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WORKING PAPER

THE DIVISION OF COMPETENCES IN THE EUROPEAN UNION

POLITICAL SERIES

W - 26

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PREFACE

To assist the various parliamentary committees and bodies in their work on the 1996 Intergovernmental Conference, the European Parliament Secretariat's 'Intergovernmental Conference' Task-force, in collaboration with the Political and Institutional Affairs Division of the Directorate-General for Research, has commissioned the present study on 'The Division of Competences in the European Union'.

The objective of this study is to define the political and legal instruments necessary for establishing a more transparent, democratic and precise distribution of competences between the European Union and its Member States in the context of the 1996 Intergovernmental Conference.

In particular, the present study was foreseen to deal, amongst others, with the following subjects:

- an analysis of the functioning of the current system of distribution of powers between the Union and the Member States: attributed powers, implied powers and subsidiary powers;

- an analysis of the functioning of the current relationship between Union and the Member State competence: exclusive national or Community powers and the "occupied field";

- an assessment of the legal or political mechanisms needed to establish a new division of competences between the EU and its Member States;

- an assessment of an alternative list of competences to be established in order to formulate a precise division of powers between the Union and the Member States;

- an examination of the rôle and the extent of the principle of subsidiarity regarding both the possible legal and political mechanisms to be established, as well as the alternative list of competences or any other possible mechanism;

- to propose any other possible alternative mechanisms which would make possible such a division of powers;

- conclusions and basic options on the fundamental choice to be made by the European Parliament between these two above-mentioned possibilities or any other one.

We hope that this study will make a useful contribution to the current political and legislative debate within the European Parliament.

1996 IGC TASK-FORCE
Secretariat

Luxembourg, March 1997

The Division of Competences in the European Union

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KOMPETENCEFORDELINGEN

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KOMPETENCEFORDELINGEN I DEN EUROPÆISKE UNION

- Sammenfattende oversigt -

1. Med undtagelse af området international handelspolitik - hvor vi mener, at Fællesskabet bør have sammenfaldende beføjelser med WTO - og området menneskerettigheder, hvor Fællesskabet bør have generel kompetence til at vedtage en hvilken som helst foranstaltning, som øger beskyttelsen af menneskerettigheder *inden for fællesskabsrettens anvendelsesområde* - mener vi ikke, at Fællesskabet har behov for flere materiel-retlige beføjelser.

2. Tværtimod. Der er i dag øget opmærksomhed omkring kompetencespørgsmålet i Den Europæiske Union. Den offentlige debat efter Maastricht har klart vist - med rette eller urette - at offentligheden ikke har tillid til, at fællesskabsinstitutionerne er i stand til at garantere visse grænser for Fællesskabets indgriben i det offentlige liv. Fra mange sider har der været rejst krav om, at man med henblik herpå skulle forsøge at "fastnagle" Fællesskabets kompetence. Der bør i denne forbindelse især sættes ind for at øge offentlighedens tillid til grænserne for Fællesskabets og Unionens retlige beføjelser.

3. Formålet med denne undersøgelse er ikke at fremlægge en optimal liste over eller formel for kompetencefordelingen mellem Fællesskabet og Unionen og medlemsstaterne. Lige siden traktatudkastet blev forelagt, har der været i massevis af sådanne lister og formler. De vigtigste af disse er vedføjet som bilag til denne undersøgelse.

4. Vi vil i stedet for i første række anlægge en "fænomenologisk" synsvinkel - dvs. vi vil prøve at forstå, hvordan kompetencespørgsmålet kommer til udtryk i en politisk struktur som Fællesskabet. Hvilken forbindelse er der mellem Fællesskabet og andre beslutningsstrukturer og -processer og endelig, hvad kan der gøres for at fastlåse bestemte beføjelser, hvis det er i den retning, man ønsker den politiske proces skal gå.

5. Det er et stort dilemma i forbindelse med al kompetencefordeling, at der eksisterer to verdensanskuelser side om side, som på sin vis er uforenelige.

   I henhold til den ene af disse verdensanskuelser er kompetencefordeling et funktionelt problem, et spørgsmål om at placere en given sag på det "bedste", "mest effektive" og "mest rationelle" beslutningsplan. Subsidiaritet kan betragtes som det mest indlysende eksempel på denne verdensanskuelse: dette princip bygger på en antagelse om, at beslutninger bør træffes så nært som muligt ved de mennesker, der berøres af dem; *men* hvis der kan opnås bedre, mere effektive resultater på et højere beslutningsplan, vil dette ikke blot være en betingelse, men også en begrundelse for at placere de pågældende beslutninger på et sådant plan. Det klassiske eksempel i denne forbindelse er den grænseoverskridende miljøforurening: eftersom ingen stat kan håndtere det problem alene, kan og bør det løses på transnationalt plan.

6. Den anden verdensanskuelse er mere principiel en funktionel. Grænserne mellem de forskellige beføjelser betragtes som udtryk for "ukrænkelige" værdier. Denne synsvinkel - der adskiller sig fra den ovenfor beskrevne version af subsidiaritet - er kendetegnet af grundlæggende grænser. Det forholder sig med grundlæggende grænser som med grundlæggende rettigheder. Alle går ind for dem, undtagen når de kommer i vejen for ens eget yndlingsprojekt. Påberåbelsen af grundlæggende grænser har to parallelle rødder. For det første er de udtryk for et menneskesyn, som forbinder de mest dyrebare værdier med individuelle samfund, som eksisterer inden for større politiske strukturer, og disse samfund må derfor ikke krænkes. Mindre sociale enheder kan nøjagtig lige som enkeltpersoner blive undertrykt af stærkere sociale kræfter og skal derfor beskyttes. Det andet aspekt vedrører den enkle kendsgerning, at grundlæggende grænser medvirker til at forhindre en ophobning af magt på ét beslutningsplan. Man går ud fra, at det er en værdi *i sig selv* at forhindre en sådan magtophobning.

7. Alle ikke-centralistiske systemer, som vores team er bekendt med - Den Europæiske Union, USA, Tyskland og Canada - lider af personlighedsspaltning, da de på én og samme tid i forskellig udstrækning prøver at give plads til både den funktionelle og den principielle verdensanskuelse. Konflikter og modsigelser er i den forbindelse uundgåelige.

8. Et perfekt eksempel herpå er EU-traktatens artikel 3b. I stk. 1 forsøger man at fastlægge en grundlæggende grænse, og i stk. 2 og 3 lader man samtidig den funktionelle verdensanskuelse komme til udtryk. Men dette forsøg på at bringe de to verdensanskuelser i samklang med hinanden er en kimære: artikel 3b, stk. 1, er således ikke bare overordentlig uklar. Den komparative erfaring lærer os noget, som ikke-jurister har vanskeligt ved at forstå: selve sprogets væsen og karakteren af love og retsfortolkning synes at indebære, at det praktisk talt er umuligt at finde frem til en sproglig formulering i et forfatningsdokument, som kan *garantere* en virkelig grundlæggende grænse mellem f.eks. centralregeringens beføjelser og de beføjelser, som de enkelte forfatningsmæssige enheder har. I hvilken udstrækning, et system bevæger sig imod den ene eller den anden pol, afhænger i langt højere grad af de menneskers politiske og juridiske moral, som udøver de lovgivende beføjelser, og som kontrollerer disse beføjelser. Mange forbundsstater har gjort den fælles erfaring, at de er en form for rammegivere hovedsageligt besjælet af de grundlæggende grænsers moral, som derefter konfronteres med de føderale styringsorganer, den lovgivende magt, den udøvende magt og domstolene, der lader sig lede af funktionelle instinkter - når man nu en gang har regeringsmagten, vil man også gerne udføre sin opgave så effektivt som muligt. Hvad dette fører til er velkendt. Hvor er den forbundsstat, hvorom man kan sige, at grundlæggende grænser, som de alle hævder at have, har modstået en målbevidst indsats fra en central myndigheds side på at få indflydelse?

   Nøglen til kompetenceforvaltning ligger altså ikke i at finde den magiske, forfatningsmæssigt garanterede formel eller liste, men i at forstå forholdet mellem kompetence, beslutningstagning og legitimitet og at erkende, i hvilket omfang disse kan formes. Derfor har vi i denne undersøgelse valgt en fænomenologisk og samtidig normativ indfaldsvinkel. Vi vil i det følgende fremlægge en "forfatningsmæssig-institutionel" redegørelse for kompetencespørgsmålet i EF. Denne udgør ikke baggrunden for undersøgelsen, men er selve kernen i undersøgelsen. At forstå, hvordan tingene har udviklet sig, er nøglen til at forstå de

muligheder, der står åbne for os, med henblik på at forsøge at løse de problemer, som Unionen i øjeblikket står overfor på dette område.

9. Samtidig med at vi afviser listemetoden og går ind for den funktionelle og pragmatiske metode, der er anvendt i traktaten, vil vi foreslå to vigtige tilføjelser til vor fænomenologiske indfaldsvinkel:

   Vi undersøger idéen med opstilling af lister og forsøger at redegøre for, hvad der efter vor opfattelse er den mest avancerede fremgangsmåde i denne forbindelse.

   Vi forelægger en *normativ case-study* - forslaget til direktiv om tobaksreklamer. Vi gør dette for at få vore læsere lidt væk fra de abstrakte overvejelser vedrørende kompetencefordeling og for at se, hvordan problemet stiller sig i forbindelse med et konkret forslag. Vi hævder på det bestemteste, at direktivforslaget - ligesom andre direktivforslag - bør betragtes som en kompetenceoverskridelse, og vi anfører alle de nødvendige juridiske argumenter til underbygning af dette synspunkt. *Vi gør dette, fordi man efter vor opfattelse kun kan tale seriøst om at fastsætte grænser for Fællesskabets kompetence i forbindelse med et forslag, hvis politiske målsætning man er enig i. Omtalte case study er et plædoyer - et plædoyer for en behersket fremgangsmåde inden for rammerne af den fleksibilitet, som traktaten giver mulighed for. Hvis vor undersøgelse ikke kan bifaldes, vil det være nødvendigt at foretage en langt mere grundlæggende ændring af traktaten, hvilket efter vor opfattelse vil undergrave dens funktionsdygtighed.*

10. Med direktivforslaget om tobak som eksempel går vi i denne undersøgelse ind for en restriktiv udøvelse af de funktionelle beføjelser, som Fællesskabet har fået tildelt. Da en af vore centrale konklusioner er, at kompetenceproblematikken i højere grad er et spørgsmål om en bestemt politisk og juridisk kultur end et spørgsmål om formelt juridisk sprog, er det nødvendigt, at der på dette område langsomt udvikler sig en vis disciplin.

11. Efter vor opfattelse har De Europæiske Fællesskabers Domstol historisk set forsømt at bibringe fællesskabsinstitutionerne en sådan disciplin og har nu sandsynligvis ikke den moralske autoritet til at gøre det. Den udfordring af Domstolen, der er kommet fra den tyske forfatningsdomstol og andre tilsvarende domstole, bør ikke undervurderes. Forfatningsmæssigt er der tale om en tidsindstillet bombe.

12. Vi vil foreslå, at der oprettes et forfatningsråd for Fællesskabet, som i visse henseender udformes efter fransk forbillede. Forfatningsrådet skal kun have beføjelse til at behandle kompetencespørgsmål (herunder subsidiaritet) og skal træffe afgørelser i sager, som det får forelagt efter en lovs vedtagelse, men inden dens ikrafttræden. Det kan få forelagt sager af Fællesskabets institutioner, medlemsstaterne eller Europa-Parlamentet, der handler på vegne af et flertal af sine medlemmer. Forfatningsrådet skal have samme præsident som Domstolen for De Europæiske Fællesskaber, og dets medlemmer skal være medlemmer af forfatningsdomstolene eller tilsvarende domstole i medlemsstaterne. Ingen medlemsstat vil få vetoret i forfatningsrådet. Rådets sammensætning vil desuden understrege, at

kompetencespørgsmålet grundlæggende også er et spørgsmål om nationale forfatningsmæssige normer, men at det fortsat skal løses på unionsplan af en EU-institution.

I undersøgelsen vil vi ikke gå i enkeltheder med forslagets tekniske aspekter. Undersøgelsens største fortjeneste, om overhovedet, består deri, at den giver udtryk for de bekymringer, der er knyttet til de grundlæggende grænser, uden dog at drage Fællesskabets forfatningsmæssige integritet i tvivl, som det var tilfældet i forbindelse med den tyske forfatningsdomstols Maastricht-afgørelse. Da spørgsmålet om grænser fra et retligt synspunkt er forbundet med en vis ubestemmelighed, bliver det afgørende spørgsmål ikke, hvori grænserne består, men hvem der træffer afgørelse herom. Sammensætningen af det foreslåede forfatningsråd fjerner på den ene side spørgsmålet fra det rent politiske plan, og på den anden side får vi et organ, som i dette spørgsmål efter vor opfattelse vil komme til at nyde langt større offentlig tillid end Domstolen selv.

13. I undersøgelsen forklarer vi, hvorfor dette forslag ikke skal betragtes som et angreb på Domstolen, men tværtimod bør hilses velkommen af denne.

DIE KOMPETENZVERTEILUNG

IN DER EUROPÄISCHEN UNION

- Zusammenfassende Übersicht -

PE 166.756

DIE KOMPETENZVERTEILUNG IN DER EUROPÄISCHEN UNION

- Zusammenfassende Übersicht -

1. Mit Ausnahme des Bereichs der Internationalen Handelspolitik - wo unserer Ansicht nach die Gemeinschaftskompetenzen neben den Kompetenzen der WTO bestehen sollten - und dem Bereich der Menschenrechte, in dem die Gemeinschaft eine allgemeine Zuständigkeit für die Durchführung aller Maßnahmen zur Verbesserung des Menschenrechtsschutzes *innerhalb des Geltungsbereichs des Gemeinschaftsrechts* erhalten sollte, ist nach unserem Dafürhalten keine Ausweitung der materiellrechtlichen Rechtsprechung der Gemeinschaft erforderlich.

2. Im Gegenteil! Es besteht eine große Sensibilität für die Frage der Kompetenzen in der Europäischen Union. Die öffentliche Debatte nach Maastricht hat - zu Recht oder nicht - ein klares Mißtrauen der Öffentlichkeit in die Fähigkeit der Gemeinschaftsinstitutionen gezeigt, für gewisse Grenzen des Einwirkens der Gemeinschaft in das öffentliche Leben zu sorgen. Von vielen Seiten wurde gefordert, die Gemeinschaftskompetenzen diesbezüglich "festzunageln". Die wichtigsten Anstrengungen in diesem Zusammenhang sollten auf eine Steigerung des Vertrauens der Öffentlichkeit in die Grenzen der Rechtsprechung der Gemeinschaft und der Union gerichtet sein.

3. Mit dieser Studie soll nicht versucht werden, ein optimales Schema oder eine optimale Liste für eine Verteilung der Kompetenzen zwischen der Gemeinschaft und Union und ihren Mitgliedstaaten vorzulegen. Seit dem Vertragsentwurf gibt es solche Schemas und Formeln zuhauf. Die wichtigsten davon sind in einem Anhang zu dieser Studie aufgeführt.

4. Wir verfolgen statt dessen in erster Linie einen "phänomenologischen" Ansatz, d.h. wir versuchen zu verstehen, wie sich die Frage der Kompetenzen in einem politischen Gebilde wie der Gemeinschaft konkret niederschlägt. Welche Zusammenhänge bestehen zwischen der Gemeinschaft und anderen Regierungsstrukturen und -prozessen, und was kann schließlich getan werden, um bestimmte Kompetenzen zu verankern, wenn die politischen Prozesse in diese Richtung laufen?

5. Ein wesentliches Dilemma der Kompetenzverteilung ist das gemeinsame Bestehen zweier in gewissem Sinne unvereinbarer Weltanschauungen.

   Für die eine Weltanschauung ist die Kompetenzverteilung ein funktionales Problem, eine Frage der Zuteilung der "besten", "effizientesten" und "rationellsten" Ebene zur Lösung der jeweiligen Sachfrage. Die Subsidiarität ist wohl der beste Ausdruck dieser Weltanschauung: Sie geht von der Annahme aus, daß Entscheidungen auf einer möglichst nahen Ebene zu den davon Betroffenen getroffen werden sollten; *doch* wenn sich auf höheren Führungsebenen

bessere und effizientere Ergebnisse erzielen lassen, so wäre das nicht nur eine Bedingung, sondern auch eine Rechtfertigung für das Fassen solcher Beschlüsse auf dieser Ebene. Das klassische Beispiel dafür ist die grenzüberschreitende Umweltverschmutzung: Da kein Staat allein mit dem Problem fertig wird, kann und sollte es auf transnationaler Ebene angegangen werden.

6. Die andere Weltanschauung ist eher grundsätzlich als funktional. Die Grenzen zwischen den verschiedenen Rechtsprechungen werden als Ausdruck "unverletzlicher" Werte betrachtet. Dieser Ansatz läßt sich im Gegensatz zu der oben beschriebenen Version der Subsidiarität als ein Konzept der Grundlegenden Grenzen kennzeichnen. Grundlegende Grenzen sind wie Grundrechte. Jedermann ist dafür, außer wenn sie dem eigenen Steckenpferd in die Quere kommen. Die Berufung auf die grundlegenden Grenzen hat zwei parallele Wurzeln. Sie sind zunächst Ausdruck eines Menschenbildes, das die tiefsten Werte bestimmten innerhalb größerer Gemeinwesen bestehenden individuellen Gemeinschaften anvertraut, die deshalb nicht verletzt werden dürfen. Kleinere soziale Einheiten können genauso wie Einzelpersonen durch stärkere soziale Kräfte unterdrückt werden und müssen deshalb geschützt werden. Der zweite Aspekt beruht auf der einfachen Tatsache, daß durch grundlegende Grenzen die Anhäufung von Macht auf einer Regierungsebene verhindert werden kann. Man geht davon aus, daß die Verhinderung dieser Art von Machtanhäufung schon ein Wert an sich ist.

7. Alle nicht zentralistisch aufgebauten Systeme, die untersucht wurden - wie die Europäische Union, die USA, Deutschland und Kanada -, leiden unter einer Persönlichkeitsspaltung, da sie gleichzeitig mit verschiedenen Dosierungen versuchen, die funktionale und die grundlegende Weltanschauung miteinander in Einklang zu bringen. Konflikte und Widersprüche sind hierbei unvermeidlich.

8. Ein perfektes Beispiel dafür ist Artikel 3b EUV. In Absatz 1 versucht er eine Definition der grundlegenden Grenzen, und in den Absätzen 2 und 3 möchte er gleichzeitig der funktionalen Weltanschauung Ausdruck verleihen. Dieser Versuch, die beiden Anschauungen miteinander in Einklang zu bringen, ist jedoch eine Schimäre: So ist nicht nur der erste Absatz von Artikel 3b außerordentlich schwammig. Vergleichende Erfahrungen haben etwas gezeigt, was für Nichtjuristen schwer verständlich ist: Die Natur der Sprache, der Gesetze und der Gesetzesauslegung legt nahe, daß praktisch keine Formulierung in einem Verfassungstext eine wirklich grundlegende Grenze etwa zwischen der Macht der Zentralregierung und der Macht der einzelnen Teile des Staates *garantieren* kann. Das Ausmaß, in dem ein System sich auf den einen oder anderen Pol zubewegt, hängt vielmehr von dem politischen und rechtlichen Ethos derer ab, die legislative Befugnisse ausüben, sowie derer, die sie kontrollieren. Vielen föderalistisch aufgebauten Staaten ist die Erfahrung gemein, daß sie Rahmengeber sind, die eher vom Ethos der grundlegenden Grenzen geleitet werden, auf die dann die Organe der Bundesregierung, die Legislative, die Exekutive und die Gerichte stoßen, welche eher von funktionalistischen Instinkten gelenkt werden. Wenn man schon einmal an der Regierung ist, so will man seine Aufgabe schließlich auch so effizient wie möglich erfüllen. Wozu dies führt, ist wohlbekannt. Wo ist der Bundesstaat, von dem sich sagen läßt, daß in ihm grundlegende Grenzen, die alle für sich in Anspruch nehmen, den entschlossenen Versuchen der Einflußnahme durch die Zentralregierung widerstanden haben?

Der Schlüssel zur Kompetenzverwaltung liegt also nicht darin, die verfassungsmäßig garantierte magische Formel oder Liste für die Kompetenzverteilung zu finden, sondern die Beziehung zwischen Kompetenzen, Beschlußfassung und Legitimität zu verstehen und zu erkennen, in welchem Maße diese gestaltet werden können. Deshalb haben wir uns in dieser Studie für einen phänomenologischen und gleichzeitig normativen Ansatz entschieden. Wir werden später einen "verfassungsmäßig-institutionellen" geschichtlichen Abriß des Problems der Kompetenzverteilung in der EG vorstellen. Dies ist nicht der Hintergrund der Analyse, sondern dies steht im Mittelpunkt der Analyse. Das Begreifen, wie die Dinge gelagert sind, ist der Schlüssel zum Verständnis der Möglichkeiten, die sich bieten, um die Probleme, mit denen die Union derzeit in diesem Bereich konfrontiert ist, anzugehen oder zu beseitigen.

9. Obwohl wir gegen die Strategie einer Auflistung sind und vielmehr den im Vertrag enthaltenen funktionalen und pragmatischen Ansatz befürworten, so schlagen wir doch zwei wichtige Ergänzungen für unseren phänomenologischen Ansatz vor:

   Wir prüfen den Gedanken der Auflistung und versuchen den unserer Ansicht nach dafür am besten geeigneten Ansatz zu erläutern.

   Wir ziehen eine *normative Fallstudie* heran, den Richtlinienentwurf für die Tabakwerbung. Wir tun dies, um den Leser von den abstrakten Erwägungen der Kompetenzverteilung wegzuführen und zu sehen, wie sich das Problem im Zusammenhang mit einem konkreten Vorschlag darstellt. Wir treten nachdrücklich dafür ein, die Richtlinie - wie auch andere Richtlinien - als *ultra vires*-Angelegenheit zu betrachten, und wir führen alle rechtlichen Argumente an, die diese Auffassung stützen. *Wir tun dies deshalb, weil man nur vor dem Hintergrund eines Vorschlags, über dessen politisches Ziel man sich einig ist, ernsthaft Grenzen für die Gemeinschaftszuständigkeiten festlegen kann. Die Fallstudie ist ein Plädoyer - ein Plädoyer für ein maßvolles Vorgehen innerhalb der sich durch den Vertrag bietenden Flexibilität. Sollte unsere Analyse nicht auf Zustimmung stoßen, so müßte der Vertrag viel grundlegender geändert werden, wodurch unserer Ansicht nach jedoch seine Funktionalität untergraben würde.*

10. Wir treten in dieser Studie unter Heranziehung des Beispiels des Richtlinienentwurfs zum Tabak für eine restriktive Ausübung der der Gemeinschaft zugewiesenen funktionalen Kompetenzen ein. Da eine unserer wichtigsten Schlußfolgerungen darin besteht, daß das Problem der Kompetenzverteilung mehr eine Frage der politischen und rechtlichen Kultur und weniger eine Frage der rechtlichen Formulierung ist, muß sich diesbezüglich langsam eine gewisse Disziplin entwickeln.

11. Unserer Ansicht nach hat es historisch gesehen der Europäische Gerichtshof versäumt, den Gemeinschaftsinstitutionen eine solche Disziplin beizubringen, und jetzt fehlt es ihm wahrscheinlich an der moralischen Autorität, um dies nachzuholen. Die Herausforderung des Gerichtshofs durch das Deutsche Verfassungsgericht und andere ähnliche Gerichte darf nicht unterschätzt werden. Hier tickt eine verfassungsmäßige Zeitbombe.

12. Wir schlagen die Schaffung eines Verfassungsrats für die Gemeinschaft vor, der in gewisser Weise nach dem Muster seines französischen Namensvetters aufgebaut ist. Der Verfassungsrat wäre nur für Kompetenzfragen (einschließlich der Subsidiarität) zuständig und würde in Fällen entscheiden, die ihm nach der Verabschiedung, jedoch vor dem Inkrafttreten eines Gesetzes unterbreitet werden. Er könnte von jeder Gemeinschaftsinstitution, jedem Mitgliedstaat oder auf Veranlassung der Mehrheit seiner Mitglieder auch vom Europäischen Parlament angerufen werden. Präsident des Verfassungsrates wäre der Präsident des Europäischen Gerichtshofs, und seine Mitglieder wären die Mitglieder der Verfassungsgerichte oder ihrer Pendants in den Mitgliedstaaten. Im Verfassungsrat hätte kein einzelner Mitgliedstaat Vetorecht. Durch die Zusammensetzung dieses Organs würde auch deutlich, daß die Kompetenzfrage im wesentlichen auch ein Problem der nationalen Verfassungsnormen ist, das jedoch immer noch einer Lösung auf Unionsebene durch eine Institution der Union unterworfen ist.

    Wir werden in dieser Studie nicht im einzelnen auf einige der technischen Aspekte des Vorschlags eingehen. Das Hauptverdienst der Studie besteht - wenn überhaupt - darin, daß sie der Besorgnis über die grundlegenden Grenzen Ausdruck verleiht, ohne jedoch die verfassungsmäßige Integrität der Gemeinschaft in Frage zu stellen, wie es bei der Maastricht-Entscheidung des Bundesverfassungsgerichts der Fall war. Da die Frage der Grenzen aus materiellrechtlicher Sicht eine gewisse Unbestimmtheit impliziert, besteht der kritische Punkt nicht darin, welches die Grenzen sind, sondern wer darüber entscheidet. Die Zusammensetzung des vorgeschlagenen Verfassungsrates entfernt das Problem einerseits von der rein politischen Ebene; andererseits wird so ein Gremium geschaffen, das in dieser Frage hoffentlich auf ein viel größeres Maß an öffentlichem Vertrauen als der EUGH selbst zählen kann.

13. Im Verlauf der Studie erläutern wir, weshalb dieser Vorschlag nicht als Angriff auf den Gerichtshof verstanden werden darf, sondern vielmehr von diesem selbst begrüßt werden sollte.

Η ΚΑΤΑΝΟΜΉ ΑΡΜΟΔΙΟΤΉΤΩΝ

ΣΤΗΝ ΕΥΡΩΠΑΪΚΉ ΈΝΩΣΗ

- Συνοπτική παρουσίαση -

PE 166.756

Η ΚΑΤΑΝΟΜΗ ΑΡΜΟΔΙΟΤΗΤΩΝ ΣΤΗΝ ΕΥΡΩΠΑΪΚΗ ΕΝΩΣΗ

- Συνοπτική παρουσίαση -

1. Αν εξαιρέσουμε τον τομέα της πολιτικής για το Διεθνές Εμπόριο - όπου νομίζουμε ότι οι αρμοδιότητες της Κοινότητας θα πρέπει να θεωρούνται ίδιας έκτασης με εκείνες του Παγκόσμιου Οργανισμού Εμπορίου - και τον τομέα των Ανθρωπίνων Δικαιωμάτων - όπου η Κοινότητα θα πρέπει να είναι γενικά αρμόδια για τη λήψη οιουδήποτε μέτρου που θα μπορούσε να ενισχύσει την προστασία των ανθρωπίνων δικαιωμάτων στο πλαίσιο εφαρμογής του κοινοτικού δικαίου, δεν πιστεύουμε ότι οι ουσιαστικές αρμοδιότητες της Κοινότητας χρήζουν οιασδήποτε αύξησης.

2. Τουναντίον, Παρατηρείται αυξημένη ευαισθησία όσον αφορά το θέμα των αρμοδιοτήτων της Ευρωπαϊκής Ένωσης. Η μετά το Μάαστριχτ δημόσια συζήτηση κατέδειξε σαφώς την έλλειψη εμπιστοσύνης των πολιτών - δικαιολογημένη ή μη - όσον αφορά την ικανότητα των κοινοτικών θεσμικών οργάνων να εγγυηθούν τα όρια της ανάμειξης της Κοινότητας στη δημόσια ζωή. Υπήρξαν άπειρες εκκλήσεις για να καταβληθούν προσπάθειες παγίωσης των αρμοδιοτήτων της Κοινότητας στο θέμα αυτό. Οι κύριες προσπάθειες θα έπρεπε να έχουν ως στόχο την αύξηση της εμπιστοσύνης των πολιτών στα όρια των αρμοδιοτήτων της Κοινότητας και της Ένωσης.

3. Η προσέγγισή μας στην παρούσα μελέτη δεν είναι να αναζητήσουμε τη βέλτιστη συνταγή για την κατανομή αρμοδιοτήτων μεταξύ της Κοινότητας και της Ένωσης και των κρατών μελών της. Από το Σχέδιο Συνθήκης και ύστερα υπάρχει πληθώρα τέτοιων μαγικών συνταγών. Θα παραθέσουμε τις σημαντικότερες στο τέλος της μελέτης αυτής.

4. Η δική μας κύρια προσέγγιση είναι, αντίθετα, φαινομενολογική· προσπαθούμε, δηλαδή, να κατανοήσουμε πώς λειτουργεί το θέμα των αρμοδιοτήτων σε μια πολιτική συγκρότηση όπως είναι η Κοινότητα. Ποιός σύνδεσμος υπάρχει ανάμεσα σε αυτήν και άλλες δομές και συστήματα διακυβέρνησης, και τέλος, να διερευνήσουμε το τί μπορεί να γίνει προκειμένου να παγιωθούν ορισμένες αρμοδιότητες εάν αυτές είναι οι τάσεις της πολιτικής διαδικασίας.

5. Ένα μείζον υφέρπον δίλημμα στο ζήτημα των αρμοδιοτήτων είναι η συνύπαρξη δύο γενικών θεωρήσεων οι οποίες, κατά μια έννοια, είναι ασυμβίβαστες.

   Κατά τη μία από αυτές η κατανομή αρμοδιοτήτων είναι λειτουργική, θέμα υπαγωγής του κάθε συγκεκριμένου τομέα στο καλύτερο, στο πιο αποτελεσματικό, στο πιο ορθολογιστικό επίπεδο λήψης αποφάσεων. Η επικουρικότητα μπορεί να θεωρηθεί ότι εκφράζει αυτήν ακριβώς την άποψη: Ξεκινάει από την υπόθεση ότι οι αποφάσεις θα πρέπει να λαμβάνονται όσο το δυνατόν πλησιέστερα σε εκείνους τους οποίους αφορούν· αν, όμως, μπορούν να εξασφαλιστούν καλύτερα και πιο ικανοποιητικά αποτελέσματα σε υψηλότερο επίπεδο αυτό όχι μόνο υπαγορεύει αλλά και δικαιολογεί τη λήψη αποφάσεων σε αυτό το επίπεδο. Κλασικό παράδειγμα η διαμεθοριακή ρύπανση: εφόσον κανένα

κράτος δεν έχει τη δυνατότητα να την αντιμετωπίσει μόνο του, το πρόβλημα μπορεί, και επιβάλλεται, να αντιμετωπισθεί σε διακρατικό επίπεδο.

6. Η άλλη γενική θεώρηση δίνει το κύριο βάρος στις βασικές αρχές και όχι στη λειτουργικότητα. Τα όρια μεταξύ των αρμοδιοτήτων θεωρούνται ως έκφραση "απαράβατων" αξιών. Μπορούμε να χαρακτηρίσουμε την προσέγγιση αυτή - η οποία διαφέρει από την προαναφερθείσα εκδοχή της επικουρικότητας - ως προσέγγιση θεμελιωδών ορίων. Τα θεμελιώδη όρια είναι σαν τα θεμελιώδη δικαιώματα. Όλοι είναι υπέρ αυτών ως τη στιγμή που θα παρεμβληθούν στο προσφιλή τους σχέδια. Η γοητεία των θεμελιωδών δικαιωμάτων πηγάζει από δύο παράλληλα στοιχεία. Κατ΄ αρχήν ως έκφραση μιας θεώρησης της ανθρωπότητας όπου οι βαθύτερες αξίες ενσαρκώνονται από τις επιμέρους κοινωνίες οι οποίες ανήκουν σε ευρύτερους πολιτικούς οργανισμούς που, έτσι, γίνονται απρόσβλητοι. Οι μικρότερες κοινωνικές ομάδες είναι εκτεθειμένες στην ίδια με τα μεμονωμένα άτομα άσκηση πίεσης από ισχυρότερες κοινωνικές δυνάμεις και, γι΄ αυτό, πρέπει να προστατεύονται. Το δεύτερο στοιχεία γοητείας έγκειται στο απλό γεγονός ότι τα θεμελιώδη όρια βοηθούν στο να μη συγκεντρώνεται η εξουσία σε ένα μόνο επίπεδο διακυβέρνησης. Πιστεύεται ότι και μόνο ο παρεμποδισμός αυτής της μορφής συγκέντρωσης συνιστά από μόνος του αξία.

7. Όλα τα μη συγκεντρωτικά συστήματα με τα οποία είναι εξοικειωμένη η ομάδα αυτή - η Ευρωπαϊκή Ένωση, οι ΗΠΑ, η Γερμανία και ο Καναδάς - πάσχουν από διχασμό προσωπικότητας όταν προσπαθούν να προσαρμοστούν ταυτόχρονα, με διαφορετική ένταση, στις δύο γενικές θεωρήσεις. Η προσπάθεια αυτή οδηγεί αναπόφευκτα σε σύγκρουση και αντίφαση.

8. Το άρθρο 3Β της Συνθήκης για την Ευρωπαϊκή Ένωση αποτελεί κλασικό παράδειγμα στη συγκεκριμένη περίπτωση· προσπαθεί να προσδιορίσει κάποια θεμελιώδη όρια στην πρώτη του παράγραφο και να εκφράσει τη λειτουργική γενική θεώρηση στη δεύτερη και τρίτη παράγραφο. Ο συμβιβασμός αυτός είναι, ωστόσο, χίμαιρα και τούτο όχι μόνο επειδή η πρώτη παράγραφος του Άρθρου 3Β "σηκώνει πολύ νερό". Η συγκριτική εμπειρία μας διδάσκει κάτι που είναι δύσκολο να κατανοήσουν οι μη νομομαθείς: ότι από την ίδια τη φύση της γλώσσας, του δικαίου και της νομικής ερμηνείας προκύπτει ότι καμία ουσιαστικά διατύπωση ενός συνταγματικού κειμένου δεν μπορεί να εγγυηθεί ένα πραγματικά θεμελιώδες όριο ανάμεσα στις αρμοδιότητες της κεντρικής εξουσίας και εκείνες των συστατικών της φορέων. Ο βαθμός στον οποίον ένα σύστημα τείνει προς τον έναν ή τον άλλο πόλο εξαρτάται πολύ περισσότερο από το πολιτικό και νομικό πνεύμα αυτών που ασκούν τις νομοθετικές αρμοδιότητες και αυτών που τις ελέγχουν. Μια κοινή εμπειρία πολλών ομοσπονδιακών κρατών είναι μια ιστορία θεμελιώδους νομοθεσίας που εμπνέεται περισσότερο από τη λογική των θεμελιωδών ορίων τα οποία στη συνέχεια έρχονται σε αντιπαράθεση με ομοσπονδιακά κυβερνητικά όργανα, νομοθετικά και εκτελεστικά σώματα και δικαστήρια που βασίζονται σε λειτουργικά ένστικτα γιατί, τελικά, όταν κυβερνάς θέλεις να κυβερνάς όσο το δυνατόν καλύτερα. Τα αποτέλεσματα είναι πασίγνωστα. Σε ποιό ομοσπονδιακό κράτος μπορεί κανείς να ισχυριστεί ότι τα θεμελιώδη όρια, που οι πάντες διατείνονται ότι έχουν, έχουν αντέξει στην επίμονη προσπάθεια παραβίασής τους από την κεντρική αρχή;

Συνεπώς, το κλειδί για τη διαχείριση των αρμοδιοτήτων δεν είναι να βρεθεί ένα μαγικό σχήμα που θα είναι συνταγματικά κατοχυρωμένο, αλλά να κατανοηθεί η σχέση μεταξύ αρμοδιοτήτων, λήψης αποφάσεων και νομιμότητας και να διαπιστωθεί σε ποιό βαθμό μπορούν να προσαρμοστούν. Για το

λόγο αυτό, στη μελέτη μας επιλέξαμε μια προσέγγιση όχι μόνο κανονιστική αλλά και φαινομενολογική. Θα παρουσιάσουμε κατωτέρω μια "συνταγματική - θεσμική" ιστορία του ζητήματος των αρμοδιοτήτων στην Ευρωπαϊκή Κοινότητα. Δεν πρόκειται για βοηθητικό στοιχείο της ανάλυσης αλλά για τον ίδιο τον πυρήνα της. Η κατανόηση της διαδικασίας διαμόρφωσης των πραγμάτων είναι το κλειδί που θα μας βοηθήσει να κατανοήσουμε τις επιλογές που έχουμε στη διάθεσή μας για να εγκύψουμε πάνω στα προβλήματα που αντιμετωπίζει αυτή τη στιγμή η Ένωση στο συγκεκριμένο τομέα ή για να τα διορθώσουμε.

9. Συγχρόνως, παρόλο που απορρίπτουμε την προσέγγιση της μαγικής συνταγής και τασσόμεθα υπέρ της της λειτουργικής και πρακτικής μεθόδου της Συνθήκης, προσθέτουμε δύο σημαντικά στοιχεία στη φαινομενολογική μας προσέγγιση:

   Εξετάζουμε την ιδέα της απαρίθμησης αρμοδιοτήτων και προσπαθούμε να παρουσιάσουμε αυτό που, κατά την άποψή μας, είναι η πιο ολοκληρωμένη προσέγγιση για κάτι τέτοιο.

   Παρουσιάζουμε μελέτη μιας συγκεκριμένης κανονιστικής περίπτωσης - το Σχέδιο Οδηγίας για τη Διαφήμιση των Προϊόντων Καπνού. Χρησιμοποιούμε αυτό το παράδειγμα για να κάνουμε τους αναγνώστες μας να εγκαταλείψουν την αφηρημένη θεώρηση των αρμοδιοτήτων και να δουν πώς διαμορφώνεται το ζήτημα στο πλαίσιο μιας συγκεκριμένης πρότασης. Υποστηρίζουμε σθεναρά ότι το Σχέδιο Οδηγίας - και άλλα ανάλογα - θα πρέπει να θεωρούνται ως Ultra Vires και να παραθέτουμε όλα τα νομικά επιχειρήματα που έχου στη διάθεσή μας για να στηρίξουμε την άποψη αυτή. Καταλήξαμε σ΄ αυτήν την επιλογή γιατί, κατά τη γνώμη μας, μόνο μια πρόταση με την οποία είναι κανείς σύμφωνος μπορεί να χρησιμεύσει ως σημείο αναφοράς σε μια σοβαρή προσπάθεια οριοθέτησης των αρμοδιοτήτων της Κοινότητας. Η επιλογή της περιπτωσιολογίας αντανακλά την προτίμησή μας για μια μετριοπαθή προσέγγιση στο πλαίσιο της ευελιξίας που παρέχει η Συνθήκη. Εάν η ανάλυσή μας απορριφθεί, τότε η Συνθήκη θα πρέπει να τροποποιηθεί προς την κατεύθυνση μιας προσέγγισης που θα δίνει περισσότερο βάρος στις θεμελιώδεις αρχές πράγμα που, κατά την άποψή μας, θα αποδυναμώνει τη λειτουργικότητά της.

10. Στη μελέτη μας αυτή υποστηρίζουμε ανεπιφύλακτα - χρησιμοποιώντας ως παράδειγμα το Σχέδιο Οδηγίας για τη διαφήμιση των προϊόντων καπνού - μια περιοριστική προσέγγιση στην άσκηση των λειτουργικών αρμοδιοτήτων που έχουν εκχωρηθεί στην Κοινότητα. Δεδομένου ότι ένα από τα βασικά συμπεράσματα στα οποία καταλήγουμε είναι ότι το ζήτημα των αρμοδιοτήτων είναι περισσότερο θέμα συγκεκριμένης πολιτικής και νομικής παιδείας και λιγότερο θέμα τύπου της νομικής γλώσσας, θα πρέπει να καλλιεργηθεί με αργό ρυθμό μια τέτοια σχολή σκέψης.

11. Κατά τη γνώμη μας, το Δικαστήριο των Ευρωπαϊκών Κοινοτήτων απέτυχε, ιστορικά, να ενσταλλάξει στα κοινοτικά όργανα μια τέτοια νοοτροπία και τώρα δεν διαθέτει ίσως το απαιτούμενο ηθικό κύρος για να το πράξει. Δεν είναι δυνατόν να υποτιμήσουμε την πρόκληση που αντιπροσωπεύει για το Ευρωπαϊκό Δικαστήριο, το Γερμανικό Συνταγματικό Δικαστήριο και άλλα σαν αυτό. Γεγονός που αποτελεί συνταγματική ωρολογιακή βόμβα.

12. Εμείς προτείνουμε τη δημιουργία ενός Συνταγματικού Συμβουλίου για την Κοινότητα που θα έχει ως πρότυπο, σε ορισμένες πτυχές του, το ωμόνυμό του γαλλικό. Το Συνταγματικό Συμβούλιο θα έχει

δικαιοδοσία μόνο σε ζητήματα αρμοδιοτήτων (συμπεριλαμβανομένης και της επικουρικότητας) και θα εκδίδει αποφάσεις σε υποθέσεις που θα του υποβάλλονται μετά την έγκριση ενός νόμου αλλά πριν από την έναρξη ισχύος του. Στο Συμβούλιο αυτό θα μπορούν να προσφεύγουν όλα τα κοινοτικά όργανα, όλα τα κράτη μέλη ή το Ευρωπαϊκό Κοινοβούλιο με απόφαση της πλειοψηφίας των Μελών του. Πρόεδρός του θα είναι ο Πρόεδρος του Ευρωπαϊκού Δικαστηρίου και μέλη του τα μέλη των Συνταγματικών Δικαστηρίων ή των αντίστοιχων ισότιμων δικαστηρίων των κρατών μελών. Στο Συνταγματικό Συμβούλιο κανένα μεμωνομένο κράτος μέλος δεν θα έχει δικαίωμα βέτο. Η σύνθεση θα υπογραμμίζει επίσης το γεγονός ότι το ζήτημα των αρμοδιοτήτων, παρόλο που αφορά κατά θεμελιώδη τρόπο τους εθνικούς συνταγματικούς κανόνες, εξακολουθεί να υπόκειται σε λύση που θα δοθεί σε επίπεδο Ένωσης από όργανο της Ένωσης.

Στη μελέτη αυτή δεν πρόκειται να αναπτύξουμε κάποιες τεχνικές πτυχές της πρότασης. Η αξία της, αν έχει, είναι ότι καθιστά προφανές το ζήτημα των θεμελιωδών ορίων χωρίς, ωστόσο, να θέτει σε κίνδυνο τη συνταγματική ακεραιότητα της Κοινότητας όπως έγινε με τη γερμανική απόφαση για το Μάαστριχτ. Εφόσον, από ουσιαστική άποψη, το θέμα των ορίων περιέχει μια εγγενή ακαθοριστία, το κρίσιμο σημείο δεν είναι να ορίσουμε ποιά είναι τα όρια αλλά ποιός τα αποφασίζει. Η σύνθεση του προτεινόμενου Συνταγματικού Συμβουλίου αφενός μεν δίνει λύση στο ζήτημα αυτό από τον αμιβώς πολιτικό στίβο, αφετέρου δε δημιουργεί ένα Σώμα που, στο συγκεκριμένο ζήτημα, θα έχει την εμπιστοσύνη των πολιτών σε πολύ μεγαλύτερο βαθμό από ότι το ίδιο το Ευρωπαϊκό Δικαστήριο.

13. Στο κύριο μέρος της μελέτης εξηγούμε γιατί η πρόταση αυτή δεν θα πρέπει να εκληφθεί ως επίθεση κατά του Δικαστηρίου αλλά, αντίθετα, να γίνει δεκτή από αυτό με ικανοποίηση.

THE DIVISION OF COMPETENCES

IN THE EUROPEAN UNION

- Executive Summary -

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THE DIVISION OF COMPETENCES IN THE EUROPEAN UNION

- Executive Summary -

1. With the exception of the field of International Trade Policy – where we believe that the Community competences should be held to be co-extensive with the WTO – and the field of Human Rights where the Community should be given a general competence to adopt any measure which would increase the protection of human rights *within the sphere of application of Community law* -- we do not believe that the Community requires any increase in its substantive jurisdiction.

2. On the contrary. There is a heightened sensitivity to the issue of Competences in the European Union. The post Maastricht public debate demonstrated a clear public distrust – justified or otherwise -- in the ability of Community Institutions to guarantee the limits to Community encroachment on public life. There have been many calls to try and "nail" down Community competences in this regard. The main efforts in this regard should be directed at increasing public confidence in the jurisdictional limits of the Community and Union.

3. The approach we take in this Study is not to try and come up with the optimal list or formula for dividing competences between the Community and Union and its Member States. From the Draft Treaty onwards such lists and formulae exist galore. We shall attach the most important in an annex to this study.

4. Instead, our principal approach is "phenomenological" – i.e. we try and understand how the issue of competences "plays out" in a polity such as the Community. What is the nexus between it and other governance structures and processes, and finally, to explore what can be done to try and anchor certain competences if that is what the political process wishes.

5. One major underlying dilemma of competences is the coexistence of two world views which in a certain sense are irreconcilable.

   For one world view division of competences is functional, a matter of allocating the "best", "most efficient" "most rational" level of governance to the appropriate subject matter. Subsidiarity can be read as giving expression precisely to this view: It starts from a presumption that decisions should be as close as possible to those affected by them; *but* if better, more efficient, outcomes can be assured at higher levels of governance, that would not only be a condition for taking those decisions at that level but also a justification. The classical example is trans-boundary pollution: Since no one state can tackle the problem alone, it may, and should, be tackled at the transnational level.

6. The other world view is essentialist rather than functional. Boundaries between jurisdiction are considered as an expression of "inviolable" values. We can characterize this approach – distinct from the above version of subsidiarity – as one of Fundamental Boundaries. Fundamental Boundaries are like fundamental Rights. Everybody is in favour except when they get in the way of one's pet project. The appeal of fundamental boundaries rests in two parallel roots. First as an expression of a vision of humanity which vests the deepest values in individual communities existing within larger polities which, thus, may not be transgressed. Smaller social units can suffer parallel oppression to individuals by stronger societal forces and, thus, must be protected. The second appeal lies in the simple fact that fundamental boundaries help prevent the aggregation of power in one level of government. It is thought that there is a *per se* value in preventing that type of aggregation.

7. All the non unitary systems with which this team is familiar – the European Union, the USA, Germany and Canada – suffer from split personality, trying to accommodate at one and the same time, with different dosages, the functional and the essentialist. Conflict and contradiction are inevitable.

8. Article 3b TEU is a perfect example of this. It tries both to define a fundamental boundary in its first paragraph and to give expression to the functional world view in its second and third paragraphs. But this reconciliation is a chimera: It is not simply that the first paragraph of Article 3b is extraordinarily porous. Comparative experience teaches us something that non lawyers find difficult to understand: The very nature of language, of law, and of legal interpretation suggests that practically no language in a constitutional document can *guarantee* a truly fundamental boundary between, say, the central power and that of the constituent units. The extent to which a system will veer towards one pole or another depends much more on the political and legal ethos which animates those who exercise legislative competences and those who control it. A common experience of many federal states is a story of framers animated more by the ethos of fundamental boundaries who are then met by organs of federal government, legislatures, executives and courts animated by functionalist instincts – after all, once you are governing you want to do it most efficiently. The results are well known. Where is the federal state in relation to which one can say that fundamental boundaries, which all profess to have, have withstood a determined effort at infiltration by central authority?

   The key to competence management, then, is not to find the magical drafting formula or list which will be constitutionally guaranteed, but to understand the relationship between Competences, decision making and legitimacy and to see the extent to which these can be shaped. This is why we have opted for a phenomenological as well as a normative approach in this Study. We will be presenting below a "constitutional-institutional" history of the issues of competences in the EC. This is not the background to the analysis– this is the centre of the analysis. To understand how things shaped up is the key to understanding the options available to address or redress the problems the Union now faces in this area.

9. At the same time, though we reject the list approach and favour the functional and pragmatic method used in the Treaty, we offer two important additions to our phenomenological approach:

We examine the idea of lists and try and present what in our view is the most sophisticated approach to this.

We present a *Normative Case Study* – the Draft Directive On Tobacco Advertising. We use it to take our readers outside the abstract consideration of competences and to see how the issue shapes in relation to a concrete proposal. We argue strenuously that the Draft Directive – and others like it – should be regarded as *Ultra Vires* and we build all the legal arguments available for this view. *We do this because in our view it is only against a proposal with the policy objective of which one agrees – that one can be serious about setting limits to Community competences. The Case Study is Advocacy – advocacy for a restrained approach within the flexibility offered by the Treaty. If our analysis is to be rejected than the Treaty would have to be modified in a more essentialist manner which in would, in our view, undermine its functionality.*

10. We advocate in this study, using the Draft Tobacco Directive as our example, a restrictive approach to the exercise of the functional competences given to the Community. Since one of our key conclusions is that the issue of Competences is more a matter of a certain political and legal culture and less a matter of formal legal language, there must develop a slow discipline in this regard.

11. In our view, historically the European Court of Justice has failed to instill in the Community Institutions such a discipline and now probably lacks the moral authority to do so. One cannot underestimate the challenge to the Court of Justice by the German Constitutional Court and others like it. This represents a constitutional time bomb.

12. We would propose the creation of a Constitutional Council for the Community, modeled in some ways on its French namesake. The Constitutional Council would have jurisdiction only over issues of competences (including subsidiarity) and would decide cases submitted to it after a law was adopted but before coming into force. It could be seized by any Community institution, any Member State or by the European Parliament acting on a Majority of its Members. Its President would be the President of the European Court of Justice and its Members would be sitting members of the constitutional courts or their equivalents in the Member States. Within the Constitutional Council no single Member State would have a veto power. The composition would also underscore that the question of competences is fundamentally also one of national constitutional norms but still subject to a Union solution by a Union institution.

    We will not elaborate in this study some of the technical aspects of the proposal. Its principal merit, if it has any, is that it gives expression to the fundamental boundary concern without however compromising the constitutional integrity of the Community as did the German Maastricht decision. Since, from a material point of view, the question of boundaries has an inbuilt indeterminacy, the critical issue becomes not what are the boundaries but who gets to decide. The composition of the proposed Constitutional Council removes the issue, on the one hand, from the purely political arena; on the other hand, it creates a body which, on this issue, would, we expect, enjoy a far greater measure of public confidence than the ECJ itself.

13. We explain in the body of the Study why this proposal should not be considered as an attack on the Court but should be welcomed by it.

LA DIVISION DE COMPETENCIAS

EN LA UNION EUROPEA

- Resumen -

PE 166.756

LA DIVISION DE COMPETENCIAS EN LA UNION EUROPEA

- Resumen -

1. Excepto en el ámbito de la política de comercio internacional, en el cual creemos que las competencias de la Comunidad deberían hacerse extensivas a la OMC, y en el ámbito de los derechos humanos, en el cual la Comunidad debería gozar de competencia general para adoptar cualquier medida destinada a aumentar el nivel de protección de los mismos *en el ámbito de aplicación del Derecho comunitario*, no creemos que la Comunidad requiera ningún aumento sustancial de su jurisdicción.

2. Por el contrario, existe una mayor sensibilidad por el tema de las competencias en la Unión Europea. El debate público post-Maastricht demostró una clara desconfianza por parte de la opinión pública, justificada o no, hacia la capacidad de las Instituciones comunitarias para garantizar los límites de la intrusión de la Comunidad en la vida pública. Se han producido muchos intentos de "limitar" las competencias de la Comunidad en este aspecto. Los mayores esfuerzos deberían ir dirigidos a acrecentar la confianza de la opinión pública respecto a los límites jurisdiccionales de la Comunidad y de la Unión.

3. El planteamiento adoptado en este estudio no consiste en facilitar una lista o una fórmula óptima para el reparto de competencias entre la Comunidad y la Unión y sus Estados miembros. Desde que se elaboró el proyecto de Tratado, existe una multitud de listas y fórmulas de esta índole. Adjuntaremos las principales en anexo a este estudio.

4. En vez de ello, nuestro planteamiento es "fenomenológico", es decir, tratamos de entender qué papel desempeña la cuestión de las competencias en una organización política como la Comunidad. Cuál es el nexo entre esta y otras estructuras y procesos de gobierno. Y por último, tratamos de estudiar qué puede hacerse para afianzar algunas competencias si ello es lo que el proceso político requiere.

5. Un dilema fundamental en este contexto es la coexistencia de dos visiones del mundo que en cierto modo son irreconciliables.

   Para una visión del mundo, la distribución de competencias es un problema funcional: cómo asignar el "mejor, más eficiente y más racional" nivel de gobierno al asunto adecuado. La subsidiariedad puede entenderse como la expresión precisamente de este planteamiento: parte del supuesto de que las decisiones deben tomarse lo más cerca posible de aquellos a quienes afectan; *pero* si se pueden asegurar resultados mejores y más eficaces a niveles más elevados de gobierno, ello no sólo sería una condición para la toma de estas decisiones a dicho nivel, sino también una justificación. El ejemplo clásico es la contaminación transfronteriza: dado que

ningún Estado puede abordar el problema por sí solo, éste puede, y debe, ser abordado a escala transnacional.

6. La otra visión del mundo es más esencialista que funcional. Los límites entre jurisdicciones se consideran como una expresión de valores "inviolables". Podemos definir este planteamiento -distinto de la versión de la subsidiariedad a la que antes nos hemos referido- como uno de límites fundamentales. Los límites fundamentales son como los derechos fundamentales. Todo el mundo está a favor excepto cuando se interponen en el camino de su proyecto favorito. El interés de los límites fundamentales reside en dos principios paralelos. En primer lugar, como una expresión de una visión de la humanidad que otorga los valores más importantes a las comunidades individuales existentes dentro de organizaciones de gobierno más amplias que, por tanto, no se pueden traspasar. Las unidades sociales más pequeñas pueden sufrir una opresión paralela de los individuos que las integran por parte de fuerzas sociales más fuertes, y por ello deben ser protegidas. La segunda razón de interés reside en el simple hecho de que los límites fundamentales impiden la acumulación de poder en un nivel de gobierno. Se considera que al impedir este tipo de acumulación tiene un valor intrínseco.

7. Todos los sistemas no unitarios bien conocidos por nuestro equipo: la Unión Europea, los Estados Unidos, Alemania y Canadá sufren de doble personalidad; intentan conciliar, con distintas dosificaciones, la visión funcional y la esencialista. Los conflictos y las contradicciones son inevitables.

8. El artículo 3 B del TUE es un ejemplo perfecto de esta situación. Este artículo intenta establecer unos límites fundamentales en el primer párrafo y expresar la visión funcionalista del mundo en el segundo y el tercero. Pero esta reconciliación es una quimera, y no únicamente porque el primer párrafo del artículo 3 B sea muy ambiguo. Experiencias comparativas nos enseñan algo difícil de entender para los no iniciados en el ámbito del Derecho: la naturaleza del lenguaje, del derecho y de la interpretación de las leyes sugieren que, prácticamente en ningún caso, el lenguaje que se utiliza en un documento constitucional puede *garantizar* realmente unos límites fundamentales entre el poder central y el de las unidades que lo constituyen. El grado de inclinación del sistema hacia un polo u otro depende más del espíritu político y legal de los que ejercen las competencias legislativas y de los que las controlan. Una experiencia común de varios Estados federales es una historia de artífices movidos más por el espíritu de los límites fundamentales, con los que se encuentran después los órganos de los gobiernos federales, legislaturas, ejecutivos y tribunales animados por instintos funcionalistas; al fin y al cabo, cuando se gobierna siempre se pretende hacerlo de la manera más eficaz posible. Los resultados son bien conocidos. ¿Dónde está el Estado federal en relación con respecto al cual se puede afirmar que los límites fundamentales, que todos pretenden tener, han soportado un esfuerzo decidido de infiltración por parte de la autoridad central?

   Por lo tanto, la clave de la gestión de las competencias no es encontrar la fórmula o la lista mágica garantizada constitucionalmente, sino entender la relación entre las competencias, la toma de decisiones y la legitimidad y ver hasta qué punto se pueden ajustar. Por esta razón hemos optado por utilizar en este estudio un planteamiento fenomenológico así como normativo. A continuación, presentaremos un historial "constitucional-institucional" de los

asuntos de a las competencias en la CE. No se trata de los antecedentes del análisis sino del núcleo del análisis. Entender el proceso de formación de las cosas es la clave para entender las opciones de que disponemos para afrontar o corregir los problemas a los que se enfrenta la Unión en este ámbito.

9. Al mismo tiempo, aunque rechaza el planteamiento de crear una lista y estamos a favor del método funcional y pragmático utilizado en el Tratado, añadimos dos elementos importantes a nuestro planteamiento fenomenológico:

   Examinamos la idea de las listas e intentamos presentar el que, bajo nuestro punto de vista, es el planteamiento más sofisticado.

   Presentamos un *estudio de casos de la normativa* -el proyecto de Directiva relativa la publicidad de los productos del tabaco. Utilizamos este ejemplo para sacar a nuestros lectores de la consideración abstracta de las competencias y mostrar cómo el tema va adquiriendo forma en relación con una propuesta concreta. Sostenemos enérgicamente que el proyecto de Directiva, y otros semejantes, se deben considerar como *Ultra Vires* y, de hecho, hemos establecido todos los argumentos legales disponibles en favor de este punto de vista. *Hemos elegido esta opción porque creemos que sólo pueden establecerse límites a las competencias de la Comunidad, examinando una propuesta con el objetivo político con el que se está de acuerdo. El caso del estudio es la defensa de un planteamiento moderado dentro de la flexibilidad que ofrece el Tratado. Si nuestro análisis se rechaza entonces se tendría que modificar el Tratado para que tuviera un carácter más esencialista hecho que, en nuestra opinión, limitaría su funcionalidad.*

10. En este estudio, utilizando el proyecto de Directiva relativa a los productos del tabaco como ejemplo, abogamos por un planteamiento restrictivo del ejercicio de las competencias funcionales otorgadas a la Comunidad. Dado que una de nuestras conclusiones básicas es que el tema de las competencias es más un asunto de cierta cultura política y jurídica que un asunto de lenguaje jurídico formal, se tiene que desarrollar una disciplina lenta a este respecto.

11. Según nuestro punto de vista, históricamente el Tribunal de Justicia Europeo ha fracasado a la hora de facultar a las Instituciones Comunitarias tal disciplina y ahora probablemente carece de la autoridad moral para hacerlo. No se puede subestimar el desafío que el Tribunal Constitucional alemán y otros han supuesto para el Tribunal de Justicia Europeo. Esto representa una bomba de relojería constitucional.

12. Nosotros proponemos la creación de un Consejo Constitucional para la Comunidad, basado en algunos aspectos en su homónimo francés. El Consejo Constitucional sólo tendría jurisdicción en materia de competencias (incluyendo la subsidiariedad) y decidiría sobre casos que se le sometieran tras la aprobación de una ley pero antes de su entrada en vigor. Cualquier Institución Comunitaria, cualquier Estado miembro o el Parlamento Europeo actuando por decisión de la mayoría de sus miembros podrían recurrir a él. Su presidente sería el Presidente del Tribunal de Justicia Europeo y sus miembros serían miembros de los tribunales constitucionales o de sus equivalentes en los Estados miembros. En el Consejo Constitucional,

ningún Estado miembro tendría derecho a veto. La composición también subrayará que la cuestión de las competencias es esencialmente una cuestión de normas constitucionales nacionales pero aún sujeta a una solución de la Unión propuesta por una Institución de la Unión.

En este estudio no desarrollaremos algunos aspectos técnicos de la propuesta. Su principal mérito, si alguno tiene, es que pone de manifiesto el tema de los límites fundamentales sin comprometer la integridad constitucional de la Comunidad, como hizo la decisión alemana sobre Maastricht. Desde un punto de vista material, la cuestión de los límites contiene una indeterminación intrínseca, porque el punto crítico no es determinar cuáles son los límites sino quién decide. La composición del propuesto Consejo Constitucional por un lado, retira esta cuestión del terreno puramente político y, por otro, crea un órgano que, en este ámbito, gozará, esperamos, de más confianza por parte de la opinión pública que el propio Tribunal de Justicia Europeo..

13. En el cuerpo del estudio exponemos por qué esta propuesta no debe ser considerada como un ataque al Tribunal sino que debe ser acogida por éste con satisfacción.

LA REPARTITION DES COMPETENCES

DANS L'UNION EUROPEENNE

- Synthèse -

PE 166.756

LA REPARTITION DES COMPETENCES DANS L'UNION EUROPEENNE

- Synthèse -

1. A l'exception du domaine de la politique du commerce international (au sujet duquel nous pensons que les compétences communautaires devraient avoir la même importance que celles de l'OMC) et du domaine des droits de l'homme (dans lequel la Communauté devrait avoir une compétence générale pour adopter toute mesure susceptible d'accroître la protection des droits de l'homme dans le contexte de l'application de la législation communautaire), nous ne pensons pas qu'il soit nécessaire d'élargir la juridiction de la Communauté.

2. Au contraire. Il y a une sensibilité accrue à l'égard de la question des compétences de l'Union européenne. Le débat public de l'après-Maastricht a clairement montré la méfiance du citoyen (justifiée ou non) quant à la capacité des institutions communautaires de garantir les limites de l'empiétement communautaire sur la vie publique. Il y a eu, à cet égard, de nombreux appels, pour tenter de restreindre les compétences communautaires. Les principaux efforts devraient viser à augmenter la confiance des citoyens dans les limites de la juridiction de la Communauté et de l'Union.

3. L'approche que nous adoptons dans cette étude n'est pas d'essayer d'élaborer une liste optimale ou une formule de répartition des compétences entre la Communauté et ses Etats membres. Depuis le projet de traité, il existe une foule de listes et formules de ce type. Nous évoquerons les plus importantes dans une annexe à cette étude.

4. Notre approche sera plutôt "phénoménologique", c'est-à-dire que nous essayerons de comprendre comment le problème des compétences se règle dans un ensemble tel que la Communauté, de voir quel est le lien entre celle-ci et d'autres structures et modes de gouvernement pour, en fin de compte, explorer ce qu'il est possible de faire pour essayer d'ancrer certaines compétences si c'est là ce que requiert le processus politique.

5. Un important dilemme sous-jacent en ce qui concerne les compétences réside dans la coexistence de deux visions du monde qui, d'une certaine manière, sont inconciliables.

   Dans une de ces visions, la répartition des compétences est fonctionnelle, c'est-à-dire un problème d'affectation du "meilleur", du" plus efficace", du plus "rationnel" niveau de gouvernement au domaine approprié. La subsidiarité peut s'entendre comme l'expression précise de cette perspective : elle part de l'hypothèse que les décisions doivent se prendre le plus près possible des personnes qu'elles concernent; toutefois, si des résultats meilleurs et plus efficaces peuvent être assurés à des niveaux supérieurs de gouvernement, ce serait non seulement une condition mais également une justification pour prendre ces décisions à ce

niveau. L'exemple classique est celui de la pollution transfrontalière : aucun Etat ne pouvant résoudre le problème seul, il peut et doit l'aborder au niveau transnational.

6. L'autre vision du monde est essentialiste plutôt que fonctionnelle. Les frontières entre les juridictions sont considérées comme l'expression de valeurs "inviolables". Nous pouvons caractériser cette approche (distincte de la version susmentionnée de la subsidiarité) comme une approche des frontières fondamentales. Les frontières fondamentales sont comme les droits fondamentaux. Nous y sommes tous favorables sauf lorsqu'elles entravent nos projets personnels. L'attrait des frontières fondamentales repose sur deux fondements parallèles. Tout d'abord, en tant qu'expression d'une vision de l'humanité qui défend les valeurs les plus profondes des communautés individuelles existant au sein de régimes plus vastes, qui ne peuvent dès lors être transgressées. Les entités sociales plus petites peuvent être opprimées comme les individus par des forces plus grandes et elles doivent être dès lors protégées. Le deuxième attrait réside dans le simple fait que les limites fondamentales aident à prévenir la concentration du pouvoir à un seul niveau de gouvernement. On reconnaît une valeur intrinsèque à la prévention de ce type d'agrégation.

7. Tous les systèmes non-unitaires que l'on connaît - l'Union européenne, les Etats-Unis, l'Allemagne et le Canada- souffrent d'une sorte de dédoublement de personnalité et tentent de concilier, en une fois et selon des dosages différents, le fonctionnalisme et l''essentialisme. Les conflits et les contradictions sont inévitables.

8. L'article 3 B du traité sur l'Union européenne en est un parfait exemple. Il tente à la fois de définir une frontière fondamentale dans le premier paragraphe et d'exprimer une vision du monde fonctionnelle dans les deuxième et troisième paragraphes. Mais cette réconciliation est une chimère, et pas seulement parce que le premier paragraphe de cet article 3 B est extrêmement perméable. Une comparaison nous enseigne une chose que les non-juristes comprennent difficilement : la nature même de la langue, de la loi et de l'interprétation juridique suggère que, pratiquement, aucune langue, dans un document constitutionnel, ne peut garantir une distinction véritablement fondamentale entre, par exemple, le pouvoir central et celui des unités constituantes. Le degré auquel un système s'orientera vers un pôle ou un autre dépend beaucoup plus du génie politique et juridique qui anime ceux qui exercent des compétences législatives et ceux qui les contrôlent. Une expérience commune de nombreux Etats fédéraux est celle des "encadreurs", davantage conscients des frontières fondamentales qui sont ensuite respectées par les organes du gouvernement fédéral, législatifs, exécutifs et judiciaires, animés d'un esprit fonctionnaliste (après tout, une fois parvenu au pouvoir, on souhaite gouverner de la manière la plus efficace). Les résultats sont bien connus. Où est l'Etat fédéral dont on peut dire que les limites fondamentales, que tous affirment posséder, ont résisté à l'effort résolu d'infiltration de l'autorité centrale ?

La solution pour la répartition des compétences n'est pas de trouver la formule ou la liste magique, qui sera garantie constitutionnellement, mais de comprendre la relation entre les compétences, la prise des décisions et la légitimité, et de voir dans quelle mesure cela peut se réaliser. C'est la raison pour laquelle nous avons opté pour une approche phénoménologique ainsi que normative dans cette étude. Nous entendons présenter ici une histoire

"constitutionnelle- institutionnelle" des questions relatives aux compétences dans la C.E.. Il ne s'agit pas de l'arrière- plan mais du centre de l'analyse. Comprendre comment les choses fonctionnent permettra de comprendre les options disponibles pour résoudre les problèmes que l'Union rencontre maintenant dans ce domaine.

9. En même temps, bien que nous rejettions l'approche d'un catalogue et que nous préférions la méthode fonctionnelle et pragmatique utilisée dans le traité, nous nous proposons d'ajouter deux éléments importants à notre approche phénoménologique :

   Nous examinons l'idée de l'établissement des listes et nous présentons ce qui nous paraît être la meilleure approche pour aborder cette méthode. Nous présentons une étude de cas normatif (la proposition de directive sur la publicité pour le tabac).

   Nous l'utilisons afin de permettre aux lecteurs de prendre du recul par rapport aux considérations abstraites en matière de compétence, et de voir comment cela fonctionne avec une proposition concrète.
   Nous insistons sur le fait que la proposition de directive (ainsi que d'autres) doit être considéré "ultra vires" et nous établissons tous les arguments juridiques appropriés.
   Nous le faisons parce que nous pensons que c'est seulement face à une proposition sur l'objectif politique de laquelle on est d'accord que l'on peut proposer sérieusement des limites aux compétences de la Communauté. Cette étude de cas est un plaidoyer - en faveur d'une approche restrictive par rapport à la flexibilité offerte par le traité. Si notre analyse était rejetée, le traité devrait être modifié de manière plus essentialiste, ce qui, à notre avis, limiterait sa fonctionnalité.

10. Prenant la proposition de directive sur le tabac comme exemple, nous préconisons dans cette étude une approche restrictive de l'exercice des compétences fonctionnelles attribuées à la Communauté. Une de nos conclusions essentielles étant que le problème des compétences relève davantage d'une certaine culture politique et juridique que d'un langage juridique formel, les règles doivent s'élaborer lentement à cet égard.

11. A notre avis, historiquement, la Cour de Justice européenne n'a pas réussi à instaurer une telle discipline dans les institutions européennes, et, à présent, elle manque probablement d'autorité morale pour le faire. On ne peut pas sous-estimer le défi lancé à la Cour de Justice par la Cour constitutionnelle allemande et d'autres. C'est là une bombe à retardement constitutionnelle.

12. Nous proposons la création d'un Conseil constitutionnel de la Communauté, calqué dans une certaine mesure sur le modèle de son homologue français. Ce conseil constitutionnel aurait uniquement dans ses attributions les questions de compétences (y compris la subsidiarité) et trancherait les cas qui lui sont seraient soumis après le vote d'une loi, mais avant son entrée en vigueur. Il pourrait être saisi par toute institution communautaire, par tout Etat membre ou par le Parlement européen agissant au nom d'une majorité de ses membres. Son président serait le président de la Cour de justice européenne et ses membres seraient des magistrats des cours constitutionnelles ou des instances équivalentes des Etats membres. Au conseil constitutionnel, aucun Etat membre ne disposerait du droit de veto. Sa composition soulignerait également que

la question des compétences est aussi fondamentalement liée aux normes constitutionnelles nationales, mais reste subordonnée à une solution de l'Union apportée par une institution de l'Union.

Nous ne nous attarderons pas, dans cette étude, sur certains aspects techniques de la proposition. Son principal mérite, éventuellement, c'est d'exprimer une préoccupation fondamentale concernant la limite, sans toutefois compromettre l'intégrité constitutionnelle de la Communauté, comme l'a fait la décision allemande sur Maastricht. Puisque d'un point de vue matériel, la question des limites est encore indéterminée, le point critique n'est pas ce que sont véritablement les limites, mais qui prend les décisions. La composition du conseil constitutionnel que nous proposons, d'une part, éloigne le problème du domaine purement politique et, d'autre part, crée une instance qui, nous l'espérons, jouirait plus largement de la confiance public que la Cour de justice européenne.

13. Nous expliquons dans cette étude pourquoi cette proposition ne doit pas être considérée comme une attaque contre la Cour, mais que celle-ci devrait, au contraire, l'accueillir avec intérêt.

LA RIPARTIZIONE DELLE COMPETENZE

NELL'UNIONE EUROPEA

- Sintesi -

PE 166.756

LA RIPARTIZIONE DELLE COMPETENZE NELL'UNIONE EUROPEA

- SINTESI -

1. Eccezion fatta per il settore della politica del commercio internazionale (per il quale pensiamo che le competenze comunitarie dovrebbero avere la stessa importanza di quelle dell'OMC) e di quello dei diritti dell'uomo (nel cui contesto la Comunità dovrebbe avere una competenza generale per approvare qualsiasi misura suscettibile di migliorare la protezione dei diritti dell'uomo *nel quadro dell'applicazione della legislazione comunitaria*), noi non pensiamo che sia necessario ampliare la giurisdizione della Comunità.

2. Esiste, però, un profondo interesse per il problema delle competenze dell'Unione europea. Il pubblico dibattito del dopo Maastricht ha chiaramente dimostrato la diffidenza del cittadino (giustificata o no) sulla capacità delle Istituzioni comunitarie di garantire i limiti degli sconfinamenti della Comunità nella vita pubblica. A tale riguardo, vi sono state numerose richieste volte a tentare di "restringere" le competenze comunitarie. I principali sforzi, quindi, dovrebbero essere volti ad aumentare la fiducia del pubblico riguardo ai limiti giurisdizionali della Comunità e dell'Unione.

3. L'impostazione adottata per questo studio non è quella di tentare di elaborare l'elenco o la formula migliori per la suddivisione delle competenze tra la Comunità e l'Unione ed i suoi Stati membri. Da quando si è elaborato il progetto di trattato elenchi e formule del genere esistono in abbondanza. Ne allegheremo a questo studio le più importanti.

4. La nostra principale impostazione sarà, invece, "fenomenologica", vale a dire che tenteremo di comprendere come il problema delle competenze si posizioni in un complesso politico quale la Comunità, di studiare qual è il legame tra quest'ultima ed altre strutture e procedure di governo, ed infine, di esplorare ciò che è possibile fare per sperimentare e definire alcune competenze, se ciò è quanto desidera il processo politico.

5. Un sottostante e fondamentale dilemma riguardante le competenze risiede nella coesistenza di due visioni del mondo, che, in un certo senso, sono inconciliabili.

   In una visione del mondo la subdivisione delle competenze è funzionale vale a dire un problema di attribuzione "del migliore, del più efficace e del più razionale" livello di governo al tema appropriato.
   La sussidiarietà può essere intesa come l'espressione precisa di tale impostazione: essa parte dall'ipotesi che le decisioni devono essere assunte a livello più vicino possibile a quello delle persone che esse riguardano; *tuttavia*, se risultati migliori e più efficaci possono essere garantiti da livelli superiori di governo, ciò sarebbe non soltanto una condizione per assumere tali

decisioni a tale livello, ma anche una giustificazione. L'esempio classico è dato dall'inquinamento transfrontaliero: poiché nessuno Stato può risolvere il problema da solo, esso può e deve essere trattato a livello transnazionale.

6. L'altra visione del mondo è essenzialista piuttosto che funzionale. Le frontiere tra le giurisdizioni vengono considerate come l'espressione di valori "inviolabili". Possiamo caratterizzare questa impostazione (diversa dalla summenzionata versione della sussidiarietà) come quella delle frontiere fondamentali. Le frontiere fondamentali sono come i diritti fondamentali. Tutti siamo loro favorevoli tranne nel caso in cui ostacolino i nostri personali progetti. L'attrattiva delle frontiere fondamentali riposa su due principi paralleli. In primo luogo, come espressione di una visione dell'umanità che attribuisce i valori più importanti dalle comunità individuali esistenti in seno a organizzazioni politiche più vaste, che, così, non possono essere disattesi. I complessi sociali più piccoli possono essere oggetto di un'oppressione parallela a quella contro gli individui che ne fanno parte, esercitate da forze sociali più forti e, quindi, devono essere protette. La seconda attrattiva risiede nel semplice fatto che le frontiere fondamentali impediscono la concentrazione del potere in un solo livello di governo. Si ritiene che sia un valore "*intrinseco*" impedire questo tipo di concentrazione.

7. Tutti i sistemi non unitari studiati - Unione europea, Stati Uniti, Germania e Canada - sono colpiti da uno sdoppiamento della personalità quando tentano di adattarsi con diversa intensità alla visione funzionale e a quella esistenziale. I conflitti e le contraddizioni divengono, quindi, inevitabili.

8. L'articolo 3B del TEU ne è un esempio perfetto. Esso tenta, contemporaneamente, di definire frontiere fondamentali nel primo paragrafo e di formulare la visione del mondo funzionale nel secondo e nel terzo paragrafo. Ma questa riconciliazione è una chimera, non soltanto perché il primo paragrafo dell'articolo 3B è molto vecchio. Esperienze comparate ci hanno insegnato qualcosa che i non giuristi fanno fatica a comprendere: la natura stessa del linguaggio, della legge e dell'interpretazione giuridica suggerisce che, praticamente mai il linguaggio di un documento costituzionale può garantire una frontiera veramente fondamentale tra ad esempio il potere centrale e quello delle unità che lo costituiscono. Il fatto che un sistema tenda verso un polo o verso un altro dipende molto più dal genio politico e giuridico di quanti esercitano competenze legislative e di quanti le controllano. Un'esperienza comune di molti Stati federali è la storia di "artefici" animati maggiormente dall'etica delle frontiere fondamentali, che sono poi raggiunte da quegli organi del governo federale, legislativi, esecutivi e giudiziari che sono animati da istinti funzionalisti. Dopo tutto, una volta che si è al potere si desidera governare nel modo più efficace: i risultati sono ben conosciuti. Ove si situa lo Stato federale rispetto a quelle che possono essere dette le frontiere fondamentali, che tutti affermano di detenere e che hanno resistito allo sforzo determinato dell'autorità centrale di infiltrarsi?

La soluzione per la suddivisione delle competenze non è quella di trovare il progetto di formula magica o dell'elenco garantito a livello costituzionale, ma di capire la relazione tra le competenze, l'adozione delle decisioni e la legittimità, e di vedere in quale misura essa possa essere plasmata. E questo è il motivo per il quale abbiamo scelto una impostazione fenomenologica, oltre che normativa, per questo studio. Presenteremo, in appresso, la storia

"costituzionale-istituzionale" dei temi relativi alle competenze in seno all'Unione europea. Non si tratta dello sfondo dell'analisi, ma ne è il centro stesso. Comprendere come le cose funzionano è la chiave per comprendere le opzioni disponibili per trattare o risolvere i problemi dell'Unione in quest'area.

9. Nello stesso tempo, anche se respingiamo l'impostazione di creare un "elenco" e siamo a favore del metodo funzionale e pragmatico utilizzato nel trattato, ci proponiamo di aggiungere due fattori essenziali alla nostra impostazione fenomenologica:

   Noi esaminiamo l'idea dell'elaborazione di elenchi e tentiamo di presentare ciò che a nostro parere è l'approccio più sofisticato.

   Noi presentiamo uno *studio di casi normativi* (il progetto di direttiva sulla pubblicità per il tabacco). E lo facciamo per portare i nostri lettori al di fuori dello studio astratto delle competenze e per osservare come ciò si modella in funzione di una proposta concreta. Noi insistiamo sul fatto che il progetto di direttiva, come vari altri, debba essere considerato "ultra vires" e a tal fine abbiamo elaborato tutti gli argomenti giuridici disponibili. *Lo facciamo poiché, a nostro parere, e soltanto contro una proposta sul cui obiettivo politico si è d'accordo che è possibile fissare dei limiti alle competenze della Comunità. Questo studio di caso è la difesa di un'impostazione moderata rispetto alla flessibilità offerta dal trattato. Se la nostra analisi dovesse essere respinta, allora il trattato dovrebbe essere modificato in modo più essenzialista, il che, a nostro parere, limiterebbe la sua funzionalità.*

10. Noi sosteniamo in questo studio, appoggiandoci come esempio sul progetto di direttiva sul tabacco, un'impostazione restrittiva nell'esercizio delle competenze funzionali attribuite alla Comunità. Poiché una delle nostre conclusioni chiave è che il problema delle competenze è una questione di cultura politica e giuridica piuttosto che una questione di linguaggio giuridico formale, dovrà lentamente svilupparsi, a questo riguardo, una disciplina.

11. A nostro parere, storicamente, la Corte di giustizia europea non è riuscita ad instaurare, all'interno delle Istituzioni europee una disciplina del genere e, ora, essa manca probabilmente d'autorità per poterlo fare. Non è possibile sottovalutare la sfida posta alla Corte di giustizia dalla Corte costituzionale tedesca e da altre. Essa è una bomba costituzionale a scoppio ritardato.

12. Noi proponiamo, quindi, la creazione di un Consiglio Costituzionale della Comunità impostato, in qualche modo, sul modello del suo omologo francese. Il Consiglio costituzionale avrebbe unicamente giurisdizione per i problemi di competenza (ivi compresa la sussidiarietà), e risolverebbe i casi sottopostigli quando una legge è stata adottata, ma prima della sua entrata in vigore. Ad esso potrebbero rivolgersi tutte le Istituzioni comunitarie, tutti gli Stati membri o il Parlamento europeo, a nome della maggioranza dei suoi membri. Suo presidente sarebbe il Presidente della Corte di giustizia europea ed i suoi membri sarebbero dei magistrati delle Corti costituzionali, o istanze equivalenti, degli Stati membri. In seno al Consiglio costituzionale nessuno Stato membro potrebbe godere di un diritto di veto. La sua

composizione sottolineerebbe anche che la questione delle competenze è fondamentalmente una questione di norme costituzionali nazionali, che resta però sottoposta ad una soluzione data dall'Unione su richiesta di una istituzione dell'Unione.

Non ci attarderemo, nel corso di questo studio, su aspetti tecnici della proposta. Il suo principale merito, se ne possiede uno, è quello di porre in luce il problema delle frontiere fondamentali senza, comunque, compromettere la integrità costituzionale della Comunità, come è stato fatto dalla decisione tedesca su Maastricht. Da un punto di vista materiale, il problema delle frontiere possiede una indeterminatezza insita, poiché il punto critico è di determinare non quello che sono veramente le frontiere, ma chi decide. La composizione del Consiglio costituzionale da noi proposta, da un lato, rimuove il problema dall'arena puramente politica e, d'altro lato, crea un organo che, su tale materia, godrà, noi lo speriamo, di una fiducia dell'opinione pubblica maggiore di quanto non goda la stessa Corte di giustizia europea.

13. Spiegheremo, nel corso dello studio, che tale proposta non deve essere considerata come un attacco contro la Corte, ma come la stessa dovrebbe apprezzarla.

VERDELING VAN DE BEVOEGDHEDEN

IN DE EUROPESE UNIE

- Samenvatting -

PE 166.756

VERDELING VAN DE BEVOEGDHEDEN IN DE EUROPESE UNIE

- Samenvatting -

1. Met uitzondering van het internationaal handelsbeleid - ten aanzien waarvan de bevoegdheden van de Gemeenschap naar onze opvatting van eenzelfde omvang dienen te zijn als die van de WTO - en de mensenrechten - ten aanzien waarvan de Gemeenschap een algemene bevoegdheid moet krijgen tot het nemen van alle besluiten die de bescherming van de mensenrechten *binnen de werkingssfeer van het Gemeenschapsrecht* zouden verbeteren - zijn wij niet van mening dat de Gemeenschap een uitbreiding van haar materiële jurisdictie behoeft.

2. Integendeel: er is sprake van een toegenomen bewustzijn inzake de bevoegdheden in de Europese Unie. Uit het openbare debat na Maastricht is gebleken dat er een - al dan niet gerechtvaardigd - wantrouwen in de publieke opinie bestaat over het vermogen van de instellingen van de Gemeenschap om de grenzen van de invloed van de Gemeenschap op het openbare leven te waarborgen. Er is veelvuldig geroepen om een nauwkeurige afbakening van de bevoegdheden van de Gemeenschap in dit opzicht. De inspanningen op dit terrein dienen zich voornamelijk te richten op vergroting van het vertrouwen van het publiek in de jurisdictionele beperkingen van de Gemeenschap en de Unie.

3. In deze studie trachten wij geen optimale lijst of formule te vinden voor de verdeling van de bevoegdheden tussen de Gemeenschap en de Unie en haar lidstaten. Sinds het ontwerpverdrag bestaat er een groot aantal lijsten en formules. De belangrijkste worden opgenomen in een bijlage bij deze studie.

4. Onze benadering is in hoofdzaak "fenomenologisch" van aard, d.w.z. wij trachten te doorgronden hoe het vraagstuk van de bevoegdheden zich in een bestel als de Gemeenschap uit en wat het verband is tussen deze en andere bestuursstructuren en -processen; tot slot gaan wij na wat er kan worden ondernomen om bepaalde bevoegdheden te verankeren, als de politiek dat wil.

5. Een belangrijk onderliggend dilemma bij bevoegdheden is de coëxistentie van twee wereldbeschouwingen, die in zekere zin onverenigbaar zijn.

   In de ene wereldbeschouwing worden bevoegdheden verdeeld op functionele grondslag: een gegeven materie wordt toegewezen aan de "beste", "efficiëntste" en "rationeelste" bestuurslaag. Subsidiariteit kan worden gezien als een middel om aan deze visie uiting te geven. Het uitgangspunt is dat besluiten dienen te worden genomen zo dicht mogelijk bij degenen die daarvan de gevolgen ondervinden; *maar* als betere, efficiëntere resultaten op een hoger bestuursniveau kunnen worden behaald, zou dat niet alleen een voorwaarde, maar ook een

rechtvaardiging zijn om die besluiten op dat niveau te nemen. Een klassiek voorbeeld is grensoverschrijdende vervuiling: aangezien geen enkel land het probleem alleen aankan, kan en moet het op transnationaal niveau worden aangepakt.

6. De andere wereldbeschouwing is essentialistisch en niet functioneel van aard. De grenzen tussen jurisdicties worden beschouwd als een uiting van "onschendbare" waarden. Kenmerkend voor deze benadering - die zich onderscheidt van de hierboven genoemde subsidiariteit - zijn fundamentele grenzen. Fundamentele grenzen zijn vergelijkbaar met fundamentele rechten. Iedereen is ervoor, behalve wanneer zij iemands lievelingsproject belemmeren. De aantrekkelijkheid van fundamentele grenzen wortelt in twee parallelle factoren. Ten eerste is er een mensheidsbeeld dat de hoogste waarden toekent aan individuele gemeenschappen binnen een groter bestel, die om die reden niet mogen worden aangetast. Kleine sociale eenheden kunnen net als het individu te lijden hebben onder onderdrukking door sterkere maatschappelijke krachten en moeten daarom worden beschermd. Het tweede aspect is dat fundamentele grenzen de accumulatie van macht op één overheidsniveau helpen voorkomen. Het voorkomen van een dergelijke accumulatie wordt als *per se* waardevol beschouwd.

7. Alle niet-unitaire stelsels waarmee dit team bekend is - de Europese Unie, de VS, Duitsland en Canada - lijden onder een gespleten persoonlijkheid, omdat zij tegelijkertijd in verschillende doseringen de functionele en de essentialistische benadering met elkaar in overeenstemming trachten te brengen. Conflicten en contradicties zijn niet te vermijden.

8. Artikel 3B van het EU-Verdrag is hiervan een perfect voorbeeld. Het wil in de eerste alinea een fundamentele grens aangeven en tegelijkertijd in de tweede en derde alinea de functionele wereldbeschouwing verwoorden. Deze verzoening is echter een hersenschim: het is niet alleen zo dat de eerste alinea van artikel 3B uitermate poreus is. Vergelijkend onderzoek leert ons iets dat niet-juristen maar moeilijk kunnen begrijpen: De aard van taal, recht en juridische interpretatie duidt erop dat in de praktijk geen enkele taal in een constitutioneel document de *waarborg* kan bieden van een werkelijk fundamentele grens tussen bijvoorbeeld de centrale macht en de macht van de samenstellende delen. In hoeverre een stelsel naar de ene of de andere pool overhelt, hangt in veel sterkere mate af van het politieke en juridische ethos dat de inspiratie vormt voor diegenen die wetgevende bevoegdheden uitoefenen en diegenen die controle uitoefenen. Een ervaring die veel federale staten gemeen hebben, is dat ontwerpers, die zich vooral laten inspireren door het ethos van fundamentele grenzen, vervolgens stuiten op federale overheidsorganen en wetgevende, uitvoerende en rechterlijke instanties, die zich laten leiden door functionalistische instincten - per slot van rekening wil je, als je eenmaal regeert, het zo efficiënt mogelijk doen. De resultaten zijn bekend. Waar is de federale staat waarvan men kan zeggen dat de fundamentele grenzen, die zij alle naar eigen zeggen hebben, een vastberaden poging tot infiltratie door de centrale autoriteit hebben kunnen weerstaan?

   Cruciaal voor de omgang met bevoegdheden is daarom niet het vinden van een magische formule of lijst die constitutioneel wordt gewaarborgd, maar inzicht in de relatie tussen bevoegdheden, besluitvorming en legitimiteit en in hoeverre deze kunnen worden gevormd. Daarom hebben wij in deze studie gekozen voor een fenomenologische alsmede een normatieve benadering. Wij presenteren hieronder een "constitutioneel-institutionele" geschiedenis van het

bevoegdhedenvraagstuk in de EG. Deze geschiedenis vormt niet de achtergrond van de analyse, maar het kernpunt ervan. Inzicht in de ontstaansgeschiedenis vormt de sleutel voor inzicht in de beschikbare keuzemogelijkheden om de problemen waarmee de Unie op dit gebied nu wordt geconfronteerd, aan te pakken of weg te nemen.

9. Tegelijkertijd voegen we, hoewel we het idee van een lijst van de hand wijzen en de voorkeur geven aan de in het Verdrag gevolgde functionele en pragmatische methode, twee belangrijke punten toe aan onze fenomenologische benadering:

   We onderzoeken het denkbeeld van lijsten en zetten de in onze ogen meest subtiele benadering uiteen.

   We beschrijven een *normatieve case study*, de ontwerprichtlijn inzake tabaksreclame. Daarmee wordt de lezer niet langer geconfronteerd met een abstracte beschouwing van de kwestie van bevoegdheden, maar kan hij zien hoe de zaak ligt bij een concreet voorstel. Wij houden een krachtig pleidooi dat de ontwerprichtlijn - en andere soortgelijke voorstellen - als *ultra vires* dient te worden beschouwd en wij onderbouwen deze opvatting met alle beschikbare juridische argumenten. *Wij doen dit omdat men naar onze opvatting alleen bij een voorstel waarvan men de beleidsdoelstelling aanvaardt, in alle ernst de communautaire bevoegdheden kan inperken. De case study is een pleidooi, een pleidooi voor een ingetogen benadering met gebruikmaking van de flexibiliteit die het Verdrag biedt. Indien onze analyse wordt verworpen, zou het Verdrag in meer essentialistische richting moeten worden aangepast, hetgeen naar onze opvatting het functioneren ervan zou ondergraven.*

10. Wij bepleiten in deze studie - met de ontwerprichtlijn inzake tabaksreclame als voorbeeld - een restrictieve benadering van de uitoefening van de aan de Gemeenschap toegekende functionele bevoegdheden. Aangezien een van onze centrale conclusies luidt dat het bij bevoegdheden eerder gaat om een bepaalde politieke en juridische cultuur en niet zozeer om formele rechtstaal, moet zich op dit vlak geleidelijk een discipline ontwikkelen.

11. Naar onze mening heeft het Europese Hof van Justitie historisch gezien verzuimd de communautaire instellingen van een dergelijke discipline te doordringen en mist het nu waarschijnlijk het morele gezag om dit alsnog te doen. De uitdaging die het Duitse constitutionele hof en andere soortgelijke organen aan het Hof van Justitie hebben gericht, mag niet worden onderschat. Hier tikt een constitutionele tijdbom.

12. Wij stellen voor een constitutionele raad voor de Gemeenschap in het leven te roepen, die in zekere zin geënt is op het gelijknamige Franse orgaan. Onder de jurisdictie van deze constitutionele raad vallen alleen kwesties op het vlak van bevoegdheden (met inbegrip van de subsidiariteit) en besluitvorming vindt plaats naar aanleiding van zaken die aan het Hof worden voorgelegd nadat een wet is goedgekeurd, maar voordat deze in werking treedt. De raad kan worden ingeschakeld door elke communautaire instelling, elke lidstaat of door het Europees Parlement op basis van een besluit van een meerderheid van zijn leden. De raad wordt voorgezeten door de President van het Europese Hof van Justitie en bestaat verder uit zittende

leden van de constitutionele hoven of gelijkwaardige instellingen in de lidstaten. In de constitutionele raad krijgt geen enkele lidstaat een vetorecht. Met de samenstelling wordt ook onderstreept dat het bij bevoegdheden fundamenteel ook gaat om een kwestie van nationale constitutionele normen, waarvoor echter een oplossing voor de Unie door een instelling van de Unie moet worden gevonden.

In deze studie werken wij een aantal technische aspecten van het voorstel niet verder uit. Zo het voorstel al merites heeft, dan in de eerste plaats dat het de zorg rond fundamentele grenzen verwoordt zonder evenwel de constitutionele integriteit van de Gemeenschap in gevaar te brengen, zoals het Duitse besluit naar aanleiding van Maastricht heeft gedaan. Aangezien de kwestie van de grenzen uit materieel oogpunt een ingebouwde onbepaaldheid bezit, wordt de kritieke vraag niet wat die grenzen zijn, maar wie de besluiten neemt. Door de samenstelling van de voorgestelde constitutionele raad wordt enerzijds de kwestie aan de zuiver politieke arena onttrokken, en wordt anderzijds een orgaan ingesteld dat naar onze verwachting op dit punt een veel grotere mate van openbaar vertrouwen zal genieten dan het Europese Hof van Justitie.

13. Wij zetten in de studie uiteen waarom dit voorstel niet als een aanval op het Hof mag worden beschouwd, maar door het Hof dient te worden toegejuicht.

A DISTRIBUIÇÃO DE COMPETÊNCIAS NA UNIÃO EUROPEIA

- Resumo geral -

PE 166.756

A DISTRIBUIÇAO DE COMPETÊNCIAS NA UNIÃO EUROPEIA

- Resumo geral -

1. Com excepção do sector da Política Comercial Internacional - onde consideramos que as competências da Comunidade deveriam ser co-extensivas com a OMC - e o domíno dos direitos humanos - onde a Comunidade deveria gozar de competências gerais para adoptar qualquer medida destinada a aumentar o nível de protecção dos direitos humanos *no âmbito da aplicação do direito comunitário* -, não consideramos que a Comunidade necessite de um aumento substancial da sua jurisdição.

2. Pelo contrário, existe uma maior sensibilidade para o tema das competências na União Europeia. O debate público pós-Maastricht demonstrou uma clara desconfiança por parte da opinião pública, justificada ou não, quanto à capacidade das instituições comunitárias para garantir os limites da participação da Comunidade na vida pública. Verificaram-se muitas tentativas para "delimitar" as competências da Comunidade neste domínio. Os maiores esforços deveriam destinar-se a aumentar a confiança da opinião pública relativamente aos limites jurisdicionais da Comunidade e da União.

3. A análise que fazemos neste estudo não consiste em apresentar uma lista de competências ideal ou uma fórmula para a distribuição das competências entre a Comunidade e a União e os seus Estados-membros. Desde que se elaborou o projecto de Tratado, existe uma grande variedade de listas e fórmulas deste tipo, às quais nos referiremos no anexo a este estudo.

4. Em vez disso, a nossa análise é "fenomenológica" - ou seja, tentamos entender qual o papel desempenhado pela questão das competências numa organização política como a Comunidade; qual será a relação entre este aspecto e outras estruturas e processos de governação. E, por último, tratamos de averiguar o que se poderá fazer para assegurar algumas competências, se é isso que o processo político deseja.

5. Um dilema fundamental neste contexto é a coexistência de duas visões do mundo que, de certo modo, são irreconciliáveis.

   Para uma visão do mundo, a distribuição de competências é um problema funcional: como atribuir o "melhor, mais eficiente e mais racional" nível de governação ao assunto adequado. A subsidiariedade pode entender-se como a expressão desta posição: parte do pressuposto de que as decisões devem tomar-se o mais próximo possível daqueles que são afectados por elas; mas quando podem assegurar-se resultados melhores e mais eficazes a níveis mais elevados da governação, tal não é apenas uma condição para a tomada de decisões a esse nível, mas também uma justificação. O exemplo clássico é a poluição transfronteiriça. Dado que nenhum Estado pode resolver o problema por si só, este pode, e deve, ser resolvido a uma escala transnacional.

6. A outra visão do mundo é "essencialista" e não funcional. Os limites das competências consideram-se como uma expressão de valores "invioláveis". Podemos caracterizar esta análise - diferente da versão da subsidiariedade a que nos referimos - como um dos Limites Fundamentais. Os limites fundamentais são como os direitos fundamentais. Todas as pessoas são a favor, excepto quando os mesmos se interpõem no caminho do seu projecto favorito. A força dos limites fundamentais reside em dois princípios paralelos. Em primeiro lugar, como uma expressão de uma visão da humanidade que concede os valores mais importantes às comunidades existentes dentro de organizações políticas mais amplas, as quais, por esta razão, não podem ser transgredidas. As unidades sociais mais pequenas podem ser objecto de uma opressão paralela contra os indivíduos que as integram por parte de forças sociais mais fortes e, por este motivo, devem ser protegidas. A segunda força reside no simples facto de que os limites fundamentais impedem a acumulação do poder num único nível de governação. Considera-se que impedir este tipo de acumulação constitui um valor *per se*.

7. Todos os sistemas não-unitários com os que trabalha a nossa equipa - União Europeia, Estados Unidos, Alemanha e Canadá - sofrem de uma "dupla personalidade" quando tentam adaptar-se, com diferentes intensidades, à visão funcional e à visão essencialista. Nesse momento, os conflitos e as contradições são inevitáveis.

8. O artigo 3°B do TUE constitui um exemplo perfeito desta situação. Este artigo tenta estabelecer limites fundamentais no primeiro parágrafo e expressar a visão funcionalista do mundo no segundo e terceiro parágrafos. Contudo, esta reconciliação é uma quimera, e não unicamente porque o primeiro parágrafo do artigo seja demasiado "poroso". As experiências comparativas dizem-nos algo que os não iniciados no domínio do direito não conseguem entender: que a natureza da linguagem, do direito e da interpretação das leis sugerem que, praticamente em nenhum caso, a linguagem que se utiliza num documento constitutivo pode garantir realmente uns limites fundamentais entre o poder central e as unidades que o constituem. O facto de que o sistema tenda para um polo ou outro depende mais do espírito político e jurídico daqueles que exercem as competências legislativas e dos que as controlam. Uma experiência comum de vários Estados federais é uma história de artífices movidas mais pelo espírito dos limites fundamentais que se alcançam através de órgãos dos governos federais, legislações, executivos e tribunais baseados em instintos funcionalistas, porque, ao fim e ao cabo, quando se governa, sempre se pretende fazê-lo da forma mais eficaz possível. Os resultados são bem conhecidos. Onde está o Estado federal, quando se pode afirmar que os limites fundamentais, que todos pretendem defender, apoiaram uma determinada campanha de infiltração por parte de uma autoridade central?

   Portanto, o princípio que deve orientar a gestão das competências não é o de encontrar a fórmula ou a lista mágica "assegurada" constitucionalmente, mas sim entender a relação entre as competências, a tomada de decisões e a legitimidade, e ver o âmbito no qual se possam aplicar. Por esta razão, neste estudo, optámos por utilizar a posição fenomenológica e normativa. Seguidamente apresentaremos uma história "constitucional/institucional" dos temas relativos às competências da CE. Não se trata dos antecedentes da análise, mas sim do núcleo da análise. Entender o processo de formação das coisas constitui a chave para entender as

opções de que dispomos para examinar ou reexaminar os problemas com que se enfrenta União neste domínio.

9. Ao mesmo tempo, embora rejeitemos a posição de criar uma lista e estejamos a favor do método funcional e prático utilizado no Tratado, acrescentamos dois elementos importantes à nossa análise fenomenológica:

   Examinamos a ideia das listas e tentamos apresentar o que, do nosso ponto de vista, constitui um posicionamento mais sofisticado.

   Apresentamos um estudo sobre um texto legislativo concreto - o Projecto de Directiva relativa à publicidade dos produtos do tabaco. Utilizamos este exemplo para que os nossos leitores esqueçam as considerações abstractas das competências e para que vejam que o tema vai adquirindo a forma de uma proposta concreta. Sugerimos energicamente que o projecto de directiva, e outros textos semelhantes, se concebam como *Ultra Vires* e, de facto, apresentamos uns argumentos legais disponíveis a favor desta visão. Seleccionamos esta opção porque acreditamos que só podem estabelecer-se limites às competências da Comunidade quando se enfrenta uma proposta que tem um objectivo político com o qual se concorda. O estudo deste caso é a defesa de um posicionamento moderado dentro da flexibilidade que oferece o Tratado. Se a nossa análise for rejeitada, então haverá que modificar o Tratado para que este tenha um carácter mais essencialista, que, do nosso ponto de vista, debilitaria a sua funcionalidade.

10. Neste estudo, utilizando o projecto de directiva relativo aos produtos do tabaco como exemplo, defendemos um posicionamento restritivo do exercício das competências funcionalistas outorgadas à Comunidade. Dado que uma das nossas conclusões básicas é a de que o tema das competências é mais um assunto de certa cultura política e jurídica e menos um assunto da forma da linguagem jurídica, é necessário desenvolver uma disciplina lenta neste tema.

11. Do nosso ponto de vista, historicamente, o Tribunal de Justiça europeu fracassou no momento de instaurar nas instituições comunitárias essa disciplina, e agora, provavelmente, não dispõe de autoridade moral para o fazer. Não se pode subestimar o desafio que o Tribunal Constitucional alemão e outros lançaram ao Tribunal de Justiça Europeu, facto este que representa uma bomba-relógio constitucional.

12. Propomos a criação de um Conselho Constitucional para a Comunidade, baseado em alguns aspectos no seu homónimo francês. O Conselho Constitucional só teria jurisdição em matéria de competências (incluindo a subsidiariedade) e decidiria sobre casos que lhe fossem apresentados após a aprovação de uma lei, mas antes de que a mesma entrasse em vigor. Qualquer instituição comunitária, qualquer Estado-membro ou o Parlamento Europeu, actuando por decisão da maioria dos seus membros, poderiam recorrer a esse Conselho. O seu presidente seria o presidente do Tribunal de Justiça Europeu e os seus membros seriam membros dos tribunais constitucionais ou dos seus equivalentes dos Estados-membros. No Conselho Constitucional nenhum Estado-membro em separado teria o direito de veto. A composição também salientaria que a questão das competências seria essencialmente uma das normas

constitucionais a nível nacional, embora sujeita a uma solução da União proposta por uma instituição da União.

Neste estudo, não desenvolveremos alguns aspectos técnicos da proposta. O seu principal mérito, se o tem, é o facto de dar expressão ao tema dos limites fundamentais sem comprometer a integridade constitucional da Comunidade, tal como aconteceu com a decisão alemã sobre Maastricht. Do ponto de vista material, a questão dos limites possui uma "indeterminação", porque o ponto crítico não é o de determinar quais são os limites mas sim quem os decide. A composição do proposto Conselho Constitucional soluciona este ponto, por um lado, no plano puramente político e, por outro, cria um órgão que, neste domínio, gozará de mais confiança por parte da opinião pública do que o próprio TJCE

13. No corpo deste estudo explicamos por que razão esta proposta não deve ser considerada como um ataque ao Tribunal, mas sim ser acolhida com satisfação.

TOIMIVALLAN JAKO

EUROOPAN UNIONISSA

- Yhteenveto -

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-Yhteenveto -

1. Lukuunottamatta kansainvälistä kauppapolitiikkaa, jonka osalta uskomme, että yhteisön ja WTO:n toimivaltojen olisi katsottava olevan samanaikaisesti voimassa - ja ihmisoikeuksien alaa, jolla yhteisölle olisi annettava yleinen toimivalta hyväksyä mikä tahansa toimenpide, jonka avulla ihmisoikeuksien suojelua lisättäisiin *yhteisön lainsäädännön soveltamisalalla* - emme usko, että yhteisö tarvitsee aineellisoikeudellisen toimivaltansa laajentamista.

2. Päinvastoin. Kysymykseen Euroopan unionin toimivallasta on ryhdytty kiinnittämään huomiota entistä herkemmin. Maastrichtin jälkeisessä julkisessa keskustelussa tuli ilmi suuren yleisön tuntema ilmeinen epäluulo - olipa se perusteeton tai ei - sitä kohtaan, että yhteisön toimielimet pystyisivät varmistamaan rajojen asettamisen yhteisön julkisen elämään puuttumiselle. Useita vetoomuksia on esitetty sen puolesta, että yhteisön toimivalta täsmennettäisiin selvästi tältä osin. Tältä osin pyrkimysten pääpainon olisi oltava siinä, että lisätään suuren yleisön luottamusta yhteisön ja unionin toimivallan rajoja kohtaan.

3. Tässä tutkimuksessa soveltamassamme tarkastelussa ei pyritä esittämään optimaalista luetteloa tai kaavaa toimivallan jakamiseksi yhteisön sekä unionin ja sen jäsenvaltioiden välillä. Aina perustamissopimuksen luonnoksesta lähtien tällaisia luetteloita ja kaavoja on laadittu runsaasti. Niistä tärkeimmät liitetään tämän tutkimuksen liitteeseen.

4. Lähestymistapamme pääpaino on sen sijaan "ilmiöiden" tarkastelussa ts. pyrimme ymmärtämään, kuinka kysymys toimivallasta on sovellettavissa yhteisön kaltaiseen järjestelmään, mikä on sen yhteys muihin hallintorakenteisiin ja menettelyihin; lopuksi pyrimme selvittämään, mitä voidaan tehdä toimivallan kiinnittämiseksi perustaan joiltakin osin, jos poliittisessa menettelyssä sitä toivotaan.

5. Yksi toimivaltaan liittyvistä perimmäisistä ongelmista on se tosiasia, että on olemassa kaksi perusnäkemystä, joita jossakin mielessä on mahdotonta sovittaa yhteen.

   Ensimmäisen perusnäkemyksen mukaan toimivallan jako on funktionaalista, ts. kutakin aihetta varten valitaan "paras", "tehokkain" ja "järkevin" hallinnon taso. Läheisyysperiaate voidaan tulkita juuri tämän näkökannan ilmaukseksi: Sen lähtökohtana on, että päätökset olisi tehtävä mahdollisimman lähellä niitä, joita ne koskevat, *kuitenkin* siinä tapauksessa, että hallinnon ylempien tasojen toiminnalla päästään parempiin ja tehokkaampiin tuloksiin, tämä olisi sekä riittävä edellytys että peruste näiden päätösten tekemiselle ylemmällä tasolla. Saasteiden kulkeutuminen rajojen yli on klassinen esimerkki: koska mikään valtio ei pysty yksinään ratkaisemaan ongelmaa, sitä voidaan ja sitä pitää käsitellä kansainvälisellä tasolla.

6. Toinen perusnäkemys on pikemminkin essentialismin näkökannan mukainen kuin funktionaalinen. Toimivallan rajojen katsotaan edustavan "rikkomattomia" arvoja. Tätä näkemystä - joka selvästi poikkeaa edellä esitetystä läheisyysperiaatteen tulkinnasta - voidaan luonnehtia näkemykseksi perusrajoista. Perusrajat ovat perusoikeuksien kaltaisia. Kaikki ovat niiden kannalla, paitsi silloin kun ne rajoittavat asianomaisen tärkeinä pitämiä hankkeita. Perusrajoihin perustuvan näkemyksen johtoajatuksina on kaksi samansuuntaista taustanäkemystä: Siinä saa ensinnäkin ilmauksensa näkemys ihmisyydestä laajempien järjestelmiin alaisuuteen kuuluvien yksittäisten yhteisöjen perimmäisten ja siten loukkaamattomien arvojen puolustajana. Yhteiskunnan vahvemmat voimat voivat painostaa pienempiä yhteiskunnallisia yksiköitä samoin kuin ihmisyksilöitä, joten niitä on suojeltava. Toinen näkemyksen johtoajatuksista on se yksinkertainen tosiasia, että perusrajat auttavat estämään vallan keskittymistä yhdelle hallintotasolle. Tällaisen keskittymisen estämistä pidetään jo sinänsä arvokkaana asiana.

7. Kaikkien ei-unitaristisen järjestelmien, joihin tutkimusryhmä on perehtynyt - Euroopan unioni, USA, Saksa ja Kanada - ongelmana on jakautunut identiteetti, koska ne yrittävät samanaikaisesti, vaikkakin erilaisin painotuksin, sovittaa yhteen funktionalismin ja essentialismin näkemyksiä. Konfliktit ja ristiriidat ovat väistämättömiä.

8. SEU-sopimuksen 3 b artikla on kuvaava esimerkki tästä. Artiklan ensimmäisessä kohdassa pyritään määrittelemään perusraja, samalla kun sen toisessa ja kolmannessa kohdassa pyritään tuomaan ilmi funktionalistinen perusnäkemys. Tämän yhteensovittamisyrityksen tulos on kuitenkin "sekasikiö", sen lisäksi että 3 b artiklan ensimmäinen kohta on erityisen "huokoinen". Vertailu muuhun kokemuspiiriin osoittaa meille asian, jota muiden kuin juristien on vaikea ymmärtää: kielen, juridiikan ja laintulkinnan perusluonteesta seuraa, että missään valtio-oikeudellisessa asiakirjassa ei pystytä kielellisin ilmaisuin *varmentamaan* todella perustavaa rajanmäärittelyä esimerkiksi keskusvallan ja sen osien välillä. Se, missä määrin järjestelmä kallistuu jompaakumpaa ääripistettä kohti riippuu paljon suuremmassa määrin siitä, millaisessa poliittisessa ja oikeudellisessa hengessä lainsäädännöllisen toimivallan käyttäjät ja sen valvojat toimivat. Tavallinen monista liittovaltioista saatu kokemus on, että puitekehysten määrittäjät toimivat pikemminkin perusrajojen hengessä, minkä jälkeen näiden perusrajojen kanssa joutuvat tekemisiin liittovaltion hallinnon elimet, lainsäädäntöelimet, toimeenpanevat elimet ja tuomioistuimet, jotka toimivat funktionalistisessa hengessä - on ymmärrettävää, että kukin hallinnosta vastaava yksikkö pyrkii hoitamaan tämän tehtävänsä mahdollisimman tehokkaasti. Seuraukset ovat yleisesti tunnettuja. Missä on liittovaltio, josta voidaan sanoa, että perusrajat, joita kaikilla liittovaltioilla niiden omien näkemysten mukaan on, on pystytty säilyttämään puolustamalla niitä keskushallinnon määrätietoisia asioihin puuttumisyrityksiä vastaan ?

   Ratkaisu toimivallan järjestämisen kysymykseen ei siis ole löydettävissä siten, että joillekin tekstin ilmaisuille tai luettelolle annettaisiin perustuslain mukainen vahvistus, vaan siten, että ymmärretään toimivallan, päätöksenteon ja legitimiteetin välinen suhde ja nähdään, missä määrin niitä voidaan muokata. Tämän vuoksi päädyimme soveltamaan sekä fenomenologista että normatiivista lähestymistapaa tässä kertomuksessa. Seuraavassa esitämme "perustuslakia ja instituutioita koskevan" historiakatsauksen toimivaltakysymyksistä EY:ssä. Nämä eivät ole tarkastelun taustatekijöitä, vaan sen keskipiste. Sen ymmärtäminen, miten asiat ovat

muovautuneet, on avain sen ymmärtämiseen, mitä vaihtoehtoja on tarjolla unionin tällä alalla nyt kohtaamien ongelmien käsittelemiseksi tai korjaamiseksi.

9. Vaikka hylkäämmekin luettelointiin perustuvan lähestymistavan ja pidämme parempana perustamissopimuksessa sovellettua funktionaalista ja pragmaattista menetelmää, esitämme samalla kaksi olennaista lisäystä fenomenologisen tarkastelutapamme täydennykseksi:

   Käsittelemme luettelojen laatimisen perusajatusta ja pyrimme esittämään tästä mielestämme pisimmälle kehitetyn tarkastelun.

   Esitämme *normatiivisen esimerkkitapauksen* - luonnoksen direktiiviksi tupakan mainonnasta. Esitämme sen lukijoillemme, jotta toimivallan abstraktiin tarkasteluun rajoittumatta voidaan nähdä, miten aiheen kehittely sujuu, kun kysymyksessä on konkreettinen ehdotus. Olemme painokkaasti sitä mieltä, että tätä ja muita vastaavia direktiiviluonnoksia olisi pidettävä *ultra vires* -tapauksina ja kehittelemme kaikki tätä kantaa tukevat lainopilliset väitteet. *Teemme näin, koska katsomme, että rajojen asettamista yhteisön toimivallalle voidaan pohtia vakavasti vain, jos käsiteltävänä on ehdotus, jonka perustana olevan politiikan tavoitteen tarkastelija voi hyväksyä. Esimerkkitapaus on puolustuspuhe sen puolesta, että perustamissopimuksen tarjoaman joustavuuden puitteissa sovellettaisiin varovaista lähestymistapaa. Jos tarkastelumme hylätään, perustamissopimusta olisi muutettava enemmän essentialististen näkemysten mukaiseksi, jolloin mielestämme sen toimivuus heikkenisi olennaisesti.*

10. Tuomme tässä tutkimuksessa esiin, tupakkaa koskevaa direktiiviluonnosta esimerkkinä käyttäen, että kannatamme rajoitetun etenemistavan käyttämistä yhteisölle annetun toiminnallisen toimivallan soveltamisessa. Yksi keskeisistä johtopäätöksistämme on, että toimivalta on aihe, joka on pikemminkin kytkeytynyt tiettyyn poliittiseen ja oikeudelliseen käytäntöön, ja että tässä on vähäisemmässä määrin kysymys muodollisesti oikeasta juridisesta kielenkäytöstä, joten asiassa noudatettavan käytännön on vähitellen kehityttävä tältä osin.

11. Näkemyksemme mukaan historiallinen tarkastelu osoittaa, että Euroopan yhteisöjen tuomioistuin ei ole onnistunut saamaan yhteisön toimielimiä noudattamaan tällaista käytäntöä eikä sillä nyt kenties ole tarvittavaa moraalista arvovaltaa tämän toteuttamiseksi. Ei voida aliarvioida sitä haastetta, joka Euroopan yhteisöjen tuomioistuimeen kohdistuu Saksan perustuslakituomioistuimen ja muiden vastaavien elinten toiminnan johdosta. Kysymyksessä on perustuslaillinen aikapommi.

12. Ehdotamme, että perustetaan yhteisön perustuslakineuvosto, joka joiltakin osin perustuisi Ranskan vastaavan elimen mukaiseen malliin. Perustuslakineuvostolla olisi toimivalta ainoastaan toimivaltaa koskevissa kysymyksissä (läheisyysperiaate mukaan lukien) ja se tekisi päätöksiä asioissa, jotka annettaisiin sen käsiteltäväksi jonkin lain hyväksymisen jälkeen mutta ennen sen voimaantuloa. Perustuslakineuvostoon voisivat vedota kaikki yhteisön toimielimet, jäsenvaltiot sekä Euroopan parlamentti jäsentensä enemmistöllä. Perustuslakineuvoston presidenttinä olisi Euroopan yhteisöjen tuomioistuimen presidentti ja sen jäseninä olisivat jäsenvaltioiden perustuslakituomioistuinten tai niiden kaltaisten elinten istuvat jäsenet. Millään

yksittäisellä jäsenvaltiolla ei olisi perustuslakineuvostossa veto-oikeutta. Sen kokoonpanossa korostuisi myös se, että toimivaltakysymykseen aihekokonaisuutena liittyvät myös kansalliset perustuslailliset normit, mutta unionissa kysymys on kuitenkin ratkaistavissa unionin toimielimen avulla.

Emme tässä tutkimuksessa kehittele pidemmälle ehdotuksen joitakin teknisiä näkökohtia. Ehdotuksen mahdolliset ansiot ovat ennen kaikkea siinä, että ehdotuksessa tuodaan ilmi huoli perusrajoista, kuitenkaan asettamatta kyseenalaiseksi yhteisön perustuslaillista koskemattomuutta, kuten Saksan Maastrichia koskevassa päätöksessä tehtiin. Koska aineelliselta kannalta tähän kysymykseen rajoista liittyy aiheen luonteesta johtuva määrittelemättömyys, kriittinen kysymys ei ole, mitkä kyseiset rajat ovat, vaan se, kuka niistä voi päättää. Perustuslakineuvoston toteuttaminen ehdotetussa kokoonpanossa toisaalta siirtäisi kysymyksen pois yksinomaan poliittiselta foorumilta, toisaalta näin luotaisiin elin, joka tässä kysymyksessä saisi olettamuksemme mukaan osakseen paljon suuremman suuren yleisön luottamuksen kuin Euroopan yhteisöjen tuomioistuin.

13. Tutkimuksen perusosassa selvitämme, miksi tätä ehdotusta ei ole pidettävä Euroopan yhteisöjen tuomioistuinta vastaan kohdistettuna hyökkäyksenä, vaan että tuomioistuimen olisi suhtauduttava tutkimukseen myönteisesti.

TILLDELNING AV BEFOGENHETER

I EUROPEISKA UNIONEN

- Sammanfattning -

PE 166.756

TILLDELNING AV BEFOGENHETER I EUROPEISKA UNIONES

- Sammanfattning -

1. Med undantag för området internationell handelspolitik - där vi anser att gemenskapens befogenheter skall vara lika omfattande som för Världshandelsorganisationen (WTO) - och området mänskliga rättigheter där gemenskapen bör ges en allmän behörighet att vidta varje åtgärd som skulle öka skyddet av mänskliga rättigheter inom *gemenskapsrättens tillämpningsram* - anser vi inte att gemenskapen behöver någon utökning av sin omfattande jurisdiktion.

2. Tvärtom finns det en ökad känslighet vad gäller behörighetsfrågan inom EU. Den offentliga debatten efter Maastricht visar ett klart misstroende hos allmänheten - berättigat eller ej - i fråga om gemenskapsinstitutionernas förmåga att garantera gränser för gemenskapens intrång i det offentliga livet. Det har förekommit många försök med att klargöra gemenskapens befogenheter i detta avseende. De största insatserna med hänsyn till detta bör inriktas på att öka allmänhetens förtroende vad avser gränserna för gemenskapens och unionens behörighetsområden.

3. I denna undersökning har vi valt att inte försöka upprätta en optimal lista eller formel för tilldelning av befogenheter mellan gemenskapen och unionen och dess medlemsstater. Från och med förslaget till fördrag finns det massvis av sådana listor och formler. Vi skall ange de viktigaste i en bilaga till denna undersökning.

4. I stället har vi valt ett "fenomenologiskt" grepp - dvs. vi försöker förstå vilken roll frågan om befogenheter spelar i en sådan statsform som gemenskapens. Vilket är sambandet mellan denna och andra styrelsestrukturer och -processer och slutligen att utforska vad man kan göra för att försöka fastställa vissa befogenheter, om det är vad den politiska processen kräver.

5. Ett stort problem när det gäller behörighet är de två samtidigt existerande världssynsätten, vilka i viss mening är oförenliga.

   Enligt ett av dessa synsätt är tilldelning av befogenheter en funktionell fråga där det gäller att finna den "bästa", "mest effektiva", "mest rationella" beslutsnivån för rätt sakområde. Subsidiaritet kan tolkas ge uttryck för precis detta synsätt: Den baseras på en förmodan att beslut bör fattas så nära dem som påverkas som möjligt, *men* om bättre, mer effektiva resultat kan garanteras på högre beslutsnivå, skulle detta inte endast vara en förutsättning för att fatta dessa beslut på den nivån utan även berättiga ett sådant beslut. Det klassiska exemplet är miljöförorening över nationsgränser: Eftersom ingen stat kan lösa problemet ensam skall och bör det lösas på transnationell nivå.

6. Det andra synsättet är snarare grundläggande än funktionellt. Gränslinjer mellan behörighetsområden anses som ett uttryck för "okränkbara" värden. Vi kan karakterisera detta synsätt - som skiljer sig från den tidigare nämnda subsidiaritetsversionen - som ett för grundläggande gränslinjer. Dessa är som grundläggande rättigheter. Alla är för dem utom när de är till hinder för ens eget speciella projekt. Det positiva med grundläggande gränslinjer har två parallella grundorsaker. Först som ett uttryck för mänsklighet som övergår i djupgående normer i enskilda samhällen som existerar inom större statsformer, som således inte får överträdas. I mindre sociala enheter kan enskilda människor få utstå motsvarande förtryck av starkare samhällskrafter och måste således skyddas. Ett andra positivt drag med grundläggande behörighetsgränser är det enkla faktum att de hjälper till att förhindra att makten samlas på en statlig beslutsnivå. Man anser att det finns ett värde *per se* att förhindra den typen av maktkoncentration.

7. Alla icke centralstyrda system som denna grupp känner till - Europeiska unionen, USA, Tyskland och Kanada - lider av splittrad karaktär när de på en och samma gång och med olika doseringar försöker ta hänsyn till både det funktionella och det grundläggande. Konflikt och inkonsekvens är oundviklig..

8. Artikel 3b i Romfördraget är ett perfekt exempel på detta. Där försöker man både definiera en grundläggande ram i dess första stycke och att ge uttryck för det funktionella synsättet i dess andra och tredje stycke. Men denna sammanjämkning är en chimär. Det beror inte endast på att den första stycket i artikel 3b är sällsynt intetsägande. Jämförande erfarenheter lär oss något som andra än jurister har svårt att förstå: Själva naturen i fråga om språk, rättsregler och lagtolkning antyder att praktiskt taget ingen språklig framställning i ett konstitutionellt dokument kan *garantera* en verkligt grundläggande gränslinje mellan ska vi säga den centrala makten och makten hos de konstituerande enheterna. I vilken utsträckning ett system svänger mot en pol eller en annan beror mycket mer på den politiska och rättsliga grundsynen hos dem som utövar lagstiftande befogenheter och dem som kontrollerar systemet. En gemensam erfarenhet i många federala stater är en historia om rambyggare, drivna mer av etiska normer för grundläggande gränslinjer som på andra sidan möts av federala regeringens organ, lagstiftande församlingar, verkställande myndigheter och domstolar drivna av funktionalistiska motiv - när allt kommer omkring vill man, när man väl har regeringsmakt, använda den på det mest effektiva sättet. Resultaten är välkända. Var finns den federala stat där man kan säga att grundläggande gränslinjer för behörighet, som alla gör anspråk på att ha, har motstått en central myndighets beslutsamma ansträngning att tränga igenom dessa gränslinjer?

   Den viktigaste faktorn för tilldelning av befogenheter är således inte att finna det magiska utkastet till en formel eller en lista som skall garanteras enligt konstitutionen utan att förstå förhållandet mellan befogenheter, beslutsfattande och legitimitet och att förstå i vilken utsträckning dessa kan utvecklas. Detta är orsaken till varför vi har valt ett fenomenologiskt liksom normativt grepp i denna undersökning. I följande avsnitt kommer vi att presentera en "konstitutionell-institutionell" historik över frågor som rör befogenheter inom EU. Detta är inte bakgrunden till analysen - detta är det centrala i analysen. Man måste förstå hela utvecklingen för att kunna förstå de möjligheter som finns för att lösa eller avhjälpa de problem som unionen nu står inför på detta område.

9. Samtidigt, även om vi förkastar listmetoden och stöder den funktionella och pragmatiska metod som används i fördraget, erbjuder vi två viktiga tillägg till vår fenomenologiska analys:

   Vi undersöker idén om listor och försöker presentera vad som enligt vår åsikt är det mest sinnrika tillvägagångssättet för denna metod.

   Vi presenterar en *normativ fallstudie* - förslaget till direktiv om tobaksreklam. Vi använder den för att föra våra läsare utanför den abstrakta bedömningen av befogenheter för att hur sakfrågan utvecklas i förhållande till ett konkret förslag. Vi hävdar ihärdigt att förslaget till direktiv - och andra liknande - bör betraktas som *icke konstitutionell* och vi bygger alla tillgängliga juridiska argument på denna åsikt. *Vi gör detta därför att enligt vår uppfattning är det endast mot ett förslag som har politiska mål till vilka man samtycker - som man allvarligt kan ta itu med att fastställa gränser för gemenskapens befogenheter. Fallstudien är befrämjande - befrämjande av en återhållsam inställning inom ramen för den flexibilitet som fördraget ger. Om vår analys skall förkastas, måste fördraget ändras till att bli mer grundläggande, vilket enligt vår mening skulle minska dess funktionalitet.*

10. Vi förespråkar i denna undersökning, med förslaget till tobaksdirektiv som vårt exempel, en restriktiv inställning när det gäller utövandet av de funktionella befogenheter som tilldelats gemenskapen. Eftersom en av våra viktigaste slutsatser är att frågan om behörighet är mer en fråga om en viss politisk och rättslig kultur och mindre en fråga om formellt juridiskt språk måste en varsam disciplin avseende detta utvecklas.

11. Vi anser att historiskt har EG-domstolen misslyckats med att införa en sådan disciplin i gemenskapens institutioner och troligtvis nu saknar den moraliska auktoriteten att göra detta. Man kan inte undervärdera utmaningen för domstolen från den tyska konstitutionsdomstolen och andra liknande denna. Detta utgör en konstitutionell tidsbomb.

12. Vi vill föreslå att ett konstitutionellt råd inrättas för gemenskapen som i vissa avseenden utformas efter sin franska motsvarighet. Det konstitutionella rådet skulle endast ha jurisdiktion över behörighetsfrågor (inklusive subsidiaritet) och skulle avgöra fall som överlämnats till det efter det att en lag antagits men innan den trätt i kraft. Detta råd skulle kunna utnyttjas av varje gemenskapsinstitution, varje medlemsstat eller Europaparlamentet företrädande en majoritet av sina medlemmar. Dess ordförande skulle vara EG-domstolens ordförande och dess medlemmar skulle utgöras av sittande medlemmar i konstitutionella domstolar eller deras motsvarighet i medlemsstaterna. Ingen ensam medlemsstat skulle ha vetorätt i det konstitutionella rådet. Rådets sammansättning skulle även understryka att frågan om befogenheter i grunden även är en fråga om nationella, konstitutionella normer men fortfarande beroende av en lösning för hela unionen av en unionsinstitution.

    I denna undersökning kommer vi inte att närmare uttala oss om förslagets tekniska aspekter. Dess största förtjänst, om det har någon, är att den uttrycker oron över grundläggande behörighetsramar utan att dock äventyra gemenskapens konstitutionella integritet såsom skedde enligt det tyska Maastricht-beslutet. Eftersom frågan om gränslinjer ur materiell synvinkel har en inbyggd obestämbarhet, gäller den avgörande frågan inte vilka gränserna är utan vem som

får besluta. Det föreslagna rådets sammansättning eliminerar å ena sidan frågan från det rent politiska planet, å andra sidan skapar det ett organ som i denna fråga förmodar vi skall få ett mycket större förtroende hos allmänheten än själva EG-domstolen.

13. Vi förklarar i undersökningens huvuddel varför detta förslag inte bör betraktas som en attack mot domstolen utan bör välkomnas av den.

THE DIVISION OF COMPETENCES

IN THE EUROPEAN UNION

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THE DIVISION OF COMPETENCES IN THE EUROPEAN UNION

A. APPROACH AND ORIENTATION - PHENOMENOLOGICAL AND NORMATIVE

The approach we take in this Study is not to try and come up with the optimal list or formula for dividing competences between the Community and Union and its Member States. From the Draft Treaty onwards such lists and formulae exist galore. We shall attach the most important in an annex to this study.

Instead, our principal approach is "phenomenological" – i.e. we try and understand how the issue of competences "plays out" in a polity such as the Community. What is the nexus between it and other governance structures and processes, and finally, to explore what can be done to try and anchor certain competences if that is what the political process wishes.

One major underlying dilemma of competences is the coexistence of two world views which in a certain sense are irreconcilable.

For one world view division of competences is functional, a matter of allocating the "best", "most efficient" "most rational" level of governance to the appropriate subject matter. Subsidiarity can be read as giving expression precisely to this view: It starts from a presumption that decisions should be as close as possible to those affected by them; *but* if better, more efficient, outcomes can be assured at higher levels of governance, that would not only be a condition for taking those decisions at that level but also a justification. The classical example is trans-boundary pollution: Since no one state can tackle the problem alone, it may, and should, be tackled at the transnational level.

The other world view is essentialist rather than functional. Boundaries between jurisdiction are considered as an expression of "inviolable" values. We can characterize this approach – distinct from the above version of subsidiarity – as one of Fundamental Boundaries. Fundamental Boundaries are like fundamental Rights. Everybody is in favour except when they get in the way of one's pet project. The appeal of fundamental boundaries rests in two parallel roots. First as an expression of a vision of humanity which vests the deepest values in individual communities existing within larger polities which, thus, may not be transgressed. Smaller social units can suffer parallel oppression to individuals by stronger societal forces and, thus, must be protected. The second appeal lies in the simple fact that fundamental boundaries help prevent the aggregation of power in one level of government. It is thought that there is a *per se* value in preventing that type of aggregation.

All the non unitary systems with which this team is familiar – the European Union, the USA, Germany and Canada – suffer from split personality, trying to accommodate at one and the same time, with different dosages, the functional and the essentialist. Conflict and contradiction are inevitable.

Article 3b TEU is a perfect example of this. It tries both to define a fundamental boundary in its first paragraph and to give expression to the functional world view in its second and third paragraphs. But this reconciliation is a chimera: It is not simply that the first paragraph of Article 3b is extraordinarily porous. Comparative experience teaches us something that non lawyers find difficult to understand: The very nature of language, of law, and of legal interpretation suggests that practically no language in a constitutional document can *guarantee* a truly fundamental boundary between, say, the central power and that of the constituent units. The extent to which a system will veer towards one pole or another depends much more on the political and legal ethos which animates those who exercise legislative competences and those who control it. A common experience of many federal states is a story of framers animated more by the ethos of fundamental boundaries who are then met by organs of federal government, legislatures, executives and courts animated by functionalist instincts – after all, once you are governing you want to do it most efficiently. The results are well known. Where is the federal state in relation to which one can say that fundamental boundaries, which all profess to have, have withstood a determined effort at infiltration by central authority?

The key to competence management; then, is not to find the magical drafting formula or list which will be constitutionally guaranteed, but to understand the relationship between Competences, decision making and legitimacy and to see the extent to which these can be shaped. This is why we have opted for a phenomenological as well as a normative approach in this Study. We will be presenting below a "constitutional-institutional" history of the issues of competences in the EC. This is not the background to the analysis– this is the centre of the analysis. To understand how things shaped up is the key to understanding the options available to address or redress the problems the Union now faces in this area. Likewise, do not be tempted to skip the little stories such as that of the Italian Migrant Worker in Germany and his battle to get a scholarship for his young son under the canopy of European law. The story does not illustrate the principle: The story *is* the principle. The temptation to transgress and push and redefine jurisdictional lines and to infiltrate fundamental boundaries is always connected with a story and a good cause. To understand this narrative is to learn about the limits which legal drafting and Treaty provisions can and cannot achieve.

At the same time, though we reject the list approach and favour the functional and pragmatic method used in the Treaty, we offer two important additions to our phenomenological approach:

We examine the idea of lists and try and present what in our view is the most sophisticated approach to this.

We present a *Normative Case Study* – the Draft Directive On Tobacco Advertising. We use it to take our readers outside the abstract consideration of competences and to see how the issue shapes in relation to a concrete proposal. We argue strenuously that the Draft Directive – and others like it – should be regarded as *Ultra Vires* and we build all the legal arguments available for this view. *We do this because in our view it is only against a proposal with the policy objective of which one agrees – that one can be serious about setting limits to Community competences. The Case Study is Advocacy – advocacy for a restrained approach within the flexibility offered by the Treaty. If our analysis is to be rejected than the Treaty would have to*

be modified in a more essentialist manner which in would, in our view, undermine its functionality.

Finally, it should be noted that the issue of Competences as a live political issue has erupted only in recent years – in the last decade or so – and that hitherto it was rather dormant. What accounts for this eruption? It is only by a detailed and sober analysis of the constitutional history of the Union that we will understand the present day legal and political anxieties.

B. THE SILENT CONSTITUTIONAL REVOLURION: THE COLLAPSE OF THE PRINCIPLE OF ENUMERATION AS A CONSTITUTIONAL GUARANTEE IN THE LEGAL ORDER OF THE EUROPEAN UNION

When we talk about constitutional revolutions in the legal order of the Union we usually refer to the "heroic" period of the mid-60s to mid-70s, a period in which the European Court of Justice, in cooperation with national courts, introduced and accepted such classic doctrines as Direct Effect, Supremacy and the protection of fundamental human rights.

The mid-70s to mid-80s are traditionally considered as an epoch of stagnation in the evolution of European integration. The momentum created by the accession of Great Britain, Ireland and Denmark did not last long. The Oil Crisis of late 1973 displayed a Community unable to develop a common external posture and internally the addition of three new Member States, two of which -- the UK and Denmark -- often recalcitrant partners, burdened the decision making process bringing it to a grinding pace. It is not surprising that much attention was given in that period to proposals to address a seriously deteriorating institutional framework and to re-launch the Community.

And yet it is in this very period of political stagnation that one of the most formidable large scale mutations in the constitutional architecture of the Community takes place, a mutation which has received far less attention than the constitutional revolution of the 60s. It concerned the principle of division of competences between Community and Member States.

In most federal polities the demarcation of competences between general polity and constituent units is the most explosive of "federal" battle-grounds. Traditionally, as mentioned, the relationship in non-unitary systems is conceptualized by the principle of enumerated powers. The principle has no fixed content and its interpretation varies from system to system; in some it has a stricter and in others a more relaxed construction. Typically, the strength by which this principle is upheld (or, at least, the shrillness of the rhetoric surrounding it) is a reflection of the strength of the belief in the importance of preserving the original distribution of legislative powers as a defining feature of the polity. Thus, there can be little doubt about the very different ethos which underscored the evolution of, for example, the Canadian and U.S. federalisms, in their formative periods and beyond, regarding enumeration. Nowhere is this different ethos clearer than in the judicial rhetoric of enumeration. The dicta of Lord Atkin (in the Canadian context) and Chief Justice Marshall (in the American context) concerning powers are the theater pieces of this rhetoric as an expression of different ethos.

On enumeration, Lord Atkin stated:

> No one can doubt that this distribution ... of legislative powers between the Dominion and the Provinces ... is one of the most essential conditions, probably the most essential condition [in the Canadian federal arrangement]... while the ship of state now sails on larger ventures ... she still retains the watertight compartments which are an essential part of her original structure. A.G. for Canada v A.G. for Ontario [1937] A.C. 326 (P.C.).

Over a century before Chief Justice Marshall asserted:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

Likewise, the recurring laments over the "Death of Federalism" in this or that federation are typically associated with a critique of the relaxed attitude towards enumeration and the inevitable shift of power to the center at the expense of the states.

The difference in approach to the strictness or flexibility of enumeration is reflective of very basic understanding of federalism and integration. Returning to the Canadian / U.S. comparison, we find the Atkin and Marshall dicta conceptualized as follows: Wade, a distinguished British constitutionalist in the context of the Canadian experience suggests that:

> The essential elements of a federal constitution are that powers are divided between the central and provincial governments and that neither has legal power to encroach upon the domain of the other, except through the proper process of constitutional amendment.... [T]he spirit ... which is inherent in the whole federal situation [is] that neither side, so to speak, should have it in its power to invade the sphere of the other.

In contrast, Sandalow, one time Dean of the Michigan Law School, reflecting on the U.S. experience suggests that :

> The disintegrative potential of [questions concerning the legality of governmental action] is especially great when they involve the distribution of authority in a divided or federal system. ...[The solution to this problem in the United States is that if]...Congress determines that a national solution is appropriate for one or another economic issue, its power to fashion one is not likely to be limited by constitutional divisions of power between it and the state legislatures.

The recent bare majority decision of the Supreme Court in *Lopez* overturning federal legislation for lack of competences under the Commerce Clause is, probably, the exception to prove Sandalow's point. It is the first decision of that nature since the New Deal days in 1937 and despite a certain new mood in the USA and a couple of subsequent decisions in this direction it is still very much an open question whether there will be a change the general understanding of non-

interference by the judiciary in allocational principles.

These differences in approach could be explained by formal differences in the structure of the British North American Act (which predated the current Canadian Constitution) as compared to the American Constitution. But they also disclose a principled difference in the value attributed to enumerated powers as part of the federal architecture of the two systems, a difference between ends and means, functions and values. In the Wade conception of the Canadian system the very division of powers is considered as a per se value: as an end in itself. The form of divided governance was regarded on par with the other fundamental purposes of a government such as obtaining security, order and welfare, and as part of its democratic architecture. In the United States, as the system has evolved, the federal distribution retained its constitutional importance, but, in the practice of that system, there was a tendency to subject that principle of division to higher values and to render it as a useful means for achieving other aims of the American Union. To the extent that the division became an obstacle for the achievement of such aims it was sacrificed. We may refer to this approach as a functional one. The dichotomy is, of course, not total and we find strands of both in each of the systems. Nevertheless, in the weight given to each of the strands, in the evolution of the two federations there are clear differences. And ultimately, and of crucial importance, the legal debate about division of powers, was (and remains) frequently the code for battles over raw power between different locations of governance.

In Europe, the Treaty itself does not precisely define the material limits of Community jurisdiction. But it is clear that in a system that rejected a "melting pot ethos" and speaks in the Preamble to its constituent instrument of " an ever closer union among the peoples of Europe," which saw power being bestowed by the Member State on the Community (with residual power thus retained by the Member States) and consecrated in an international Treaty containing a clause which conditions revision of this Treaty effectively on ratification by parliaments of all Member States, the "original" understanding was that the principle of enumeration would be strict and that jurisdictional enlargement (*rationae materia*) could not be lightly undertaken. This understanding was shared not only by scholars, but evidenced also in the practice of the Member States and the political organs of the Community as well as by the Court of Justice itself. Thus, in its most famous decision, *Van Gend en Loos*, the Court speaks of the Community as constituting "... a new legal order of international law for the benefit of which the states have limited their sovereign rights, *albeit in limited fields*". And earlier, in even more striking language, albeit related to the Coal and Steel Community, the Court explained that,

> [t]he Treaty rests on a derogation of sovereignty consented by the Member States to supranational jurisdiction for an object strictly determined. The legal principle at the basis of the Treaty is a principle of limited competence. The Community is a legal person of public law and to this effect it has the necessary legal capacity to exercise its functions but only those.

In the 60s the Member States reacted to the Direct Effect and Supremacy constitutional revolution by seizing effective control of Community governance. Given that a lax attitude to enumeration would indeed seem to result in a strengthening of the center at the expense of the Member States, we would expect that this "original" understanding of strict enumeration would be tenaciously preserved.

And yet, the period of the 1970s to the early 1980s is, in our view, as fundamental in the transformation of Europe as the 60s. In this period the Community order underwent a mutation almost as significant as that which preceded it in the previous decade. In the 1970s and early 1980s the principle of enumerated powers as a constraint on Community *material* jurisdiction (absent Treaty revision) substantially erodes and in practice virtually disappears. The constitutional result was that no core of sovereign state powers was left beyond the reach of the Community. Put differently, if the constitutional revolution was celebrated in the 1960s "albeit in limited fields," the 1970s saw the erosion of these "limits."

As Judge Lenaerts, an eminent authority, assesses the Community today: "[t]here simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community"

It is interesting (assuming we are correct in our characterization of the 70s) that this mutation went largely unnoticed by the interpretative communities in Europe: the Member States and their governments, political organs of the Community, the courts, and, to an extent, academia. This lack of attention is all the more interesting given that the interaction among those interpretative communities brought about this fundamental mutation. To be sure, the fact that Community jurisdiction grew remarkably in the 1970s and early 1980s was widely observed. Indeed, this growth was, as mentioned above, willed by all actors involved.

It is important to understand that we are not claiming that in this period jurisdictional expansion was *quantitatively* impressive. This would be strange in a Community which was afflicted by a profound decisional malaise. In fact there were many areas of explicit Community competence, such as Transport, where nothing was done. The interesting tale concerns the variety of new fields into which the Community moves, each on its own of relatively little importance. In fact, it could be argued that these activities emerged as a distraction given the Community's inability to deal with its truly pressing problems. But the cumulative effect of all these activities was significant.

What was not understood was that in this process of growth and as a result of its mechanics, the guarantees of jurisdictional demarcation between Community and Member States eroded to the point of collapse. This cognitive dissonance is so striking that our analysis shall attempt to explain not only the legal-political process by which strict enumeration eroded and practically disappeared, but also the reasons for the non-transparency of so fundamental a change in the Community architecture.

Naturally, because the process itself was largely unnoticed when it occurred, its far reaching consequences and significance were not appreciated at the time. But the consequences and significance of the mutations in the 70s, even if unnoticed then, are defining the debate about competences since, at least, the entry into force of the Single European Act.

C. A TIPOLOGY OF JURISDICTIONAL MUTATION IN THE EC

It is important that we do not use the term mutation loosely. As a "Framework document" there are many instances where the Treaty itself calls for, or allows, change without Treaty amendment. We want to reserve the term mutation to those instance where the change is fundamental.

If we were to try and map the original understanding of the distribution of competences of the Community and Member States in schematic terms the following picture would emerge.

(1) there are areas of activity over which the Community has no jurisdiction,

(2) there are areas of activity which are autonomous to the Community, which are beyond the reach of the Member States jurisdiction as such, and

(3) there are large areas of activity where Community and Member State competences overlap and are concurrent.

A very strict concept of enumeration would suggest that this demarcation, whatever its precise content, could and should change only in accordance with the provisions for Treaty amendment. Jurisdictional mutation in the concept of enumeration would occur were we to find evidence of substantial change in this map without resort to Treaty amendment.

In fact, during the period in question mutation thus defined occurs. Moreover it is not occasional or limited but happens in a multiplicity of forms the combination of which leads to our claim of erosion of constitutional guarantees of enumeration. The picture may best be grasped by thinking of mutation as occurring in four distinct categories or prototypes.

1. The Categories of Mutation

1. Extension

Extension is mutation in the area of autonomous Community jurisdiction . The most striking example illustrating this type of change is the well known history of the evolution of a higher law of human rights in the Community. Though the Treaty contains elaborate provisions for review of Community measures by the European Court of Justice it does not include a "bill of rights" against which to measure Community acts, nor does it mention, as such, human rights as a grounds for review. And yet, in a process starting in 1969 but consolidated in the 1970s, the Court constructed a formidable apparatus for such review. Independent of the legal rationale and the policy motivations for such a development, it could not have occurred if the Court had taken a strict view of permissible change in the allocation of competences and jurisdiction. If the court had taken such a view, such a dramatic change could have taken place only by Treaty amendment.

An equally striking example from an area of autonomous Community jurisdiction concerned the standing of the European Parliament to be sued and its locus standi to bring an action for judicial

review against acts of other Community institutions. The plain and simple language of the Treaty would seem to preclude both action against and by the European Parliament. Yet the Court, in an expansive systemic (and, in our view wholly justified) interpretation of the Treaty first allowed Parliament to be sued and then, after some hesitation, granted Parliament standing to sue.

The category of extension calls for four ancillary comments.

First, it must be emphasized that the analysis of extension (and indeed the other categories of mutation) is intended, for the time being, to be value-neutral. We do not present these examples as a critique of the "Court running Wild" or exceeding its own legitimate interpretative jurisdiction. Evaluating these developments, to which we shall return later, involves considerations far wider and weightier then the often arid discussion of judicial propriety. What is important, if there is any force in our analysis, is the recasting of known judicial developments usually analyzed in other legal contexts as data in the analysis of jurisdictional mutation.

Second, in the case of extension, the principal actor instigating extension was the Court itself, though of course at the behest of some plaintiff; other actors played a more passive role. The action of the Court must be viewed simultaneously as both reflective of a flexible, functional approach to enumeration and constitutive of such an ethos in the Community.

Third, this jurisdictional mutation, despite the radical nature of the measures themselves, was rather limited, since it was confined to changes within the autonomous sphere of the Community and did not have a direct impact on the jurisdiction of the Member States. Indeed, the human rights jurisprudence actually curtailed the freedom of action of the Community. The changes of standing concerning the Parliament were similar in potentially chilling the legislative power of Commission and Council although occurring in a more muted form.

Finally, and perhaps not altogether surprisingly, these developments and others like them, partly because they were seen as pertaining to these other legal categories and partly because they did not encroach directly on the Member State jurisdiction, were, with limited exceptions, both welcomed and accepted by the different interpretative communities in Europe. (In any event, these developments were hardly perceived as pertaining to the question of jurisdictional demarcation.)

2. Absorption

Absorption is a far deeper form of mutation. It occurs when, in the exercise of substantive legislative powers bestowed on the Community, the E.C. legislative authorities, often unintentionally, impinge on areas of Member State jurisdiction outside the explicit competences of the Community.

One of many striking illustrations is offered by the events encapsulated in the Casagrande case.

Donato Casagrande, an Italian national, son of Italian migrant workers, lived all his life in Munich.

In 1971-1972 he was a pupil at the German Fridtjof-Nansen-Realschule. The Bavarian law on educational grants (BayAf`G) entitles children who satisfy a means test to receive a monthly educational grant from the Lander. The city of Munich refused his application for a grant relying on Article 3 of the same educational law, which excluded from entitlement all non-German aliens except stateless people and aliens residing under a right of asylum.

Casagrande, in an action seeking a declaration of nullity of the educational law, relied principally on Article 12 of Council Regulation 1612/68. The Article provides that "...the children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory." Further, the Member States must encourage "... all efforts to enable such children to attend these courses under the best possible conditions."

The Bayerisches Verwaltungsgericht, in an exemplary understanding of the role of review of the European Court of Justice, sought a preliminary ruling on the compatibility of the Bavarian educational provision with Article 12 of the Council Regulation. The submission of the Bavarian Public Prosecutor's Office (Staatsanwaltschaft), which intervened in the case, illustrated well the issue of powers and mutation.

The Council, it was submitted, exceeded its powers under Articles 48 and 49 EEC. These Articles are concerned with the conditions of workers. "Since individual educational grants come under the sphere of educational policy [in respect of which the Council has no jurisdiction]...it is to be inferred that the worker can claim the benefit of assimilation with nationals [as provided in Article 12] only as regards social benefits which have a direct relation with the conditions of work itself and with the family stay ...."

Article 12 of the Regulation must under this view be read as entitling children of migrants to be admitted under the same conditions, but not to receive educational grants. Giving his assertion its strongest reading, the Bavarian public prosecutor thus denied the very possibility of a conflict between Article 12 and the Bavarian BayAfog, since it simply could not apply to educational grants. Under a weaker interpretation, he was pleading for a narrow interpretation of the provision of Article 12 because of the jurisdictional issue. Underlying this submission was the deeper ground that if education is outside the Community competence, then the Regulation itself transgresses the demarcation line; in any event, the interpretation sought by Casagrande could not stand.

How then was the Court to deal with the question? One can detect two phases in the process of judicial consideration. The first phase consisted of an interpretation of the specific Community provision in an effort to understand its full scope. It is important to notice that while engaging in this phase the Court acted as if it were in an empty jurisdictional space with no limitations on the reach of Community law. Not surprisingly, the Court's rendering of Regulation 12 led it to the conclusion that the Article did cover the distribution of grants.

In the second phase of analysis the Court addressed the jurisdictional-mutation problem. We must remember that the primary ground for the illegality of a measure, the infringement of the Treaty,

certainly covers jurisdictional incompetence. The Court first acknowledged that "...educational and training policy is not as such included in the spheres which the Treaty had entrusted to the Community institutions." The allusion to the Community institutions is important: the case after all deals with an issue of "secondary legislation" enacted by the political organs. But, in the key phrase (not an example of lucidity), the Court continues "...it does not follow that the exercise of powers transferred to the Community," enlarging thus the language from Community institutions to the Community as a whole and hence from secondary legislation to the entire Treaty, "is in some way limited if it is of such a nature as to affect [national] measures taken in the execution of a policy such as that of education and training." Now we understand the importance of the two-phased judicial analysis.

In phase one the Court explained the meaning of a Community measure. The interpretation may be teleological but not necessarily to the degree which the Court performed in relation to the evolution of the higher law of human rights. Absorption is in this way distinguishable from extension. In the second phase, the Court stated that to the extent that national measures, even in areas over which the Community has no competence, conflict with the Community rule, these national measures will be absorbed and subsumed by the Community measure. The Court said that it was not the Community policy which was encroaching on national educational policy; rather, it was the national educational policy which was impinging on Community free-movement policy and thus must give way.

The category of absorption also calls for some interim commentary.

> First, in this higher form of mutation at least two interpretative communities are playing a role in the erosion of strict enumeration: principally the legislative interpretative Community, comprising in this case Commission, Parliament and Council (with a decisive role for the Governments of the Member States), and the judicial one. This is important in relation to the question of the acceptance of the overall mutation of jurisdictional limits. As a simple examination of extension might have indicated, it cannot be seen as a judicially led development, although legal sanctioning by the Court will have played an important role in encouraging this type of legislation in future cases.
>
> Second, the limits of absorption are important. Although absorption extends the effect of Community legislation outside the Community jurisdiction, it does not, critically, give the Community original legislative jurisdiction (in, say, the field of education). The Community could not, in the light of *Casagrande v Landeshauptstadt Mhnchen* directly promulgate its own full-fledged educational policy.

This distinction should not diminish the fundamental importance of absorption and its inclusion as an important form of mutation, however. This can be gauged by trying to imagine the consequences of a judicial policy which would deny this possibility of absorption. The scope of effective execution of policy over which the Community had direct jurisdiction would, in a society in which it is impossible to draw neat demarcation lines between areas of social and economic policy, be significantly curtailed; but at the same time there is a clear sacrifice and erosion of the principle of enumeration. And, of course, the absorption doctrine invokes a clear preference for

the Community competence rather than the state competence. In a sense the language of the Court suggests a simple application of the principle of supremacy. But this is not a classical case of supremacy. After all, in relation to issues of jurisdiction, supremacy may only mean that each level of government is supreme in the fields assigned to it. Here we have a case of conflict of competences. The Court is suggesting that in such conflicts the Community competence must prevail. This is probably the doctrinal crux of absorption.

3. Incorporation

The term is borrowed from the Constitutional history of the United States, denoting the process by which the federal Bill of Rights, initially perceived as applying to measures of the federal government alone, was extended to state action through the agency of the Fourteenth Amendment. The possibility of incorporation within the Community system appears at first sight improbable. We noted already the absence of a Community "bill of rights." Community incorporation would entail not one but two acts of high judicial activism. First, the creation of judge-made higher law for the Community, and then its application to acts of the Member States.

Looking, however, at this issue not through the prism of human rights discourse, but as a problem of jurisdictional allocation suggests that incorporation may not, after all, be so inconceivable. In the field of human rights, incorporation invokes no more than a combination of extension and absorption. The frequency and regularity by which these two other forms of Community mutation are exercised suggest that incorporation is a distinct possibility.

The interplay of the actors in pushing for this form of mutation is interesting. In an early case, the Court, of its own motion, seemed to open the door to this development. In subsequent cases, the Commission pushed hard for such an outcome, but the Court's responses were mixed. In some cases it seemed to be nodding in this direction in other cases it firmly rejected the possibility.

In the 70s, then, incorporation was not a fait accompli in the evolving picture of mutation of jurisdictional limits. But the concept, even in its embryonic Community form, was important for two reasons.

> First, it shows again the internal interplay of the various actors in pushing the frontiers of Community jurisdiction. At times it is the Court; at other times the legislative organs in conjunction with the Court; at other times still, the principal actor is the Commission trying, as in this case, to enlist the Court in its support.
>
> Second, it shows the dynamics of erosion of enumeration. That incorporation could be tried, more than once: at first splitting the Court from the Opinion of its Advocate General and then being developed into a somewhat bifurcated jurisprudence, is only conceivable in a legal-political environment which has already moved, through the agencies of extension and incorporation, far away from a strict concept of enumeration.

It should come as no surprise that a decade later the Court took the plunge firmly and it is now established that there will be ECJ human rights review of certain categories of Member State acts.

4. Expansion

Expansion is the most radical form of jurisdictional mutation. Whereas the case of absorption concerned Community legislation in a field in which the Community had clear original jurisdiction, and described a mutation occurring in terms of the effects of such legislation spilling over into fields reserved to the Member States, by expansion we mean the case in which the original legislation of the Community "broke" jurisdictional limits.

We have already alluded to the expansive approach to implied powers adopted by the Court as part of the constitutionalization process in the Foundational Period. If expansively applied, implied powers may have the de facto consequence of permitting the Community to legislate and act in a manner not transparent from clear grants of power in the Treaty itself. This would not constitute veritable expansion. It is not veritable expansion because typically the powers implied will be in an area in which the Community clearly may be permitted to act, and the powers to act would be construed precisely as "instruments" enabling effective action in a permissible field. Thus in the leading case of implied powers, there was no question that the Community could act in the field of Transport Policy; what the Court did was to enable it, within this field, to conclude international agreements.

Even if, then, implied powers cannot be construed strictly as true expansion, as defined above, they are important in this context.

First, the way a court will approach the question of implied powers is in itself at least an indirect reflection of its attitude to enumeration, even if implying powers as such does not constitute a mutation: a court taking a restrictive approach to enumeration will tend to be cautious in implying powers, whereas a Court taking a functional, flexible approach to enumeration will be bolder in its implied powers jurisprudence. It is interesting that the European Court of Justice itself has seen a movement in its attitude to implied powers (and by implication to enumeration). In its very early jurisprudence, it took a cautious and reserved approach to implied powers; it was really only in a second phase that it changed direction on this issue as part of the process of constitutionalization.

Second, even though, strictly speaking, the doctrine of implied powers is intended to give the Community an instrument in a field within which it already has competence, in reality, these distinctions often break down. When the Court in the 1970s considered and construed the powers that flowed from the Common Commercial Policy, it did, even on a very conservative reading, extend the jurisdictional limits of the Community.

It is, however, in the context of Article 235 of the Treaty that we find the locus of true expansion. Article 235 is the "elastic clause" of the Community; its "necessary and proper" provision. It provides that:

> 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.

On its face, this is no more than a codified version of implied powers; clearly, Article 235 should not be used to expand the jurisdiction of the Community (which derives from its objectives and functional definition as explicitly and implicitly found elsewhere in the Treaty) by adding new objectives or amending existing ones. But, since the language of the Article is textually ambiguous, and concepts such as "objectives" are by their nature open-textured, there has been a perennial question as to how far Article 235 may be utilized to go beyond the literal Treaty definition of sphere of activities and powers without actually amending the Treaty.

The history of Article 235 in legislative practice, judicial consideration, and doctrine includes several changes which reflect the changes in the development of the Community itself.

In the period 1958 to 1973, Article 235 was used by Community Institutions relatively infrequently and, when used, was usually narrowly construed. Under the restrictive view, shared by all interpretative communities at the time, the function of Article 235 was to make up for, within an area of activity explicitly granted by the Treaty, the absence of an explicit grant of legal powers to act. Two examples demonstrate the early conception of the Article. One was the enactment on the basis of Article 235, in 1968, of Regulation 803/68 on Customs Valuation setting out the criteria by which the value of imported goods to the Community for the purpose of imposing custom duty would be calculated. Implicit in this recourse to Article 235 was the belief that:

(1) customs valuation was necessary to attain the objectives of the Treaty, but

(2) since the reach of the Community spheres of activity had to be narrowly construed, one could not use the Common Commercial Policy or Article 28 as a legal basis, since these did not explicitly cover customs valuation.

A second example is the use of Article 235 as a legal basis for extending the list of food products in Annex 2 to the Treaty. Here it was clear that the sphere of activities did cover the measure in question, but that there was no specific grant of power in relation to new products. Recourse to Article 235 seemed necessary. The explanation for this restrictive quantitative and qualitative usage is simple: Quantitatively, in that phase of setting up the basic structures of the Community system, the Treaty was relatively explicit in defining the legislative agenda and in the grant of legal powers. The initial legislative program simply did not call for frequent recourse to Article 235. Qualitatively, that period, especially since the Mid-1960s, was characterized by a distinct decline in the "political will" of at least some of the Member States to promote expansion of Community activity.

Following the Paris Summit of 1972, where the Member States explicitly decided to make full use of Article 235 and to launch the Community into a variety of new fields, recourse to Article 235 as an exclusive or partial legal basis rose dramatically.

It is thus from 1973 until the entry into force of the Single European Act that there is not only a very dramatic increase in the quantitative recourse to Article 235, but a no less dramatic recourse to it in a broader understanding of its qualitative scope. In a whole variety of fields, for example, conclusion of international agreements, the granting of emergency food aid to third countries,

creation of new institutions, the Community made use of Article 235 in a manner that is simply not consistent with the narrow interpretation of the Article as a codification of implied powers in their instrumental sense. Only a truly radical and "creative" reading of the Article could explain and justify its usage as, for example, the legal basis for granting emergency food aid to non-associated states. But this wide reading, in which all political institutions partook, meant that it would become virtually impossible to find an activity which could not be brought within the "objectives of the Treaty". This constitutes the climax of the process of mutation and is the basis for our claim not merely that no core activity of state function could be seen any longer as still constitutionally immune from Community action (which really goes to the issue of absorption), but also that no material sphere of the material competence could be excluded from the Community acting under Article 235. It is not simply that the jurisdictional limits of the Community expanded in their content more sharply in the 1970s than they did as a result of, for example, the Single European Act (SEA). The fundamental systemic mutation of the 1970s, culminating in the process of expansion, was that any sort of constitutional limitation of this expansion seemed to have evaporated.

It is important to emphasize again that, for this inquiry the crucial question is not the per se legality of the wide interpretation of Article 235. In the face of a common understanding by all principal interpretative communities, that question has little if any significance and perhaps no meaning. Far more intriguing and far more revealing is to explore the explanation for and the significance of the phenomenon. One should not, after all, underestimate its enormity in comparison to other non-unitary (federal) systems. Not only did the Community see in this second phase of its systemic evolution a jurisdictional movement as profound as any that has occurred in federal states, but even more remarkable, indeed something of a double riddle, is the fact that this mutation did not, on the whole, ignite major "federal" political disputes between the actors (for example, Member States and Community).

No one factor can explain a process so fundamental in the architecture of the Community. We suggest the following as some of the more important factors that played a role in this change.

a) In the very description we offered of the process of jurisdictional mutation one can find already part of the explanation to the riddles. Note that there is no single event, no landmark case which could be said to constitute the focal point of the mutation. Even some of the important cases we mentioned, such as those in the field of human rights, were not seen in the optic of jurisdictional mutation. Instead there is a slow change of climate and ethos whereby strict enumeration is progressively, relentlessly, but never dramatically, eroded. Extension, Absorption, Incorporation, powers implied by the Court, all feed each other in cog-and-wheel fashion so that no dissonances are revealed within the constitutional architecture itself as it is changing. When the Court is very activist in an area, in Extension for example, it is so toward the Community as such and not vis-a-vis the more sensitive Member States. By contrast, in the case of Absorption and Expansion, areas where the mutative effect impinges on Member State jurisdiction, the role of the Court is in a kind of "active passivism" -- reacting to impulses coming from the political organs and opting for the flexible rather than strict notion of enumeration. In its entire history there is not one case, to our knowledge, where the Court struck down a Council measure, already adopted, on grounds of *lack of competence*. The relationship between Court and political organs was a bit like the offense in American football: the Court acted as the Pass Protectors from any constitutional challenge; the

political organs and the Member States made the winning pass.

Nevertheless, incrementalism alone cannot explain a change so radical and a reaction so muted. But then politically the Community architecture at the end of the Foundational Period was unlike any other federal polity. Therein lies one emphatically important aspect of this development. Even if the judicial signals were such to indicate that strict enumeration would not be enforced by the Court, these could after all have remained without a response by the political organs and the Member States.

Two factors combine to explain the very aggressiveness with which the political process rushed through the opening judicial door, one historical the other structural; both are rooted in the heritage of the Foundational Period.

b) In a determined effort commencing in 1969, the end of the de Gaulle era, and culminating in the successful negotiation of British, Danish and Irish accession in 1973, the Community sought ways to revitalize itself, to shake off the hangovers of the Luxembourg Crisis, to extricate itself from the traumas of the double British rejection and to launch itself afresh. The Paris Summit of 1972, in which the new Member States participated, introduced an ambitious program of substantive expansion of Community jurisdiction and a revival of the dream of European Union. Article 235 was to play a key role in this revival. In retrospect this attempt was a failure since the Community was unable to act in concert about the issues that really mattered during the 70s such as developing a veritable Industrial Policy or even tackle with sufficient vigour Member State obstacles to the creation of the Common Market. The momentum was directed to a range of ancillary issues such as Environmental Policy, Consumer Protection, Energy, Research and the like, all important of course, but a side game at the time. And yet, each of these though not taken very seriously in substance (and maybe because of that) required extensive and expansive usage of Article 235 and did represent part of the brick-by-brick demolition of the wall circumscribing Community competences.

c) But the structural, rather than historical, explanation of the process of expansion and its riddles is the critical one. The process of decline in the decisional supranational features of the Community during the 60s and early 70s, demonstrated by the enhanced "Voice" of the Member States in the Community policy making and legislative processes, was the key factor giving the Member States the confidence to engage in such massive jurisdictional mutation and to accept it with relative equanimity.

In federal states, such a mutation would by necessity be *at the expense* of Member State Government power. In the post-Foundational Period Community, in contrast, by virtue of the near total control of the Member States over the Community process, the EC appeared more as a instrument in the hands of the Governments rather than as a usurping power. The Member State governments, jointly and severally, were confident that their interests were served by any mutative move. If the governments of the Member States can control each legislative act, from inception through adoption and then to implementation, why would they fear a system in which constitutional guarantees of jurisdictional change were weakened? Indeed, they had some incentive in transferring competences to the Community, as a way of escaping the strictures, or nuisance, of parliamentary

accountability. In federal states the classical dramas of federalism in the early formative periods presuppose two power centers: the central and that of the constituent parts. In the Community, in its post-Foundational Period architecture, the constituent units' power was the central power.

As we see in several cases from that period, it was hardly feasible politically, although it was legally permissible, for a Member State to approve an "expansive" Community measure and to challenge its constitutionality as *ultra vires*. It is easy also to understand why the Commission (and Parliament) played the game. The Commission welcomed the desire to reinvigorate the Community and to expand its (and the Commission's own) fields of activity. Since most Community decision-making at that time was undertaken in the shadow of the veto consecrated by the dubiously legal Luxembourg Accord, the Commission found no disadvantage, and in fact many advantages, in using Article 235. Neither the Commission nor Parliament, which is to be consulted under the 235 procedure, were likely to challenge judicially the usage. Moreover, since Article 235 enabled the adoption of "measures," whether regulations, directives or decisions, it enabled a facility not always available when using other legal bases.

D. EVALUATING THE MUTATION OF JURISDICTIONAL LIMITS AND THE EROSION OF STRICT ENUMERATION IN THE 70s

Undoubtedly the process of mutation is evidence of the dynamic character of the Community and its ability to adapt itself in the face of new challenges. It is also evidence, that what was perceived as negative and debilitating political events in the 1960s had an unexpected payoff. We do not believe that the Community would have developed such a relaxed and functional approach to mutation had the political process not placed so much power in the hands of the Member States. Yet, even then, at least two long-term problems were taking root.

1. The question of constitutionality

We have argued that the de facto usage of Article 235 from 1973 until the Single European Act implied a construction, shared by all principal interpretative communities, which opened up practically any realm of state activity to the Community provided the governments of the Member States found accord among themselves.

This raised two potential problems of a constitutional nature.

From the internal, autonomous legal perspective, it is clear that Article 235 could not be construed simply as a procedural device to unchecked jurisdictional expansion. Such a construction would empty Article 236 (Treaty Revision) of much of its meaning and would be contrary to the very structure of 235. Legal doctrine was quick to find autonomous internal constructions which would not empty the Article of meaning, but which would not constrain its virtually limitless substantive scope. Thus it has been suggested that Article 235 cannot be used in a way that would actually violate the Treaty. Few writers (or actors) sought to check the expansive use of the Article. And the general view had been (and in many quarters remains) that the requirement of unanimity does effectively give the necessary guarantees to the Member States. If there has been a debate over the

Article's meaning, it concerns the analytical construction of the Article. The Community is no different from any other legal polity. Language, especially such contorted language as found in Article 235, has never been a serious constraint on a determined political power.

The constitutional problem with an expansive interpretation of Article 235, and in general with the entire erosion of strict enumeration, does not thus rest in the realm of autonomous positivist legalisms.

The Constitutional danger is of a different nature. As we saw, the Constitutional "revolution" of the Community in the 1960s and the system of judicial remedies upon which it rests, depend on creating a relationship of trust, a new community of interpretation, in which the European Court of Justice and Member State courts would play complementary roles.

The overture of the European Court toward the Member State courts in the original constitutionalizing decisions such as *Van Gend en Loos* was based an idea of judicial-constitutional contract. Suggesting that the new legal order would operate "in limited fields," the European Court was not simply stating a principle of European Community law, which as the maker of that principle, it would later be free to abandon. It was inviting the supreme Member State Courts to accept the new legal order with the understanding that it would, indeed, be limited in its fields.

The acceptance by the Member State legal orders was premised, often explicitly, on that understanding. Thus the Italian Constitutional Court, when it finally accepted supremacy, did so "on the basis of a *precise criterion of division of jurisdiction.*" (Emphasis added)

The danger in this process is now clear. Whereas the principal political actors may have shared a common interest in the jurisdictional mutation, it was, like still water, slowly but deeply boring a creek in the most important foundation of the constitutional order, the understanding between European Court and its national counterparts about the material limits to Community jurisdiction. The erosion of enumeration meant that the new legal order, and the judicial-legal contract which underwrote it, was to extend to all areas of activity, a change for which the Member State legal orders might not have bargained. With the addition of the S.E.A., what was an underground creek will become one of the more transparent points of pressure of the system. What was a danger then has become a reality now with the decision of the German Constitutional Court in its Maastricht Decision to which we shall return below.

There is another, and obvious, sense in which erosion of enumeration is problematic from a constitutional perspective. The general assumption that unanimity gives sufficient guarantee to the Member States against abusive expansion (since it needs the assent of all States) is patently erroneous. First it is built on the false assumption which conflates the Government of a State with the State. Constitutional guarantees are designed, in part, to defend against the political wishes of this or that Government which after all, in democratic societies, is contingent in time and often of limited representativity. Additionally, even a wall-to-wall political support fails to consider that constitutional guarantees are intended to protect, in part, individuals against majorities, even big ones. It is quite understandable why, for example, political powers might have a stake in expansion. One of the rationales, trite but no less persuasive for this, of enumeration and divided powers is

exactly that: the attempt to prevent concentration of power in one body and at one level. When that body and that level operate in an environment of reduced public accountability (as is the case of Commission and Council in the EC environment) the importance of the constitutional guarantee even strengthens.

2. Mutation and the question of the democratic character of the Expansion

Treaty amendment by Article 236 or its equivalent in the TEU provides for satisfying the constitutional requirement within Member States which invariably call for assent of national parliaments. The expansive usage of Article 235 evades that type of control. At a very formal level we could argue that jurisdictional mutation of the nature which occurred in the 1970s accentuates the problems of democratic accountability of the Community. This deficit is not made up by the non-binding consultation of the European Parliament in the context of 235.

The "democratic" danger of unchecked expansion is not, however, in the formal lack of Member State parliamentary ratification: The structure of European democracies is such that it is idle to think that governments could not ram most expansive measures down willing or unwilling parliamentary throats. After all in most European Parliamentary democracies governments enjoy a majority in Parliament and members of parliaments tend to be fairly compliant in following the policies of the party masters in government. The danger of expansion rests in a more realistic view of European democracies.

The major substantive areas in which expansion took place were social: consumer protection, environmental protection and education, for example. These are areas of typical diffuse and fragmented interests. Whether we adopt a traditional democratic or a neo-corporatist model, we cannot fail to note that the elaboration of the details of such legislation in the Community context had the effect of squeezing out interest groups representing varying social interests which had been integrated to one degree or another into national policy-making processes. The Community decision-making process, with its lack of transparency and tendency to channel many issues into "State Interests" tends to favor certain groups well placed to play the Community-Member State game and disfavors others, for example, those which depend on a parliamentary chamber to vindicate diffuse and fragmented interests.

Expansion thus did not simply underscore the perennial "democracy deficit" of the Community, but actually distorted the balance of social and political forces in the decisional game at both the Member States and Community level.

E. CONFRONTING THIS HERITAGE IN TODAY'S UNION - THE IDEA OF LISTS!

Let us start from one of the basic ideas of non unitary systems namely the idea of a balance[1] between periphery and center, in part explained by the view of federal systems as a contractual arrangement, 'power checks power' (Marx), power should place a limit on power (Montesquieu)[2]. This view includes the existence of (at least) two distinct levels of government, that can be separated.

Classical models of federalism attempted to regulate the division of competences by "listings of competences" allocated to the different levels of government rather than by functional allocation of responsibilities.

The following types of lists can be found in existing federal systems:

- Catalogue of competences for the central unity

- Catalogue of competences for the decentralized entities

- Catalogue of frame-competences

- Catalogue of concurring competences

Most federal systems include a catalog of exclusive competences for the federal (central) legislator. Generally, those competences are characterized as being of a 'national' interest: foreign relations, defense, measures related to a common internal market: currency, transport, interstate commerce, postal services, or to turn it differently, issues related to the sovereignty of the central state.

The attribution of competences to the federal power enumerated in a catalogue is always backed by either another catalogue (of concurring or framework-competences) or a structural principle of competence delimitation. Lists enumerating the exclusive competences of the constituent units are the exception.

In the *United States,* Article 1 Section 8 of the Constitution defines the competences of Congress, the 10th Amendment underlines that everything else is attributed to the competences of the states. This clear scheme is "flawed" by a realm of concurring competences and the Supreme Court has contributed to a significant enlargement of federal competences.

In *Germany*, Article 73 of the Constitution enumerates the competences of the federal legislator. In addition, there is a catalogue of concurring competences and frame competences, and in addition to those enumerations in catalogues, there is a structural principle laid down in Article 72 of the

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[1] Lenaerts, Koen: Constitutionalism and the Many Faces of Federealism, American Journal of Comparative Law 38 (1990), 205.

[2] King, Preston: Federalism and Federation, Baltimore/Maryland 1982, p. 56 et seq.

constitution.

Concurring competences in the German model means, that the Laender have a competence as long as the federal legislator has not taken action. The catalogue of concurring competences is combined with a structural principle: the federal power is only allowed to take action in order to enhance economic and legal unity, uniformity of social conditions, Art. 72 of the Constitution. In addition, the catalogue of concurring competences has to be read together with the rule that federal law overrules state law.
Frame competence allow the federal power to decide upon the principles, the states legislate about the details.

Switzerland offers an interesting variation: The list of exclusive competences of the entities is quite short, and the system puts an accent on concurring competences with some procedural rules. In the Swiss system, federal competences include concurring competences that are limited to principles; concurring competences without limits; and competences that allow parallel cantonal competences. The anarchic structure of this scheme can be explained by the fact that the constitution is very easy to modify, thus a severe conflict in the realm of competences can be solved by a modification of the constitution.

Not surprising, the four different permutations of catalogues mentioned in the beginning do not exist in a pure form in reality. Instead, catalogues are combined, and - e.g. in the German model - there is a structural element added to the catalogue-system.

It can be said that concurring and parallel competences emphasize a dual structure and enhance intergovernmental collaboration, as long as there is no strict superiority rule, that declares law of the federal unit superior to the law of the lower units.

Catalogues seem to offer the advantage of appearing clearer and more fixed than structural principles.

There are two problems with this conception:

The first is captured by Duchacek, in his study of Comparative Federalism: A federal constitution may be seen as a political compact that explicitly admits of the existence of conflicting interests among the component territorial communities and commits them all to seek accommodation without outvoting the minority and without the use of force. Federalism is by definition an unfinished business because many issues can be neither foreseen nor immediately solved, at the time of the initial bargain, some issues may not yet have crystallized and other issues may have already proven too controversial to try to solve immediately. But this is the whole merit of a federal formula. It is based on a wise recognition that in politics many issues cannot be solved now or ever. With its seemingly precise and elaborate articles defining the way in which authority is divided between the two or more sets of different jurisdiction, a federal constitution is misleading: like any other political system it creates an impression of finality and accuracy in a context-that leaves - and must leave - so many issues to future improvisations.

The second problem is that catalogues invariably are subject to interpretation and exist in a particular political environment, which becomes the key for their fixity and clarity.

Existing federal systems like the U.S. and Germany prove the irresistability of a centripetal pull especially if there is mainly a catalogue of competences for the central power, and the competences for the other units are simply the left-overs of that catalogue. One way out of the dilemma might appear to be a reversal of the German-USA scheme as was classically the Canadian model.

But it would be misleading to imagine that simply by reversing the model of allocation and, say, defining a the core as being with the constituent units and the residual with central government the centripetal pull can be countermanded. Experience proves again and again that the key is a culture of diversity rather their formal lists - so these, of course, can contribute (marginally we think) to such a culture.

Our fundamental conclusion is that the functional approach adopted by the Treaties, listing objectives and not seeking to translated these into water-tight lists of legislative competences is sound.

Material lists retain, however, symbolic attraction. The most sophisticated approach favorable to some form of listing in our view has been that adopted by the German scholar Fritz Scharpf and then adopted by the Weidenfeld study.

Scharpf[3] famously has shown some of the dangers of centralization in the German federal model. Because of the specificity of the European model, as distinct from some federal States Scharpf examines the idea of going back to the doctrine of Dual federalism, applied in the U.S. until 1937. Though discredited in the U.S., the doctrine contains ideas that could, perhaps, work for the multinational union of States in Europe. In the U.S. though, the doctrine failed as it turned out to be impossible to draw a line between a single economic policy and the political autonomy of the states: it broke down when the expansion and growing interdependence of government activity at both levels frustrated the search for clear lines of demarcation between federal and state areas of responsibility. Since 1937, not a single Federal law has been declared void because of the violation states' exclusive competences and only recently are there signs that this trend may be reversed.

Canada has seen a different development: The explicit declaration of exclusive competences of the provinces has reversed the centripetal tendencies observed elsewhere but this probably contributed to the present weakness of the Canadian union.

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[3] Scharpf, Fritz W.: Kann es in Europa eine stabile federale Balance geben? (Thesen), in: Wildenmann, Rudolf (Hg.): Staatswerdung Europas? Baden-Baden 1991, pp. 415-428; more or less the same idea in: Scharpf, Fritz W.: Autonimieschonend und gemeinschaftsvertroglich. Zur Logik einer europäischen Mehrebenenpolitik, in: Weidenfeld, Werner (ed.): Reform der Europäischen Union. Materialien zur Revision des Maastrichter Vertrages 1996, Gktersloh 1995, pp. 75-96, which is a shorter version of the Discussion Paper 9/93, Max-Planck Institut für Gesellschaftsforschung, Köln; cg. Also Scharpf, Fritz W.: Community and Autonomy Multilevel Policy-Making in the European Union, European University Institute RSC Working Paper No. 96/1.

The American and the Canadian experience could give us the idea that the problem of federal balance necessarily leads to either centralization or weakness and even dissolution of the Union.

The decisive question is, how to establish a stable balance. Elements of a solution, according to Scharpf, are explicit competences of the center *and* the periphery; thus establishing a bipolar order that would limit the European center to the regulation of transborder problems and that would reserve to the Member States the determination of the domestic political order and the area-field related to cultural identity. The specification of concurrent competences would be superfluous.

All this would escape the fate of American Dualism only, if the mistakes of Dualism were avoided: because of the increasing interdependence of problems and policies, even exclusive competences must not be treated as strictly separated, impermeable compartments. In practice, a bipolar system would require mutual reservation and respect of a principle of mutual 'federal comity' or 'Union loyalty', comparable to the German 'Bundestreue'[4]. The obligation of both levels to choose mutually acceptable means when performing the proper functions of government at each level.

The bottom line of this argument is that a new political culture is necessary which is where the insight of Scharpf coincide with the basic thrust of this study.

Elazar[5], too, a major theorist of American federalism uses the same idea differently when he writes of a "thinking federal" requirement, and when he emphasizes the role of political culture.

Scharpf expects the recognition of a bi-polar order to prevent the one-sided orientation of judicial review towards the enumerated powers of the central government (characteristic of federal states). The court would have to balance competing jurisdictional claims with a view not only to their substantive justification, but also to the manner in which powers are exercised.

The core of reserved member-state rights would lie in the protection of the cultural and institutional identity of the members, including education, cultural policy, the shaping of the country's internal political and administrative institutions and procedures. In addition, Scharpf suggests, one would probably also have to include historically evolved economic and social institutions (neither the nationalized health-service in Britain, nor the corporatist self-administration of social-security systems in Germany, neither the legalistic works constitution in Germany nor the informal practices of workplace-based industrial relations in Britain should as such be a legitimate object of European-wide legislation).
The judiciary couldn't stay on the fence of considering the realm of respective competences as a question of political discretion; it would have to balance the equally legitimate interests and duties of both levels in the concrete case.

Even so, the recognition of reserved powers on two levels is not a magic solution that could help

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[4] Bundestreue goes back to Rudolf Smend, Ungeschriebenes Verfassungsrecht im monarchischen Bundesstaat, 1916; Smend though refers to Heinrich Triepel, Unitarismus und Federalismus im Deutschen Reich, 1907.

[5] Elazar, Daniel J.: Exploring Federalism, Tuscaloosa, London 1987, p. 102.

to draw a clear line between the two levels: EC/EU and Member states regulate and evaluate the same area fields form different perspectives: Scharpf gives the examples of the TV-directive (television as a service and, at the same time, as part of cultural autonomy), education (recognition of studies and degrees from abroad), voting rights in local elections.

Just as the post-1937 Supreme Court denied the possibility of substantively defined areas of state jurisdiction beyond the reach of the federal commerce power, so there cannot be any fields of national competence which cannot be touched by European measures safeguarding the four basic freedoms or regulating transnational problems.

Scharpf concludes that in an interdependent world, the goal can no longer be the clear separation of spheres of responsibility in accordance with the model of dual federalism. Ultimately what remains is the principle of federal comity.

We would add that trust in the Institution overseeing the operationalization of this is as critical.

Scharpf, too, as we do holds that one cannot separate the political process from the question of allocation of competences and the idea of federal comity must also be refelcted in multilevel policy-making though the tendency towards over-coordination and centralization must always be borne in mind.

The American example shows that the need for central-government harmonization is drastically reduced if member-states shape their own regulations so as to facilitate instead of restricting interstate mobility. At a minimum there must be opportunities for outside applicants to achieve conformity to national standards without having to bear excessive costs. And, by reducing the scope and comprehensiveness of their own regulations, member-states may create space for non-governmental forms of self-coordination which will reduce the need for central coordination.

In conclusion the following points summarize this approach:

- there are area-fields where the internal market requires centralization of decision-making competences (foreign trade, agricultural policy, plus area-fields where diverse national regulation would bear high costs: drug-regulation, standards for technical devices, services offered by European Agencies)

- but, normally, the classical federal either-or doesn't make sense; the legitimacy basis of the EC/EU is to weak to survive an ongoing centripetal trend;

therefore an explicit list of competences reserved to the member-states should be established, this is not to confound with a clear separation of area fields; it is rather about recognizing the principle that EC/EU *and* the Member-States have competences in the same area-fields and, therefore, there has to be mutual respect and restraint (federal comity) in competence matters. This means limitation of the central harmonization to a minimum, use of autonomy-compatible means by the EC/EU; use of Community-compatible means by the Member-States.

In an annex to this study we shall provide different possibilities of lists as they pertain to these ideas.

F. EXCURSUS – A NORMATIVE "CASE-STUDY": THE TOBACCO ADVERTISING DRAFT DIRECTIVE [6]

The purpose of this case study is to take the reader through an actual controversy concerning a controversial piece of draft legislation. Our aim is to remain within the functional, purpose oriented division of competences in the Treaties and to argue, streneously, that even within such a system a legally rooted argument can be made for a self-limiting approach to competences. We adopt an "Advocacy" mode for this Case Study. We do not wish to pretend that alternative legal constructs do not exist. We present this as advocacy for an approach that in our view ought to be taken on this paradigmatic example.

This Draft Directive -- proposed as a measure based on Article 100a EEC -- would ban all forms of advertising for tobacco products, both direct and most indirect forms, throughout the territory of the Community. [7]

The Legal Affairs Committee of Parliament divided sharply on its compatibility with the competences of the Community and we believe that it presents the best possible case study of the conundrum of competences.

It is clear that the proposed ban on tobacco advertising has substantive appeal to important sections of opinion in Europe. It is forcefully argued that such a ban will have a positive social and health impact. We have made the assumption that the linkage between smoking and serious hazards to health including the disturbing statistics on smoking-related deaths is well-established.

The actual and potential impact of print and other advertising of tobacco products on the incidence of smoking is a more controversial issue. Whether tobacco advertising increases the incidence of smoking or only affects brand selection by existing smokers is a matter of fact which we did not and could not examine. We have, however, for the purposes of this Study assumed here too that a link between advertising and an increased incidence of smoking does, to a larger or smaller extent, exist. By accepting the assumption that smoking does constitute a serious health hazard and by

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[6] Amended proposal for a Council Directive on the approximation of Member States' laws, regulations and administrative provisions on advertising for tobacco products (92/C 129/04) COM(92) 196 final -- SYN 194; (Submitted by the Commission pursuant to Article 149(3) of the EEC Treaty on 30 April 1992) OJ No C 167, 27. 6. 1992, p. 3.

[7] The sole, and limited, exceptions would be some form of advertising for tobacco products in "tobacco sale outlets: establishments specializing in the sale of tobacco and with enclosed indoor premises for serving customers. Shops with several counters for a range of different goods on sale are excluded from this definition." Television advertising is not covered by the draft directive since it is already banned by Directive 89/552/EEC. In its latest draft the Commission would also allow a limited measure of indirect advertising.

assuming a linkage between advertising of tobacco products and the incidence of smoking we are able to pose the problem in its starkest and hardest form:

We are looking at a measure which, on the one hand, is promoted as a means -- perhaps even an effective means -- to address a serious public health concern. If so, it would be in the public interest to enact the Directive in its current sweeping and totalistic form. This supposed interest must, however, be balanced against an equally grave question which is also of serious public concern: Does this draft legislation, with all its supposed benefits -- which we are willing to assume -- exceed the constitutionally mandated competences and powers of the European Community?
The Community shall act within the limits of the powers conferred upon it ... and of the objectives assigned to it therein. (Article 3b Maastricht)

Immediately we see why the problem of competences is so acute. On the one hand no one can deny the public health benefit that at least some form of regulation would have on tobacco advertising. But if we are concerned with the issue of the limits (or the absence thereof) to Community competences; the fear that "Brussels" has "gained power" in an increasingly large number of areas -- areas which should remain within the province of the Member States independently of the wisdom or otherwise of the content of proposed Community legislation cannot be brushed aside.

There is general agreement among the Institutions and the Member States regarding the principle that the Community does not have, and should not have, unlimited jurisdiction and powers. It is, of course, very easy to pay lip service to these principles when they fall in line with a desirable outcome. However, commitment to constitutionality -- in this case the principle of limited Community competences -- is tested when the specific consequences are problematic and require, as is the case in hand, that one refrain from enacting a measure which promotes a policy which may be favoured on its merits.

The tobacco advertising illustrates another conundrum. The Treaty of European Union, and in particular the chapter on public health Title X TEU - Article 129 – specifically excludes any harmonization of health laws and regulations of the Member States. [8] And yet, can we not regard

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[8] Title X, Public Health, Article 129 (Maastricht) provides:

1. The Community shall contribute towards ensuring a high level of human health protection by encouraging cooperation between the Member States and, if necessary, lending support to their action.

Community action shall be directed towards the prevention of diseases, in particular the major health scourges, including drug dependence, by promoting research into their causes and their transmission, as well as health information and education. Health protection requirements shall form a constituent part of the Community's other policies.

2. Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination.

3. The Community and the Member States shall foster cooperation with third countries and the competent international organizations in the sphere of public health.
4. In order to contribute to the achievement of the objectives referred to in this Article, the Council:

this as a measure of harmonization of the Single Market?

Under existing Community law, in the field of public health, the Community only has the competence to do no more than is strictly necessary to ensure that disparate Member State public health measures do not impede the proper functioning of the Internal Market. How should one treat such a Directive? Should one argue that using the guise of Article 100a, the proposed directive only masquerades as a measure designed to ensure the proper functioning of the internal market and that in reality it constitutes a sweeping arrogation of public health competence which the Community does not enjoy? The votes in the European Parliament testify to the delicacy of these issues. [9]

The view that we have taken in this part of our Study, and which we shall try and demonstrate, is that as drafted the Directive is, and ought to be, regarded as violative of Community competences. This Conclusion does not mean that restrictions on tobacco advertising are necessarily undesirable or legally prohibited. Our view is that a almost total ban -- which can only be justified as a measure designed to protect public health and which far exceeds anything that can reasonably be brought under Article 100a EEC or indeed any other basis of Community competence -- cannot be enacted by the Community and should remain in the province of the Member States to be decided by their governments and parliaments and subject to their constitutional limitations.

We should also emphasize that this view is not shared by all, which in turn explains some of our proposals regarding the resolution of disputes concerning competences.

-- acting in accordance with the procedure referred to in Article 189b, after consulting the Economic and Social Committee and the Committee of the Regions, shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States;
-- acting by a qualified majority on a proposal from the Commission, shall adopt recommendations.

[9] Even in the European Parliament which has been very sympathetic to the social objectives of the proposed legislation the measure barely passed the scrutiny of the Legal Affairs Committee. The vote was 15-13. Europe 1.2.92 No 5659 p10. In plenary the measure passed by 150-123-12 as regards the final resolution. 158-141-8 as regards the Commission proposal as amended by the Parliament. The question of competence and legal basis was one of the central planks of the opposition to the measure.

We shall now present our train of reasoning in relation to this case-study.

1. Limits to Community Jurisdiction and Competences

The European Community enjoys very wide competences in a variety of economic and social fields. Moreover, the demarcation of competences has not been, and is not intended to be, static. As the Community has developed over the years its competences have grown: Partly through Treaty amendments, but also to a very large extent through an evolutive process which, with the sanction of the European Court of Justice, has matched Community powers with its objectives and dynamic growth. Yet, despite this impressive growth, the principle of limited competences, enshrined in the Treaties remains unchanged and must be preserved.

Article 3 EEC provided inter alia for "the approximation of the laws of Member States to the extent required for the proper functioning of the common market." (emphasis added)

Article 4 EEC provides inter alia that "Each institution shall act within the limits of powers conferred upon it by this Treaty."

Article 173 mentions, inter alia, as a grounds for declaring acts of the Council and the Commission[10] illegal "lack of competence".

In its early jurisprudence the Court stated:

[t]he Treaty rests on a derogation of sovereignty consented by the Member States to supranational jurisdiction for an object strictly determined. The legal principle at the basis of the Treaty is a principle of limited competence. The Community is a legal person of public law and to this effect it has the necessary legal capacity to exercise its functions but only those. (Joined Cases 7/56 & 3-7/57 Algera)

In its most celebrated case, Van Gend en Loos, the Court stated that the Community constitutes

a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit in limited fields. (Emphasis added)

It should also be noted that when the supreme jurisdictions of the Member States embraced the new Community legal order and accepted the principle of the Supremacy of Community law, they conditioned such acceptance on this very understanding of a Community of limited competences. Thus, for example, the Italian Constitutional Court in its famous Frontini decision accepting supremacy did so "on the basis of a precise criterion of division of jurisdiction." (emphasis added.)[11]

Safeguarding this principle of limited competences becomes all the more imperative since the entry

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[10] The Court has added Parliament to this list.

[11] 1974 CML Rev 372, 385

into force of the Single European Act in 1987 which moved the Community in many of its spheres to decision making by majority vote. Whereas before 1987 Community legislation had to receive the de facto consent of all Member States, thus providing some guarantees to the division of competences, [12] such guarantee, as already mentioned, no longer exists.

Before explaining how the demarcation line of Community jurisdiction is drawn, and why in our view the draft directive as currently formulated transgress that line, we would like to set out, in extreme brevity, the cardinal reasons for insisting on the integrity of such a demarcation.

The Rule of Law

As the Court has stated the Community is a system based on the principle of the Rule of Law. The Community demands of both the Member States and individuals within the Community strict adherence to Community law. It also expects the courts in the Member States to enforce Community law against any violation. The Community cannot demand loyalty to the EC legal order if it itself disregards the rule of law. If the principle of limited competences were to be undermined by Community organs, not only will the moral force of the required commitment to Community law be undermined, but there would be a very real danger that one or more of the supreme jurisdictions of the Member States would refuse to give legal force to such a measure, precipitating the Community into a dangerous constitutional crisis. It might also provoke strong reactions from national parliaments.

Non-concentration of Power

The principle of limited jurisdiction and divided competences between Community and its Member States is not a technical legalistic rule. It embodies a profound aspect of democratic organization. It places a check on the tendency of all bodies exercising governmental power to try and draw as much power to themselves and is designed to prevent the excessive aggregation of power in one level of government. This principle becomes all the more compelling as the Community grows and the ability of individuals to influence Community governance diminishes. There would be somewhat less concern if the Community organs, especially Commission and Parliament, were to exercise a measure of self-restraint on the issue of jurisdictional limits. The tendency, instead, has been quite the opposite.

The Democracy Deficit

In the Community, this notion of non-aggregation of power is given a particularly sharp edge. Despite the increase in the powers of the European Parliament, it is still true that on most issues the Council of Ministers -- representing the executive branch of government -- retains the final dispositive say on Community legislation without decisive control of any directly elected parliamentary chamber. Transgressing the jurisdictional line compromises thus not only the

[12] It should be emphasized, nonetheless, the even a unanimous Council may transgress the jurisdictional limit. Such unanimity does not per se guarantee the constitutionality of a measure.

principle of non-aggregation of power, but also more fatally transfers legislative competence to a context in which true parliamentary accountability is weak, at best indirect and at times altogether lacking.

Diversity

By its nature Community legislation tends in many cases to impose uniform norms, standards, and prescriptive behaviour throughout the Member States. In many occasions this is justified in the interests of greater economic efficiency and social mobility. However, precisely in the context of a Single Market and an Europe Without Frontiers the danger of obliterating the rich diversity of social behaviour and societal and cultural values becomes acute. Maintaining the jurisdictional limits of the Community is one way of acting against that danger. This, it should be noted in passing, is increasingly acknowledged even by the Commission in its more "relaxed" attitude to harmonization under its so called "New Approach to Harmonization".

G. DRAWING THE JURISDICTIONAL LINE

How does one draw the jurisdictional limits of the Community? The jurisdiction limits of the Community may be determined by reference to one or more of four principal techniques.

The most prevalent way of establishing Community legislative competences is through the explicit grant of powers in the Treaty in such diverse field as Transport, Competition, Common Commercial Policy, Agriculture and the like. Even in these explicit fields, the powers granted are not always limitless. The Court has recognized, for example, that a trade agreement may include elements which are not covered by the Common Commercial Policy thus necessitating that the Member States join in, under their reserved competences, as parties to such a "Mixed" agreement.

Sometimes the Treaty defines a policy area, e.g. Transport, in which the Community is given competence, but does not specifically grant the necessary powers for its execution. It is now established, following the caselaw of the Court that such powers may be implied. (Case 22/70 ERTA)

The Treaty defines objectives for the Community but sometimes is not explicit in defining a clear policy area for their execution. When this happens, one is taken to the outer limits of Community jurisdiction. Nonetheless, Article 235, under strict material conditions (e.g. policy must be necessary for the functioning of the Common Market) and equally strict procedural conditions,(e.g. unanimity) allows the Community to stretch its jurisdiction to achieve such objectives. Even here the boundaries are not limitless.

The above three techniques may be said to give the Community "Original" or "Primary" legislative jurisdiction.

Community Jurisdiction is determined in one other way in relation to which it would be more appropriate to speak of "Derivative" or "Secondary" Community competence.

The "Derivative" competence is best explained by way of illustration. The famous Casagrande case involved the Community Regulation 1612/68 which regulates, inter alia, some of the duties of the Member States in relation to Community migrant workers. Clearly the Community has "original" jurisdiction in this field. The Regulation includes, however, also a provision which related to the education facilities which must be granted to the children of migrant workers. Bavaria argued that such a provision encroached on Education Policy which was outside the scope of Community law, and reserved to the Länder under the German Constitution. The Court held that "...it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect ... [Member State] measures taken in the execution of a policy such as that of education ..." (Case 9/74 1974 ECR, Recital 12 of judgment).

However, and this should be made absolutely clear, whereas the Community may, in the execution of, say, its migrant worker policy, encroach on Member State education law and policy, this does not give the Community the competence, or power, or jurisdiction to promulgate its own education policy or educational norms which are not derivative and necessary for the execution of a policy for which it has original jurisdiction.

This is crucial to a correct understanding of the jurisdictional limits of the Community under Article 100a which allegedly provides the legal basis for the Draft Directive on Tobacco advertising. Clearly under Article 100a the Community has jurisdiction to adopt harmonization measures intended to further the goal of establishing an Internal Market -- an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty.

The fields of such potential harmonization are consequently very wide. It is this extreme width, and the fact that politically, socially and culturally sensitive areas of Member State public policy may be touched by Community harmonization ex Article 100a, which requires a strict adherence to the above mentioned "derivative" nature of jurisdictional limits in these cases.

Thus, the Community should not, and may not, under the guise of legislative harmonization designed to promote the economic objective of the internal market, seek to adopt its own health policy or health norms, public security policy or public security norms, public morality policy or public morality norms, cultural policy etc. It may only encroach into these fields to the extent that is strictly necessary to achieve the internal market.

It is possible that a Community measure may serve more than one objective. The fact that it serves an objective which is outside the scope of the Treaty, or, arguably, was even adopted with that ultra vires objective in mind, does not necessarily invalidate it, if (and only if) it can be shown to have a legitimate basis in the Treaty. [13]

[13] An important distinction must be added here. Sometimes harmonization measures are taken in an area where the Community has got "original" or "primary" jurisdiction. The Titanium Dioxide Case is an example. There the Community adopted harmonization measure in an area -- Protection of the Environment -- where there is an established Community Policy and competence. In the Beef Hormone Case the Community also was operating in a field in which it had original or primary jurisdiction namely agriculture. In these cases, as we shall argue below, the latitude of Community harmonization measures may be wider especially in relation to the intricate issue of distortion

We shall now apply these considerations to the actual Commission Proposal.

1. The Commission Proposal For A Council Directive On Advertising For Tobacco Products – Its Content

The Draft Directive on Advertising would complete the already existing Community ban on Television advertising by prohibiting throughout the Community all and every form of advertising, direct and most indirect, of tobacco products in all and any media.

Article 1

Without prejudice to Directive 89/552/EEC, all forms of advertising for tobacco products shall be banned in the territory of the Community.

The sole exceptions would be publicity within "tobacco sales outlets" which are defined as "establishments specializing in the sale of tobacco and with enclosed indoor premises for serving customers. Shops with several counters for a range of different goods on sale are excluded from this definition." (Article 1, third indent). Some limited form of indirect advertising would be allowed:

Article 2

Member States shall ensure that brands or trademarks whose reputation is mainly associated with a tobacco product are not used for advertising in other areas, if this brand or trade mark is being used for advertising of a tobacco product.

2a. The provisions of paragraph 2 shall not affect a company's right to advertise under its brand or trade mark products other than tobacco products on condition that:

the turnover from tobacco products marketed under the same brand or trade mark, even by a different company, does not exceed half the turnover from non-tobacco products of this brand;

the brand or trade mark was first registered for non-tobacco products.

Member States shall ensure that new tobacco products do not make use of the reputation acquired by certain brands or trade marks already used in association with products other than tobacco products.

It is amply evident from the Preamble to the proposal and from its explanatory statement that the main purpose of the proposal is a concern for public health and a desire to reduce the risks

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of competition. But in areas such as Health or Public Morality where the Treaty has not granted the Community original or primary jurisdiction, the encroachment on these areas of public regulation must be kept to the strictest minimum.

resulting from smoking. Although the Proposal refers to a 1986 "Resolution" of the Council and the Representatives of the Governments of the Member States meeting within the Council on a programme of action of the European Communities against cancer,[14] it is equally clear that under Treaty of Rome the Community has no original legislative competence in the field of health. As mentioned above, even under the proposed Maastricht Treaty, the Community competence in Health matters would exclude this type of legislation.

The Commission resorts therefore to Article 100a as the legal basis for its proposal and this is what makes this case study so pertinent.

Key to the analysis of the proposed Directive is an analysis of its objective and content (*le but et le contenu*[15]). It seems that the proposed Directive has as its principal objective the safeguarding of public health. In our view the internal market rationale -- which exists -- is secondary. That this is so is evident both from the way the Directive has been explained by the Commission, perceived by many in Parliament, and also by central provisions of its operative parts. We propose to examine first, then, its objective and then its content with a view to showing that its principal objective is dehors the Treaty and its content exceeds any internal market justification.

As we shall see when we examine the question of correct legal basis, since the Commission has proposed to base the directive on Article 100a, it has privileged in its preamble the internal market dimensions, namely its importance for the free movement of media carrying publicity for tobacco and the elimination of distortion to competition in the field.

It is, of course, possible, as we noted, for a legal act to have more than one objective and that in pursuing one objective, others would be achieved too. In the context of choosing the correct legal basis, one has to distinguish between principal objective and content and ancillary objective and content. [16] The principal objective and content will determine the appropriate legal basis.[17] The matter is far more critical when the issue is not what is the correct legal basis among two options in the Treaty, but whether the Community has any legal basis at all.

Here too, a legal act may have more than one objective. It is possible that in pursuing one objective which is appropriately one of the objectives of the Treaty, the legal act may accomplish other objectives which are outside its competences. This would not void the act. However, the draft directive on tobacco advertising falls into a different category. It is in our view an act the principal objective of which, and a great deal of its content, are in pursuant of public health objectives over which the Community has no competence under the pre-Maastricht regime, and no harmonization competence under the Treaty of European Union.

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14 OJ C 184/19 23.7.1986

15 Case 295/90 Parliament v Council Decision of July 7th, 1992, Recital 13)

16 Case 70/88 Parliament v Council, Decision of October 4th, 1991, Recital 17.

17 Case 155/91 Commission v Council, Decision of March 17th, 1993.

If this assessment is correct two possible results may ensue:

The hard view would be that to the extent that draft legislation is proposed the principal objective of which is outside the competence of the Community, and only its ancillary objective is within the competence of the Community, it should for this reason alone be withdrawn and re-drafted. If enacted it should be annulled. We would point out that in assessing Member State legislation for compatibility with the Treaty, the Court does not only address the effect of legislation but also its purpose. Legislation which has, for example, as its purpose to constitute a disguised restriction to trade and partition the common market is dealt with more severely than Member State legislation which is in pursuance of an objective which is legitimately within the province of the Member States. In the Henn & Darby case and in the Sunday Trading cases the Court explicit in taking into account the legitimate purpose of the legislation in question despite its impact on the market. By contrast in several tax discrimination cases and Article 30 cases, the protectionist purpose of the national legislation had a role in condemning the measures in question.

As a matter of policy we would argue that when the Community itself abuses the legislative process by adopting measures with a principal objective outside the scope of the Treaty, even if part of the impact, or rhetoric, is the completion of the internal market, such measures should not be adopted and if they are they should be annulled. This would be the case with the present Commission draft.

Even if this view is unacceptable, an alternative less strict view would condemn the proposal as drafted.

The less strict view would be that when the Commission adopts legislation with a principal, or even ancillary purpose which is outside the competences of the Community, only those operative provisions which serve the legitimate purpose would be allowed, and those serving the illegitimate purpose should be disallowed. In our case, only those provisions which can be shown to be enacted with the purpose, and having the effect of, enhancing the internal market should be allowed. Those provisions whose presence can be explained by reference to the illegitimate purpose -- public health -- may not be allowed.

At the Edinburgh Summit, in reviewing the principle of Subsidiarity the European Council emphasized the following:

"The principle that the Community can only act where given the power to do so -- implying that national powers are the rule and the Community's the exception -- has always been a basic feature of the Community legal order (The principle of attribution of powers). [18]

It added that

"In order to apply [the principle of attribution of powers] correctly the institutions need to be

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[18] European Council in Edinburgh, 11-12 December, 1992, Conclusions of the Presidency, SN 456/92 p15. (emphasis added).

satisfied that the proposed action is within the limits of the powers conferred by the Treaty and is aimed at meeting one or more of its objectives. The examination of the draft measure should establish the objective to be achieved and whether it can be justified in relation to an objective of the Treaty and that the necessary legal basis for its adoption exists."[19]

In our view, as we shall seek to demonstrate, the Draft Directive circumvents these strictures of the principle of attribution. The first question, therefore, is to ascertain the principal objective of the Draft Directive.

As we shall show in our analysis of the issue of legal basis, both the Preamble and the content of the Draft have a mixture of concern for the free movement of media (legitimate objective) and public health (illegitimate objective other than in the context of harmonizing measures which interfere with free movement). We also believe that originally market considerations were a veritable objective in the earlier less restrictive versions of the directive. [20] In the current versions, the public health rationale has come to dominate.

Very revealing in this respect is the Explanatory Memorandum of the Commission Doc 0437EN91800 of March 8th, 1991, Revision 3. In Section I the Memorandum starts off by a synoptic view of the current legislation in the various Member States. (pp 3 & 4).

The Memorandum then states:

The Commission's aim ... was initially to harmonize the provisions in force in the member States on advertising for tobacco products in the press and by means of bills and posters. (p5)

The Commission then withdrew its proposal and announced a new one (the current proposal) aimed at complete harmonization of provisions on advertising of tobacco products. In Section II the Commission explains the "Basis of Community Action. It is worth reproducing this section in its entirety:

The ways and means of circulating information in the twelve Member States are increasingly of a trans-frontier nature. As a result, people in one Member State are increasingly coming into contact with other Member States' media, be it in the form of radio, television, the written press or posters. Advertising for tobacco products is following this trend, particularly because of its centralized nature and the fact that it uses themes which have a Community-wide - not to say international - appeal.

In the 1950s in Europe, tobacco consumption - and more particularly cigarette smoking - became an accepted social habit, acquiring a positive image which was fostered by advertising. Thirty years on, tobacco has now become one of our major health problems, being the principal cause of death by lung cancer and a major contribution factor to a variety of other serious diseases,

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19 Edinburgh Conclusions p.19.

20 Cf. OJ C 124 19.5.89.

including cardiovascular disease.

Each year, tobacco products are responsible for the deaths of some 430,000 people throughout the European Community, accounting for at least 25% of all deaths between the ages of 35 and 69, and 10% of deaths among the elderly. If current trends continue, the WHO predicts that, in the European region encompassing 31 countries, tobacco will, by the year 2025, have accounted for two million deaths among people aged less than 25 years in 1990.[21]

The Member States are aware of this situation and established the prevention of smoking as one of the priority aims of the "Europe against Cancer" programme launched in 1986.

In this context, advertising would appear to be one of the factors responsible for the expansion of the market for tobacco products. The great flood of words and images seeking to promote the consumption of tobacco products glosses over any hint of the harmfulness of tobacco and incites young people to adopt what appears to be a socially acceptable behavior pattern.

Although it is not universally accepted that advertising has been shown to be uniquely and directly responsible for people trying out smoking or getting addicted to the habit, the fact remains that it does play a fundamental role in promoting the smoking habit, and habit which tends to be acquired in most cases in childhood or adolescence. Some 60% of smokers start smoking at the age of 13, with more than 90% starting before the age of 20. Given that only something like 10% of current smokers actually start smoking as adults, adolescents form the group from whom the largest number of new smokers are recruited.[22]

According to the tobacco industry, the aim of advertising is simply to persuade smokers to change brands, and as such enhances the competition between the various products on the market.[23] *Any form of advertising by definition seeks to increase the targeted product's share of the market.*

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[21] Dr. Richard Peto, University of Oxford, Clinical Trial Service Unit and ICRF Cancer Studies Unit; Chairman of the WHO Consultative Group on statistical aspects of tobacco-related disease.
. Consultation on the Statistical Aspects of Tobacco-Related Mortality. Convened by the World Health Organization in Geneva in October 1989.
. Epidemiology: "Tobacco-attributable mortality: global estimates and projections." Tobacco Alert. World Health Organization. January 1991.
. "It can be done.: A World Health Organization report on the first European conference on tobacco policy in Madrid, 7-11 November 1988.

[22] Tye, J.C., Warner, K.E., and Glantz, S.A. "Tobacco advertising and consumption: evidence of a causal relationship." World Smoking and Health, (1988) 6-13

. Royal College of Physicians of London. "Smoking and Health. The third report of the Royal College of Physicians of London." London, Pitman Medical (1987) p. 104

. Chapman, S. "Cigarette advertising and Smoking: A review of the evidence." British Medical Association, London (1985)

[23] Tye, J.B., Warner K.E. Glantz, S.A. "Tobacco advertising and consumption: Evidence of a causal relationship." J. Public Health Policy: 492-508, 1987

Nonetheless, omnipresent tobacco advertising impinges on the consciousness of all sections of the population, children and adults, smokers and non-smokers, not to mention smokers who might like to kick the habit. Let us take a closer look at the children and adolescents group, a large number of whom make acquaintance with cigarette-smoking at a very early age. Some will manage to give up smoking, while others will not. Id it not reasonable to assume that young people whom advertising has educated to brand loyalty may not, be dint of that fact alone, become regular smokers? If advertising did not bring in new customers year in year out, month in month out, day in day out - If, in other words, the competition between rival firms for market segments had no effect on the amount actually consumed - there can be no doubt that tobacco consumption would very quickly plummet as a result of demographic trends and the premature demise of smokers afflicted with tobacco-related diseases.

Highlighting the role of advertising for tobacco products does not mean to say that there are not other factors contributing to inciting young people to start smoking, including the behavior of friends, teachers, parents and relations and role-model personalities. It is a fact, though, that tobacco advertising sets out precisely to conjure up an image of congeniality, adventure and the personality-cult - in other words, it uses imagery.

Tobacco is freely available product and as such is subject to the laws of the market and the laws of competition. This means that consumers must have access to information and there must be product distribution arrangements. However, as tobacco use is acknowledged to be extremely harmful, information on tobacco products should be restricted to those who are really interested and concerned, i.e. the consumers.

To this effect, advertising must be authorized only in establishments selling tobacco and with indoor premises specially designed to serve the customer.

Open sales outlets for tobacco products on public thoroughfares, such as kiosks or stands, and supermarkets or shopping centers, do not give the level of protection - particularly for young people - required by the industry and by the health authorities.

Thus, by retaining scope for advertising within tobacco retailing enabling consumers to compare the various types and brands of tobacco available, while at the same time shielding the other sections of the population. As a result, advertising at the point of sale can remain subject to each Member State's public health protection requirements.

In an attempt to circumvent the restrictions imposed on direct advertising and to create or strengthen brand images, the tobacco industry has turned to indirect advertising.

Studies of advertising have shown that the great majority of young people see "brand-stretching" advertising of this type as advertising for the associated tobacco products. Young consumers do not see the difference. Looking at things from a normal point of view, it is quite obvious that, given the very high level of recognition of the tobacco brands, this kind of advertising, ostensibly for something else entirely, is in fact perceived as being for the tobacco products, and by its nature

constitutes pressure to consume the tobacco, and not the other, products.[24]

More recently, the tobacco industry has started to develop a different type of advertising campaign to attract young people. This takes the form of using a product which is already well established on the market and which is well known among young people to launch a new tobacco product under the same brand name.

This has the effect of implanting the existing product to achieve maximum psychological effect on young people.

This new approach too must be banned if it is not to circumvent the ban on advertising for tobacco products. What is more, by exploiting a positive image created with a different product, this practice could distort competition conditions between tobacco products or prompt competing brands to resort to similar practices in a bid to circumvent the ban.

Advertising must be subject to restrictions designed to protect other tights and general interests. In the case of tobacco products, what is needed is an adequate level of protection for the health of the population in general.

The Paris Convention (Stockholm, 14 July 1967) and the Council Directive relating to trade marks (89/104EEC)[25]

The elimination by 1992 of all barriers to trade requires the harmonization of national provisions on advertising for tobacco products in all information media.

Article 100A(3) of the Single European Act states that: "The Commission, in its proposals envisaged in paragraph 1 concerning heath, safety, environmental protection and consumer protection, will take as a base a high level of protection." The only way of ensuring such full harmonization is to base it on authorization for advertising limited to the inside of tobacco products sale outlets. Such advertising has no effect on the operation of the internal market, nor does it prevent the application of national provisions, such as voluntary agreements.

On the other hand, it is important, in terms of public health requirements within the meaning of the EEC Treaty, to ensure the free movement of these various media and to prevent the emergence of barriers to trade for non-compliance with national provisions regarding advertising for tobacco products.

In other words, given the current state of Member States' legislation and bearing in mind the likely future developments, full harmonization can only be based on completely banning advertising for tobacco products outside sales outlets.

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[24] Altken PP et al. "Brand-stretching" advertisements for cigarettes: the impact on children." Health Education Journal (1985) 44: 201-202

[25] OJ L40, 11.2.1989, p. 1

Given the interdependent nature of advertising media and in order to avoid any risk of distorting competition and allowing the rules and regulations to be circumvented, this ban must cover all forms of advertising apart from television advertising, which is already prohibited under the above mentioned Directive 89/552/EEC.[26]

In the twelve Member States, the advertising budget for tobacco products does not exceed 3% of the total advertising budget for all products or services.

In Norway, where a total ban on tobacco advertising exists since 1975, eight years before the ban, sales of advertisements - of all kinds --increased by 3.9% as against a 5.6% increase in the eight year period after the ban. This example of Norway shows that an advertising ban does not worsen the economic situation of the press.

Finally, the Commission, by submitting this proposal, withdraws the previous one - "Amended proposal for a Council Directive on the authorized advertising of tobacco products in the press and by means of bills and posters" - COM(90) 147 final - SYN 194.[27]

Several things are striking about this very explanation of the Basis of Community Action. Most striking is the overwhelming weight, frank and explicit, which is given to the public health concern. But for a fleeting reference in the first paragraph, the bulk of the first 21 recitals of the explanation for the Basis of Action is an analysis of the grave health risks which smoking causes and an analysis of the contribution of advertising, in all its forms, to the incidence of smoking. This may all be true but it is surely outside the legislative scope of the objectives of the Community. [28]

After explaining the dangers of smoking and of advertising, the explanatory statement draws a conclusion that the elimination of barriers to trade requires the harmonization of national provision on advertising for tobacco products in all information media. This is a non-sequitur. Surely it has to be demonstrated why, for example, different national regimes for stationary bill board advertising constitutes a barrier to trade.

The Commission offers two rationales:

"... people in one Member State are increasingly coming into contact with the other Member States' media, be it in the form of ... posters."

People in one Member State will come into contact with posters in another Member State for the most part if they travel to that second Member State. This cannot, we submit, be the basis of harmonization: If this were so, the Community would have unlimited competence to legislate in

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[26] OJ L298. 17.10.1989, p. 23

[27] OJ C116 of 11 May 1990

[28] Unless one goes to the absurd contention that per-se the health of Community nationals legitimates Community action since their ill-health will have, say, adverse economic effects....

every single social field in which there is a chance for a citizen of one Member State to come into contact with the social regimes of another -- be it penal law, contract law, torts and the like. To give but one example, suppose that in one Member State smoking is prohibited in restaurants and in another Member State it is permitted. It would appear from the Commission rationale that since the citizen of the first Member State may find himself or herself in a restaurant in the second Member State, the Community would have acquired a basis for legislation.

The second rationale offered by the Commission is to avoid the risk of distorting competition and allowing the rules and regulations to be circumvented. We shall deal with this rationale in a separate section concerning distortion to competition. [29]

Finally, it seems puzzling, that in transformation from explanatory statement which is overwhelmingly public health oriented, to draft Directives, by sleight of the legislative hand, the relative weight between public health and market considerations is redressed, and a measure which is so clearly concerned primarily with health, becomes one which tries to appear as being motivated instead primarily by the market.

We may turn now to an examination of the content of the draft Directive and its alleged justification in terms of the internal market. This rationale may be summarized as follows:

-- Several Member States have instituted restrictions, some even total bans, on advertising for tobacco products.

-- The elimination by December 1992 of all barriers to trade requires the harmonization of national provisions on advertising for tobacco products in all information media. Absent such harmonization, the free movement within the Community of the various media in which tobacco products are advertised would be impeded constituting an impermissible barrier to trade.

-- Since Article 100a(3) requires the taking as a base for harmonization a high level of protection, a total ban on advertising is indicated.

-- Even in those instances in which no impediment to free movement can be demonstrated, the existence of disparate national regulation of tobacco advertising would constitute a distortion to competition in the tobacco and advertising industries which must be eliminated. Elimination of distortion to competition, in the Commission view, provides a legitimate basis for legislation.

2. Critique of the Rationale of the Commission and of Article 100a as a Legal Basis

In our view the total ban exceeds the level of harmonization which is necessary to ensure a proper functioning of the internal market as an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty and is thus ultra vires and illegal. In this field of health, where the Community has no original

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[29] See infra

jurisdiction and unlike the field of Environmental protection where it does, it can only act to the extent and only to the extent that market considerations so demand. Moreover, we shall argue that adopting the Commission rationale in this case -- especially the reliance on the Commission view of Distortion to Competition -- will constitute an extremely dangerous precedent for future legislative activity of the Community opening the door for Community intervention, on the basis of majority voting, in practically all aspects of social and cultural law and policy of the Member States and rendering Subsidiarity far less effective.[30]

In the interest of clarity we shall deal separately with the issue of free movement (of media) and distortion of competition.

3. The near Total Ban on Advertising and Free Movement of Advertising Media within the Internal Market

The fundamental point is that in our opinion the total ban on advertising exceeds harmonization which can be justified as being necessary to ensure free movement within the internal market and must therefore be excluded from the ban unless some other rationale can be found. Even a cursory examination of the Draft Directive will reveal that many aspects of the total ban on advertising cannot be regarded as eliminating barriers to trade in advertising media among Member States which may have disparate regulatory regimes in this sector.

The following is a non-exhaustive list of examples.

Stationary advertising:

An obvious and paradigmatic example is, of course, stationary -- poster and bill board -- advertising. Unlike newspapers, television transmissions and indirect-advertising-products which are all tradable and which may have a trans-frontier market, the ban on stationary advertising cannot be justified as necessary under the free movement rationale and thus if this were the sole rationale would have to be excluded from the directive.

In fact the disparate regulatory regimes which exist in this field are more akin to "use regulation" than to "product regulation." They are more the equivalent of a Member State prohibiting the smoking in restaurants rather than the Member State who prohibit the importation of cigarettes. It can hardly be argued that if one Member State decides, say, that it will prohibit bill board advertising in the country side, the Community gains competence to harmonize since sector since this constitutes a barrier to trade.

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[30] The fact that in the past the Community and its Member States have passed legislation disrespectful of constitutional limitation on EC jurisdiction should not be decisive in allowing even further constitutional profligacy.

The only possible rationale may be sought in the notion of "distortion to competition" or by a focus on the advertising industry itself (services). We shall treat this rationale below and seek to show that it too is misconceived.

Newsprint advertising -- Newspapers and Magazines:

At face value it would seem that since newspapers and magazines are products which may have a trans-frontier market, disparate regulation among the Member State would lead to an impediment to free movement. If, say, Portugal bans all advertising of tobacco products and, say, Germany does not, German magazines carrying advertisements for tobacco products would not be able to circulate freely in Portugal. Harmonization (upwards Article 100a(3)) would seem to be required.

This logic of a total ban of any newsprint advertising, in our submission, is mechanical, over inclusive and hence disproportionate and exceeds that which is truly necessary to achieve an internal market in newsprint. If we are correct, a total ban on newsprint advertising would too be ultra vires and illegal.

We shall illustrate this briefly with two examples.

Local advertising "newspapers".

There is a growing sector of newsprint advertising which consists in a local periodical (usually a weekly) which is focused on one small local market -- say a mid sized town or a borough within a large town -- which is distributed freely to residents and which consists mostly of paid advertising focusing on the specific locality. As a practical matter these local advertising "newspapers" have no market whatsoever beyond their locality and certainly no conceivable European market. [31] Tobacco advertising in such local advertising "newspapers" in a Member State which does not prohibit it, will have no appreciable effect on intra-Community trade since there is no conceivable transnational market for such newspapers. [32]

To ban such advertising can be justified solely on health grounds which is not covered by Article 100a and for which the Community has no competence.

Marketing Inserts in newspapers

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[31] One can imagine a minuscule case where a local advertizing "newspaper" in a frontier town could have some market across the frontier. We would regard this as de-minimis in a manner comparable to the concept of de minimis in European Competition law. Such cases would not have any appreciable effect on the operation of the internal market.

[32] The "distortion to competition " rationale in these cases, we shall show, is even more specious than the stationary advertizing case.

Another growing form of newsprint advertising is the local "insert." The "insert" is a specially produced and detached printed advertisement -- often glossy -- which does not form an integral part of the newspaper, but which is inserted into the newspaper or magazine, at times at the distribution centeres. It is frequently used in weekend editions of newspapers, and it too often has a local flavour. Typically, the "international" or the "European" editions of the newspapers -- those copies which are sent to distributors abroad -- do not carry the marketing inserts, often to save on cost of transportation.

If the Draft Directive were concerned solely with ensuring the elimination of barriers to trade and free movement of newspapers, it would be sufficient to require that inserts carrying advertising for tobacco products in those countries where this is permitted may not be used in editions distributed for transnational consumption. This would correspond to the already existing practices of the industry, would not require different production lines (as may be the case with industrial goods having to satisfy different regulatory regimes in different Member States) and would be perfectly consistent with the exigencies of the internal market. Newspaper distribution is a highly centralized operation and there is practically no secondary distribution and parallel import market. A total ban on inserts carrying tobacco advertising where a perfectly feasible and less intrusive measure exists and which is thus not necessary for internal market reasons, takes the Directive beyond the scope of Article 100a and is ultra vires. [33]

Integral advertising in newspapers with a European Market.

There is also an issue of proportionality concerning the content of the Draft Directive. Of the total number of newspaper and magazine titles, only a very small fraction has any actual and potential intra-Community trade effect. Our conclusion is that the total ban in the Draft Directive penalizes an entire economic sector, where a barriers problem exists in relation to a very few.

Given the three considerations above, it is not inconceivable to imagine that Member States should be allowed to retain their internal regulation, while insisting on a Community norm only for transnational trade.

At first sight this construct might seem to conflict with a simplistic notion of a single market. What kind of single market would it be if two standards could exist side by side? To be sure, in relation

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[33] This construct argues, thus, for a from of optional harmonization of which there are many examples under Community law. A Member State is left to determine whether or not it will adopt a Community standard, but for any transnational trade the Community standard must apply. Optional Advertizing cannot apply to products which may be components in larger industrial products. Thus, in relation to, say, safety requirement of electrical or mechanical components, the Member States may be required to adopt the Community standards (total harmonization) since once these components are incorporated into other finished products which will then travel freely they will constitute a risk beyond the Member State frontiers. In the case of finished products, the case for total harmonization is much weaker. In relation to newspaper inserts which may be simply controlled at the point of distribution there is no economic case for full harmonization. Although optional harmonization has been out of favour, it should be reconsidered in the light of the principle of subsidiarity.

to many industrial goods the existence of numerous standards would defeat the very purposes such as economies of scale which the internal market is designed to achieve. Subsidiarity is not only a constitutional principle but also a philosophy which calls for respect for the decentralized features of a federal system. Should then the principle of one standard for all extend to all products with no differentiation?

That indeed would be a simplistic notion of single market which does not exist even in developed federal states such as the USA and which would certainly militate against the spirit of subsidiarity. The notion of the Single Market is not a principle which must override all other competing principles including that of jurisdictional limits and Member State autonomy and diversity in fields in which the Community has no original and primary legislative competence. To illustrate:

The Member States have very different norms and standards of public morality in the field of publishing. In some Member States, perhaps, total frontal nudity in advertising in general consumption newspapers would be interdicted, others may take a less restrictive approach. Likewise, Member States have very different standards to sexually explicit products. These differences are an expression of societal values and mores. There is a big market in such products free circulation of which is, of course, obstructed in the Community because of the different Member State norms.

The Community would have the competence to adopt harmonization measures regulating the level of, say, nudity in advertising as it would have in harmonizing the measure of "explicitness" of pornographic (or erotic) products -- all in the interest of a single market. They may even adopt a measure which was the "highest", namely prohibiting, say, any kind of nudity.

But could this limited competence be extended so that the Community would have the powers to mandate within the Member States societal norms of public morality in print and other media? The Community simply has no jurisdiction in this field, and cannot gain such jurisdiction simply because in some way this serves the Single Market. It could not do so even if there was unanimous agreement among Governments within the Council.

We already argued above that in some cases of harmonization, such as safety features of components or perhaps of industrial goods there probably is no alternative to having a uniform standard. The problem thus becomes one of determining a line between those cases in which it is absolutely necessary and others where the Single Market can operate without such uniformity.

At this point we are not proposing any "Bright line" test. But we are able to give some preliminary indications and in particular two:

The Community should have more latitude in areas where harmonization is part of a recognized Community policy such as environmental protection, agriculture etc.

By contrast, where the only competence of the Community derives from the Single Market rationale more circumspection must be exercised. In particular, when the harmonization touches on areas which are non-technical and impinge upon policies where different societies may legitimately have, and wish to maintain, their own value choices, the burden of measures which go beyond what is strictly necessary must be very high. Restrictions on Advertising, indeed, any restrictions on expression, is precisely such an area. The margin of appreciation of the Member States should be left so far as possible intact. Some societies are comfortable with a larger measures of government paternalism. Others are more jealous of individual autonomy, even the autonomy to harm oneself. The Community may not invade this area in the guise of free circulation when perfectly adequate alternative exists.

Indirect Advertising

Indirect advertising -- the use of tobacco brands for the promotion of other "benign products" (clothing) or the borrowing of high prestige brand names of "benign products" to promote new brands of tobacco -- would be banned under the Draft Directive for any undertaking where alternative brands exceeded a certain threshold.

The effect of the partial ban on indirect advertising is to put into jeopardy the free exercise by an undertaking of its own industrial property in marketing a product which is, as yet, totally legal. Imagine a high profile company in the field of perfumes which has built a reputation for high quality and prestigious products. Imagine further that this company wished to diversify into tobacco products, a product which is legal in all Member States. Arguably, under the Draft Directive, the company would not be able to use its brand names for the new product (tobacco) since capitalizing on name recognition from its other products would constitute indirect advertising.

This ban gives rise to serious legal problems. We shall mention a couple:

Clearly this ban compromises the right to a free exercise of property guaranteed by practically all constitutions of the Member States. Admittedly, this right is not absolute and restrictions may be imposed if they are in the general interest, serve a function that is deemed constitutionally more important than the right to exercise of property and the restrictions are proportionate to the objective sought.

Nowhere in its draft proposal does the Commission indicate that it has gauged the actual or potential harmful impact that can be expected from indirect advertising (as distinct from direct advertising) and nowhere has it demonstrated that such harm is so severe that only a ban would be necessary to eliminate the problem.

Even if the harm from indirect advertising were severe, one can envisage many instances where it would be difficult to show an intra-Community impact and hence a Community legal basis on which to found the ban on indirect advertising. In its original drafts the Commission did not include

this aspect of the proposal; it was added explicitly as a health means. Its internal market rationale is tenuous in many cases. There still exist many tobacco brand names which are totally local. For the producers of these names to engage in promotion of other products could not affect trade between Member States nor would it have an appreciable impact in the Common Market or a substantial part of it. Consider the following potential absurdity: Restrictive practices or an abuse of a dominant position in relation to such local tobacco products would not be caught by Community law because of its internal dimension, but indirect advertising would be so caught. The total ban on indirect advertising, without attempting to differentiate between products which have an intra-Community impact and those which are restricted to a national market is, once again, questionable under the principles of proportionality and subsidiarity.

To return to the over all analysis of the Directive, with these few examples we hope to have shown that the directive with its sweeping ban on advertising exceeds in numerous respects harmonization necessary to ensure free movement. If our analysis is correct it will have demonstrated our initial proposition that also in its content, not only in its rationale, the Draft Directive as currently drafted is using the internal market and free movement rationale as a foil, as a mask, for what is in truth primarily a measure of public health for which the Community lacks harmonizing competence under Article 100a.

Even if this is not so, there are, as we have sought to demonstrate, several features of the Directive which exceed that which is necessary for the elimination of barriers to trade.

4. Distortion to Competition

An alternative rationale for harmonization which has become increasingly in vogue, especially in the most far fetched legislative proposals, is the elimination of Distortion to Competition.

Eliminating distortion to competition is a recognized and important dimension of achieving the internal market. It has been used in, say, the Environmental field to create regimes which would allow producers in different Member States to compete with each other on a level playing field. If, say, the environmental waste disposal regime in one Member State were much more onerous than in another, the final per-unit cost of the product would be effected, and competition would be distorted. In the present case the distortion argument is necessary where one cannot find a direct barriers to trade justification for harmonization such as the ban on stationary bill board advertising. The argument would run more or less as follows:

If, say, in one Member State there is a ban on tobacco advertising on Billboards and in another such advertising is permitted there will be "distortion of competition": Among the advertising industry in the different Member States, and also among tobacco producers, favouring those advertisers and producers in the more permissive Member State. Therefore, in order to eliminate such distortion of competition, the Community must have jurisdiction to harmonize such measures ex Article 100a.

It appears to us that this is one of the most dangerous arguments on which to base Community jurisdiction and must be treated with utmost circumspection. It abuses the legitimate distortion to competition argument. There are many difficulties with this notion. We shall list only the most salient.

It grants the Community practically limitless jurisdiction. Almost every aspect of internal social regulation can be shown to have an economic impact which, in turn, will "distort competition". Consider the following:

Different rates of income tax on individuals and companies affect their economic ability to make profits, invest and engage in research and development. The Community has competence to harmonize income tax since the disparate tax distorts competition among undertakings. Could it really be said that without Treaty amendment and on the sole basis of Article 100a the Community could harmonize, by majority vote, income tax rates in the different Member States?

The number of years children have to be in school affects the labour market. What they study in school affects their skills as workers: The Community has competence in education, since differences in the quality of would-be "workers" will distort competition.

Whether or not there is military conscription affects the labour market, and thus the Community may harmonize military service to eliminate the distortion to competition in this area.

Length of annual holidays will distort competition among undertaking and hence the Community will have competence to harmonize the number of national holidays.

Criminal liability of company directors will require different levels of insurance by companies. This would "require" harmonization by the Community.

Public morality standards of sexually explicit material will have an appreciable effect on the cinema industry and thus must be subject to Community harmonization.

Regulation of smoking in public places will have an impact on the tobacco industry and on the health of would-be workers and thus must be subject to Community harmonization.

The opening hours of shops and bars and Member State laws regulating the age in which minors may be served alcoholic drinks will have an impact on alcohol consumption and thus must be subject to Community harmonization.

Some of these examples may be considered absurd and outlandish. But they follow the very rationale which is being used to justify Community competence to regulate the means of advertising

of tobacco products which clearly have no transnational impact.

The list is endless and any attempt to circumscribe Community competence would be doomed. Ultimately just about all aspects of social regulations will have an economic impact which could be said to "distort" competition and thus must be subject to Community harmonization.

The combination of Distortion of Competition rationale and the "highest standard requirement" in, say, health might lead to the absurd result, that each time one or more Member States adopt, for example, a new health measure, they will force not only the Community, but also all other Member States, in purely internal situations, to adopt these standards so that competition is not "distorted". A Member State in this way will be able to export the costs of its social and economic choices on to all other Member States.

The most puzzling aspect of the Commission's reliance on distortion to competition in this context concerns the political economy, and this for two reasons:

The reliance on "Distortion of Competition" is, paradoxically, counter to the philosophy of the Internal Market and of a Europe Without Frontiers. Thus, If, say, billboard advertising is permitted in one country and prohibited in another, tobacco producers in different Member States, who under the internal market philosophy are encouraged to treat the Community as one large market, will advertise on billboards in those countries in which they may, and not advertise in those in which it is prohibited. In each market they will be competing with each other on an equal footing.

This would be true also for providers of advertising services.

The second reason is even more striking, and may be introduced by an example from the United States. In the United States the multi-billion baby formula food industry is divided among three giant producers. At a certain point, ostensibly on the grounds of health, these producers had adopted an industry code of conduct which forbade all advertising of baby formula. The reason was so as not to discourage women from breast-feeding, since medical opinion was that no formula was as healthy as natural maternal milk. When a major European producer attempted to penetrate this multi-billion food sector, it became impossible. The ban on advertising constituted an effective barrier to the entry of a competing product on the market. An anti-trust case is now pending.

In all Member States smoking cigarettes is legal. In those Member States where advertising is permitted, it will be the total ban on advertising, even over those media which do not move from one Member State to another, which will create a distortion to competition since it will practically preclude the ability of competing brands of cigarettes from other Member States to establish themselves in the local market.

How then should one draw the line of distortion to competition which may be the subject of regulation and that which may not? After all, we are not suggesting that regulatory distortion of competition may not exist and that in certain cases it should not be remedied by Community

harmonization. Indeed, the Court of Justice has recognized this as a legitimate basis for harmonization. [34]

We would suggest two fundamental lines of reasoning which would all have to be justified before distortion to competition resulting from disparate regulatory regimes in the Member States may be used as a basis for harmonization.

Most simply it should be shown that the result of the different regulatory regime affects the competitive relationship between undertakings in the internal market. We have sought to show that neither the tobacco industry nor the advertising industry, and probably not even the media industries (which hardly compete with each other in a cross-country setting) would have the competitive relationship appreciably affected by disparate internal advertising regimes for tobacco products.

This was not the case with the environmental regulation in the Titanium Dioxide or beef hormone case, where the different regimes directly affected the pricing and competitive relationships in a highly competitive transnational markets.

Secondly, it will be noted that the Titanium dioxide and Meat Hormones cases -- concerned areas of harmonization in which there were positive Community policies, in other words, where the Community was already empowered under the Treaty to act. Where the Community has no original power to act, such as in the area of income tax, or public morality, it should not be given such powers without explicit Treaty amendment and solely on the basis of "distortion to competition" as in the billboard example. To allow legislation in these situations would, as shown in the examples listed above, render Community competences practically limitless.

The usage of the distortion to competition in this case therefore is not only a thin disguise for the health objective which is truly at the basis of the Draft Directive but also constitutes a veritable danger to a fundamental constitutional principle of attributed powers.

5. The Appropriate Legal Basis For The Directive

Even if the Community were to have the competence to adopt the proposal as drafted, which, we have suggested is not the case, a different issue concerns the appropriate legal basis for the proposal. A Community measure adopted with an incorrect legal basis is void. [35]

The Draft Directive is based on the Treaty as a whole, but, in particular, on Article 100a. In the

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[34] e.g. Titanium Dioxide Case

[35] See eg Case 45/86 Commission v Council [1987] ECR 1493 Recital 22.

light of Case 155/91 Commission v Council (Directive déchets - Base Juridique)[36] it is submitted that the use of Article 100a is erroneous. As drafted, in its current expansive form, under the EEC regime the only appropriate legal basis would be Article 235 EEC. Under the Treaty of European Union, the legal basis should be Article 129 TEU.

Case 155/91 concerned Council Directive 91/156/EEC of March 18th, 1991 [37] amending Directive 75/442/EEC[38] on waste.

The proposed legal basis of the 1991 Waste Directive as proposed by the Commission was identical to the Tobacco Advertising Draft proposal:

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

In the case of the 1991 Waste Directive the Council, unanimously, amended the legal basis to read:

Having regard to the Treaty establishing the European Economic Community, and in particular Article 130s thereof,

Article 130s is a specific provision under Title VII Environment of the Treaty. The procedure for decision making, as distinct from Article 100a provides for unanimous decision making by the Council and for mere consultation of the European Parliament, whereas Article 100a provides for majority voting (with some exceptions) and for the Cooperation procedure with the European Parliament. The Commission, (European Parliament intervening in support) challenged the Council (the Kingdom of Spain intervening in support) requesting the annulment of the Directive as adopted by the Council ex Article 173 EEC.

It must be noted that in that case, as in the case of the draft on Tobacco Advertising, the dispute concerning legal basis is not formal. Since the alternative articles

entail different rules regarding the manner in which the Council may arrive at its decision .... [t]he choice of the legal basis could thus affect the determination of the content of the contested regulations.[39]

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36 Decision of March 17, 1993 (not yet reported).

37 OJ L 78/32 26.3.91

38 OJ L 194/47 25.7.1975

39 Case 45/86 Commission v Council [1987] ECR 1493 Recital 12.

When an erroneous legal basis is adopted with the above consequences, the measure is incompatible with Community law.

0.1 It is a constant feature in the jurisprudence of the Court that

...in the context of the organization of the powers of the Community the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review.[40]

In relation to the 1991 Waste Directive the Commission argued that

...la directive a pour objet tant la protection de l'environnement que l'etablissement et le fonctionnement du marche interieur. Des lors, celle-ci aurait du etre adoptee uniquement sur la base de l'article 100 A du traite... [41]

The same reasoning informs the Commission's choice of Article 100a in the case of the Tobacco Advertising Draft. In support of this position the Commission relied on Case 300/89 Commission v Council (Titanium Dioxide).[42] In the Waste Case the Council defended its rejection of Article 100a and its substitution of Article 130s reasoning that the latter constitutes

la base juridique correcte de la directive 91/156 qui, eu egard a son but et son contenu, vise essentiellement la protection de la sante et de l'environnement.[43]

In our view, the position of the Draft Directive on Tobacco Advertising is similar. Its objective and content relate essentially, as we have tried to illustrate above, to the protection of health.

Our argument here should not be taken to mean that from the moment the TEU came into effect the Community could never adopt harmonization measures on matters that affect public health. After all, the protection of health of humans is one of the grounds mentioned in Article 36 and is also a mandatory requirement under the Rule of Reason in Cassis de Dijon. Following Case 155/91, it all becomes a matter of degree. Measures which are principally about public health should indeed be excluded, under the terms of the TEU from harmonization. Measures which are principally market oriented may, instead, as in the case of Titanium Dioxide be the subject of harmonization.

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40 Id. Recital 11.

41 Case 155/91 Recital 5.

42 Decision of June 11, 1991 (Not yet reported).

43 Recital 6.

The line will not always be easy to draw.

6. Subsidiarity and The Tobacco Draft Directive

We turn now to examine the draft Directive under the principle of subsidiarity. It affords a useful example of the delicacy of this issue too.

The principle of subsidiarity finds its legal expression in Article 3b of the Treaty of European Union.

ARTICLE 3b

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

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 in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty." 6) Article 4 shall be replaced by the following:

Although the Treaty of European Union has not yet come into effect and the draft Directive was enacted within the framework of the Treaty of Rome as amended by the Single European Act, the principle of subsidiarity is relevant for the examination of the draft.

In explaining the principle, the European Council in the Edinburgh Summit stated, inter alia, the following:

European Union rests on the principle of subsidiarity, as is made clear in Articles A and B of title I of the Treaty on European Union. This principle contributes to the respect for the national identities of Member States and safeguards their powers. It aims at decisions within the European Union being taken as closely as possible to the citizen.

This desideratum would apply even if the Treaty of European Union does not come into force, a-fortiori if it does.

More specifically, the European Council explicated the principle as follows:

Article 3b of the EC Treaty covers three main elements:

- *a strict limit on Community action (first paragraph);*

- *a rule (second paragraph) to answer the question "Should the Community act?". This applies to areas which do not fall within the Community's exclusive competence;*

- *a rule (third paragraph) to answer the question: "What should be the intensity or nature of the Community's action?". This applies whether or not the action is within the Community's exclusive competence.*

The three paragraphs cover three distinct legal concepts which have historical antecedents in existing Community Treaties or in the case-law of the Court of Justice:

The principle that the Community can only act where given the power to do so - implying that national powers are the rule and the Community's the exception - has always been a basic feature of the Community legal order (The principle of attribution of powers).

The principle that the Community should only take action where an objective can better be attained at the level of the Community than at the level of the individual Member States is present in embryonic or implicit form in some provisions of the ECSC Treaty and the EEC Treaty; the Single European Act spelled out the principle in the environment field. (The principle of subsidiarity in the strict legal sense).

The principle that the means to be employed by the Community should be proportional to the objective pursued is the subject of a well-established case-law of the Court of Justice which, however, has been limited in scope and developed without the support of a specific article in the Treaty. (The principle of proportionality or intensity).

It will be seen, thus, that Article 3b covers two elements, attribution and proportionality, which are already existing operative, legally binding principles of the Community.

As regards the second element "The principle of subsidiarity in the strict legal sense," the following should be noted.

First, and contrary to much speculation in the literature, it was the view of the European Council itself that it was a legally binding principle capable of judicial application:

The principle of subsidiarity cannot be regarded as having direct effect; however, interpretation of this principle, as well as review of compliance with it by the Community institutions are subject

to control by the Court of Justice, as far as matters falling within the Treaty establishing the European Community are concerned.

Second, even prior to its entry into force, the Council and the Commission have undertaken to engage in a review of pending legislation to examine the extent to which it complies with the principle of subsidiarity. The results of this review are to be released in the December 1993 European Council Summit, but it has already been indicated that a variety of measures including "comparative advertising" would be subject to review.

A key element of Subsidiarity is that it is for the Community Institutions and principally the Commission to undertake a Subsidiarity review before proposing legislation. It is not for individuals to have the onus of undertaking this review as a challenge.

Finally, it would be unacceptable to attempt to pass legislation which contravened the principle of subsidiarity at the last moment before the putative entry into force of the Treaty of European Union on the grounds that it does not yet apply.

In our view the Draft Directive fails the Subsidiarity test in two respects: Substantive and Procedural. We shall show than as drafted, the proposed Directive is not respectful of some of the operational parts of subsidiarity. Additionally, it will become clear that the Commission has put forward its draft without considering all its subsidiarity implications.

Applying the Principle of Subsidiarity to the Draft Directive

The first element of subsidiarity is the principle of attribution -- the general limit on Community action. We have already noted the interpretation which the European Council has given this element namely,

Compliance with the criteria laid down in this paragraph is a condition for any Community action.

In order to apply this paragraph correctly the institutions need to be satisfied that the proposed action is within the limits of the powers conferred by the Treaty and is aimed at meeting one or more of its objectives. The examination of the draft measure should establish the objective to be achieved and whether it can be justified in relation to an objective of the Treaty and that the necessary legal basis for its adoption exists.

We have already dealt extensively with the issue of Community competences and legal basis reaching the conclusion that as currently drafted the proposed Directive would be in violation of the first paragraph of Article 3b TEU.

In relation to the third element of subsidiarity, we shall reproduce here the guidelines established by the European Council[44] as regards the interpretation of the third element and see the extent to which the Directives as drafted is in compliance. We shall comment only to the extent that non-compliance is suspected.

This paragraph applies to all Community action, whether or not within exclusive competence.

Any burdens, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens, should be minimized and should be proportionate to the objective to be achieved;

Comment: In our view the financial burden falling on economic operators -- namely newspaper publishers -- as a result of the total ban is disproportionate to the objective of ensuring free movement of printed news and entertainment media. Compared to the total number of newsprint titles in the twelve Member States, the number of newspapers and magazines which have an appreciable intra-Community market beyond their local or Member State market is minuscule. Except for a handful of newspapers, the percentage of copies which sell beyond Member State boundaries is also minuscule. By contrast the income from tobacco advertising represents a major part of advertising revenue of many titles.

The following figures from the German marketplace are illustrative:

The IVW (Informationsgemeinshcaft zur Geststellung der Verbreitung von Werbetraegern) which estimates the accuracy of the quarterly circulation figures of newspapers and magazines given by German publishers to their advertisers estimates that on average, in the magazine sector, of 1,528 titles 337 do not export at all. Nonetheless even those 337 titles, about 20% or periodicals published in Germany, would be banned from carrying tobacco advertising. We imagine that similar, or in the case of other languages even a higher percentage of journals would be affected.

Of total numbers published, it would seem that only 6.01% are sold outside Germany. Focussing on the ten largest periodical publishers in Germany (representing 85% of the market), of their exports outside Germany (a fraction of their total sale -- see 6% figure above), only 22.7% are to other EEC countries, i.e. intra-Community trade. Of these sales, the publishers estimate that a full 82.9% are to German tourists abroad. Genuine intra-Community sales would, it is estimated, amount to 3.87% of total exports.

The most striking estimate is, then, the percentage of true intra-Community sales of popular German magazines. The publisher association estimates this figure to be only 0.21% of total

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[44] European Council in Edinburgh 11-12 December 1992, conclusions of the Presidency, SN 456/92 Section II, p 19 et seq.

numbers sold. For technical, non popular journals the number must be even smaller.

There are no available figures in Germany for newspaper sales outside Germany. But, according to the German Publishers Association the Springer organization estimates the number of true intra-Community sale (to non German tourists) to be around 0.07% of their total newspaper production.

We would readily agree that these figures are approximate. But we believe that they do give an order of magnitude which is indicative of the market. It may very from one Member State to another (with higher percentages for some English and French publications and lower percentages for, say, Danish, Portuguese and Greek publications). Figures for the Dutch periodical market suggest a similar order of magnitude -- yearly sales of over 500 million copies of which less than 5% sold outside the Netherlands -- mostly in Belgium.

If these figures are at all representative, they would indicate two conclusions:

If indeed the objective of the Draft Directive is to ensure the free movement of print media within the Community, the total ban on advertising achieves this by a considerable economic burden -- the total ban of advertising for tobacco products and the revenue it generates -- which on its face is disproportionate to the objective, considering the large number of titles which never sell outside a Member State, and the relatively small percentage of sales (less than 1%) of those who do. In effect, supposedly for the sake of a small number of titles which have appreciable trade within the Common Market, the Draft Directive proposes to ban tobacco advertising in all titles, the majority of which never venture beyond national frontiers. If economic proportionality has any meaning it would seem to apply here. But then, as we have argued above, the Directive's true objective and content is about health and the Market is truly subsidiary.

As a minimum the Commission would have to undertake a full objective examination of this issue if it is to be faithful to the third element of subsidiarity. It could be argued that even if the effects are small, they exist and no alternative to a total ban exist. We would treat this type of reasoning with skepticism. Modern publishing and printing technology makes the production of "transnational editions" with different advertising packages increasingly easy. This option would have to be examined by the Commission and discarded.

The Commission does, in its explanatory Statement, give one figure namely the percentage of Tobacco advertising as part of the total advertising budget for all products or services within the EEC.

In the twelve Member States, the advertising budget for tobacco products does not exceed 3% of the total advertising budget for all products or services. [45]

[45] Doc 0437EN91800 March 8th, 1991. Rev. 3 at p.9

This Commission statement is puzzling in two respects:

First it relates an irrelevant statistic for economic proportionality. It is not the percentage of tobacco advertising from total advertising which is relevant, but the comparison of the economic costs to the media of eliminating this revenue compared to the gravity of the barriers to trade problem.

Second, the Commission datum is relevant for another consideration. The alternative rationale for harmonization is the distortion to competition. We have already argued that there would be no appreciable distortion in the tobacco sector, since in each Member State, tobacco products could be advertised on an equal basis among competing products. Indeed, we have already noticed that the banning of advertising, would practically exclude the penetration of new brands from other Member States into a home market. New brand penetration depends on advertising. The total ban even on advertising media which does not cross the frontiers will solidify a partitioned market in tobacco products.

The distortion to competition therefore must be in the advertising service sector. We have, of course, argued that this is a specious argument. Advertising agencies from all Member States would be able to compete for the non-trans-frontier advertising media in those Member States in which it would remain permitted.

But even if we are wrong in this contention, it is worth recalling here the second recital of Article 3b:

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 in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

If tobacco advertising constitutes less than 3% of the total advertising sector, how can the Commission argue that potential distortion of competition in so small a segment of the Advertising Market constitutes a serious and appreciable distortion justifying a total ban? And could this really be said to be consistent with Article 3b(2) which stipulates that by reason of scale Community action has to be justified? In our view, under the principle of subsidiarity, the burden is on the Community Institutions to make the case of scale and effect. In none of its statements has the Commission even tried to make this case. The figures they have supplied to the public indicate the opposite conclusion.

We continue now with the European Council guidelines to Subsidiarity:

Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting

Community law, care should be taken to respect well established national arrangements and the organization and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.

It is obvious that a total ban is at tension with this desideratum, and in our view it has not been demonstrated that it is truly necessary.

Where it is necessary to set standards at Community level, consideration should be given to setting minimum standards, with freedom for Member States to set higher national standards, not only in the areas where the treaty so requires (118a, 130t) but also in other areas where this would not conflict with the objectives of the proposed measure or with the Treaty.

The proposed draft does exactly the opposite: It sets the highest standards even in areas such as non intra-Community media which have no free movement considerations and which do not appreciably distort competition. The inconsistency with this guideline is glaring.

The form of action should be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community should legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Non-binding measures such as recommendations should be preferred where appropriate. Consideration should also be given where appropriate to the use of voluntary codes of conduct.

As a minimum, the Commission should explore the possibility of reaching a voluntary code of conduct with the media to eliminate by auto-regulation the problems of intra-Community trade, small as they are. As indicated above, new technologies may make this possible. Procedurally, only a failure to reach such a voluntary code of conduct should allow legislation to be considered. We believe that the reason such an exploration is spurned is not because it is not feasible, but because it is in fact feasible, though it would not result in a total ban on tobacco advertising. This, for health reasons, the Commission does not want.

Where appropriate under the Treaty, and provided this is sufficient to achieve its objectives, preference in choosing the type of Community action should be given to encouraging cooperation between Member States, coordinating national action or to complementing, supplementing or supporting such action.

Where difficulties are localized and only certain Member States are affected, any necessary Community action should not be extended to other Member States unless this is necessary to achieve an objective of the Treaty.

This guideline is highly pertinent to the draft Directive. It is clear that if there is a trans-frontier problem it would be most noticeable in relation to languages which are spoken in more than one country and, to some extent to some of the wider spoken languages (English, French etc.) The problem would be truly de-minimis in relation to media in some of the less widely spoken languages. Put differently -- Why should the, say, Danish, or Spanish, or Greek media be made to pay a price for a market problem (if there is one) which really affects some other Member States? Procedurally, it is not clear that the Commission has given any attention to this issue.

We turn, then, finally to the second element of Subsidiarity -- "the principle of subsidiarity in the strict legal sense." It is worth noting here too parts of the guide lines of the European Council.

In relation to the second paragraph of Article 3b the European Council commented.

...

For Community action to be justified the Council must be satisfied that both aspects of the subsidiarity criterion are met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action and they can therefore be better achieved by action on the part of the Community.

In general, if we are correct that a primary objective of the proposed draft is public health, it is clear that they should be left under this guideline to the Member States.

The following guidelines should be used in examining whether the above-mentioned condition is fulfilled:

- *the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States; and/or*

- *actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (such as the need to correct distortion of competition or avoid disguised restrictions on trade or strengthen economic and social cohesion) or would otherwise significantly damage Member States' interests; and/or*

- *the Council must be satisfied that action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.*

It is apparent from our earlier analysis that we do not believe that many of the criteria mentioned here are met. We have argued that only part of the issue under consideration has transnational effect, and yet the Commission proposal in its totalistic dimensions pretends that the entire issue

has transnational effects. In our view, the current proposal is deficient in meeting the requirements of Subsidiarity. Procedurally, this is at least partially so because its legislative history extends well before the adoption of Article 3b and the European Council guidelines of December 92. Substantively, since we believe that the Directive is drafted as a health measure and principally for health reasons, we do not believe it will, or should, survive the procedural scrutiny which the Edinburgh European Council requires.

Conclusion

The Commission Draft Directive on Tobacco Advertising is an example of the problem, but also of the ability to sustain a rigorous analysis even without resorting to lists and remaining within the functional, purpose oriented scheme of the Treaties.

H. ADJUDICATING THE DILEMMA OF COMPETENCES - JUDICIAL KOMPETENZ - KOMPETENZ

This era of political equanimity in the face of "unlimited jurisdictional miles" has now passed with the shift to majority voting and the seeds -- indeed the buds -- of crisis are, with us. Subsidiarity has not truly resolved the issue of competences. It appears so far to be a political tool which gives the Union an excuse not to act when it is expedient, but does not offer a meaningful restraint when it is not. It is of course possible, on a subject matter by subject matter basis, to attempt to curtail the legislator as Maastricht does in, say, the fields of public health and culture. It tries to preclude harmonization legislation. But can even those clear provision stop processes such as Absorption? And even if they could, it would be at a significant cost of rigidity the price of which can never be anticipated.

In the face of this unresolved dilemma, the German Constitutional Court, in its Maastricht Decision, did just what was suggested above. It rejected the ECJs claim to exclusive Kompetenz-Kompetenz and claimed that the limits to Community legislative powers was as much a matter of German constitutional law as it was a matter of Community law. As such it, the German Constitutional regards itself as competent, indeed as mandated by the German constitution to monitor the jurisdictional limits of the Community legislative process. Indeed, it delegated that function to any constitutional organ of the German State.

Formally, the decision constitutes a flagrant act of defiance vis-a-vis the European Court of Justice in direct contradiction with its jurisprudence on the power of national courts to declare Community law invalid. It flies in the face of, inter alia, the third paragraph of Article 177 It is also untenable in a legal functionalist sense: There would be as many fundamental boundaries to the Community as there are Member States. And how can the same Community measure be considered intra-vires in one Member State and ultra-vires in another?

We find in this episode, then, the deepest pathology of the Rectangular problems defined by Parliament in the associated study to this: A shift in decision making processes (from a culture of unanimity to one of majority voting) making visible (and acting as catalyst as well) a crisis on competences which had lost the strong legitimacy which consensual politics provided and this in turn precipitating a new crisis in relation to the External Hierarchy of Community Norms.

The burden of the previous analysis is to understand that the attempts to reconcile the functional with the essential becomes a search for legitimation. This legitimation can be pursued by a strategy which will combine different approaches:

1. There can be an attempt to draw fundamental boundaries around some core Statal functions. But it would be very difficult without doing serious violence to, say, the Internal Market to make those boundaries truly inviolable. You can, as Maastricht seeks to do, try to exclude any Community legislation in the field of public health. But would you want to stop the Community's activity to harmonize the certification of safe medicines which would allow them to circulate freely, to the great benefit of consumers, within the Union? Is a Directive harmonizing the labeling of tobacco products or medicinal products a measure of public health, or a measure designed to allow free movement? The notion that no core activity of a State can be truly insulated probably continues to hold true. It is better to be clear on this point rather than try to buy legitimacy at the price of obfuscation. Still, Legislative Restrictions if not water tight, do place constraints on the Union and, more importantly, can be one element in a campaign to change a political and legal ethos towards greater restraint.

2. The nexus between decision making and competences does not only explain the emergence of the present crisis of competences. It also hints that jurisdictional flexibility can be maintained, with however, decisional rigidity. Article 235 provides a measure of jurisdictional flexibility. It is, as we have seen, problematic. None the less, it would be a great deal more problematic if it allowed for majority voting. Even greater legitimacy would have been bestowed on it if, say, the assent of the European Parliament were required. This is not to suggest that we favour retention of unanimous decision making. But it does most definitely suggest that we think that there is a nexus between these two concepts and that to the extent that the Community and Union maintain differentiated decision making, "heavy" decisional procedures can help compensate for jurisdictional flexibility.

3. Finally, since inevitably the Community and Union will continue to occupy major fields of activity where the drawing of fundamental boundaries is inconceivable and where decisional heaviness would be dysfunctional, a lot will depend on a careful exercise of restraint in interpreting the functional guidelines provided in both the first paragraph and the second and third paragraphs of Article 3b. Courts can not replace the legislator in micro-managing the decisional delicacy of Subsidiarity. But credible Judicial Review can help restore confidence – among national parliaments for example -- that the Community legislative process is under control also in this area. Indeed, we would give a very sympathetic consideration to the idea of empowering national Parliaments to bring cases before the European Court of Justice on the grounds of violating the

jurisdictional limits of the Union.

But has the European Court the credibility in this area?

We believe that the Community is suffering from a crisis of confidence in this respect. It is in the light of these considerations that we wish to turn to that dramatic episode of the German Constitutional Court decision. We want to use some of dynamics of the Cold War as a device for evaluating the judicial Kompetenz-Kompetenz aspect of the Maastricht Decision of the German Constitutional Court.

On this reading, the decision was not a declaration of War but the commencement of a cold war with its paradoxical guarantee of co-existence following the infamous MAD logic: Mutual Assured Destruction. For the German Court actually to declare a Community norm unconstitutional rather than simply threaten to do so, would be an extremely hazardous move, so hazardous as to make its usage unlikely. The use of a tactical nuclear weapons always was considered to carry the risk of creating a nuclear domino effect. If other Member State courts followed the German lead, or if other Member States legislatures or governments were to suspend implementation of the norm on some reciprocity rationale a veritable constitutional crisis in the Community could become a reality -- the legal equivalent of the Empty Chair political stand-off in the 60s. It would be hard for the German government to remedy the situation especially if the German Court decision enjoyed general public popularity. Could the German Constitutional Court, would the German Constitutional Court be willing to face the responsibility of dealing such a blow (rather than a threat of a blow) to European integration?

But the logic of the Cold War is that one has to assume the worst and to arm as if the other side would contemplate a first strike. The European Court of Justice would, thus, have to be watching over its shoulder the whole time, trying to anticipate any potential move by the German Constitutional Court. Some aspects of the recent jurisprudence of the ECJ may already be influenced by this.

It could be argued that this situation is not unhealthy. That the German move of the 90s in relation to competences resembles their prior move in relation to human rights and that it was only that move which forced the European Court to take human rights seriously. Thus, the current move will force the Court to take competences seriously.

This view has some merit in it, but ultimately we find it unpersuasive for two reasons.

There is no "non proliferation treaty" in the Community structure. MAD works well, perhaps, in a situation of two superpowers. But there must be a real fear that other Member State Courts will follow the German lead in rejecting the exclusive Kompetenz-Kompetenz of the ECJ. The more courts adopt the weapon, the greater the chances that it will be used. Once that happens, it will become difficult to push the past back into the tube.

Courts are not the principal Community players. But this square-off will have negative effects on the decision making process of the Community. The German Government and Governments whose Courts will follow the German lead, will surely be tempted to play that card in negotiation. ("We really cannot compromise on this point, since our Court will strike it down...)

For reasons to which we alluded and which are developed further in the associate Study we do not think that a solution to this problem can be found by a simple drawing up of new list of competences for the Community.. Instead, we believe that long term solution can only take place by a change of ethos. Institutions can play a role in this.

I. A EUROPEAN CONSTITUTIONAL COUNCIL

We would propose the creation of a Constitutional Council for the Community, modeled in some ways on its French namesake. The Constitutional Council would have jurisdiction only over issues of competences (including subsidiarity) and would decide cases submitted to it after a law was adopted but before coming into force. It could be seized by any Community institution, any Member State or by the European Parliament acting on a Majority of its Members. Its President would be the President of the European Court of Justice and its Members would be sitting members of the constitutional courts or their equivalents in the Member States. Within the Constitutional Council no single Member State would have a veto power. The composition would also underscore that the question of competences is fundamentally also one of national constitutional norms but still subject to a Union solution by a Union institution.

We will not elaborate in this study some of the technical aspects of the proposal. Its principal merit, if it has any, is that it gives expression to the fundamental boundary concern without however compromising the constitutional integrity of the Community as did the German Maastricht decision. Since, from a material point of view, the question of boundaries has an inbuilt indeterminacy, the critical issue becomes not what are the boundaries but who gets to decide. The composition of the proposed Constitutional Council removes the issue, on the one hand, from the purely political arena; on the other hand, it creates a body which, on this issue, would, we expect, enjoy a far greater measure of public confidence than the ECJ itself.

This proposal may appear to be an attack on the Court. Our view is that such a view is shortsighted and fails to appreciate that the issue of competences is already bringing about a shift in the position of the Court.

The Court's earlier "hands off" attitude to expansive Community competences will no longer work. Whether it likes it or not, it will be called upon, with increasing frequency to adjudicate competence issues. And here the Court will be put into a "no win" situation: Whatever decision it will take in this vexed field, it is likely to earn the displeasure of one or more powerful constituencies.

We will draw now, by way of hypothetical examples, four typical "competence" related scenarios which will illustrate the new political environment.

Scenario 1: The Outer Reaches of Community Jurisdiction

The Tobacco Advertising Draft Directive is a good example of the problems the Court will face in the post Maastricht era.

There is discord among the Member States about the substantive merits of the total ban and about the competence of the Community to enact such a ban. This example illustrates perfectly how the issue of competences is almost always intricately involved with the substantive content of any proposal. Often, substantive opposition will be masked as opposition to the principle of Community jurisdiction and vice-versa. Critically, in the pre-SEA period consensus among the Member States would be necessary for adoption. Once such consensus were achieved, the issue of competences would be diffused.

Imagine then that the Proposal is adopted by majority vote and reaches the Court with a challenge claiming that Community exceeded its jurisdiction, a claim supported by some Member States and powerful economic actors (the tobacco lobby), opposed by other Member States and the equally powerful anti-tobacco public forces.

The intricacies of jurisdictional and substantive issues are daunting. To approve the measure would represent an expansive reading of Article 100a in an era where the political climate opposes, in principle, such expansive readings. The Court might draw considerable "flack" and its credibility as an effective guarantor against profligate Community legislation might be damaged. By contrast, to strike down the measure, even in part, will give rise to vocal complaints of the Court succumbing to the interests of big business and being insensitive to social issues.

There is no need to conceptualize the example -- it speaks for itself. If we are right in our prediction that this type of issue is likely to rise with increasing frequency, it will become apparent that the Court will increasingly find itself in visible controversy.

Scenario 2: Subsidiarity

We do not wish here to go beyond what is necessary to achieve the objectives of this study.

Article 3b TEU provides:

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

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 in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

Whereas the prevailing view, influenced in part by German constitutional theory, was that Subsidiarity was not a justiciable concept, in the conclusions to the Edinburgh Summit the European Council pronounced that

"[t]he principle of subsidiarity cannot be regarded as having direct effect; however, interpretation of this principle, as well as review of compliance with it by the Community institutions are subject to control by the Court of Justice, as far as matters falling within the Treaty establishing the European Community are concerned."

Issues of subsidiarity are likely to reach the Court, if at all, when there is disagreement between a majority and minority of Member States. As regards the first paragraph of Article 3b, the issue before the Court would present itself in precisely the manner of the tobacco draft Directive given above and with the same political consequences. The second paragraph -- subsidiarity in the strict sense -- is, in our view, justiciable and should be so. Given, however, the open-textured nature of the provision, the appropriate criterion for judicial review would be reasonableness and excess of jurisdiction. The Court should not simply substitute its view of the matter for that of the majority in Council, but decide whether, in the circumstances, the Council decision could reasonably be considered to accord with subsidiarity. In most cases the answer is likely to be positive.

But it is likely that here two, substance and constitutional limits will be intricately connected, in a sensitive political context. Each time the Court affirms a measure, it will be charged as weak on constitutional limits. When it annuls, it will be accused of being political, ideological and worse. My own view is that if the Court avoids subsidiarity issues put before it on the grounds that they are "political," it will not only lose credibility as a guarantor against Community jurisdictional excesses, but this task will be taken on by national supreme courts at huge cost to the constitutional architecture of the Community. But this does not mean that in deciding subsidiarity issues the Court will not pay a political cost as well.

Scenario 3: Legal Bases

The question of legal basis for Community legislation is a sub-species of the general Competences issue. Here the issue is not simply whether or not the Community may act, but what is the appropriate legal basis. In the Pre-SEA period this mattered little. When in doubt there was a

regular usage of the catch-all Article 235. By contrast, since 1987, under renewed Community majority voting, the legal basis means a lot: it will determine the decisional process with the intricacies of majority voting and Parliamentary involvement. The intricacies of the decisional process will, in turn, determine substantive outcome. Once more, the mixture of constitutional principle and substantive content will render these controversies, of which there have been quite a few already, increasingly explosive. A decision on legal basis will often determine whether and with what content a decision will emerge. If say, the Court in our tobacco Directive example were to decide that Article 100a is an inappropriate legal basis and that, instead, the Community may only act on the basis of, say, Article 235, the measure in its current form will be doomed with the same political outcome.[46]

Scenario 4: Competences and the National Courts

We have already noted the brewing conflict with the German and other constitutional Courts on who should be the last umpire of the system.

Scenario 5: Visibility

Implicit in the analysis of the competence issue is another consideration -- the growing visibility of the European Court of Justice beyond the circle of practitioners and cognoscenti. The increased visibility is another sign of the maturing of the system and derives, in my view from the following causes:

a. A general new awareness of the Community resulting from the Maastricht Debate, the first veritable Community wide debate on the Community in its history.

A pioneering public opinion survey conducted through the Eurobarometer is instructive in this regard.[47] In a Community wide survey in 1992 34.5% [48] of Eurobarometer respondents had some cognisance of the European Court (63.4% in Denmark, 22.7% in The Netherlands) though of a non-profound nature. The learned authors of the survey conclude that "[t]hese data suggest that the Court has become more of a public institution, one that no longer works in virtual anonymity and obscurity. [49] Excluding "inattentive respondents" (those who registered no awareness of the Court)

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[46] See eg Case 45/86 Commission v Council [1987] ECR 1493 for a playout of this issue.

[47] See Gibson & Caldeira, Compliance, Diffuse Support, and the European Court of Justice: An Analysis of the Legitimacy of a Transnational Legal Institution, Gibson & Caldeira, The Legitimacy of the Court of Justice in the European community: Models of Institutional Support, Note 4 Supra.

[48] The comparable figure for own National high court was 58%. For the Commission 51.2%. For the Community as a whole 81.4%.

[49] The Legitimacy of the Court, op cit. at 13.

the results become even more remarkable. The authors of the survey, apparently using standard social science techniques in this field, developed a measurement of diffuse public support or otherwise for the Court.[50] This is not the place to reproduce the intricate techniques and the prudent analysis of the survey. One of the general conclusions of its authors is "... that the European Court of Justice has substantial but still very limited legitimacy" in the general public. "Overall" they add, "the European Court of Justice seems to have more enemies than friends within the mass publics of the European Community." [51]

These pioneering studies will, in time, be scrutinized, hopefully repeated, and the interpretation subjected to critical review. Much of the current diffuse public attitude towards the Court is possibly conditioned by general attitudes to the Community rather than by the specificity of Court decision making. The timing of this particular survey, in the height of the Maastricht debate will have had its impact too. By citing some of their more dramatic conclusions I take no position except to indicate that as public visibility grows, so will public awareness, and with it, the Court will, willy-nilly, be thrown into public debate and also used by politicians in their own arenas. The results demonstrate too another lesson of Maastricht: Support by elites and public and Statal institutions is not necessarily an indication for the mood in the street.

b. The visibility of the Court has grown not simply as a result of the Maastricht related general higher visibility of the Community but also because of the growth in the number of cases before the Court which are of a character to capture media and public attention. The logic of the Single Market strictu sensu have brought before the Court cases such as the British Sunday Trading and the Irish Abortion cases. This is the stuff of headlines even in the popular press. Delors' famous prophecy of the elevated percentage of social legislation which will emanate from Brussels is also likely to contribute to the number of such high-visibility cases.

It is for this reason that we think that the establishment of a Constitutional Council would, or at least should, be welcomed by the European Court of Justice for it would enable it to stay outside a role that can only damage its credibility and legitimacy.

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[50] Thus, to give but a couple of examples, one question read: If the European Court of Justice started making a lot of decisions that most people disagree with, it might be better to do away with the Court altogether. Another read: The Political independence of the European Court of Justice is essential. Therefore, no other European Institution should be able to override court opinions even if it thinks they are harmful to the European Community.

[51] Id at 15.