⁹⁹

The ECJ could not include Parliament among the institutions listed in Article 230. While the lack of *locus standi* is a “procedural gap,” it does not mean that procedural rights are denied. It is a *praeter legem*, not *contra legem* issue. Thus, referencing the Court as an activist in this situation is inappropriate.

Some might say that these are but two within a wide range of cases. In reviewing a great variety of cases, one sometimes faces surprising results, such as the results in the EEC groundbreaking cases.²⁰⁰ However, if these cases portray “bully courts,” why then do ECJ judges and national courts acknowledge such results as law? If the ECJ is that far “out of step” with valid EU law, as some say, it would not have gained the prominence it now enjoys. The cognition of the ECJ position not only relies upon case law practices, but also verbatim formulation on “institutional balance” issues. Let us determine whether *contra legem* practice by EU institutions outside the court may form new law.

3. Other Deviations Contra Legem

Among the first cases to focus on the EC institutional balance was the *Roquette* case:

The consultation provided for in the third subparagraph of article 43 (2) [now Article 37] as in other similar provisions of the EEC Treaty, is the means which allows the Parliament to play an actual part in the legislative process of the Community. Such power represents an essential factor in the institutional balance intended by the Treaty.²⁰¹

The codified constitutional balance is confirmed by ECJ case law. EU and EC Treaties install institutions for legislation,

199. Case C-70/88, Parliament v. Council, 1990 E.C.R. I-2041, I-2073 §§ 24-27.

200. See, e.g., Case 26/62, NV Algemene Transport — en Expeditie Onderneming van Gend & Loos v. Nederlandsche Administratie der belastingen, 1963 E.C.R. I; Case 6/64, Costa v. ENEL, 1964 E.C.R. 585; Case 22/70, Commission v. Council, 1971 E.C.R. 263; Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A., 1978 E.C.R. 629; Case 104/81, Hauptzollamt Mainz v. Kupferberg, 1982 E.C.R. 3641.

201. Case 138/79, Roquette Freres v. Council, 1980 E.C.R. 3333, 3334 § 4.

execution, and justification. This system for distributing power specifically assigns prerogatives to each organ:

Those prerogatives are one of the elements of the institutional balance created by the Treaties. The Treaties set up a system for distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community.

Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur.²⁰²

Clearly, this fixed system of competence will sometimes result in clashes. The question for debate is whether borderlines between functions may be redefined due to longtime practices. One early case that illustrates the importance of administrative practices is the *Hormonal Injection* case:

[I]n the context of the organization of the powers of the Community the choice of the legal basis for a measure must be based on objective factors which are amenable to judicial review. A mere practice on the part of the Council cannot derogate from the rules laid down in the Treaty. Such a practice cannot therefore create a precedent binding on Community institutions with regard to the correct legal basis.²⁰³

No institution may establish derogative practices. This position has been steadfastly maintained, although it has become more specific. In the *EU-U.S. Competition Agreement* case, the ECJ in an effort to divide competencies between institutions, said that the treaty is the one and only source of law:

202. Case C-70/88, *Parliament v. Council*, 1990 E.C.R. I-2041, 2072 §§ 21-22.

203. Case 68/86, *United Kingdom of Great Britain & Northern Ireland v. Council*, 1988 E.C.R. 855, 898 § 24.

[A]ccording to the Commission...it may derive its powers from sources other than the Treaty, such as the practices followed by the institutions. Moreover, reasoning by analogy from the third paragraph of Article 101 of the Euratom Treaty, the Commission considers that it can itself negotiate and conclude agreements or contracts whose implementation does not require action by the Council and can be effected within the limits of the relevant budget without giving rise to any new financial obligations on the part of the Community, provided that it keeps the Council informed.

That argument cannot be accepted.²⁰⁴

One of the basic arguments for rejecting a rule-creating administrative practice in contradiction to the treaty-based constitutional balance is that “in any event, a mere practice cannot override the provisions of the Treaty.”²⁰⁵ “Override” means the establishment of a practice totally contradictory to legislation. However, taking later case law into consideration, such conclusions seem inaccurate. In the *Edicom* case, the ECJ states:

As for the argument based on previous practice, suffice it to say that a mere practice on the part of the Council cannot derogate from the rules laid down in the Treaty and therefore cannot create a precedent binding on the Community institutions with regard to the correct legal basis.²⁰⁶

Deviations from treaty-based balances of competencies are *contra legem* and deemed illegal. As far as I can see, there are no exceptions to this principle.

D. Deviation by Agreement?

May EU institutions agree upon competency rearrangements alternatively to the treaty prerogatives? Is the treaty institutional balance negotiable?

Obviously, the answer is no. Nowhere in the treaties are bargaining positions available. Apparently the provision of EC

204. Case C-327/91, French Republic v. Commission, 1994 E.C.R. I-3641, I-3676 §§ 31-32.

205. *Id.* at I-3677 § 36.

206. Case C-271/94, Parliament v. Council, 1996 E.C.R. I-1689, I-1714 § 24.

Treaty Article 300(7), which states that concluded agreements should be binding on EU institutions and the Member States, does matter. Internal arrangements are not included, while international agreements are.

I am not aware of any agreements between EU institutions concerning the balance of power that have been tried before the ECJ. One case that relates to such “competency cooperation” is the EU 1993 *FAO Arrangement*.²⁰⁷ Since the arrangement was considered valid under the EC Treaty (“[n]or has the Council contested its effects at any moment in the proceedings”²⁰⁸), the voting arrangement was not challenged, which clearly would have been the case if the Council had considered it illegal. The Court’s ultimate position with respect to such agreements is only indirectly known. If the 1993 Arrangement were considered contrary to the EC Treaty, that would have been considered an argument in the dispute. Since it was not, the Commission, the Council, and the United Kingdom clearly acknowledged the arrangement as legally valid. However, somewhat indirectly we may anticipate that under no circumstances will arrangements made between EU institutions that challenge the delicate balance of power, as determined through the treaty prerogatives, be upheld. Whether entities may choose not to use their own power depends upon whether that agency enjoys the freedom to not act. If an omission is a misuse of power, that option is closed.

VI. CONCLUSIONS

The “constitutionalized” EC Treaty does not allow any deviation from the institutional balance. ECJ case law is characterized by strict-rule-orientation. If entitlement fails, the EU must resort to EC Treaty Article 308 (“the rubber paragraph”). However, this competency does not allow for subsidiary legislation that exceeds treaty limits; no amendment is possible. Since the ECJ confirms that Article 308 blocks amendments, this article does not predate Article 5. Therefore, Article 308 should be read within the framework of Article 5.

Member States’ private ownership regulation that does not affect trade in “industrial and commercial property” is outside of EU competency (EC treaty Article 295). It appears systems of property are still under the Member States’ exclusive autonomy. When rights are tradable, trade in ownership rights are part of EU exclusive competency under common competition policy. Since *l’effet*

207. See, e.g., Case C-25/94, *Commission v. Council*, 1996 E.C.R. I-1469, I-1510 §§ 48-49.

208. *Id.* at I-1510 § 49.

utile holds even remote consequences as relevant, the outer limits of Member States competency are still undefined.

By the “extension mechanisms” of extraterritorial law and association agreements, the EU increases its geographical scope. The EU includes foreign corporations under the competition *acquis*. The European Economic Area agreement considerably extends parts of the *acquis communautaire* to non-members of the EU.

EU competency is horizontally and vertically divided. “Horizontal competency” reserves to the EU exclusive competency in areas of law covered by common policies. Under areas of split competency, Member States play a role in the legislative process. Only treaty-based, shared, joint action competencies require the EU to cede to Member States (see, for example, EC Treaty Article 155). In all other instances, the EU may decide that its own institutions are better suited to decide issues than are Member States’ institutions. “Institutional clashes” due to administrative practices that deviate from codified solutions are governed by the latter. The ECJ clearly protects treaty prerogatives.