

KLUWER LAW INTERNATIONAL

Division of Powers in European Union Law

**The Delimitation of Internal
Competence between the EU and
the Member States.**

By
Theodore Konstadinides

66

EUROPEAN MONOGRAPHS



Wolters Kluwer

KLUWER LAW INTERNATIONAL

Division of Powers in European Union Law

The Delimitation of Internal Competence between
the EU and the Member States

Theodore Konstadinides



Wolters Kluwer

Law & Business

AUSTIN

BOSTON

CHICAGO

NEW YORK

THE NETHERLANDS

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.care@aspenpubl.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-2615-3

© 2009 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA.
Email: permissions@kluwerlaw.com

Printed in Great Britain.

Division of Powers in European Union Law

EUROPEAN MONOGRAPHS

Editor-in-chief Professor David O'Keeffe

In this series *European Monographs* this book *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States* is the sixty-sixth title. *The titles published in this series are listed at the end of this volume.*

To Eugenia

Preface and Acknowledgements

This book is aimed to develop the conclusions of a doctoral thesis written during the course of research at the University College London (UCL) during 2003-2006. It has been substantially revised and expanded to take into account recent legislative developments, judgments of the European Court of Justice and major EU constitutional developments, such as the rejection of the EU Constitutional Treaty and the signature and pending ratification of the Treaty of Lisbon.

I am grateful to my first supervisor Professor David O' Keeffe for taking me on as a researcher to the UCL Faculty of Law and introducing me with passion to doctoral research and academic teaching. I would also like to thank my second supervisor, Professor Dawn Oliver for her encouragement and assistance throughout my time at UCL.

It is difficult to overstate my gratitude to Professor Michael Dougan, who supervised my thesis with great commitment during the second year of my research and helped me to narrow it down. I also thank him for offering me his invaluable friendship.

I would like to gratefully acknowledge the enthusiastic supervision of Dr Diamond Ashiagbor during the final year of my doctorate. I wish to thank her for her patience and continuous support during and after my submission.

I wish to express my profound gratitude to Professor John Usher and Professor Takis Tridimas, who were external examiners at my Ph.D. viva and whose invaluable advice and constructive remarks I used to adapt my thesis into the present monograph.

I wish to thank Professor Christophe Hillion for our educating and stimulating discussions during our time at UCL. I am also grateful to the UCL academic and administrative staff, fellow researchers, secretaries and librarians.

Much appreciation goes to those who assisted me turn this manuscript into readable English, in particular Mr Leslie Blake and Professor Christopher Kerse,

who also drew my attention to points of substance that needed revision. Special thanks to Mr Joerg Wunchel for assisting me with my references in German.

Furthermore, I would like to express my indebtedness to all my current colleagues at the University of Surrey for their emotional support and motivation to expand my doctoral thesis to a book. I would specifically wish to acknowledge the support of my colleague and friend Dr Tom Dyson for his encouragement during the closing stages of the preparation of this book.

I remain grateful to Kluwer Law International for making this book happen: in particular the Publishing Manager, Mr Karel van der Linde, whose help, understanding and support have been outstanding; the developmental editor Ms Niki de Bruin for her assistance with editing; the past and current Publishing Assistants, Ms Femke Feenstra and Ms Hanneke Verbeek and finally the anonymous reviewers for their encouraging comments on earlier drafts. Kluwer has been an amazing Publisher to work with. I thank everybody for their strength and patience.

Lastly, and most importantly, I am forever indebted to my parents Konstantinos and Foteini Konstadinides and my partner Natasha Gouseti for their love and understanding, endless patience and encouragement when it was most required.

Any errors are obviously entirely mine.

Theodore Konstadinides
London, December 2008

Table of Abbreviations

AG	Advocate General
All ER	All England Law Reports
BIICL	British Institute of International and Comparative Law
BVerfG	<i>Des Bundesverfassungsgericht</i> (German Federal Constitutional Court)
CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
CMLR	Common Market Law Reports
COM	European Commission
CONV	Convention on the Future of Europe (European Convention)
EC	European Community (if following a Treaty Article) Treaty Establishing the European Community as amended by the Treaty of Nice
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECR	European Court Reports
ECtHR	European Court of Human Rights
ECSC	Treaty of the European Coal and Steel Community
ECB	European Central Bank
ECT	Treaty Establishing a Constitution for Europe (EU Constitutional Treaty)
EEC	European Economic Community Treaty (if following a Treaty Article: Treaty Establishing the European Economic Community)
EFTA	European Free Trade Association
EHRR	European Human Rights Reports
EMU	Economic and Monetary Union

EP	European Parliament
EU	European Union (if preceding the Institutions: The Commission, Council of Ministers and EP)
EUI	European University Institute
EURATOM	European Atomic Energy Community
FIDE	International Federation for European Law
GG	<i>Grundgesetz</i> (Basic Law for the Federal Republic of Germany)
HL	House of Lords
HMSO	Her Majesty's Stationery Office (UK)
IGC	Intergovernmental Conference
ILO	International Labour Organization
JHA	Justice and Home Affairs
NYU	New York University
OJ	Official Journal (of the European Communities)
PJCCM	Police and Judicial Cooperation in Criminal Matters
SEA	Single European Act
TEU	Treaty on the European Union (Maastricht Agreement)
TFEU	Treaty for the Functioning of the European Union (ToL proposed amendment to the EC Treaty)
ToL	Treaty of Lisbon
UN	United Nations
WTO	World Trade Organization

Table of Contents

Preface and Acknowledgements	xi
Table of Abbreviations	xiii
Introduction	1
Chapter 1	
The Evolution of Internal Community Competences	9
Introduction	9
I. The European Coal and Steel Community	13
II. The European Atomic Energy Community	15
III. The EEC Treaty	20
IV. The Single European Act	23
V. The Treaty of Maastricht	29
VI. The Treaty of Amsterdam	36
VII. The Treaty of Nice	43
Conclusion	47
Chapter 2	
The Institutional Actors and the Horizontal Division of Competences in the Community	51
Introduction	51
I. The Legislature: Of Qualified Majorities and Bicameralism	54
II. The Executive: Of Consensus Building	63
III. The Judiciary: Of Judicialization of Politics	69
Conclusion	79

Chapter 3	
Cooperative Federalism, Primacy and European Constitutionalism	81
I. The Union as a Cooperative Federal Entity	81
II. Primacy of Application of Community Law	88
A. Absolute Primacy: A Conflict-Solving Mechanism	88
B. Relative Primacy: <i>Die Herren des Vertrages</i>	94
C. Case Study: The United Kingdom	99
III. Constitutionalism without a Constitution	108
Chapter 4	
Subsidiarity and the Monitoring of the Jurisdictional Limits of the Community Legislative Process	117
Introduction	117
I. Definition: Supplementing without Interfering	122
II. Monitoring of Subsidiarity by the ECJ	130
A. Monitoring of Subsidiarity by National Parliaments	141
Conclusion	151
Chapter 5	
Subject-Related EU Internal Competences	155
Introduction	155
I. Exclusive Community Competence	157
A. Common Fisheries Policy	160
B. Economic and Monetary Union	162
C. Common Commercial Policy	165
II. Shared/Concurrent Competence	168
A. Introduction	168
B. The Pre-emptive Effect of Community Law	169
C. Before the Adoption of Secondary Legislation: Directly Effective Provisions	170
D. After the Adoption of Community Secondary Legislation	175
1. Fully Pre-emptive Effect	175
2. Partially Pre-emptive Effect	176
III. Complementary-Negative Competence	179
A. Public Health	180
Conclusion	184
Chapter 6	
The Main Categories of Objective-Related EC/EU Internal Competences	187
Introduction	187
I. Article 95 EC: Internal Market versus Public Health	189

II.	Towards a Statement of Principle Regarding the Scope of Article 95 EC	194
III.	The Residual Competence of the EU: Article 308 EC	202
IV.	Community/Union Competence to accede to the ECHR	205
V.	An Evaluation of the Use of Article 308 EC: A Return to Orthodoxy?	214
	Conclusion	217

Chapter 7

Competence Delimitation from Laeken to the ToL 221

I.	The Laeken European Declaration	221
II.	The European Convention	224
III.	The Treaty of Lisbon	229
IV.	Competence Taxonomy	232
	A. Subject-Related Competences	233
	1. Exclusive Competence	235
	a. <i>Internal Competence</i>	235
	b. <i>External Competence</i>	237
	B. Shared Competence	238
	C. Complementary Competence	241
	D. Objective-Related Competence	242
	Conclusion	246

Chapter 8

A Variable Geometry of European Integration: Enhanced Cooperation and a *Core Europe* 249

	Introduction	249
I.	Evolution of Enhanced Cooperation	250
II.	Launching Enhanced Cooperation in the ToL	255
III.	Fischer's Idea of a <i>Core Europe</i>	258
IV.	Enhanced Cooperation and <i>Core Europe</i>	262
	Conclusion	268

Conclusion: *Kompetenz-Kompetenz* Revisited 271

Selected Bibliography 287

Table of Cases 307

Table of Treaties, Instruments and Legislation 317

Index 329

Introduction

While debate on European federalism often implies the transformation of the Union into a federal state, federalism as a principle of organizing political authority is not inevitably attached to statehood. In fact, the division of power between the 'federal' and the 'component' state is much more complicated in the EU than in traditional federations. Two issues invite enquiry in any study of the delineation of powers in EU Law: First, the degree of permanence of the nation state. This needs to take into account the shift of constitutional authority from Member States to a paradoxical organization, such as the EU, which possesses powers of coercion independent from the state itself. Second, the width of the democratic base of the Union's 'institutional dynamic' of cooperation and consensus. This, it should be noted, does not mechanically reproduce a system of parliamentarism but rather a complex system of checks and balances. All of the above convey a contradictory image of the EU as a contested project: an ever-closer Union of States and peoples with, on the one hand, a growing democratic legitimacy and, on the other hand, a supranational community with blurring responsibilities and powers, which lacks the legitimacy of a fully fledged democratic political entity.

The allocation of and differences in the scope of the EU's competences and decision-making abilities is a matter of great concern and has always been in the centre of the integration process. Not only does this explain how the Union has been incrementally expanded beyond the provisions of the original Treaties but it also raises questions as to whether any consensus is possible about the form of European cooperation in the future. The aim of this book is twofold: (i) to thoroughly examine the manner in which the principle of division of powers has developed in EU Law over the course of European integration and (ii) to cast light on the path towards a more efficient delimitation of internal competence between the main actors in European integration: namely the EU and the Member States. The book focuses specifically on the law of the First (European Community)

Pillar and is divided into eight chapters. The purpose of these chapters varies from an evaluation of the place of the 'competence provisions' in the current and future EU Treaty structure; the identification of the scope and the limits of the powers of institutional actors involved in EU decision-making; an observation of the contribution of the Court of Justice in declaring the pre-emptive effect and overarching precedence of Community law; a detection of areas where 'creeping competence' occurs; and finally, an assessment of the constitutional checks and balances available to Member States against any unprecedented expansion of EU competences.

The gradual evolution and exercise of EU internal competences through successive Treaty amendments is discussed in Chapter 1, reflecting upon the alteration in the Union's constitutional and institutional architecture, which this has caused as well as its policy profile. The transformation of 'Europe' from a technocratic organization to 'an ever-closer Union of States and people' has come at a price. The Union's growth from the six original Member States to its most recent enlargement to twenty-seven has been accompanied by tensions and by greater diversity in the Member States. The more the policy competence of the Union has expanded over time, the more the balance and boundaries of EU and national competences have become blurred. For instance, additional powers to act so as to ensure the functioning of the internal market were granted to the Community by means of introducing qualified majority voting to Article 95 EC. Additionally, the attainment of a Community objective in the course of the operation of the common market necessitated the use of Article 308 EC as a 'catch-all' provision. Although this was intended to be a residual provision, it has proved to be a wide-ranging power. These developments have fostered a process of Europeanization of national polity through the widening and deepening of the EU. But these developments have also revealed increasing levels of Euro-scepticism as well as political and constitutional instability. It is argued that the demands from national governments and regional authorities for clearer limits be set to the Union's decision-making power, and the enduring tension over the nature and purpose of European integration, have been the key drivers of integration and change.

Chapter 2 provides an insight into the Union's policy process. This process is seen as an inimitable decision-making practice where 'horizontal power relations' between main institutional actors are unstable. Despite institutional instability, and lack of connection between the Union and the classic constitutional frameworks most common in the democratic world (parliamentarism and presidentialism), the three elements that bind together modern democracies (legislative, judicial and executive) are also apparent within the Union's multiple levels of administration. What differs in the EU when it is compared to the nation state is the way these powers are distributed amongst EU Institutions: First, no power is exclusively vested in any one of its political institutions. Second, both powers and relationships between the EU Institutions are themselves subject to change. The study of institutional balance within the EU is challenging because it consists of a means of measuring the manner in which Member States influence supranational decisions. It is argued that the notion of 'power' within the Member States is not merely

synonymous with their external capacity to develop constitutional defences in order to maintain their national sovereign values. Such power owes much to the less visible internal influence of supranational decision-making. Member States are powerful because they can make or break a winning coalition in the Council of Ministers. Chapter 2 contends that the horizontal division of competences within the Community also constitutes the site where the vertical division of competences operates.

The Union's competence has flourished and expanded over the last fifty years, creating thereby a unique system that lies midway between a federal state and an anarchical international system. Different actors coexist within a cooperative hegemony of Member States. The EC Treaty has created a new legal order and the Court of Justice has asserted the direct internal effect, and the precedence of Community law over the domestic laws of Member States. Chapter 3 considers the status and effect of Community law on national legal systems and the difficulties in reconciling Community law with the national constitutional principles. It, first, examines the appropriateness of the concept of federalism as a description of the multi-levelled system of governance that exists in the Union, based, as it is upon a functional division of powers amongst different levels of government. Second, it observes the two dimensions of the principle of primacy of Community law: its inception by the Court (absolute primacy) and its reception by the Member States (relative primacy). Special tribute is paid to the constitutional implications of EU membership in the UK, in particular the question of the compatibility of the primacy of Community law with the sovereignty of Parliament: a cultural challenge to the unique character of the common law system. This chapter concludes by looking at whether the principle of primacy of Community law alone can sustain the constitutional status of the Union when, compared to federal states, the Union lacks any historical revered symbols, demos, constitution or state.

Accordingly, Chapter 4 considers the role of subsidiarity as a tool for monitoring the jurisdictional limits of the Community's legislative competence; that is, the regulation of transnational aspects that cannot be sufficiently regulated by national action. It begins by looking at its definitional origins as a principle of good governance aimed at delegating executive functions to central institutions. It then focuses at its adoption by the Community. This involves an assessment of the current ill-designed mechanisms of judicial review used by the Court of Justice and the potential role of national parliaments to monitor its implementation and exercise. It is argued that the minimalist hesitancy of the Court to take a critical approach to subsidiarity can be counterbalanced by the new role to be accorded to national parliaments under the Treaty of Lisbon (ToL) allowing them to review the compliance of a legislative act with the principle of subsidiarity. This proposal constitutes a significant response to the democratic challenge that the Union has encountered with reference to its decision-making process.

The proposed *early warning system* (or, otherwise the *yellow card*) for national parliaments has a dual purpose. First, it aims to promote a more inclusive method of political scrutiny in the decision-making process and second, it aims to enhance the Union's democratic profile by giving the directly elected national

legislatures a direct role in EU politics. Indeed, to some, national parliaments are the major winners of the ToL. Apart from the two relevant Protocols attached to the Treaty, the new wording of Article 308 EC (Article 352 Treaty for the Functioning of the European Union (TFEU) of the ToL) obliges the Commission to involve national parliaments in the procedure for the adoption of measures under this residual provision. Yet, the victory for national parliaments depends solely on the weight accorded by them to the assessment of Commission's drafts. Chapter 4 concludes by posing the question whether the proposed *yellow card* procedure is sufficient to guarantee the Union's compliance with the principle of subsidiarity or whether more efficient monitoring devices are required. Ultimately, it emphasizes the importance of a new approach by the Court of Justice. This new approach should be an effective mechanism for judicial scrutiny of purported compliance with the principle of subsidiarity as a response to the expanding scope of Community law-making competence. This scrutiny should occur not only *ex post* but also *ex ante*, when EC legislation is still at a preparatory stage.

The delimitation of internal competence between the EU and the Member States is neither based on a general constitutional provision nor premised on a strict categorization of competences within the EU Treaties. At this stage, it should be noted that a particular conception of the term *competences* is used throughout this book. In the absence of a 'competence catalogue' and for the sake of clarity, competences are divided into *subject-related* and *objective-related*. These categories draw their titles from their subject-matter (exclusive, shared and complementary competences) or their internal market objective (the flexibility provisions of Articles 95 and 308 EC). As regards *subject-related* competences, while it is clear that any action taken by the Community must have a legal basis either in the Treaty or secondary legislation and that certain Treaty provisions address the extent of that power, there is no clear substantive division of powers in the Treaties. The problem of a clear delimitation of internal Community competences lies in the fact that those competences attributed to the supranational level cannot be regarded separately from those attached to the intergovernmental arena. Instead, competence in EU law is based on an interaction between the two levels. With reference to *objective-related* competence, the Court has propounded a restrictive interpretation of the conditions under which the EU Institutions can rely upon Article 95 EC, especially as a way of overcoming restrictions on Community competence in fields other than the internal market. Similarly, the Court has recognized that new Community competences can only be launched through valid legal instruments. Article 308 EC constitutes such an instrument, with the exception of instances where its use would entail a substantial change in the present Community system, such as the entry of the Community into a distinct international institutional system, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Although, EU competences are not comprehensive enough to threaten the statehood of the Member States, one cannot dispute that they impinge on nearly every field of national legislation. The aim of Chapter 5 is to provide an insight into the main categories of *subject-related* competences (exclusive, shared and