CHAPTER I.I

The European Court of Justice and the Division of Competences in the European Union

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1 Introduction[1]

The European Court of Justice (ECJ) has always played an important role in monitoring the division of competences, both between the Member States and the EU Institutions (vertical competence disputes) and between the EU institutions themselves (horizontal battles over might and power). Most of these types of disputes reach the ECJ in the form of a legal basis case: the applicant argues that the secondary measure under attack should have been based on a different Treaty provision. In this way the Court sees to it that the principles of attribution of (specific) powers,[2] institutional balance,[3] and democratic decision-making[4] are respected by the Member States and the EU institutions.

It is not the primary purpose of this contribution to the Interface Conference to analyse this legal basis case law of the ECJ;[5] rather the aim is to link the existing body of case law on the division of competences to four categories of EU competences and thus to develop a general doctrine and a better understanding of the important issue of the division of competences in the EU, including both the vertical delimitation of competences between the EU and its Member States and the horizontal delineation of competences between the EU institutions themselves.

Those four categories are to be found, for the first time explicitly, in the Constitution for Europe[6] but they can already be discerned, as will be argued, prior to its entry into force in the current post-Nice period. These four categories of competences are: exclusive EC/EU competences, competences shared between the EC/EU and the Member States, complementary EC/EU compe-

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2 See, e.g., Kurcz, M., 'La Répartition des Compétences au Sein de l'Union Européenne' *RDUE* 2005, 3, p. 575.

3 *Cf.* Jacqué, J-P., 'The Principle of Institutional Balance' *CML Rev.* 2004, 41, p. 383.

4 *Cf.*, e.g., Stefania,N., 'How do Our Judges Conceive of Democracy? The Democratic Nature of the Community Decision-making Process under Scrutiny of the European Court of Justice', Jean Monnet Working Paper 10/2003, http://ideas.repec.org/p/erp/jeanmo/p0148.html.

5 In general on the issue, see e.g. Bradley, K., 'The European Court and the Legal Basis of Community Legislation' *EL Rev.* 1988, 13, p. 379; Cullen, H., and A. Charlesworth, 'Diplomacy by other Means: the Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States' *CML Rev.* 1999, 36, p. 1244; Emiliou, N., 'Opening Pandora's Box: the Legal Basis of Community Measures before the Court of Justice' *EL Rev.* 1994, 19, p. 488; Peter, B., 'La Base Juridique des Actes en Droit Communautaire' *RMCUE* 1994, 378, p. 324; Breier, S., 'Der Streit um die Richtige Rechtsgrundlage in der Rechtsprechung des Europäischen Gerichtshofes' *EuR* 1995, p. 46; van Ooik, R.H., *De Keuze der Rechtsgrondslag voor Besluiten van de Europese Unie* (Kluwer, Deventer, 1999) EM no. 63.

6 'Draft Treaty establishing a Constitution for Europe, 18 July 2003, adopted by consensus by the European Convention on 13 June and 10 July 2003, submitted to the President of the European Council in Rome', http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf; hereinafter referred to as the 'EU Constitution' or 'Constitution for Europe').

tences, and residual competences of the Community/Union, enabling the organisation to act in 'unforeseen cases' (current Article 308 EC; Article I-18 of the EU Constitution).[7]

2 Exclusive competence

The introduction of the principle of subsidiarity by the Treaty of Maastricht (in 1993) already made it necessary to indicate in a precise manner in which 'areas' of Community policy the competences of the EC are exclusive and in which areas they are not, since the principle merely applies to 'areas which do not fall within its [i.e. the Community's] exclusive competence'.[8] More recently, the Constitution for Europe explicitly mentioned the 'areas' of EU policy in which the Union enjoys exclusive powers (section 2.1). The next question is what exactly it means to say that the Community (or Union) enjoys 'exclusive' decision-making powers in a given area of Community policy. In particular, the consequences of exclusivity for the remaining powers of the Member States will be dealt with (section 2.2). Finally the delimitation of competences within the category of exclusive competences, including the role the ECJ in this respect, will be discussed (section 2.3).[9]

2.1 Areas of exclusive competence

In its case law the ECJ has ruled that the powers of the Community are 'exclusive' in the area of the common commercial policy (CCP, Article 133 EC) and with respect to the protection of maritime resources and the conservation of marine biological resources under the common fisheries policy.[10] The Constitution for Europe adds to these three other areas of exclusive competence: the establishment of the competition rules necessary for the functioning of the internal market; monetary policy, but only for the (thirteen) Member States which have adopted the Euro; and the customs union (Article I-13). It is submitted that already at present, post-Nice, the EC enjoys exclusive competence in these three areas as well.

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7 *Cf.*, e.g., Nettesheim, M., 'Die Kompetenzordnung im Vertrag über eine Verfassung für Europa' *EuR* 2004, 39, p. 511; Kurcz, M., *op. cit.*; and Dashwood, A., 'The Relationship between the Member States and the European Union/European Community' *CML Rev.* 2004, 41, p. 355.

8 See Article 5(2)EC.

9 Hereinafter the terms 'Union' (under the Constitution) and 'Community' (as part of the current three pillar Union) are used interchangeably if, in my view, the EU Constitution will merely clarify the current state of affaires regarding the division of competences in the EU.

10 Regarding CCP, see *Opinion 1/75* [1975] ECR 1355; Case 41/76 *Donckerwolkce* [1976] ECR 1921; *Opinion 1/94* [1994] ECR I-5267. Regarding the protection of maritime resources, see Case 804/79 *Commission* v. *UK* [1981] ECR 1045; Joined Cases 3/76, 4/76 and 6/76 *Kramer* [1976] ECR 1279.

2.1.1 The concept of an area of exclusive competence

Taking a closer look at the concept of an 'area' of exclusive competence, it must be understood, it is submitted, as encompassing all substantive aspects mentioned in the legal bases in the part of the EC Treaty (or, possibly in the future, in Part III of the Constitution) which specifically deals with that area of exclusive competence. Hence, the concept of an 'area' is essentially built up by a collection of Treaty provisions enabling the EC institutions to adopt secondary legislation on the various aspects of a certain substantive matter.[11]

Since the exclusivity of Union powers is restricted to laying down (competition) rules 'necessary for the functioning of the internal market' it must be assumed that in the four specific sub areas of competition policy a certain intra-community link must exist. Otherwise the Member States would completely lose their power to lay down rules on competition policy, also in case of purely internal situations. The Union is therefore, in my view, merely exclusively competent if it can prove that trade 'between Member States' is affected and that its rules deal, in one way or another, with competition 'within the internal market'.[12] Internal market legislation not dealing with competition policy, such as directives on tobacco advertising, fall under general internal market policy, and therefore under second category of shared competences.[13]

2.1.2 External exclusive competences

Some of the areas in which the EC enjoys exclusive competence are typically internal policy areas, such as the competition policy for the internal market. The Constitution for Europe adds that exclusivity of EU powers can also exist in the field of external relations. Three situations are mentioned: the Union has exclusive competence for the conclusion of an international agreement (1)

[11] For example, the area of competition policy, in which the Community already now, before the entry into force of the EU Constitution, enjoys exclusive competence, consists of a number of legal bases, such as Article 83 EC (which gives the power to the institutions to lay down specific rules in secondary legislation on the cartel prohibition in Article 81 and on the prohibition on misuse of a dominant economic position in Article 82 EC), Article 86(3) EC (the legal basis for Commission directives and decisions on public undertakings), and Article 89 EC (the competence to adopt regulations on state aid). In the Constitution for Europe, Article I-13 stipulates in general terms that the Union has exclusive competence for 'the establishing of the competition rules necessary for the functioning of the internal market'. European competition policy is worked out in Part III, Section 5, of the Constitutional Treaty in greater detail and therefore the exclusivity of the competence of the Union to adopt legal rules in this 'area' covers, more specifically, the prohibition of cartels; the prohibition on abuse of a dominant economic position within the internal market (Article III-163); rules on public undertakings and those entrusted with the operation of services of general economic interest (Article III-166(3)); and rules on the prohibition of state aids (Article III-169).

[12] See also the contributions of F. Vogelaar and K. Cseres to this volume.

[13] See further *infra*, section 3.1.

when its conclusion is provided for in a legislative act of the Union, (2) when its conclusion is necessary to enable the Union to exercise its internal competence; or (3) insofar as its conclusion may affect common (internal) rules or alter their scope.[14]

Opinion 1/76 is more closely related to situation 2 of those identified in the Constitution.[15] In this Opinion the ECJ first repeated the *ERTA* statement regarding the existence of an external competence: whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community has authority to enter into the international commitments necessary for the attainment of that objective even in the absence of an express provision in that connection. This is particularly so in all cases in which internal power has already been used in order to adopt (internal) measures for the attainment of common policies. The Court however added that the power to bind the Community vis-à-vis third countries can also flow by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is necessary for the attainment of one of the objectives of the Community. Thus, the internal Community measures may be adopted at the same time as the international agreement is concluded and made enforceable.

In some other case law the Court seems to have become more cautious in accepting exclusive external competences for the Community. In the *Open Skies* cases,[16] for example, the Court held that the necessity test of *Opinion 1/76* could not lead to the exclusivity of Community powers in the field of external air transport. When the Court applied the *ERTA* test, it very carefully scrutinised the internal measures at stake (the so-called third package on the liberalisation of the internal air transport market) to see on what specific points these could be 'affected' by the bilateral Open Skies agreements of the Member States. In the end the Court concluded that this was only the case with respect to three specific issues (tariff rates, computer reservation systems, slots) so that EC competence had become exclusive only to a limited extent as a result of the adoption of the internal regulations.[17]

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[14] Article I-13(2) draft EU Constitution.

[15] *Opinion 1/76* [1977] ECR I-741.

[16] Cases C-467/98 *Commission* v. *Denmark* [2002] ECR I-9519; C-468/98 *Commission* v. *Sweden* [2002] ECR I-9575; C-469/98 *Commission* v. *Finland* [2002] ECR I-9627; C-471/98 *Commission* v. *Belgium* [2002] ECR I-9681; C-472/98 *Commission* v. *Luxemburg* [2002] ECR I-9741; C-475/98 *Commission* v. *Austria* [2002] ECR I-9797; C-476/98 *Commission* v. *Germany* [2002] ECR I-9855; C-466/98 *Commission* v. *United Kingdom* [2002] ECR I-9427 (the infringement action against the UK was directed against the so-called Bermuda II agreement, since no 'real' Open Skies agreement had yet been concluded with the USA).

[17] On these cases see Heffernan, L., and C. McAuliffe, 'External Relations in the Air Transport Sector: The Court of Justice and the Open Skies Agreements' *EL Rev.* 2003, 5, p. 601; Middeldorp, G., and R.

2.2 Nature and meaning of 'exclusivity' of Community powers

Article I-12(1) of the EU Constitution stipulates that 'when the Constitution confers on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of acts adopted by the Union'.

This provision of the Constitution thus clearly indicates that the Member States are not competent at all to act in these areas. The competence to legislate does not even exist because all powers have been transferred to 'Brussels'. Only the latter can therefore decide to give parts of these powers back to the Member States ('only if so empowered by the Union'), apart from the power of Member States to strictly carry out that which the EU institutions have already laid down in their legislation ('or for the implementation of acts adopted by the Union').

These consequences of exclusivity seem, however, to be written (in the Constitution) with the internal areas of exclusive competence in mind. Regarding the external exclusive competences, the Community's power to 'legislate and adopt legally binding acts' must be understood as referring to the conclusion of international agreements. Where this treaty-making power is exclusive, or has become exclusive, it is only the EC that may become a party to the agreement with third parties. Otherwise a so-called mixed agreement can be concluded, to which not only the Community/Union but also all of its Member States are a party.[18] In case of accession to, or participation in, another international organisation (IO), exclusivity of Community powers means that it is only the EC that may accede to that organisation, not its Member States. In cases of mixed competences both the EC and its Member States will become a member of the other IO, although of course the latter's statute must foresee in membership of not only states but also international organisations like the EC (the Statute of the Council of Europe, for example, does not).

In the cases of the accession of the EC to international organisations, arrangements are usually made to avoid the increase in the votes of the EC and its members (as a block). It is therefore either the Commission *or* the Member States that have the right to speak and vote, depending on whether the issue on the agenda is considered to belong to EC competence or to national competences (in which case the Member States' representatives take the floor).

It goes without saying that the concept of 'exclusivity', both in its internal and its external dimension, puts the European Community in a very comfortable position and, at the same time, makes the Member States very dependent on

van Ooik, 'Van Verdeelde *Open Skies* naar Een Uniform Europees Extern Luchtvaartbeleid' *NtEr* 2003, p. 1; Lavranos, N., case note on *Open Skies*, *LIEI* 2003, 30, p. 81.

[18] To date the vast majority of agreements concluded by the EC have been concluded together with the Member States, such as the 'Europe Agreements' (which are in fact association agreements within the meaning of Article 310 EC). Free trade agreements (merely based on Article 133 EC) form the exception.

it. Essentially, it is up to the Institutions to decide whether or not they will give back to the Member States something that they have already lost completely.

Since the Member States are *a priori* not competent to act in those policy areas, it logically follows that they cannot exercise these non-existent powers either. For example, a Member State is not permitted to conclude a free trade agreement with a third country, even in the absence of a trade agreement between the EC and that same third country. As the Member States are not competent right from the outset, powers of decision-making cannot fall back to them as a result of the inertia of the Union; this is only possible as a result of a deliberate decision on the part of the Union.[19]

The same goes where the Community has decided to no longer exercise its powers in an area of exclusive competence. Since the Member States are deemed to have lost their power to legislate completely, even if the EC institutions decide to stop exercising theirs – which will happen only very rarely in practice – the Member States' power to adopt national legislation does not, and even cannot, revive. In other words, when a regulation or directive (or European law or framework law, under the EU Constitution) is repealed, and not replaced by new European legislation on the same topic, powers of decision-making do not automatically revert to the Member States. Even then the so-called *Sperrwirkung* remains, essentially because in case of exclusive competences the blocking effect results from primary Community law, not from the regulation or directive that was repealed.

Exclusivity of Community powers also implies that the principle of subsidiarity is irrelevant, since Member States cannot act in any event. This is clear from the text of current Article 5 EC ('In areas which do not fall within its exclusive competence') and the Constitution clarifies matters further by pointing out that the principle of subsidiarity, as well as the principle of proportionality, is about the use, the exercise of Union competences, not about the conferral or attribution of powers by the Member States to the European Union (Article I-11(1) EU Constitution).[20]

Therefore the principles of subsidiarity and proportionality can only apply to the other three categories of competences, discussed *infra* (shared, complementary and residual). For those areas, the subsidiarity principle essentially stresses that the Union institutions should be reluctant to exercise their powers and first ask themselves whether the Member States – including their decentralised authorities – cannot do the same job as well, or even better.[21]

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[19] This is an important difference with the category of shared powers, to be discussed below, section 3.2.

[20] *Cf.*, e.g., Bribosia, H., 'Subsidiarité et Répartition des Compétences entre l'Union et ses Etats Membres dans la Constitution Européenne' *RDUE* 2005, 1, p. 25.

[21] See Article 5 EC and Article I-11(3) of the EU Constitution: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better

2.3 Delineations within the field of exclusive EC competences

Obviously, Member States do not have a direct interest in the exact delimitation of EC powers within the category of exclusive powers, since at all times their national 'rest competences' are equal to zero. Nevertheless, Member States may have an interest in the exact choice of competence because the decision-making procedures for exercising powers in the different fields of exclusive competence may be different (e.g. unanimity versus qualified majority voting in the Council), even if the two legal bases at stake both fall within the category of exclusive competence. It is only that Member States do not have an interest in defending another exclusive competence legal basis for the sake of defending their own, residual, national powers.

In this respect one should realise that, as was pointed out earlier, the areas of exclusive EC competence are, in fact, composed of numerous specific legal bases, some of which still contain a 'special' decision-making procedure (other than co-decision). It therefore cannot be ruled out that legal basis disputes come before the Court, even if they are located entirely within the 'island' of exclusive competences. For example, the area of 'monetary policy' is composed of numerous legal bases in Chapter 2, Title VII of the EC Treaty, of which some require unanimous voting in the Council, others refer to co-decision or co-operation.[22] That decision-making procedures must be different, is even a prerequisite for the Court of Justice to actually annul the contested act in case it finds that it was based on an incorrect legal basis. The reason is that only if decision-making procedures are different, the final content of the secondary measure concerned may be different. If not, the choice of legal basis is a 'purely formal' matter and therefore the ECJ will not actually annul the contested measure, even if it finds that that measure has been based on an incorrect legal basis.[23]

achieved at Union level'. See also the Protocol on the application of the principles of subsidiarity and proportionality.

[22] See also the contribution of R. Smits in this volume.

[23] An example can be found in Case C-491/01 *Batco and Imperial Tobacco* [2002] ECR I-11453, where the Court did not annul the Tobacco Labelling Directive, even though it found that it had been based on the incorrect Treaty provisions (Articles 95 and 133 EC, while the Court concluded that Article 95 EC alone sufficed), the reason being that under both legal bases the co-decision procedure applied. See also Case C-211/01 *Commission* v. *Council* [2003] ECR I-8913: 'In principle, the incorrect use of a Treaty article as a legal basis which results in the substitution of unanimity for qualified majority voting in the Council cannot be considered a purely formal defect since a change in voting method may affect the content of the act adopted' (at paragraph 52).

3 Shared competence

3.1 The areas of shared competence

As yet, it has never clearly been stated in which areas the Community (or Union) enjoys competences shared with its Member States, and what this means exactly. In legal writing opinions differ as to which areas fall within the category of shared powers, and, moreover, many definitions and terms are used in different meanings (shared, concurring, parallel competences, etc.). The draft Constitution for Europe would, however, considerably clarify the issue.

Article 14(2) of that Constitution mentions eleven 'principal areas' in which competences are shared between the Union and its Member States: (1) internal market;[24] (2) social policy, for aspects defined in Part III of the Constitution; (3) economic, social and territorial cohesion; (4) agriculture and fisheries, excluding the conservation of marine biological resources; (5) environment; (6) consumer protection; (7) transport; (8) trans-European networks; (9) energy; (10) the area of freedom, security and justice (AFSJ); and (11) common safety concerns in public health matters, for the aspects defined in Part III.

Under the system of the Constitution, all other areas of Union policy automatically fall under the category of shared competence if they do not belong to either exclusive competence or to the group of complementary competences. Article I-14(1) of the Constitution stipulates:

> 'The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles I-13 [exclusive competence] and I-17 [complementary competence].'

Probably the number of these 'non-principal' areas of shared competences will remain few since most policy areas that are mentioned in Part III of the Constitution are neatly categorized under one of the three main categories (either under exclusive competences; as a 'principal area' of shared competences; or as a complementary competence).

3.2 What does sharing of competences mean?

In order to answer this question it seems best to start, once again, with the future, *i.e.* the EU Constitution:

> 'When the Constitution confers on the Union a competence shared with the Member States in a specific area, the Union and the Member States may [in the initial version of the Convention: 'shall have the power to'] legislate and adopt

[24] With respect to the first area on 'internal market', it should be noted that the competition rules fall under the first category of exclusive competences. Thus, the remaining part of internal market policy will mainly relate to competences for facilitating free movement within that internal market.

> legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence' (Article I-12(2) EU Constitution).

This provision makes it clear that in shared competence areas both the Member States and the Union possess, and continue to possess, the power to adopt rules on specific issues falling in these areas (mentioned in the previous section). In principle they both may act; however, if and when the Union decides to actually exercise its power to legislate in shared competence areas, the Member States may no longer exercise theirs. Three stages can thus be distinguished; not only under the Constitution but, in my view, already at present.[25]

3.2.1 The EC is still silent

First, as long as the Union has not yet exercised its powers, the Member States are free to exercise their powers and to adopt legally binding rules on specific issues falling under the areas of shared competence. For example, laying down restrictive rules on advertising of tobacco products, or labelling of tobacco products, is a competence which is in the hands of both the European Union and the Member States, since that specific issue ('restrictions of advertising for tobacco products') falls, or at least seems to fall, under the Union's internal market policy.[26]

This is an important difference with the category of exclusive powers, where – as was noted above – the Member States do not have such a competence in the absence of Community/Union legislation.[27] The Member States must however take into account their obligations under the EC Treaty; in the example of national prohibitions on advertising of tobacco products (and prior to the adoption of the first Tobacco Advertising Directive) notably their obligations under Articles 28-30 EC on the free movement of goods. The same goes for Member

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[25] The terms 'Union' (under the Constitution) and 'Community' (as part of the current three pillar Union) will therefore, again, be used interchangeably.

[26] At least this is true with respect to the more restricted prohibition on advertising of tobacco products (in magazines etc.) as laid down in the new Tobacco Advertising Directive (2003/33/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ L 152/16), which is based on Article 95 EC. According to Germany, however, this second directive also falls under Article 152 EC (public health), see Case C-380/03 *Germany* v. *European Parliament and Council* ('Tobacco Advertising II', case still pending [2003] OJ C 275/31). The first directive clearly belonged to public health protection, see Case C-376/98 *Germany* v. *European Parliament and Council* [2000] ECR I-8419 ('Tobacco Advertising I'). Labelling of tobacco products is also an example of internal market legislation, see Case C-491/01 *Batco* and *Imperial Tobacco* [2002] ECR I-11453.

[27] *Cf. supra*, section 2.2.

States' prohibitions on advertisements for alcohol products, since no EC Directive on this issue has been adopted yet.[28]

3.2.2 Brussels awakes

A second phase starts when the Union institutions decide to actually activate their (shared) powers of decision-making. Then, according to the text of Article 12(2) of the EU Constitution, the Member States shall no longer exercise their powers on the same specific issue. In this way the Constitution makes it clear that Member States do not lose their powers of decision-making as a result of the exercise of powers by the Union, but they 'merely' cannot exercise them any longer. The Member States must put their national powers to sleep, so to speak, once and as long as the Union exercises its powers.

In my view this exercise of powers by the Union must be understood as the adoption of 'hard law' by the institutions only (notably framework laws and laws). In case of exercise of decision-making powers through 'soft law', such as recommendations and opinions, Member States are not restrained from exercising their powers.

On the opposite side, that of the Member States, the main question is what 'no longer exercising' national competences means exactly. The phrase could be interpreted, very strictly, as meaning that the Member States may no longer adopt any legal rules at all on the, more or less, same specific issue dealt with in the legislation of the Union, regardless of whether these national rules violate the Union rules. This strict view would even entail the obligation on Member States to withdraw existing national legislation as soon as the Union legislates, at secondary level, on the same issue. After all, the EU Constitution explicitly says that in shared competence areas – to which internal market policy belongs – 'the Member States shall exercise their competence only to the extent that the Union has not exercised its competence'.

This strict interpretation boils down to the rule that the exercise of powers by the Union in shared competence areas has, at least, the same effect for Member States as their complete loss of powers in exclusive competence areas. The consequences for Member States would even go further because in case of the 'official' exclusive power areas the Member States still have the power to adopt implementing measures or they may act if empowered so by the EU institutions.[29]

Another possible interpretation, the 'flexible' one, must therefore be considered: the Member States may continue to legislate on the same specific issue on which the Union has adopted a framework law (or some other legal instrument) but they are merely prohibited from acting contrary to or in violation of the EU rules. Under this 'minimalist approach' the Member States, essentially, merely

[28] *Cf.* Case C-405/98 *Gourmet* [2001] ECR I-1795 on the Swedish prohibition of advertising for alcohol products, which legislation was tested against Articles 28-30 EC.

[29] *Cf. supra*, section 2.2.

have to respect the principle of supremacy of EC/EU law, as developed by the Court of Justice in *Costa ENEL* c.s. and as it is codified in Article I-6 of the EU Constitution.[30]

Thirdly, an 'in-between' interpretation is possible: in case the Union exercises a shared competence, the Member States are prevented from adopting, or keeping in force, national legislation which negatively affects the Union rules which were adopted at secondary level, or which alters their scope. On the one hand this interpretation is more flexible, or lenient, than the strict view because Member States do not have to revoke all of their national rules as soon as the Union legislates on, more or less, the same substantive issue. On the other hand, the 'negatively affect' interpretation is more strict than the flexible view because the national rules do not have to be in breach of Union rules in order to have to be repealed; a certain negative effect is enough to stop the Member States from exercising their powers.

This third possible interpretation, of course, stems from the *ERTA* case law, according to which existing external competences of the EC become exclusive as a result of the exercise of internal competences, provided that these internal rules can be 'affected' by the unilateral obligations/agreements of the Members States.[31] This means that, like in its *ERTA* case law, the Court will have to decide on an individual case-by-case basis whether Member States' legislation can negatively affect the secondary EU measures, or alter their scope. In an '*ERTA* reading' of Article I-12 of the draft Constitution, this provision would run something like this:

> 'The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence. In case the Union exercises its competence, the Member States shall not exercise their competence to the extent that this negatively affects the legally binding measures adopted by the Union, or where the exercise of national competences alters the scope of these measures'.

It is submitted that at present, prior to the entry into force of the EU Constitution, the second reading, the flexible interpretation (mentioned above), is to be preferred: a clear list of shared competence areas is lacking in the EC/EU Treaties, and – more important – to date we only have the well-known *Costa-ENEL/Simmenthal* case law on the principle of supremacy of Community law. That principle does not oblige the Member States to completely refrain from legislating and withdraw existing legislation as soon as the Community legislates; nor does it oblige the Member States to avoid national legislation which might negatively affect that Community legislation. The supremacy princi-

[30] Case 6/64 *Costa* v. *ENEL* [1964] ECR 1209. See also, e.g., Case 106/77 *Simmenthal II* [1978] ECR 629. Article I-6 of the Constitution stipulates: 'The Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States'.

[31] Case 22/70 *Commission* v. *Council* [1970] ECR 279. See also *supra*, section 2.1.2.

ple merely requires Member States not to act in violation of those secondary Community rules.

If and when the EU Constitution would come into force – which, as we know, is very unlikely – this should, in my view, however be changed. The more stringent *ERTA*-like interpretation (also discussed above) should then be followed because, after all, the Constitution clearly states that Member States shall stop exercising their legislative powers once the Union does so. An *ERTA* reading of Article I-12(2), regarding the consequences for Member States of legislation by the Union in shared competence areas, is then still very 'Member State friendly', since under the first, literal, reading of this provision, they would have to stop legislating completely.

3.2.3 Brussels retreats

Finally, during a third stage, the EU may decide to no longer exercise its powers in shared competence areas. In that event, i.e. if the Union 'has decided to cease exercising is competence', Member States may once again exercise their competences. They do not regain their powers of decision-making, simply because these have never been lost (as a result of the exercise of competences in shared areas by the Union); they are merely allowed to re-use, to re-activate, the national powers that were, temporarily, put to sleep.

This right of re-activation of Member States' powers during the third stage is a key difference with the category of exclusive competences since under the first category Member States have lost all of their powers right from the outset so that the lost powers cannot be re-activated during the third stage.[32]

Regarding the 'ceasing' of the exercise of competences by the Community/Union, two situations can be distinguished.

The most obvious one is where the EU institutions decide to repeal existing legislation of the Community/Union without replacing it by new legislation. This will not happen very often in the Brussels' practice; in that practice Community/Union legislation that is repealed is immediately replaced by new – even more complex – European rules.

Secondly, we can also speak of 'ceasing' to exercise Union competences in case an act of the institutions is annulled by the European Court of Justice, without the Court making use of the possibility to limit the consequences of that annulment in time.[33] After the annulment of the first Tobacco Advertising Directive, for example, the Member States were free once again to lay down national rules on tobacco advertising.[34] In the system and terminology of the EU Constitution it can be said that the EC/EU was forced to cease exercising its powers in the field of internal market policy. The third stage of renewed freedom for the

[32] *Cf. supra*, section 2.2.

[33] Article 231 EC offers this possibility. Sometimes the Court makes use of it, especially in legal bases cases.

[34] *Cf.* Vandamme, T.A.J.A., *The Invalid Directive* (Europa Law Publishing, Groningen 2005).

Member States, however, lasted only briefly because new legislation on the same subject matter was soon adopted,[35] and so quickly we reverted from the third stage to the second stage.

3.2.4 Exceptions to the system

The Constitution for Europe contains a few interesting exceptions to the rule that Member States may no longer exercise their powers once the Union has decided to use its powers. In the areas of research and technological development (R&TD) and space policy, the Constitution stipulates that the Union shall have competence to carry out activities, in particular to define and implement programmes. However, the exercise of that competence by the Union shall not result in Member States being prevented from exercising theirs (Article I-14(3) EU Constitution). A similar rule applies to the areas of development cooperation and humanitarian aid. In those areas 'the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs' (Article I-14(4)).

The underlying idea seems to be that if the Union has actually used its powers of decision-making, on the basis of the sections in Part III of the Constitution dedicated to R&TD, space policy, development cooperation and humanitarian aid, the Member States should lose less influence than when the Union legislates in other areas. What is 'shared' in these four areas is therefore both the possession and the exercise of decision-making powers. Under the 'ordinary' EU Constitution system of shared competences, it is only the existence of powers that is shared, not the power to make use of them.[36]

The fact that in these four policy areas not only the existence but also the exercise of decision-making powers is shared does not imply, in my view, that Member States' actions may be in breach of Union legislation on the same specific issue. The principle of supremacy of Union law still applies (then laid down in Article I-6), also to the four exceptional areas. However, the Member States have been given some more room for manoeuvre in the sense that their actions may negatively affect existing Union legislation on space policy, development co-operation, etc. Thus, in my view, in those four areas the same system would continue to apply as at present applies to all areas of EC/EU policy.[37] Under the Constitution, Member States are prevented from adopting or keeping in force conflicting legislation in all areas of shared competence, also in the

[35] Directive 98/43/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, [1998] OJ L 213/9 and Directive 2003/33/EC on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ 2003 L 152/16, respectively.

[36] Cf *supra*, section 3.2.2.

[37] *Cf. supra*, section 3.2.2., at the end.

four 'special' areas. The difference is that usually national legislation may not negatively affect EU legislation, or alter its scope, whereas in the four special areas Member States merely have to avoid clear-cut violations of the Union rules. This is at least how the provisions on shared powers in the Constitution (Articles I-12(2), I-14(3) and I-14(4) and the supremacy principle, Article I-6) can be reconciled.

3.3 The Court of Justice and shared competences

The Court has already very often been asked to deal with disputes on the division of competences within that which the Constitution considers to be areas of shared competences. If the EU Constitution would come into force, this important role for the Court will probably remain the same.

A first reason for this is that so many areas of Union policy fall under this category. As was noted earlier, these are not only those areas explicitly mentioned in Article I-14(2) of the Constitution (the 'principal areas' like internal market policy, environmental policy, etc.), but also all other areas of Union policy that are not explicitly mentioned under the headings of exclusive or complementary competence (such as fiscal policy).[38]

Secondly, and closely related to the first reason: within this broad group of shared competences the decision-making procedures for exercising shared competences will remain quite diverse. These procedural differences (unanimous versus qualified majority voting; strong versus weak involvement of the European Parliament; et cetera) are the most important reason for opposing interests in choosing the correct Treaty power/legal basis for secondary legislation. This, in turn, may induce an interested party (most often the Commission, the EP, or a Member State) to bring the legal basis dispute before the Court to get a definite answer as to the correct horizontal and/or vertical division of powers.

Although the Constitution would more often declare the 'ordinary legislative procedure' (Article III-396) applicable within the conglomerate of shared powers – as compared to the current situation, with a more limited scope of application of the co-decision procedure – some areas would remain excluded. Examples are the harmonisation of taxes, the 'sensitive' parts of European environmental policy and of European social policy; non-discrimination on grounds other than nationality; and some decisions on European citizenship.[39] All these areas

[38] *Cf.* section 3.1.

[39] See, respectively, Articles 93 and 94 EC and, in the EU Constitution, Articles III-171 and III-172(2) (harmonisation of indirect and direct taxes); Article 175(2) EC and Article III-234(2) of the Constitution (environmental protection); Article 137 EC and Article III-210(3) Constitution (European social policy); Article 13 EC and Article III-124(1) Constitution (rules on non-discrimination on grounds other than nationality – secondary measures on the latter ground are (already now) adopted in accordance with the co-decision procedure, see Article 12 EC and, in the Constitution, Article III-123); Articles 18, 19 and 22 EC and Articles III-125, 126 and 128 in the Constitution (Citizenship of the Union).

belong to the shared competence category and each time a 'special' procedure continues to apply – just as at present – which is often unanimous voting in the Council and consultation with the European Parliament.

Nevertheless, the procedural differences would diminish as compared to the current situation – notably in the areas of asylum and immigration policy and criminal law (together the 'area of freedom, security and justice', AFSJ), it would become possible, according to the Constitution, to decide by a qualified majority in the Council of Ministers (whereas unanimity is the rule at the moment). Also, the European Parliament would become the co-legislator under the 'ordinary legislative procedure' in these areas (whereas at present the Parliament merely has to be consulted by the Council).[40] Due to that improved *Gleichlauf* the institutions or Member States will less often feel a need to bring a legal basis dispute before the Court. Still, some specific criminal law decisions, i.e. the most sensitive ones, would continue to require unanimity[41] and, moreover, a general 'emergency brake' was built into the system at the very last moment.[42]

In conclusion, within the category of shared powers, the Court of Justice plays and will continue to play a major role regarding the exact delineation of competences, due to the 'broadness' of the second group of competences, in combination with the fact that a diversity of procedures for exercising shared competences flourishes and will continue to flourish. Albeit a bit less, because the Constitution would more often declare the ordinary legislative procedure applicable, notably in the areas of asylum, most parts of criminal law and the common agricultural policy, including fisheries. As compared to the Court's future role within the other two categories of competences (exclusive, complementary), its role regarding shared competences will certainly remain the most important one.

4 Complementary competences of the EC

In some policy areas the European Union can only complement and assist the Member States in their actions. In those areas the 'hard core' competences are to be found at national level; the 'peripheral' powers are located at EU level. Article I-17 of the Constitution speaks of 'areas of supporting, coordi-

[40] See, currently, Article 67 EC and Articles 34(2) and 39 EU. In the Constitution, regarding immigration, see Articles III-265, III-266 and III-267; and for decision-making in the area of criminal law, see Articles III-270, 271, and 272.

[41] For example, unanimity is required for the setting up of the European Public Prosecutor's Office (Article III-274(1) of the EU Constitution).

[42] Article III-271(3) of the EU Constitution: 'Where a member of the Council considers that a draft European framework law as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft framework law be referred to the European Council' (where unanimity is required).

nating or complementary action'; hereinafter the term 'complementary' is used to cover all three of them.

These areas, some of which already exist, are listed in the Constitution (section 4.1). The complementary nature of EC/EU competences is expressed by a clear common characteristic, namely a prohibition on harmonisation of national legislation of the Member States (section 4.2). Conflicting interests may nevertheless exist, for other reasons than harmonisation, within the category of complementary competences, which may urge a Member State or Institution to bring a competence question before the Court (section 4.3).

4.1 The areas concerned

The areas for supporting, coordinating or complementary action at European level are: (1) protection and improvement of human health; (2) industry; (3) culture; (4) tourism; (5) education, vocational training, youth and sport; (6) civil protection; (7) administrative cooperation (Article I-17 of the Constitution for Europe). We have to take a look at Part III of the Constitution to get a more precise idea of what these areas entail. In Chapter 5 of Part III we come across these areas once again.

Remarkably, (general) economic policy and employment policy, mentioned in Article I-15, are not listed among the areas of complementary competence, although the Union can only adopt supportive/complementary measures in these areas as well: measures 'to ensure coordination of the economic policies of the Member States, in particular by adopting broad guidelines for these policies' and: the Union shall adopt measures to ensure 'coordination of the employment policies' of the Member States.

That same Article I-15 of the Constitution raises another question: it adds that the Union may adopt initiatives to ensure coordination of Member States' social policies. In the part on shared competences, European social policy is also mentioned, at least as far as 'aspects defined in Part III of the Constitution' are concerned.[43] It therefore seems that most aspects of social policy belong to the Union/Member States' shared powers, but that the general policies and basic choices fall under the complementary powers of the Union.

At present, post-Nice, only some areas of the Article I-17 list have their own section in the EC Treaty: protection and improvement of human health (Article 152 EC); industry (Article 157); culture (Article 151); education, vocational training, youth and sport (Articles 149 and 150 EC), not however tourism, civil protection and administrative cooperation. Measures in those areas are usually based on the residual competence of Article 308 EC.[44]

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[43] *Cf. supra*, section 3.1.

[44] See further section 5.

4.2 Meaning of complementary competence

The Constitution brings together the 'supporting', 'coordinating' and 'complementary' actions at European level in one single category; the common characteristic, as was mentioned already, is the prohibition on harmonisation of national legislation:

> 'In certain areas and under the conditions laid down in the Constitution, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions in Part III relating to these areas shall not entail harmonisation of Member States' laws or regulations' (Article I-12(5) EU Constitution).[45]

In Part III, Chapter 5, the prohibition on harmonisation is repeated for all seven areas.[46] It must be noted that the prohibition does not apply to certain parts of public health policy, namely measures regarding common safety concerns (standards of quality and safety of organs and substances of human origin, blood and blood derivatives; measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health). These 'sub areas' of public health policy belong to the category of shared competences of the Union so that harmonisation of national legislation, and hence framework laws, are permissible.[47]

At present, the EC Treaty does not clearly stipulate that the prohibition on harmonisation of national legislation is the common characteristic of a certain set of EC areas (those of complementary/supportive action). On the contrary, since such a prohibition merely applies to some of the seven areas identified by the Constitution, it cannot be seen, at present, in my view, as a common characteristic. The existing areas where such a prohibition on harmonisation already applies are: education, vocational training, youth and sport (Articles 149(4) and 150(4) EC); culture (Article 151(5) EC) and protection and improvement of human health (Article 152(4)(c) EC). On the other hand, such a prohibition cannot be found with respect to industry (Article 157 EC). Also in the three areas without their own specific part in the current Treaty (civil protection, tourism, administrative cooperation), harmonising measures – often Directives that will usually be based on Article 308 EC – may be adopted.

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[45] The 'Piris' version of the draft Constitution of 25 November 2003 emphasised that the prohibition on harmonisation is the common characteristic of category 3 by transferring the phrase from Article I-16(3) to Article I-11(5), later Article I-12(5).

[46] See Article III-278(5), public health; Article III-279(3), industry; Article III-280(5), culture; Article III-281(2), tourism; Articles III-282(3) and 283(3), education c.a.; Article III-284(2), civil protection; and Article III-285(2) on administrative cooperation.

[47] See Article III-278(4) of the EU Constitution. At present a similar distinction is made in Article 152(4) EC.

4.3 The Court of Justice and Complementary Competences

Since there are only a few policy areas of complementary EC competence – much fewer than those in which the Union and the Member States share competences – legal basis disputes are unlikely to arise within the category of complementary competences. Moreover, since harmonisation of national legislation is prohibited in any event – at least in the system of the Constitution – there is no interest for a Member State in bringing an intra-complementary competence case before the Court.

The only reason for doing so would be when decision-making procedures are different. However, in most areas of complementary competences, already now, the co-decision procedure applies, making the exact choice of legal basis within the category of complementary competences a 'purely formal' matter. The Constitutional Treaty would reduce these procedural differences even further since the ordinary legislative procedure would apply to all areas of the third category,[48] including cultural policy, where currently co-decision is combined with unanimous voting in the Council (Article 151(5) EC).

The core question in the case, 'industry or industry and culture?', would lose its practical meaning after the entry into force of the Constitution because, as was pointed out earlier, both in the area of industry and in the field of culture the ordinary legislative procedure, including qualified majority voting (QMV), would apply.[49] It can therefore be expected that conflicts on the division of competences within the category of complementary competences will become even more rare than they are already today.

5 Residual competences of the EC/EU

If the three categories of competence are taken together, including their sub fields, we still do not get the full picture of Community/Union competences. The reason is that, at present, the EC Treaty contains a legal basis for responding to 'unforeseen situations' in Article 308 EC (formerly Article 235 EEC):

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

[48] See, respectively, Articles III-278(5), III-279(3), III-280(5), III-281(2), III-282(3), 283(3), III-284(2) and III-285(2) of the EU Constitution.

[49] See Article III-279(3) and Article III-280(5) of the EU Constitution, respectively.

This residual competence provision returns in the EU Constitution in a slightly different form and under the name of 'flexibility clause' in Article I-18(1):

> 'If action by the Union should prove necessary within the framework of the policies defined in Part III to attain one of the objectives set by the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall take the appropriate measures'.

Maintaining a legal basis for 'unforeseen cases' in the Constitution for Europe was not that obvious, since in the Laeken Declaration it was questioned whether Article 308 EC – and the legal basis for the internal market, Article 95 EC – should be 'reviewed' in order to 'clarify, simplify and adjust the division of competence between the Union and the Member States in the light of the new challenges facing the Union'. The question arose how to ensure that a redefined division of competences does not lead to a 'creeping expansion' of EU competences or to encroachment upon the exclusive areas of competence of the Member States.[50] However, on the other hand, it was also admitted in the same Laeken Declaration that a very strict *Kompetenzkatalog* runs the risk of making actions by the EU too inflexible and making it impossible for the organisation to respond promptly to new (e.g. technological) developments:

> 'How are we to ensure at the same time that the European dynamic does not come to a halt? In the future as well the Union must continue to be able to react to fresh challenges and developments and must be able to explore new policy areas. Should Articles 95 and 308 of the Treaty be reviewed for this purpose in the light of the *acquis jurisprudential*?'[51]

Finally, it was agreed that in the draft Constitution a legal basis for reacting to such 'fresh challenges and developments' and for 'exploring new policy areas' had to be maintained, namely in Article I-18(1), although some changes were made to the current Article 308 EC.

First, a reference to the operation of the common market is no longer made. Article I-18, more generally, refers to 'the policies defined in Part III'. This seems to broaden the powers of powers under Article I-18, as compared to the scope under current Article 308 EC, since 'in the course of the operation of the common market' seems to relate to only a few of the objectives of the European Community, mentioned in Articles 2 and 3 EC. On the other hand, in practice,

[50] See part II of the Laeken Declaration on the Future of the European Union, Presidency Conclusions, European Council meeting in Laeken, 14 and 15 December 2001, http://europa.eu/constitution/futurum/documents/offtext/doc151201_en.htm.

[51] Laeken Declaration, part II. See further, e.g., Kokott, J., and A. Ruth, 'The European Convention and Its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?' *CML Rev* 2003, 40, p. 1315.

many measures adopted under Article 235EEC/308EC have very little to do with the functioning of the common/internal market. One can think of the many Article 235 EC acts establishing secondary agencies and committees, or the environmental protection directives that were adopted on the same basis prior to the entry into force of the Single European Act.[52] It therefore, *de facto*, makes no significant difference that this condition, stemming from a time when the EEC was still mainly occupied with strictly economic issues, would be deleted if the Constitution would come into force.

More important is that the scope of powers under Article I-18 of the EU Constitution is linked to the objectives of the Union, whereas now that scope under Article 308 EC is linked to the objectives of, only, the European Community. From the phrase 'If action by the Union should prove necessary within the framework of the policies defined in Part III to attain one of the objectives set by the Constitution' it follows that acts adopted under Article I-18 of the Constitution must have a certain connection with the policy areas mentioned in Part III and the objectives of the Union mentioned in that part (and also, in more general terms, in Part I of the Constitution, in Article I-3). The scope of power under Article I-18 thus depends on the interpretation of the general objectives and activities of the Union, as well as the list of policy areas listed in Part III.

As compared to Article 308 EC the scope of competence is broader because, as was pointed out, that latter provision merely provides powers for the attainment of the objectives of the *EC*. It is therefore quite remarkable that the Court of First Instance, in the recent *Yusuf* and *Kadi* cases,[53] ruled that Article 308 EC can be used for the attainment of the CFSP (Common Foreign and Security Policy) objective of fighting international terrorism. Under Articles 60, 301 and 308 EC the Community has the powers to freeze the assets of private individuals. Articles 60 and 301 EC are, however, very special provisions because they explicitly refer to the second pillar and thus form a 'bridge' between the two pillars. Adding Article 308 EC to the magic potion then has the effect of creating sufficient powers for imposing economic sanctions on individuals. If such a bridge between two pillars does not exist, i.e. outside the field of 'economic sanctions', it is not possible, in my view, to use Article 308 EC for the attainment of EU objectives.[54]

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[52] See, for example, Schwartz, J., 'Article 235 and the Law-making Powers in the European Community' *ICLQ* 1978, 27, p. 614; Usher, J., 'The Gradual Widening of European Community Policy on the Basis of Articles 100 and 235 of the EEC Treaty' in Schwarze, J., and H. Schermers (eds.), *Structure and Dimensions of European Community Policy* (Nomos, Baden-Baden 1988); and Bungenberg, M., *Article 235 EGV nach Maastricht. Die Auswirkungen der Einheitlichen Europäischen Akte und des Vertrages über die Europäische Union auf die Handlungsbefugnis des Article 235 EGV (Article 308 EGV n.F.)* (Nomos, Baden-Baden 1999) p. 315.

[53] Case T-315/01 *Kadi* v. *Council and Commission* [2005] ECR II-3533; Case T-306/01 *Yusuf and Al Barakaat International Foundation* v. *Council and Commission* [2005] ECR II-3649.

[54] See Van Ooik, R.H., and R. Wessel, 'De Yusuf en Kadi-uitspraken in Perspectief. Nieuwe Verhoudingen in de Interne en Externe Bevoegdheden van de Europese Unie' *SEW* June 2006, 54, p. 230. On

The EU Constitution would therefore still enlarge the scope of powers for taking action in unforeseen cases: in Part III we can find almost all social, economic, non-economic, and security areas one can imagine, including the policy areas of the current second and third pillars of the Union. Since these will be integrated in Part III of the Constitution, Article I-18 EUC may also serve as the legal basis for measures dealing with unforeseen CFSP and PJCC (Police and Judicial Cooperation in Criminal Matters) situations (the later being part of the AFSJ section). Of course, the powers in the specific chapters of Part III dealing with CFSP and AFSJ/PJCC should not provide for the requisite powers, but this condition of the absence of a *lex specialis* ('and the Constitution has not provided the necessary powers') must always be fulfilled.

A third difference is that the influence of the European Parliament on the content of Article I-18 measures will increase, as compared to its influence under Article 308 EC, since it will be given a right of assent, whereas it currently only has the right to deliver opinions on the Article 308 proposals from the Commission. The requirement of unanimous voting in the Council of Ministers will, not surprisingly, be maintained.

A procedural novelty is the 'alarm mechanism' of Article I-18(2), i.e., the right of the national parliaments to be informed about Union acts which are based on Article I-18 EUC:

> 'Using the procedure for monitoring the subsidiarity principle referred to in Article I-11(3), the Commission shall draw national Parliaments' attention to proposals based on this Article'.

Once the national parliaments have been alerted, it is likely that they will analyse and discuss the Commission's 'suspicious' proposal quite thoroughly. As a next step, the national parliaments can try to influence the content of the draft Article I-18 decision, mainly through the European Parliament. As was mentioned above, the latter will have a right of approval/assent under that legal basis and is, moreover, usually the 'natural ally' of the national parliaments. Moreover, if at least one third of the national parliaments believe that the principle of subsidiarity has been breached by the draft Article I-18 decision, then they can use their powers under the Protocol on the application of the principles of subsidiarity and proportionality and, *inter alia*, ask the Commission to reconsider matters.[55]

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appeal, *Yusuf* and *Kadi* continue to contest the view of the CFI; no sufficient powers would exist for the Community to impose economic sanctions on private individuals. See Case C-402/05 P *Kadi* [2006] OJ C 36/19 and Case C-415/05 P *Yusuf* [2006] OJ C 48/11, both cases still pending before the ECJ. See also the contribution of N. Lavranos in this volume.

[55] See Article 7 of this Protocol: 'Where reasoned opinions on a draft European legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes allocated to the national Parliaments in accordance with the second paragraph, the draft *must* be reviewed'. More extensively on this, see. Weatherill, S., 'Better Competence Monitoring' *EL Rev.* 2005, 30, p. 23.

6 Cross-categorical litigation before the Court of Justice

After analysing and assessing the various categories of competence separately, and the role of the Court within each of those categories, the time has now come to turn to the Court's role in situations where competences from different categories of competence are at stake. What structural interests are at stake in these types of – what will be termed – cross-categorical cases? And how does the Court of Justice decide when the applicant and defendant argue that a secondary measure should be based on legal bases which belong to areas of two different categories of competence? Logically, six of these cross-categorical situations can be distinguished.

6.1 Exclusive versus shared competences

With respect to the delimitation between exclusive competences and shared competences, it can be expected that the 'supranational' institutions (European Commission, European Parliament) will generally favour the first category; the Council and/or (one or more) Member States on the other hand will generally argue in favor of the second category of competences. The reason is that if the measure in question falls within the exclusive EC/EU domain it will only be the Community/Union that has and may exercise powers of decision-making; the Member States do not even have such powers and therefore cannot exercise them either.[56] Under the second category of competence it is, in principle, both the Member States and the Community that may act.[57]

This structural pattern can be found, especially, when the legal basis for commercial policy, Article 133 EC, is at stake. From the case law of the ECJ regarding the legal basis of measures in the sphere of the common commercial policy (CCP) it appears that especially the Commission strongly argues that the measure at stake (for example the Energy Star Agreement, the World Trade Organisation (WTO) agreements, or the Rotterdam Convention on hazardous chemicals) should have been based on Article 133 EC, even though this implies a very modest role for the European Parliament.[58] In most of these cases the 'opposing' legal basis is the one on environmental protection, Article 175 EC, which is one of the areas belonging to the category of shared competences.

For example, in Opinion 2/00 the ECJ found that the Protocol of Cartagena on Biosafety mainly dealt with environmental protection, and not with external trade in goods. Therefore Article 175(1) EC was considered to be the appropriate legal basis for the conclusion of that Protocol on behalf of the Community. As a

[56] *Cf. supra*, section 2.2.

[57] *Cf. supra*, section 3.2.

[58] Since under Article 133 EC it does not even have the right to be consulted.

result, competence to conclude the Cartagena Protocol was shared between the European Community and its Member States.[59]

6.2 Exclusive versus complementary competence

Here the 'natural tendencies' described in the previous section will be even stronger: it is the 'supranational' institutions that argue in favour of exclusive competence, whereas the Council and/or Member States favour the choice for the third group of competences. Either it is only the Community/Union that may legislate (exclusive competence), or it is the Community/Union that can merely adopt incentive, non-harmonising, measures (the common feature of the category of complementary competences).[60] Since there is no relevant legal basis case law yet, at least as far as I am aware, this cross-categorical situation will not elaborated upon further here. One could, however, think of the choice between CCP (exclusive power) and public health policy (a complementary competence, to which the prohibition of harmonisation applies) for a decision on the labelling of tobacco products that are produced in the Community for export to third countries.[61]

6.3 Exclusive versus residual competence

By way of example the discussions on the competence to adopt the Merger Regulation can be mentioned here.[62] It was quite clear that this Regulation is concerned with competition policy, an area of exclusive EC competence, and so Article 83 EC had to be used. However, since the Merger Regulation deals with all types of concentrations, as well as with mergers in the agricultural sector, it was considered necessary to use the residual competence of Article 308 EC as well, together with Article 83 EC. In the words of the authors of this Regulation:

> 'Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Regulation should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment

59 Opinion 2/00, *Cartagena Protocol on Biosafety* [2001] ECR I-9713. *Cf.* case note by Dashwood, A., *CML Rev.* 2002, 39, p. 353.

60 *Cf.* sections 2.2 and 3.2.

61 In Case C-491/01 *Batco and Imperial Tobacco* [2002] ECR I-11453 this choice was not really at issue; the Court merely held that it was not necessary to add Article 133 EC to Article 95 EC (internal market); the public health provision (Article 152 EC) was thus not at stake. See also *infra*, section 6.4.

62 Regulation 4064/89 [1989] OJ L 395/1, amended by Regulation 1310/97 [1997] OJ L 180/1, and subsequently replaced by Regulation 139/2004 [2004] OJ L 24/1.

> of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty'.[63]

Also in several legal basis disputes that came before the ECJ the main question was whether the residual competence of Article 308 EC had to be added to the Community's exclusive competence under Article 133 EC.[64] Adding this residual competence implies that the Council can no longer decide by a qualified majority vote, but must decide by unanimity instead. For example, it was questioned before the Court whether the establishment of a common tariff nomenclature could be based on Article 133 EC (and Article 26 EC), or whether Article 308 EC should have been added as well. The Court held that the establishment of a tariff nomenclature is indispensable to the application of customs duties. Without a system of classification of goods it would be impossible to ascribe them to particular tariff headings. It followed that the power given to the Council to make changes in rates necessarily implied, in the absence of express provision in the Treaty, power to establish and amend the nomenclature relating to the application of the Common Customs Tariff (CCT). The Council therefore has a general power in relation to tariff matters, which is based on both Articles 26 and 133 EC, inasmuch as it has that power irrespective of whether the CCT is amended autonomously (Article 26) or under tariff agreements or other measures of common commercial policy (Article 133). Thus, the use of Article 308 EC was not considered to be necessary.[65]

6.4 Shared competence or complementary competence?

The core interest in this type of cross-categorical case is whether the prohibition on harmonisation of national legislation of the Member States applies or not. As was noticed earlier, this prohibition is a common feature of category 3 competences, not of category 2.[66] It can therefore be expected, generally speaking, that Member States and the Council will argue in favour of a third category competence so that the EC/EU can only adopt 'incentive measures', but no harmonising measures like Directives or, under the Constitution, framework laws. The European Parliament and the Commission on the other hand will, in general and if reasonably possible, defend a legal basis falling within the second category of shared powers. Depending on the specific subject-

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[63] Seventh recital in the preamble to the new Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24.

[64] See, e.g. Case 45/86 *Commission* v. *Council* [1987] ECR 1493 ('Generalised System of Tariff Preferences'); Case 165/87 *Commission* v. *Council* [1988] ECR 5545 ('Nomenclature').

[65] Case 165/87 *Commission* v. *Council* [1988] ECR 5545 paragraphs 7-9.

[66] Note that at present one cannot speak of a clear, single category (consisting of seven areas); the prohibition on harmonisation applies to some specific, mainly non-economic, areas, such as culture and education. *Cf. supra*, section 4.2.

matter, and their own interests, certain Member States may, however, opt for the second category as well.

After the entry into force of the Constitution, these Tobacco cases belong to the cross-categorical cases of 'shared powers (internal market) versus complementary powers (public health)'. Such cases will continue to come before the Court of Justice because under the internal market provision harmonisation of national legislation is allowed (or is even obligatory),[67] whereas most parts of public health protection fall under the third group of complementary competences so that harmonisation of national legislation remains forbidden.

6.5 Shared versus residual EC/EU competences

There are many examples in the case law of the ECJ of this type of dispute; the usual pattern is that the Commission, the European Parliament and also a majority of Member States argue in favour of a shared competence area, providing for QMV, while it is just one, or a few at best, 'rogue' Member States that maintain that the Community only has residual competence under Article 308 EC to regulate matters, hence by unanimity.

An example is the Working Time Directive case,[68] in which the UK argued that the directive in dispute had hardly any connection with the protection of the health and safety of workers and should therefore have been based on Article 235 EEC (now Article 308 EC), not on Article 118 A EEC (now part of Article 137 EC). The Court however ruled, in brief, that working too long, for more than 48 hours a week, may endanger workers' health.[69] Therefore the *lex specialis* of Article 118 A EEC was properly used as the legal basis, so that the UK could be outvoted in the Council.

All in all, the general pattern in this type of cross-categorical competence case is that a Member State that was previously outvoted in the Council – or knew that it could have been outvoted – subsequently invokes Article 308, and thus the requirement of unanimity, as a last resort before the Court of Justice.

6.6 Complementary or residual competence?

The common characteristic of the category of complementary competences is that harmonisation of national legislation is excluded. It could therefore be argued that the residual competence of Article 308 EC can be used instead – is this not exactly what a 'residual' competence is for? It would then still be possible to harmonise Member States' legislation in areas such as public

[67] On this question, see Case C-66/04 *UK* v. *European Parliament* and *Council* [2005] ECR I-10553, where the Court held that *Regulation* 2065/2003/EC on smoke flavourings did fulfil this requirement of Article 95 EC. See also Case C-217/04 *UK* v. *EP and Council* [2006] ECR I-3771, the *ENISA* case, discussed *infra*.

[68] Case C-84/94 *UK* v. *Council* [1996] ECR I-5755.

[69] *Ibid*., paragraphs 63- 66.

health, education and culture. In my view, however, this would boil down to circumventing the explicit prohibition on harmonisation laid down in Articles 149-152 of the EC Treaty.

A similar view was expressed in the Edinburgh European Council conclusions,[70] and, subsequently, in so many words in the Tobacco Advertising case. As was already pointed out, the Court ruled that 'other' provisions of the EC Treaty, including Article 308 EC, may not be used as a legal basis in order to circumvent the express exclusion of harmonisation laid down in Article 152(4) EC.[71] The Constitution for Europe also builds in a similar brake against the 'creeping expansion' of EU competence: in Article I-18(3) it is said that 'provisions adopted on the basis of this Article may not entail harmonisation of Member States' laws or regulations in cases where the Constitution excludes such harmonisation'. Thus, if the secondary measure, because of its main objectives and content, falls under one of the areas of complementary competence, using Article I-18(1) as a legal basis may not lead to the circumvention of the prohibition on harmonisation.

The practical importance of choosing between complementary and residual competences thus does not relate to whether or not the national legislation of the Member States may be harmonised; it is rather the unanimity requirement in Article 308 EC that causes the conflict. In the third category areas the co-decision procedure usually applies, including the possibility of QMV in the Council of Ministers.[72] Especially the old cases on education/vocational training illustrate this point: it was the Member States that argued that the (non-harmonising) measures on vocational training should (also) have been based on the residual competence provision, whereas the Commission argued that the provision for education (former Article 128 EEC, providing for simple majority voting at that time) sufficed. Sometimes the ECJ agreed with the Commission (Petra, Comett II),[73] in another case the ECJ ruled that both the complementary and the residual competences should have been used (Erasmus).[74]

7 Concluding remarks

Although the Constitution for Europe will probably never enter into force – due to the French and Dutch No votes – its provisions on the categories and division of competences are, in my view, very useful for a better under-

[70] Although in a, by now famous, footnote to the Edinburgh Council conclusions. On this see, e.g., de Vries, S.A., *Tensions within the internal market* (Europa Law Publishing, Groningen 2006) p. 266.

[71] Case C-376/98 *Germany* v. *European Parliament and Council* [2000] ECR I-8419, paragraph 79. *Cf.* section 6.4.

[72] *Cf. supra*, section 4.3.

[73] Case 56/88 *UK* v. *Council* [1989] ECR 1615; Joined Cases C-51/89, C-90/89 and C-94/89*UK, France and Germany* v. *Council* [1991] ECR I-2757.

[74] Case 242/87 *Commission* v. *Council* [1989] ECR 1425.

standing of this important issue. This is true not only in the future but also today, with regard to the currently existing situation concerning the vertical and horizontal division of competences in the European Union. It was submitted in this respect that the four categories of competences (exclusive, shared, complementary and residual), explicitly discerned for the first time in the Constitution for Europe, already exist, *de facto*, in the current post-Nice period.

Hence, certainly no *Umwertung aller Werte* if and when the EU Constitution would come into force but rather a useful clarification of an important aspect of the competence issue, namely the categorisation of competences, and, closely related, a better understanding of the exact meaning of each type of competence. This is the more important since other aspects of the competence issue have crystallised by now.

This goes, first, for the basic principle of attribution or conferral of powers as such (not the EU but the Member States are competent, unless a specific power has been conferred on the EU institutions; Article 5 EC), which principle returns in similar words in the EU Constitution: 'Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution' (Article I-11), although the importance of protecting Member States' competences receives more emphasis in the last sentence of Article I-II(2): 'Competences not conferred upon the Union in the Constitution remain with the Member States'.[75]

Also, the aspect of further enlarging (or diminishing) the scope of powers of the Union will not be the main issue in the years to come. This is already apparent when one takes a look at the policy areas mentioned in Part III of the EU Constitution. It then appears that most competences already exist at present, be it under the first, second or third pillar of the Union. In other words, after the Single European Act and the Treaties of Maastricht, Amsterdam and Nice, we cannot go much further in attributing new powers to the Union; the competence limits have already been reached.

As far as the decision-making procedures for exercising Treaty-based competences are concerned – the third other aspect of the division of competence issue – the estimation is more difficult to make. In several areas those procedures could still be made more 'democratic' (more intense involvement of the EP) and/or more 'smooth' (QMV in the Council, instead of unanimity). It is certainly true that the Constitution more often declares the ordinary legislative procedure to be applicable, especially within the category of shared competences. Notably in the areas of asylum and immigration policy, and criminal law, it would become possible to decide by a qualified majority vote in the Council and the European Parliament would act as the co-legislator. However, in very sensitive

75 See also Von Bogdandy, A., and J. Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for Its Reform' *CML Rev.* 2002, 39, p. 227.

areas (harmonisation of taxes, parts of environmental and social policy, etc.) procedures remain the same and strict.[76]

As far as the role of the ECJ is concerned, it was and will be asked to rule on the exact delineation of competences, both within and between ('extra-categorical') the four categories of competence that were discerned earlier. Especially within the category of shared competences, it will continue to fulfil this task of drawing borders. The reason is that so many (substantive) areas of Community/Union policy fall, and will fall, under this category – not only the 'principal areas' explicitly mentioned (internal market, environmental policy, asylum policy, etc.) but also all other areas not mentioned under the headings of exclusive or complementary competence.[77] This must be seen in combination with the fact that within this broad group the decision-making procedures remain quite diverse, and also the fact of sometimes rather vaguely described scopes of powers under specific Treaty Articles, notably those conferring 'functional' powers on the institutions.[78]

[76] *Cf.* section 3.3.2.

[77] *Cf.* section 3.1.

[78] See, e.g., Davies, G., 'The Post-Laeken Division of Competences' *EL Rev.* 2003, 28, p. 686 who points out that 'the central legal problems of competence division, arising from the functional nature of many of the Community's competences, appear to have been ignored, or incompletely understood'.