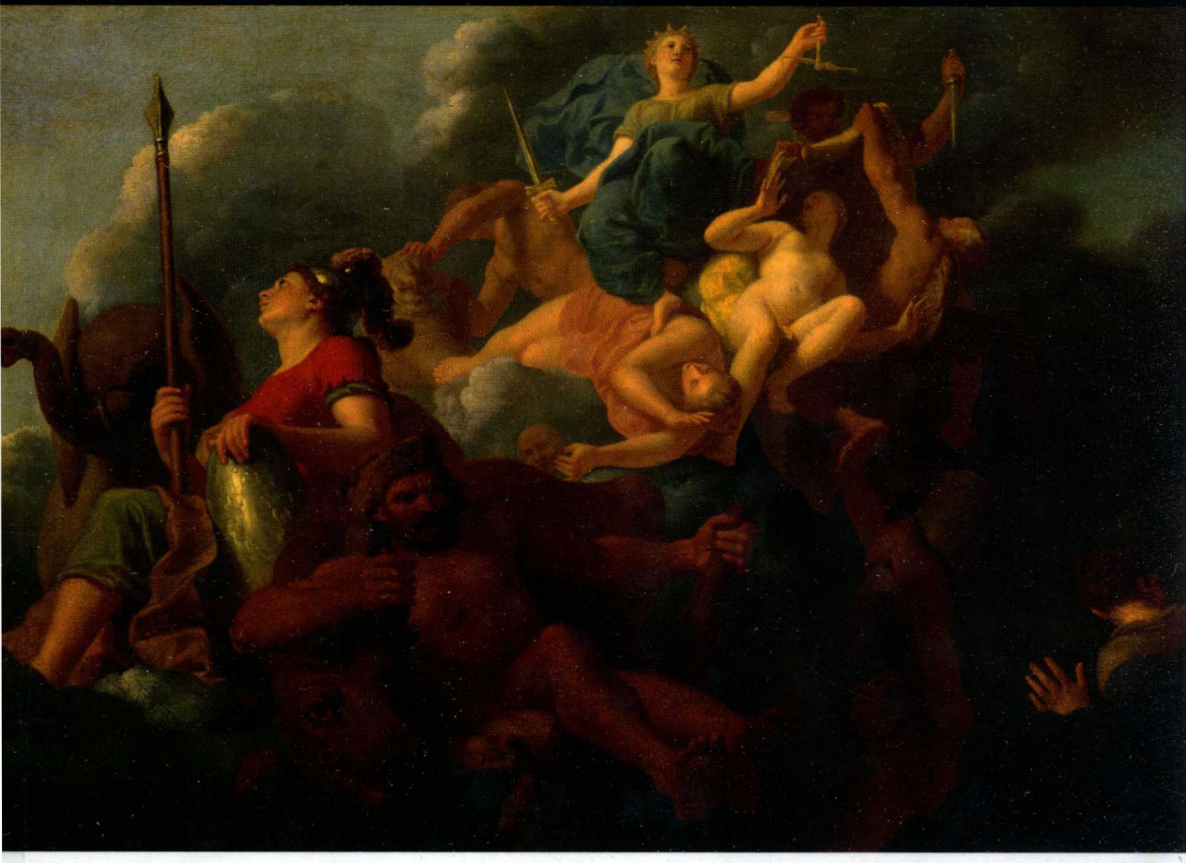
The European Court of Justice and the Autonomy of the Member States

Hans-W. Micklitz and Bruno De Witte (eds.)



intersentia

THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES

HANS-W. MICKLITZ
BRUNO DE WITTE
(editors)

intersentia
Cambridge – Antwerp – Portland

Intersentia Publishing Ltd.
Trinity House | Cambridge Business Park | Cowley Road
Cambridge | CB4 0WZ | United Kingdom
tel.: +44 1223 393 753 | email: mail@intersentia.co.uk

Distribution for the UK:
Hart Publishing Ltd.
16C Worcester Place
Oxford OX1 2JW
UK
Tel.: +44 1865 51 75 30
Email: mail@hartpub.co.uk

Distribution for the USA and Canada:
International Specialized Book Services
920 NE 58th Ave Suite 300
Portland, OR 97213
USA
Tel.: +1 800 944 6190 (toll free)
Email: info@isbs.com

Distribution for Austria:
Neuer Wissenschaftlicher Verlag
Argentinierstraße 42/6
1040 Wien
Austria
Tel.: +43 1 535 61 03 24
Email: office@nwv.at

Distribution for other countries:
Intersentia Publishing nv
Groenstraat 31
2640 Mortsel
Belgium
Tel.: +32 3 680 15 50
Email: mail@intersentia.be

The European Court of Justice and the Autonomy of the Member States
Hans-W. Micklitz and Bruno De Witte (eds.)

Cover illustration: La Justice et la Force, Henri Antoine de Favanne (1668-1752)
© RMN (Musée du Louvre) / Daniel Arnaudet

ISBN 978-94-000-0026-1
NUR 828

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

THE EUROPEAN COURT OF JUSTICE AND THE AUTONOMY OF THE MEMBER STATES

FOREWORD

The Lisbon Treaty has, once again, extended the jurisdiction of the Court of Justice of the European Union to new areas of EU law. The field of criminal justice and police cooperation, covered by the former 'third pillar' of the European Union, will from now on be subject to the full review and interpretation powers of the Court of Justice. In the field of immigration law, lower national courts are now entitled to engage with the Court of Justice through the preliminary reference mechanism, and they have started to make active use of that new possibility. The EU Charter of Rights has now the same legal value as the Treaties themselves, thus opening up yet another field for active intervention by the Court of Justice. We find ourselves in front of a seeming paradox: whereas *individual* Member State governments occasionally complain about judgments of the Court of Justice, especially when those judgments curtail that state's policy autonomy in a sensitive domain, the *collectivity* of the Member State governments have agreed, in each treaty revision so far, to confirm and extend the far-reaching powers which the Court of Justice possesses for enforcing EU law. The explanation of the paradox can only be that, deep down, the Member States of the EU remain convinced that an effective Court of Justice with strong enforcement powers is one of the salient features of European Community law which have stood the test of time, and feel no inclination to clip the wings of that Court for fear that this would affect the effectiveness of the European integration process. Nevertheless, the grumblings about single judgments, or about the consistency and direction of the Court in particular policy fields, have never ceased, and indeed have become more audible in recent years. One overall theme in this respect is the perception that the Court of Justice, quite often, does not leave sufficient autonomy to the Member States in developing their own legal and policy choices in areas where European and national competences overlap.

This overall theme was explored at a conference organised at the European University Institute in Florence in 2009, and was later elaborated in the chapters of this volume. The editors of the volume would like to express their gratitude to the generous sponsors of the conference, namely the Academy of European Law of the EUI, and the European Union Democracy Observatory programme, also based at the EUI. They are grateful for the friendly, patient and efficient cooperation of Intersentia publishers. This book owes a great debt to Hanna

Schebesta, doctoral researcher at the EUI, who played a crucial role during the editing stage of this volume.

Hans Micklitz and Bruno De Witte
Florence/Maastricht, October 2011.

CONTENTS

PART I
INTRODUCTION

JUDGE-MADE INTEGRATION?

Hans-W. Micklitz and Hanna Schebesta

1. INTRODUCTION

European integration has for a long time been perceived as a process rather than a condition. After the big bang and the strong expansive and deepening dynamic that followed, European integration is a concept in need of direction.

While the EU has had to overcome many crises already, there is a persistent narrative of integration through law, telling a tale of a reliable and continuous motor – the Court of Justice – which, for example, in the midst of the de Gaulle empty chair crisis continued to issue landmark pro-integration judgments. In Europe crises seemed confined to the political arena, without affecting the legal one.

The nature of European integration has changed and reveals new complexities: With the internal market task being close to fulfilled, the question of the desired nature and finality of the EU's internal dimension is drawing closer. The challenge as it stands today, is to define the *limits* of European integration inward looking. Cases that reach the CJEU are becoming increasingly political and the Court finds itself confronted with significant value judgments, for example on national and European identity (citizenship) or public interest evaluations (proportionality).

The problematic of the limits to integration, and the Member States' increasingly widespread defence of autonomy, is a general one, which confronts the EU as a whole, affecting its institutions, national institutions and constituencies. Yet, it poses specific questions to the legitimacy of the Court to take decisions which define the path of European integration. The CJEU is increasingly met with criticism – on two accounts: First that of institutional balance, and secondly the appropriate decision making instance as between the legislative and the judiciary. At the same time, a constitutional dimension is being raised, specifically that of the European and Member State relationship. Emblematic for this is the article entitled 'Stop the European Court of Justice' which has become so widely cited because it is seen as lending voice to a strong and widely held sentiment of disapproval on the Court.

Most commonly this criticism is delivered in terms of limits to competence and legitimacy. The EU judicial system – the application of EU law by Member State courts, supported by the preliminary reference mechanism and then