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‘Out of Bounds’ –
The Concept of Ultra Vires in
Community Law

Master thesis
20 points

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EC Law

Spring 2002

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Summary

The conditions for legality of European Community action raise the essential issue as to the limits of Community competence. It is plain that the Community only holds those powers it has been attributed under the Treaty. However, to delimit those powers has proven to be very difficult. This is problem is widely recognised and will be dealt with at the IGC in 2004.

While the Community is founded upon the principle of attributed competences, there is a fundamental limit on the activities of the institutions. According to this principle, the Community may only adopt binding measures in those areas where the Member States have expressly transferred powers to the Community. Where the Treaty does not contain a legal basis provision, the Community has no power to act and any acts issued ultra vires may be annulled on grounds of lack of competence in Article 230 EC Treaty. However, the Court has previously applied a flexible notion of this fundamental limit to evolve the Community legal order through inventive legal doctrines and wide interpretation of the Treaty provisions. Hence, the Community acts that have been found illegal on ultra vires grounds are on the whole few and often rather insignificant. The Court has consequently been criticised of not taking the limits of Community competences seriously in regards to the Member States.

The Court has conversely been more inclined to intervene on issues concerning the division of powers between the institutions. The principle of attributed competences also provides (implicitly) that any Community institution may not usurp any powers which the Treaty has attributed to another institution since the Community may only act when authorised by the Treaty. The Court has generally been prepared to engage a more intense scrutiny when a certain measure, alleged to be ultra vires, has appeared to affect the concept of institutional balance negatively, and has not shunned from utilizing its power of review in such cases to examine Community measures which are not 'acts' per se.

During the 1990's the number of successful actions against ultra vires acts duly has increased, which seems to indicate that the recent changes in the surrounding political landscape has not passed the Court entirely unnoticed. Hence, although the Court has previously been disinclined to place limits on the wide-ranged Treaty articles it did so in the *Tobacco Advertising* case. The Court explicitly referred to the principle of attributed competences as to emphasize the limitations entrenched in the legal basis of Article 95 EC Treaty. Perhaps more important, it broke a long and unfortunate streak as it was the first time the Court annulled a Council act of any real importance.

Preface

I chose this subject as a part of my degree of Master of Laws (LL.M.) after 4,5 years of study, of which most part has been dedicated to the study of Swedish law. Ironically, it was just because Community law differs in such profound ways from Swedish law that I found it so captivating. The European Union is a fascinating and gigantic project that still feels fresh and exiting: on an embryonic level - unfinished and in transformation. Community law is truly constitutional law in the making, and I guess it is only a matter of time before EU gets its own 'real' constitution.

I would like to thank my whole family, and in particular my parents who have always been supportive however crazy the plans of mine have been (or seemed to be). Studying law was probably one choice they more gladly endorsed. This work is dedicated to them...

Magnus Carlström

Lund, Sweden September 2002.

Abbreviations

AG	Advocate General
BVerfG	Bundesverfassungsgericht
CPS	Comparative Political Studies
CML Rev.	Common Market Law Review
CMLR	Common Market Law Reports
COREPER	Committee of Permanent Representatives
EAEC	European Atomic Energy Community
EC	European Community
EC Treaty	Treaty Establishing the European Community
ECB	European Central Bank
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
EJCL	Electronic Journal of Comparative Law
EL Rev.	European Law Review
EP	European Parliament
EU	European Union
IGC	Intergovernmental Conference
JT	Juridisk Tidskrift vid Stockholms Universitet
OJ	Official Journal
SEA	Single European Act
TEU	Treaty on the European Union
TOA	Treaty of Amsterdam

1 Introduction

1.1 Background

The European Court of Justice has for some time been the target a certain criticism alleging that the lack of delimitation on Community competences is attributable to an insufficient exercise of judicial control by the Court. Although it is clear that the political control has been equally unsatisfactory, that is nonetheless easier to comprehend while the ethos of politics does not entail as strict obligation of adherence to values inherent in the Rule of law. This criticism has been launched across the board, but in different manifestations; whether submitted as ‘*judicial activism*’¹, ‘*active passivism*’² or as a challenge of the ‘*Kompetenz-Kompetenz*’ of the Court, the chorus line is that the Court has not been enough serious on the limits of Community competences.

There is no doubt that the Court, through its decisions, has contributed in various ways to press on the process of ‘*an ever closer Union*’ in times when other branches of government lacked in strength or political willpower. However, during this course of action, the Court has sometimes applied a reasoning which seems unhealthy with its role as the guardian of the Treaty and with the principles which the Court purportedly submits to. Consequently, while the Community has certainly advanced, the boundaries of Community competence has from time and time on been stretched to its limits, if not transgressed, and the ethos of limited government in Community law has duly suffered. This is particularly true in the case of the principle of attributed competences, which provides one of the most fundamental limits on the powers of the Community.

To some extent, this problem can be said to have its roots in the Treaty itself. While some of the provisions of the EC Treaty conferring powers are narrowly constructed, others are rather vague and broadly worded, which leaves it to the institutions of the Community (including the Court) to judge on their limits case by case. As the Court has been overall disinclined to place limits on the broadly expressed provisions of the Treaty, these limits has in reality been very much set by the decision-makers of Community. The lack of judicial intervention, especially on issues concerning the division of

¹ A pervasive allegation that contends the Court has acted out functions which lies outside its traditional judicial role. See MacCormick, N., *On the very idea of a European Constitution: Jurisprudential reflections from the European Parliament*, JT 2001-02, p. 530.

² A charge, formulated by the scholar J. J.H. Weiler, claiming that the Court has been to mutable to political impulses which is the reason for its flexible notion of the principle of attributed competences that has ultimately lead to the erosion of the limits of Community competences. See Weiler, J. H. H., *The Transformation of Europe*, 1991 Yale Law Journal vol. 100.

powers between the Community and the Member States, is one explanation to the erosion of the principle of attributed competences. The instances where Community acts have been found illegal on ultra vires grounds are easily remembered.

However, alongside the continuous progress and expansion of the Community, the Member States has also grown more aware of the wide scope of Community competences and the vague limits safeguarding Member State sovereignty. The German Maastricht case embodies this more cautious approach among the Member States.³ It was further reflected in the Maastricht Treaty of 1993 with the amendment of Article 3b (now 5) EC Treaty and the new limits on Community legislative action in some new fields such as culture and public health.⁴

On a political level it was echoed in the discussion about the next step to come in the European unification. The Joschka Fischer speech in May 2000 started a new debate about the future of the European Union by addressing a number of sensitive issues, amongst them the question of an European Constitutional Charter. The urge for a European Constitution or at least a revision of the existing Treaty, where a list of competences would be clearly enumerated, has grown stronger amongst both politicians and scholars, although many still doubt that it would be the most wise approach in dealing with the lack of delimitation on Community competences. However, this issue was brought to attention recently by the constitutional agenda set by the European Councils at Nice and Laeken and will be a central issue at the IGC in 2004.

In the light of these developments in the law and politics of the European Union during especially the last decade, one might also ask the question if the Court has been able to adapt itself to this changing climate in the Community, i.e. has the Court finally become serious on the limits of Community competences? In a contribution not that long ago, the scholar Hjalte Rasmussen braved the Court to show colours when he called for a more “*intense review of political important acts adopted [...] to ensure the observance of the limitations entrenched in each individual legal basis*”.⁵ This thesis will take up this plea as to commence an examination of the concept of ultra vires in Community law and the ground of lack of competence that enables the Court to review and annul ultra vires acts.

³ Bundesverfassungsgericht, Judgement of 12 Oct. 1993, (1993) NJW 3047; English translation in 1 CMLR, 57 (1994). See chapter 3.3.1 of this thesis.

⁴ See de Búrca, G., *Setting Constitutional limits to EU competence?*, Francisco Lucas Pires Working Papers Series, 2001/02, p. 3.

⁵ Bernitz, U. & Nergelius, J. (eds.), *General Principles of European Community Law* (Kluwer Law, Great Britain 2000), p. 43.

1.2 Purpose and Delimitation

The bulk of the topic covered in this thesis can be described as follows: In the Community legal order, all measures must be founded on an identifiable legal basis provision enabling the competence (legal power) to act. Without the support of a proper legal basis in the Treaty, the enacting Community institution has, in principle, no competence. Acts adopted outside the allowed scope of action, as prescribed by the Treaty, is therefore considered *ultra vires*.⁶ Such acts may be annulled by the Court on grounds of *lack of competence*, in accordance with the judicial procedure prescribed by Article 230 EC Treaty, which enables the Court to control the legality of the acts of the Community.

In that context, the main purpose of this study is to examine the concept of *ultra vires* in Community law and the ground of lack of competence of Article 230 EC Treaty which corresponds to that notion.

The interest of this study is mainly focused on the demarcation between valid acts and *ultra vires* acts in Community law, i.e. what constitutes *ultra vires* under Community law and how the Court has approached such issues in exercising its power of judicial review under the ground of lack of competence. This question of *ultra vires*/lack of competence raises a number of other delicate and important issues, which will also be touched upon alongside the central theme of this thesis:

- What is the rationale behind the notion of *ultra vires*?
- Which considerations governs the Court when it decides on *ultra vires* issues?
- Has the Court engaged in a more intensified review in regards to important Community acts claimed to be *ultra vires* that could suggest a department from the Court's earlier policy?
- What is the status of the Court's demand to exclusive judicial Kompetenz-Kompetenz?

I should emphasise that my analysis is mainly focused on the question of lack of competence *ratione materiae*. As the law on delegation of powers in the Community is already fairly established and undisputed (unlike the scope and limits of the Community jurisdiction *ratione materiae*), lack of competence *ratione personae* is not as urgent subject. It will consequently only be dealt with to the extent that is necessary to realise the main contention of this thesis.

⁶ Alec Stone Sweet define *ultra vires* acts as “governmental acts that are not legally valid to the extent that the governmental entity taking them has exceeded its legally prescribed authority.”, Slaughter, A. M., Stone Sweet, A & Weiler J. H. H. (eds.), *The European Court and National Courts: Doctrine and Jurisprudence* (Hart Publishing, Oxford 1998), p. 320.

1.3 Material and Methodology

There is an notable absence of academic writings on the subject of ultra vires and lack of competence in Community law. Even in the context of the Article 230 EC Treaty, lack of competence is quickly expedited while the script lingers much longer on the other grounds of review (especially on the second ground). One explanation might be that there is not much to say about the ground of lack of competence. While that is certainly true in the sense that only a few annulment action has been successfully instigated on this ground and even fewer of them have been especially politically arousing, one might assume that one reason could be that the ground has been too mutable and amorphous to capture well in writing. Whereas this notion was one of the reasons why I found the subject so captivating, it was also the reason why I had such a hard time uncovering relevant material on the topic. The solution has thus been a gathering of material from a variety of different sources.

On the understanding the underlying principle of the Community legal order *The General Principles of EC Law* by T. Tridimas, *European Administrative Law* by J. Schwarze and in particular *The Rule of Law in the European Constitution* by Fernandez Esteban has provided excellent aid.

Another book that has been extremely helpful is *Constitutional law of the European Union* by Lenaerts and van Nuffel, which covered almost every topic of this thesis, and Jo Shaw's handbook *Law of the European Union* which has provided a good overview on Community law.

I have also acquired valuable knowledge from the various journals on Community law and constitutional law, in particular from the *Common Market Law Review* and the *European Law Review*. Additionally, the internet has proved very practical in ways to find resources to write this thesis, such as *Harvard Jean Monnet Working Papers* on internet, but above all to find up-to-date knowledge on the recent developments of EU and Community law. However, the main source of solid knowledge has still been the *case-law* of the Court. Since a large part of this thesis is preoccupied with examining the principles, concepts and values behind the ground 'lack of competence', which importance can not be assessed in the abstract alone, the study of ultra vires is also very much a study of outcomes.⁷ Last but not least, the comprehensive and easy to use *Collins Cobuild English Dictionary* (HarperCollins Publisher, Glasgow 1995) has been a tremendous help in getting a grip on the English academic lingo.

The approach of this study is not to give an complete description on the precise scope and limits of Community powers.⁸ That would be a to bigger task considering the range of powers of the Community, although it would

⁷ See Tridimas, T., *The General Principles of EC Law* (Oxford University Press, New York 1999), p. 2.

⁸ On a attempt to cover that topic, see Dashwood, A., *The limits of European Community powers*, 21 EL Rev. (1996).

certainly provide some grasp of where the territory of valid Community action ends and the ultra vires country begins. Instead, I have sought to outline the concept of ultra vires/lack of competence by examining the underlying principles, values and concepts that provides the notion of ultra vires in Community law. Moreover, I have sought to further animate the concept by placing it in its context in the Community legal order, by giving an account of the developments in Community law and the existing difficulties and challenges that comprises its story (such as the issue of *Kompetenz-Kompetenz* and the current Constitutional debate). Finally, by examination of relevant case-law and recent developments I will provide a number of case studies on lack of competence to elucidate the Court's approach on ultra vires issues and to further illustrate which considerations governs the Court when deciding on those issues. Thus, I have used a combination of descriptive and analytical methodology under the work on this thesis to realise these intentions.

1.4 Disposition of the Thesis

In the *first chapter* I will explain the rationale of the concept of ultra vires in Community law and the values and principles which underlies the Community legal order. Hence, the chapter will comprise the Rule of Law, the principle of legality and the sources on legality in the Treaty. Moreover, it will also try to cover the obligations that stem from the recognition of these fundamental ideas and the relevant principles which derives from the Treaty. This will include the principle of attributed competences and the concept of institutional balance.

The *second chapter* will deal with the Court's power of Judicial Review that provides the instrument which allows the Court to examine the legality of Community acts. Also other related issues such as the question of judicial activism, intensity of review and the *Kompetenz-Kompetenz* of the Court will be briefly addressed. An overall description of Article 230 EC Treaty will also be offered in preparation for the further examination of the ground of lack of competence in the fourth chapter.

The *third chapter* will encompass the concept of legal basis in view of it as a fundamental requirement of Community law. The choice of legal basis will also be addressed in the context of the ground of lack of competence. Moreover, the division of powers in the Community will be explained along with a short presentation over the competences of the Community relevant to this study. I will also account for the attempts during the last decade to place limits on the 'creeping expansion' of Community competences, and the more recent aspect on this topic.⁹

⁹ The term referred to between the apostrophes is taken from the Conclusions of the Presidency, European Council in Laeken 14 and 15 December 2001, *Laeken Declaration on the Future of the European Union*, Annex I, p. 22.

In the *fourth chapter*, I will first present a more detailed description over the ground of lack of competence provided by Article 230 EC Treaty, followed by an examination of the recent case-law on ultra vires concerning lack of competence *ratione materiae* of the Community. Additionally, the established doctrine on delegation of powers in the context of lack of competence *ratione personae* will be described. Last but not least this thesis will be summed up in a conclusion.

1.5 Terminological Notes

A few notes about the terminology used in this thesis may be of help to avoid any misunderstandings.

First, although the European Court of Justice since 1988 is complemented by the Court of First Instance, I will refer to them as one instance - the Court.

I will also use the term, the Community meaning the European Community, although the European Communities is more grammatically correct.

Similarly, I will refer to the collected Treaties of the European Union as the Treaty. Furthermore, it does not hurt to remind that the European Community is not the same organisation as the European Union.

Secondly, '*ultra vires*' is not the same as '*lack of competence*'. Here, *ultra vires* denotes to a status of legality of a legal measure. It is an abstract term, which only figures in the theory of Community law. By *ultra vires* I will mean an action taken outside the allowed competence enjoyed by enacting body, while *lack of competence* refers to the ground of Article 230 EC Treaty under which *ultra vires* measures may be annulled. In theory, the opposite of *ultra vires* is called *intra vires*, i.e. the act is taken within the powers of the enacting body. That a legal measure is *ultra vires* does not mean that the enacting body is lack of competence as this is decided by the Court which may be governed by other policies than strictly legal. Furthermore, although it might be perceived as rather confusing, I have used the term '*powers*' and '*competences*' interchangeably. The reason for that is that there is no distinction drawn between the two terms in the English version of the Treaty or in academic works in English on Community law, as there is in the case of French and other languages.

Thirdly, Swedish reader should beware of the differences between Community law and Swedish law, as to make no rushed conclusion or comparisons based on previous experiences. The influence of general principles of law is traditionally more stronger in Community law (inspired by the western continental tradition) than in Swedish law (which has been far more inspired by positivism). It should also be noted that the Swedish theory on Community law (in Swedish '*EG-rätt*') has its own lingo and its

concepts may not fully correspond to English theory on Community law. For instance, one could easily be tempted to draw the false conclusion that the '*principle of legality*', as prescribed here, correlates to '*legalitetsprincipen*', which in Swedish theory seem to connote more to the principle of attributed competences.¹⁰

Finally, something about the stylistics. I have used *italics* to stress words or expressions of importance, but also to highlight cited text. Moreover, although it might not be academically correct, I have used a combination of apostrophes and quotation marks. While quotation marks have been used to indicate the beginning and end of quoted sources, apostrophes has been used to emphasize or give prominence to a certain word or phrases.

¹⁰ For example, see Melin, M. & Schäder, G., EU:s konstitution (Norstedts Juridik, 5th ed., Stockholm 2001), p. 101.

2 The Rationale of Ultra Vires

The notion of ultra vires emanates from the recognition of fundamental principles and values of constitutional law, present in all modern societies governed by law. These principles and values states certain ideas which provides strong arguments for certain solutions and thus guide those bound by them on how the law should be interpreted.¹¹ There is a linear of principles originating from the Rule of law, which provides reasons on, *inter alia*, why ultra vires action should be measured illegal within the legal order bound by this fundamental rule. It is an undisputed and essential idea, that law in violation of superior rules of law should not be valid. From the Rule of law, one may derive such fundamental concepts as the idea of justification, the notion of legality and the idea of limited government¹² etc. These are principles and values which underpin the ‘constitutional’ structure of the Community.

2.1 The Rule of Law in Community Law

The Rule of law is a fundamental principle present in all systems of constitutional law, although its contents and application may vary due to different legal traditions and individual needs. The Rule of law exists in various forms throughout the different legal systems of the Member States, from which the Community derives its powers, and consequently also reign in the Community legal order.¹³ Article 6(1) TEU expresses the significance of the principle by announcing that the European Union is founded on the Rule of law along with the principle of liberty, democracy, respect for human rights and fundamental freedoms.

The Court has expressed the principle’s paramount status in the following words: “*The Union, like the European Communities on which it is founded, is governed by the rule of law. Its very existence is conditional on recognition by the Member States, by the institutions and by individuals of the binding nature of its rules*”.¹⁴ Thus, the Rule of law requires a strict adherence of the Member States to the law of the Community. However, this demand of respect also applies to the Community itself, animated by its institutions. If the Community would disregard this principle by acting *ultra*

¹¹ Tridimas, T., *The General Principles of EC Law* (Oxford University Press, New York 1999), pp. 1-2.

¹² The idea that exercise of government power should only be allowed within legally imposed limits i.e. where authorised by the constitution document.

¹³ The equivalent concepts of the Rule of law in French law is ‘Règne de la Loi’ and in German law ‘Reichstaat’. In Swedish law, the Rule of law corresponds to ‘Rättstatsprincipen’.

¹⁴ *Report of the Court of Justice on certain aspects of the application of the Treaty on the European Union*, Luxembourg, May 1995.

vires, the very foundation of the Community is undermined. While the Member States has renounced some of its powers on behalf of the Community and acknowledged the supremacy of Community law, it was made under the understanding of the Community as a government of limited powers. If this idea is undermined, so is the Rule of law, as the ethos of commitment to the principle cannot be expected to be sustained under such conditions.¹⁵ Consequently, the legal systems of the Member States would not be as willing to show the same adherence to Community law as before. Such a development could, without doubt, cause a serious constitutional crisis of the Community.¹⁶

Then, what is the nature of the concept of the Rule of law in Community law? The Rule of law embodies a wide constellation of values and principles that underlie the whole Community legal order. Its main source, or where the principle finds its best written expression, is in Article 220 (ex 164) EC Treaty and in the corresponding Article 31 ECSC and Article 136 EAEC Treaty. However, these provisions merely express one facet of the Rule of law. From the complex character of the principle, there are above all three elemental characteristics that are significant in this context. First, the Rule of law is a fundamental principle of the Community legal order in the sense that that all legal acts of the Community are susceptible to *judicial review* by the Court, supported by a system of remedies. Secondly, the principle of the Rule of law includes the *principle of legality*. Finally, the Rule of law also plays an important role in setting constitutional restrictions on government action.¹⁷ All these elements plays an important role in legitimating the Community legal order. However, to maintain the respect of Rule of law the legal system presupposes an instrument that enables it to address new challenges that may emerge in an evolving legal order like the Community. This instrument is provided through Article 220 EC Treaty.

2.1.1 Article 220 EC Treaty

Article 220 EC Treaty is arguably the most important provision in the legal history of the Court. It establishes the principle of legality as a paramount principle of Community law.¹⁸ Its importance lies in the fact that it has provided the Court with a powerful instrument to work out a system of legal principles (the General Principles of Community law) from which the legality of Community acts will be measured. The Article states that:

¹⁵ *The Division on Competences in the European Union*, DG IV Publications of the European Parliament (W-26-03/1997), chapter F.1.

¹⁶ The Maastricht judgement of the BverfG is one example on how far this development has already come. See chapter 3.3.1 of this thesis.

¹⁷ It places a limit on the administration through such principles as: the principle of legal certainty, obligation to state reasons etc.

¹⁸ Tridimas, T., *The General Principles of EC Law* (Oxford University Press, New York 1999), p. 11.

“The Court shall insure that in the interpretation and application of this Treaty the law is observed.”

Almost all the principles of Community law are heavily inspired by the values and principles of the legal orders of the Member States, in particular from French, German and English law. While some of these principles of law are derived from the legal orders of the Member States, other stem from the Treaty itself. By using the legal traditions of the different Member States as a basis, the Court has shaped and invented various principles and legal doctrines in accordance with the conditions and particular needs of the Community legal order. In this manner, the Court developed the concepts of *institutional balance* as to make up for the lack of a separation of powers - a basic feature inherent in all Member States but unsuited to the typical structure of the Treaty.¹⁹ Some of the principles has also become so well established through the case-law of the Court that they have later on been elevated to Treaty status. One such example is the *principle of attributed competences* which core essence found its way into the Treaty through the TEU in 1993. In this way, the mandate expressed in Article 220 EC Treaty has been an effective and useful tool on filling the gaps in the Community legal order and to progress the Community into a ‘constitutional order’.²⁰

2.2 The Principle of Legality

Similar to the Community concept on the Rule of law, there is neither a single definition of the principle of legality amongst the different legal traditions of the Member States.²¹ One common denominator, however, is that the principle of legality in these different legal orders derives from (or is embodied by) the concept of the Rule of law, present in modern societies.²² Here, the principle of legality can be said to form a part of a particular idea in democratic legal culture - the culture of *justification*, in which decision-makers are required to justify their decisions.²³ In that sense, the principle of legality serves both as the justification of the exercise of power transferred as well as its formal limitation.²⁴ However, the principle requires, not only that the decision-makers can justify their decisions, but also that the judiciary will review if the stated justifications meets the proper standards of the Treaty.

¹⁹ See Case C-70/88, *Parliament v. Council* [1990] ECR I-2041.

²⁰ Tridimas, T., *The General Principles of EC Law* (Oxford University Press, New York 1999), p. 4.

²¹ Fernandez Esteban, M. L., *The Rule of Law in the European Constitution* (Kluwer Law, London 1999), p. 156.

²² Fernandez Esteban, M. L., *The Rule of Law in the European Constitution* (Kluwer Law, London 1999), p. 100

²³ In Community law this is expressed by the requirement of a legal basis.

²⁴ Fernandez Esteban, M. L., *The Rule of Law in the European Constitution* (Kluwer Law, London 1999), p. 87.

The mark of the principle of legality is most apparent in the manner of which it influences the legislative and administrative procedures of the Community. It is in the administrative context the more traditional use of the term 'legality' comes to mind; compliance by the administration with the law.²⁵ However, the principle is not cast as an obligation that the actors of the Community are directly bound by, but should be seen more as a general concept of compliance with law that underlines the Community legal order. In the Community, the principle of legality is first and foremost expressed as the requirement of consistency of all new acts with existing legislation.²⁶ This is mainly reflected by the idea of *priority of superior law* (i.e. the precedence of a higher rule of law over a lower rule of law, creating a hierarchy of norms) and the *requirement of statute* (legal basis) in Community law - ideas which touches upon the very foundation of Community law. In order for these requirements to be observed, the principle of legality entails that the respect of law is guaranteed by an *independent institution* (i.e. The European Court of Justice). It also requires a *division of powers* to ensure that the prerogatives of each institution is respected (safeguarded under the concept of institutional balance). Moreover, it also entails a mechanism that ensures that the *hierarchy of norms* is not violated (ensured through the concept of legal basis).²⁷

2.3 The Source of the Principle of Legality in the EC Treaty

The principle of legality is primarily concerned with the relationship between the Community institutions and the law. Hence, the Treaty provides a number of provisions such as Article 5 EC Treaty and Article 7(1) EC Treaty, which are considered to hold certain principles and concepts of Community law on this matter, which derives from the principle of legality. These provisions embodies the well known concept of *limited government*; that the Community does not have (and should not have) unlimited powers. There is no disagreement over this notion among the Community institutions and the Member States, and it is generally agreed that the concept should embrace all actions of the Community.

However, neither Article 7(1) EC Treaty nor in Article 5(1) EC Treaty are meant to be rules from which the proper scope of Community competences should be estimated.²⁸ Instead, they are cast as principles from which the Court will review the legality of a Community act i.e. if the institution acted

²⁵ Schwarze, J., *European Administrative Law* (Sweet & Maxwell, London 1992), p. 233.

²⁶ Xanthaki, H., *The problems of quality in EU legislation: What on earth is really wrong?*, 38 CML Rev. (2001), p. 661.

²⁷ Fernandez Esteban, M. L., *The Rule of Law in the European Constitution* (Kluwer Law, London 1999), pp. 175-176.

²⁸ Nergelius, J., *Amsterdambfördragets och EU:s institutionella maktbalans*, Norstedts Juridik, Stockholm 1998, p. 122.

within the powers granted by the Treaty, or if the act is ultra vires and should be annulled under the ground of lack of competence of Article 230 EC Treaty. These are principles which underlie the ‘constitutional’ order of the Community; the *principle of attributed competences* (considered enshrined in Article 5 EC Treaty and reinforced by Article 7 EC Treaty), which refers to the relationship between the Community and the Member States and the concept of *institutional balance* (implicit in Article 7 EC Treaty), which refers to the relations between the institutions. Other examples of such principles are the principle of supremacy and direct effect. However, while these latter principles go to the scope of the Community law, the former are above all principles of delimitation or preservation. As pointed out, these principles are not stated explicitly in the Treaty, but has over time been ‘discovered’ by the Court and shaped under the mandate of Article 220 EC Treaty. A significant feature of such principles is that they are flexible and dynamic, unlike written law. It must be understood that these principles have no fixed substance – their interpretation changes over time. Hence, their contents is very much a story of outcomes (Court decisions).

2.3.1 Article 5(1) EC Treaty

As pointed out, there are a number of provisions in the EC Treaty where the principle of legality is to be found or where its influence is present. Still, the most fundamental idea of legality is outlined in Article 5(1) EC Treaty, which reads:

*“The Community shall act within the limits of the powers conferred upon it by the Treaty and the objectives assigned to it therein.”*²⁹

Although this provision was not included in the Treaty until the adoption of the TEU, its essence had already been established by the Court in the *Van Gend en Loos* case³⁰ back in 1963. The purpose of the amendment of Article 5(1) EC Treaty was to further emphasize the concept of limited government in the Community. However, the introduction of the provision by the TEU did not, *prima facie*, appear to revolutionize the jurisdiction of the Community since it still referred to the objectives of the Treaty (in Article 2 and 3 EC Treaty). Originally, competence was generally conferred upon the Community institution on the basis of the objectives to be achieved and the

²⁹ The French version is quite different: "*La Communauté agit dans les limites des compétences lui sont conférées...*". Thus, while the French and the German versions refer to the term competences ('*compétences*', '*zuständigkeiten*'), the English version translates to '*powers*'. However, this is of little significance as the English use of the terms '*competences*' and '*powers*' are applied interchangeably, by both scholars and Community institutions. Conversely, in French, '*compétences*' is used to signify the authority of the Community as a whole, while '*pouvoirs*' denotes to the authority of the single institutions.

³⁰ "... *the Community constitute a new legal order [...] for the benefit of which the States have limited their sovereign rights, albeit in limited fields...*", Case 26/62, *Van Gend en Loos* [1963] ECR 1, at p. 12.

means of accomplishing that, which had enabled the continuous expansion of Community competences.³¹ In that context, the provision did not seem to add much to the law (prior to the amendment by TEU) or to the delimitation of competences. Neither did it seem to change much to the division of powers between the institutions since Article 7(1) EC Treaty already covered that area. However, the Court has interpreted the provision to contain the principle of attributed competences, which has changed the basis of Community jurisdiction by restricting it to attributed competences.³² Moreover, the amendment to the Treaty has meant that competences which had previously been defined in terms of objectives, has been successively replaced in certain areas by precise definition (in terms of subjects) of the legitimate action.

The use of the wording ‘within the limits of the powers conferred’ indicates that the Community does not enjoy general or inherent competence. The language of Article 5(1) EC Treaty seem to define a strict and immutable limit on Community jurisdiction. However, no language of law, (even if stated in a constituent document) can guarantee that it will be truly observed. Hence, Article 5(1) EC Treaty is not meant as to provide an absolute limit, but rather a beacon which the Community should adhere to. It is with this function in mind that the principle of attributed competences is structured. The level of adherence to Article 5(1) EC Treaty is instead determined upon the political and legal ethos of those who is bound by it and who monitor its compliance.³³

2.3.2 Article 7(1) EC Treaty

Another facet of the principle of legality is expressed by Article 7(1) EC Treaty. However, this provision is more concerned with the inter-institutional relations of the Community legal order. Article 7(1) EC Treaty states that the tasks entrusted to the Community shall be carried out by the five institutions of the Community under the requisite that:

“Each institution shall act within the limits of the powers conferred upon it by this Treaty”

Although this provision strikes as very similar to that of Article 5(1) EC Treaty, it differs in a significant way by requiring that “*Each institution*” shall act within the limits of the powers conferred upon it by the Treaty, instead of referring to “*The Community shall ...*”. In the context of Article 5(1) EC Treaty, Article 7(1) EC Treaty is not primarily concerned with the (vertical) division of powers between the Community and the Member

³¹ Often under intense use of Article 308 EC Treaty, which provides the competence to act if it is necessary to attain one of the objectives of the Treaty.

³² See Opinion 2/94, *Accession to the ECHR* [1996] ECR I-1759, para. 23 and 30.

³³ See *The Division on Competences in the European Union*, DG IV Publications of the European Parliament (W-26-03/1997), chapter A.

States, but with the (horizontal) division of powers between the institutions of the Community.

The rationale of the provision is mainly to put a check on any tendencies of Community bodies to usurp powers for themselves, and to avoid a concentration of powers in one branch of government. It is this twofold function of Article 7(1) EC Treaty that provides the notion of institutional balance of the Community.

The Article enumerates the five institutions of the Community as having equal status under the Treaty in relations to one another. The institutions are jointly responsible to achieve the objectives of the Community, but their powers are separate and autonomous, divided under the provisions of the Treaty. In combination with Article 230 EC Treaty, Article 7(1) EC Treaty provides an instrument which the Court may be called upon to use to resolve issues concerning the division of powers between the institutions. In this regard Article 7(1) EC Treaty is mainly concerned with the protection of the prerogatives of each Community institution from the infringement of another institution, and has no influence on the jurisdiction of the Community as a whole. However, although Article 7(1) EC Treaty does not effect the Member States directly, they have a interest in maintaining an institutional balance to reduce the risk of having any of the institutions encroaching their powers indirectly.³⁴

2.3.3 Other Provisions in the EC Treaty on Legality

In Article 230 EC Treaty, the principle of legality is cast as the control of legality of the acts of the Community. Whilst, at this level, it provides the standards for judicial review, it also indirectly influence the decision-making of the Community. The four grounds of illegality prescribed in Article 230(2) EC Treaty (*lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or any rule of law relating to its application, misuse of power*) sets the conditions for legality of the acts of the Community institutions.³⁵ Through its exercise of judicial review, the Court contributes to further clarify the standards for the legality of Community acts. When the Court upholds an act or declare it illegal, it also provides either a decision, a suggestion or an indication on the correct interpretation or application of Community law. These conditions provide a framework from which the decision-makers can guide itself from in the work of processing legislative measures.

Another facet of the principle of legality is expressed by the requirement in Article 253 EC Treaty, that all legal acts of the Community must state the reasons on which they are based. This provision is an expression of the idea of justification. A statement of reason does not only tell the concerned parties why the Community institution adopted the act in question, but will

³⁴ Heukels, T., Blokker, N. & Brus, M. (eds.), *The European Union after Amsterdam: A Legal Analysis* (Kluwer Law, Hague 1998), pp. 283.

³⁵ Schwarze, J., *European Administrative Law* (Sweet & Maxwell, London 1992), p. 40.

also be of assistance to the Court in deciding on the legality of the act, i.e. when examining whether the objective of the act is validly pursued.

2.3.4 The Prerequisites for the Legality of Community Acts

In this context, it might be useful to illustrate the requisites of legality of Community acts, i.e. the number of basic conditions which a Community act must satisfy in order to be considered valid. These requirements are partly provided by different Treaty provisions (such as those described above), and partly derived through the case law of the Court, which means that these conditions may change whenever the Court gives new interpretations on the Treaty or develops new doctrines under Article 220 EC Treaty which concerns the legality of acts. These basic prerequisites can be reduced into three essential principles: legal basis, duty to give reasons, respect for the principle of subsidiarity and the principle of proportionality.³⁶

The first condition concerns the issue at focus in this thesis; the Community institution must have competence to adopt the act, a requirement derived by the principle of attributed competences. Thus, the act must enjoy valid support from a 'legal basis' provision in the Treaty. The enacting institution must not only enjoy competence in regards to the Member States (in accordance with Article 5 EC Treaty), but must also enjoy competence in relation to the other Community institutions (as provided by Article 7(1) EC Treaty). If an institution adopts an act *ultra vires*, the act may be annulled on grounds of '*lack of competence*'.

Secondly, every Community act must contain a statement of reasons, in accordance with Article 253 EC Treaty, to allow the parties and the Court to investigate whether the measure is validly pursued. A lack of proper statement of reasons is an '*infringement of an essential procedural requirement*' and such acts might therefore be attacked through Article 230 EC Treaty and annulled.³⁷

Third, the act must not infringe the principle of subsidiarity or the principle of proportionality provided by Article 5 EC Treaty. A violation of those principles could lead to annulment of the act on grounds of '*infringement of the Treaty or of any rule of law relating to the application*'.³⁸

However, even if these three prerequisites are fulfilled, the act may still violate an array of other principles which restrains the legislatures of the Community and thus might be considered to be in breach '*of the Treaty or of any rule of law relating to the application*' or any of the other grounds.

³⁶ See Shaw, J., *Law of the European Union* (Palgrave Law Masters, 3rd ed, 2000), p. 233.

³⁷ Case 24/62, *Commission v. Germany* [1963] ECR 63.

³⁸ It has been suggested that if a Community act would infringe the principle of subsidiarity, an action for annulment could be instigated on the ground of lack of competence. However, so far the Court has not given much hope of so ever happening. See Craig, P. & de Búrca, G., *EC law: text, cases and materials* (Oxford University Press, 2nd ed., New York 1998), p. 503.

2.4 The Principle of Attributed Competences

The principle of attributed competences³⁹ has long been an integral part of Community law. According to the conclusion of the Edinburgh Council in 1997: “*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*”.⁴⁰ These solemn words does however fail to illustrate the degree of intensity to which it has been applied. Generally, the strength by which the principle is maintained is a reflection of the belief in the importance of preserving the original division of legislative powers as a defining feature of polity.⁴¹ Thus, as the Community has undergone both phases of intense progress and stagnation, the definition of the principle and the notion of which effects stream from it has inevitably changed over time.

The original understanding of that principle had been that the Treaty should be strictly interpreted so that jurisdictional expansion (*ratione materiae*) by the Community could not be lightly undertaken.⁴² However, during the 1970's and early 1980's, the delimitation on Community jurisdiction gradually deteriorated. The integration of the Community accelerated under the flexible interpretation of Treaty provisions by the legislature. Furthermore, the transformation was passively acknowledged by the Court which meant that the legislature was almost handed ‘*carte blanche*’ to enforce its policies. Thus, the principle substantially eroded and in practice almost vanished as a constraint on Community jurisdiction.⁴³

However, the absence of delimitation on such flexible instruments as Article 308 EC Treaty and the implied powers doctrine, has been uneasy with the concept of limited government that underline the Community legal order. Consequently, the Court has been called upon to mantle its role as a ‘guardian of the Treaty’ and enforce a stricter application of the principle of attributed competences. Also, a reinforcement of the principle came with Opinion 2/94⁴⁴ of the Court. The Court strengthened the principle vis-à-vis

³⁹ This principle goes under many names. The Court just refer to it as “*the principle embodied in Article 5 EC Treaty*”. In doctrine it referred to as the principle of conferred competences, the principle of enumerated competences, the principle of limited competences or as the principle of restricted or specific competences etc. The term ‘powers’ is as also often used instead of ‘competences’ e.g. the principle of conferred powers. In French however it is called ‘compétence d’attribution’.

⁴⁰ Conclusions of the Presidency, European Council in Edinburgh 11 and 12 December 1992, *Overall approach to the application by the Council of the Subsidiarity principle and Article 3b of the Treaty on European Union*, Annex 1 to Part A, p. 15.

⁴¹ *The Division on Competences in the European Union*, DG IV Publications of the European Parliament (W-26-03/1997), chapter B.

⁴² Weiler, J. H. H., *The Transformation of Europe*, 1991 Yale Law Journal vol. 100, pp. 2433-2434.

⁴³ *The Division on Competences in the European Union*, DG IV Publications of the European Parliament (W-26 - 03/1997), chapter B.

⁴⁴ Opinion 2/94, *Accession to the ECHR* [1996] ECR I-1759 [1996] ECR I-1759.

Article 308 EC Treaty by limiting the range of its application. The Court declared, *inter alia*, that the scope of Community competences is restricted by Article 5(1) EC Treaty, and Article 308 EC Treaty can not be used to extend the Community's jurisdiction beyond the Treaty framework.⁴⁵

2.4.1 The Feature of Article 7(1) EC Treaty

As pointed out, the principle of attributed competences, now embodied by Article 5(1) EC Treaty, has for long been an integral part of Community law. Before the introduction of Article 5(1) through the TEU, it was considered to be implicit in Article 4(1) of the pre-consolidated EC Treaty, now Article 7(1) EC Treaty. Although the two provisions take separate aims they still have bearing on each other. The principle of attributed competences influence the horizontal division of powers as well as the vertical division powers. The essence of Article 7(1) and the principle of attributed competences as expressed in Article 5(1) are inescapably intertwined; the principle of attributed competences implies, *inter alia*, that an institution of the Community may not usurp any powers which the Treaty has attributed to another institution since the Community may only act when authorised by the Treaty. Thus, the core of Article 7(1), that the institutions of the Community must act within those constitutional frame set up by the Treaty, is embodied in the principle of attributed competences. This suggests that there is a strong bond between the principle of attributed powers and the concept of institutional balance in Community law, which both spring from these provisions.⁴⁶

Although the principle of attributed competences arises from the obligations stated in both Article 5(1) EC Treaty and Article 7(1) EC Treaty, these provisions must however be distinguished from one and another. Article 5 EC Treaty is first and foremost concerned with the division of powers between the Community and the Member States, while Article 7(1) EC Treaty is concerned with the division of powers between the institutions of the Community. Article 7(1) EC Treaty has no real bearing on the Community's jurisdiction vis-à-vis the Member States. However, this does not mean that it does not have any influence whatsoever on the division of powers between the Community and the Member States.⁴⁷

⁴⁵ *Ibid.*, para. 23 and 30.

⁴⁶ According to Lenaerts and van Nuffel, Article 7 (1) EC Treaty holds the principle of institutional balance – a notion shared by many scholars . This would mean that both Article 5 EC Treaty and Article 7 EC Treaty contains principles of constitutional nature which intimately connected but separate. See Lenaerts, K. & van Nuffel, P., *Constitutional law of the European Union* (Sweet & Maxwell, London 1999), p. 535.

⁴⁷ For example: Where an institution is empowered to adopt a regulation, it may limit the powers of the Member States to a greater extent than if it was constrained to the adoption of directives only, since a directive often leaves the Member States with more leeway than in the case of a regulation. See Lenaerts, K., van Nuffel, P., *Constitutional law of the European Union*, Sweet & Maxwell, London 1999, p. 89-90.

2.4.2 The Characteristics of the Principle

The principle of attributed competences is first and foremost operating within the first pillar of the EU. There is no equivalent provision to Article 5 EC Treaty under the provisions governing the second and third pillar, although it is understood that the institutions are bound in all their activities by the general principles under the EC Treaty.⁴⁸ Since the principle of attributed competences is located in the Treaty itself and therefore of 'constitutional' nature, it is binding upon the Community institutions in the respect that they must comply with it even when issuing measures, whether legislative or administrative. However, the principle must not only be observed by the Community institutions in its internal action but also in its international action.⁴⁹

The principle of attributed competences establishes itself as the most fundamental rule of delimitation on the divisions of powers between the Community and the Member States. The principle states first and foremost that, *the Community enjoys only those powers which are expressly set out in the Treaty*. This acknowledges two things: (1) that the competences of the Community are (at least in theory) limited, and (2) that the Community does not enjoy any general law-making competence, to be used arbitrarily to attain its policies.⁵⁰ However, there is room for the Community to act on implied powers according to this understanding of the principle, provided that these powers are indispensable to carry out the tasks allocated upon it.

The principle is intimately connected with the concept of legal basis. In a system where powers are conferred to the Community by the Member States (by way of the Accession Treaties), all Community actions must be founded on a proper legal basis in the Treaty, in accordance with the principle of attributed competences, or it will be ultra vires. To assess whether the action is properly based upon a the legal basis, it must determined that the objective is validly pursued under that provision by the enacting institution. At the Edinburgh Summit, the Council declared its view on the proper application of the principle of attributed competences:

*"In order to apply [the principle of attribution of competences] 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."*⁵¹

⁴⁸ See Shaw, J., *Law of the European Union* (Palgrave Law Masters, 3rd ed, 2000), p. 214.

⁴⁹ See Opinion 2/94, *Accession to the ECHR* [1996] ECR I-1759, para. 24.

⁵⁰ Dashwood, A., *The limits of European Community powers*, 21 EL Rev. (1996), p. 115.

⁵¹ Conclusions of the Presidency, European Council in Edinburgh 11 and 12 December 1992, *Overall approach to the application by the Council of the Subsidiarity principle and Article 3b of the Treaty on European Union*, Annex 1 to Part A, p. 19.

As explained however, so far the incentives has not existed for the Community institutions to apply the principle ‘correctly’ at a strict regular basis, and the judicial control of the Court has not been used efficiently enough.

2.5 The Concept of Institutional Balance

Traditionally, institutional balance is accomplished by the principle of separation of powers; dividing the executive, legislative functions (and judicial powers), vesting each function in one branch of government.⁵² However, the Court has explicitly ruled out the existence of an equivalent separation of powers in the Community.⁵³ According to the Court there is no basis for such a separation of powers in the Treaty provisions governing the institutions. The institutional structure of the Community does not provide such a clear-cut line between executive and legislative functions;⁵⁴ both the Council and the Commission, for example, possess both legislative and executive functions.⁵⁵ The Community does not have a legislature in its traditional sense, but instead different legislative processes in which the institutions participates on various accounts. Neither is there any clear identifiable executive although the most obvious candidate to that call is without a doubt the Commission.

Hence, instead of a clear separation of powers, the functions of government are allocated to the different Community institutions through specific rather than general legal basis, i.e. the Treaty determines simultaneously the field of activity as well as the competent institution. The underlying concept is that the power should mainly be allocated according to functional criteria - the subject matter ought to be handed over to the ‘most efficient’ or ‘most rational’ institution.⁵⁶ Thus, there is a blend of legislative and executive powers, rather than a separation of those powers, and it is that blend which characterise the institutional balance in the Community.

⁵² The constitution of the United States of America from 1787 is a textbook example of the principle of separation of powers; dividing the powers between the Congress, the President and the Supreme Court.

⁵³ See Cases 188 to 190/80, *France, Italy and United Kingdom v. Commission* [1982] ECR 2545, para. 6.

⁵⁴ Fernandez Esteban, M. L., *The Rule of Law in the European Constitution* (Kluwer Law, London 1999), p. 156-157.

⁵⁵ The legislative function is presently divided between the Council and the Parliament, participated by the Commission and a number of additional bodies. The executive function is mainly held by the Commission, but often by means of delegated powers from the Council.

⁵⁶ *The Division on Competences in the European Union*, DG IV Publications of the European Parliament (W-26 - 03/1997), chapter A.

This system does not however necessarily result in a more vulnerable balance of powers than the classic principle of separation of powers of checks and balances. According to the classical theory on separation of powers, the aim is to avoid concentration of powers vested in one branch of government which could potentially lead to a totalitarian rule. In a system of institutional balance, this may equally be accomplished by a wide dispersal of those powers in more than one institution.⁵⁷ Still, this requires a guarantee that the powers attributed upon the institutions (the division of powers) are safeguarded against encroachment from other institutions, i.e. sufficiently protected by a judicial authority, which in the Community is the responsibility of the Court.

The institutional balance in Community law is not an immutable concept, but changes over time with the amendments of the Treaty,⁵⁸ with the adoption of new institutional practises, and whenever the Court provides a new interpretation on a legal basis which influence the institutional balance. Thus, the institutional balance is different in each and every of these legal bases - there is not one single and constant balance within the framework of the Treaty.⁵⁹ The legal basis reflects the balance between institutions at a certain situation and at a specific moment.

Moreover, the rules affecting the balance between the institutions are also often unclear and inadequate which is an important underlying factor behind conflicts between the institutions.⁶⁰ In addition, the Treaty does not provide any sufficient definition to the substance of institutional balance. To find the source and definition of the concept one must instead look towards the Court. Thus, the concept of institutional balance is almost intertwined with the Court and the power of judicial review.

2.5.1 The Court's Notion of Institutional Balance

The institutional balance plays a specific part in the judgements of the Court on disputes over the relations between the institutions. Since there is no specific provision in the Treaty on the settlement of disputes between the institutions, they are instead dealt with as actions relating to the illegality of their acts. The Court has also several times referred to the institutional balance as a rationale for its decision to find an act of a Community

⁵⁷ Xénophon, A. Y., *Delegation of regulatory authority in the European Union*, Harvard Jean Monnet Working Paper No. 03/01.

⁵⁸ For example: through the Treaty of Maastricht in 1992, the Court of Auditors was given the status of an institution, and a Committee of the Regions was established to contribute with advise in the legislative process; through the Treaty of Amsterdam in 1997, the co-decision procedure (Article 251 EC Treaty) was introduced, and changed the institutional balance between the Council, the Commission and the EP considerably.

⁵⁹ Heukels, T., Blokker, N. & Brus, M. (eds.), *The European Union after Amsterdam: A Legal Analysis* (Kluwer Law, Hague 1998), p. 276.

⁶⁰ For example: on international agreements, Case C-327/91, *France v. Commission* [1994] ECR I-3641; for the use of budgetary powers, Case 106/96, *United Kingdom v. Commission (Poverty 4)* [1998] ECR I-2729.

institution illegal. However, this is not a completely without controversy as the Court has been accused of justifying its decisions, when settling such conflicts, by the means of a non-defined doctrine which is not sufficiently supported for by the Treaty.⁶¹

The Court's view of institutional balance can be found in the *Chernobyl* case⁶² which concerned the EP's right of action under Article 230 EC Treaty. Here, the Court used the concept of institutional balance as a rationale to simply override the wording of the Treaty itself, and in so doing it extended the prerogatives of the EP. According to the Court, the concept of institutional balance corresponds to a system for "*distributing powers among the different Community institutions, assigning to each institution its own role in the institutional structure of the Community and the accomplishment of the tasks entrusted to the Community*".⁶³ Furthermore, the observance of institutional balance means that "*each of the institutions must exercise its powers with due regard for the powers of the other institutions*".⁶⁴

This notion of institutional balance clearly refers to Article 7(1) EC Treaty, which requires that the institutions must act within the constitutional frames set up by the Treaty and respect the powers of the other institutions.

The Court also holds that it is the duty of the Court to "*ensure that the provisions of the Treaty concerning institutional balance are fully applied*".⁶⁵ Thus, the observance of the principle of legality as expressed by Article 7(1) EC Treaty and other provisions affecting the institutional balance, e.g. legal basis provisions, is for the Court to ensure in accordance with Article 220 EC Treaty.⁶⁶ The Court has therefore on a number of occasions annulled Community measures on the rationale that they endangered the institutional balance.⁶⁷ This is done through the annulment procedure on the grounds of lack of competence brought by the Council or

⁶¹ MacCormick, N., *On the very idea of a European Constitution: Jurisprudential reflections from the European Parliament*, JT 2001-02, p. 530.

⁶² Case C-70/88, *Parliament v. Council* [1990] ECR I-2041. The Court introduced the concept of institutional balance in case-law as early as 1958 as "*a balance of powers which is characteristic of the institutional structure of the Community*" (Case 9/56, *Meroni & Co. v. High Authority* [1958] ECR 133, p. 152), however, according to Sacha Prechal, it was not until 1990 with the *Chernobyl* case that the Court explained its notion of institutional balance in more concrete terms. See Heukels, T., Blokker, N. & Brus, M. (eds.), *The European Union after Amsterdam: A Legal Analysis* (Kluwer Law, Hague 1998), p. 275.

⁶³ *Ibid.*, para. 21.

⁶⁴ *Ibid.*, para. 22.

⁶⁵ *Ibid.*, para. 25. See also *Report of the Court of Justice on certain aspects of the application of the Treaty on the European Union*, Luxembourg, May 1995: "(The Court) ensures that the delimitation of powers between the institutions is safeguarded, thereby helping to maintain the institutional balance".

⁶⁶ "*The Court, which under the Treaties has the task of ensuring that in the interpretation and application of the Treaties the law is observed, must [...] be able to maintain the institutional balance*" Case C-70/88, *Parliament v. Council* [1990] ECR I-2041, para. 23.

⁶⁷ For example, Case C-327/91, *France v. Commission* [1994] ECR I-3641; Case 9/56, *Meroni & Co. v. High Authority* [1958] ECR 133.

the Commission (Article 230 (2) EC Treaty), or by the ECB or the EP, for the purpose of protecting their prerogatives (Article 230 (3) EC Treaty).

2.5.2 A Principle of Institutional Balance?

It has been argued that the concept of institutional balance in the Community constitutes a principle of Community law. The idea of institutional balance as an principle is not a novelty of Community law, but an internationally acknowledged theory. In international law, the principle stipulates that the organs of an institutional organisation cannot transgress the institutional limitations laid down in the constituent instrument determining how they exercise their powers. If translated to Community conditions, the principle corresponds well to what Article 7(1) EC Treaty already provides.

According to many scholars, the Community principle of institutional balance is provided for by Article 7(1) EC Treaty. It is claimed that the principle derives from the obligation, embodied in Article 7(1) EC Treaty, that each institution takes equal part in the solution of accomplishing the tasks of the Community within the limits of its competences as attributed by the Treaty.

Even though doctrine has promoted the notion of institutional balance into a principle, the Court has so far not made such a move to my knowledge, although the Court came very close doing so in the *Chernobyl* case.⁶⁸

Nonetheless, the Court's notion of institutional balance comes very close to the academic definition of the principle. The Court has not defined exactly what such a principle would entail, but the main idea is that the Treaty has set up an division of powers between the institutions and bodies of the Community, and each institution must exercise its powers with due regard for the powers of the other institutions.⁶⁹ Such a principle would be intimately connected with the horizontal delimitation of powers.

As explained, the concept of institutional balance refers to the inter-institutional relations of the Community. It would then seem that a principle would only encompass the institutions (the Council, Commission, EP and arguably also the Court).⁷⁰

2.5.3 Delegation of Power and Institutional Balance

As previously explained, the principle of attributed competences implies, *inter alia*, that the institutions of the Community must respect each others powers. In this regard it captures the core of Article 7(1) EC Treaty, that the

⁶⁸ Heukels, T., Blokker, N. & Brus, M. (eds.), *The European Union after Amsterdam: A Legal Analysis* (Kluwer Law, Hague 1998), p. 277.

⁶⁹ Heukels, T., Blokker, N. & Brus, M. (eds.), *The European Union after Amsterdam: A Legal Analysis* (Kluwer Law, Hague 1998), p. 275.

⁷⁰ Heukels, T., Blokker, N. & Brus, M. (eds.), *The European Union after Amsterdam: A Legal Analysis* (Kluwer Law, Hague 1998), p. 281.

each institution may only act within the constitutional frames set up by the Treaty. Read in the light of the concept of institutional balance this also provides that the institutions may not unconditionally transfer its powers to other institutions or outside bodies, as this could change the balance of powers. This notion is important when settling the extent to which the powers of the Community institutions may be delegated to other Community institutions or to outside bodies (including Member States). Basically, delegation takes place when one authority pass on power, which it has been conferred, to another body. Unrestrained delegation could very well disturb the institutional balance which is why (in accordance with the principle of attributed powers) a Community institution may only delegate those specific powers which it is granted under the Treaty. The Court has more than once referred to institutional balance as a valid reason for declaring a Community measure illegal when it comes to wrongful delegation of powers. It has been in particular restrictive when it comes to the transfer of powers that does not take place between the institution of the Community. Accordingly, the Court has laid down strict requirements on the delegation of powers outside the sphere of the institutions, to such established bodies as agencies.⁷¹ In the case of delegation of powers, which has not been granted by the Treaty, the Court has noticed that the institutional balance could be render ineffective if such delegation of powers was allowed.⁷² Consequently, the Court has struck down on cases involving illegal delegation of powers on the grounds of *lack of competence*.

⁷¹ Many EU agencies have been founded on the general Treaty clause of Article 308 (which in itself is at odds with the principle of limited government), although submitted to two important demands; first, that the provision can not be used to change the institutional framework or its balance of power, and secondly, it may not be applied if more special provisions pertain. See Vos, E., *European Administrative Reform and Agencies*, RSC No 2000/51.

⁷² Case 9/56, *Meroni & Co. v. High Authority* [1958] ECR 133, para. 41-46.

3 Judicial Review of the Acts of the Institutions

By the means of its legislative measures, the Community has the power to advance its overall policy “*of an ever closer union among the peoples of Europe*”.⁷³ In any legal order there must however exist a system for testing the legality of such measures. In the Community, this is provided by the power of judicial review exercised by the Court.

The concept of judicial review is an obvious extension of the idea of limited government - that the exercise of government power should only be allowed within legally imposed limits. To safeguard these limits there must be some sort of control of the governmental bodies exercising powers, which is often achieved through a ‘*check and balances*’ system; the Government is controlled by an elected parliamentary chamber. In the Community, however, the checks of the legal limits of the Community by the EP is almost non-existent, or at its best weak.⁷⁴ Therefore, the control of the exercise of Community powers is almost entirely the responsibility of the Court, placing it in the centre of deciding on the scope and boundaries of the competences of the Community. Consequently, the Court has often been called upon to settle difficult questions of constitutional nature. Therefore, it is often said, that the Court exercises the functions of a ‘*constitutional court*’, although it is not formally considered to be one.⁷⁵

It is clear that the Court first and foremost considers that the rationale of judicial review to be to uphold the Rule of law.⁷⁶ To serve that purpose, i.e. to ensure that the law is observed in the interpretation and application of the Treaty (as prescribed by Article 220 EC Treaty), the Court is granted a extensive set of judicial instruments covering a wide range of illegalities.⁷⁷ For example, the Court enjoys, not only the right to review the legality of acts adopted by Community institutions (Article 230 EC Treaty), but also the means to try if that institution has failed to take measures when it was required to (Article 232 EC Treaty).

⁷³ The Preamble of EEC Treaty and Article 1 TEU.

⁷⁴ See *The Division on Competences in the European Union*, DG IV Publications of the European Parliament (W-26 - 03/1997), at chapter F section 1.

⁷⁵ Although it is clear that the Court sees itself to serve the same function: “*The Court [...] carries out tasks which, in the legal systems of the Member States, are those of the constitutional courts ...*”. *Report of the Court of Justice on certain aspects of the application of the Treaty on the European Union*, Luxembourg, May 1995.

⁷⁶ See Case 294/83, *Parti Ecologiste v. European Parliament (Les Verts)* [1986] ECR 1339, para. 23.

⁷⁷ Article 230, 232, 234, 241 and 288 EC Treaty

3.1 Judicial Activism?

The Court has for a long time been the target of a criticism, claiming the Court has stepped beyond its judicial role and behaved politically. More precisely, the Court has embraced functions that usually is carried out by other organs, such as legislative, by inventing legal doctrines that lack proper support in the Treaty.⁷⁸ Others have seen this as a necessity to fulfil the vision of an integrated and developed Europe, and in that context, a flexible interpretation of the Treaty must not only be warranted but also legitimate since that vision is expressed by the preamble and the first articles of the EC Treaty.⁷⁹

The allegation of judicial activism is rooted in the expansion of Community jurisdiction, that was especially intensive during the 1970's and 1980's. The creative reading of the Treaty provisions and the broad interpretation of Community aims which expanded the powers of the Community, has been observed with a growing awareness by many of the Member States. Consequently, the Court has at times been blamed for a lack of interest about the protection of the Member States sovereignty against the enlargement of Community powers. It has been argued that the Court ought to adopt a more positivistic approach, i.e. apply a narrower interpretation of the text of the Treaty (especially of the rules concerning the delimitation of Community competences) to avoid a serious decline of confidence in the Court and the EU at a whole.⁸⁰

3.2 The Intensity of Judicial Review

To avoid a confrontation between the legal orders of the Member States and the Community, the scholar Hjalte Rasmussen (arguably the Court's fiercest critic) has called for "*a far more intense review of politically important acts adopted by the Community's legislators to ensure the observance of the limitations entrenched in each individual legal basis.*"⁸¹

Undoubtedly, the Court has previously not been as serious over the limits of Community competences as it should have been. The balance between the what the Court *should* and what the Community *needs* (or urges), i.e. what has often been between putting restraint on the legislature's desire to expand the jurisdictional boundaries of the Community, and that of facilitating the integration of the Community, has indeed turned out to be a difficult balance

⁷⁸ MacCormick, N., *On the very idea of a European Constitution: Jurisprudential reflections from the European Parliament*, JT 2001-02, p. 530.

⁷⁹ Craig, P. & de Búrca, G., *EC law: text, cases and materials* (Oxford University Press, 2nd ed., New York 1998), pp. 90-91.

⁸⁰ Bernitz, U. & Nergelius, J. (eds.), *General Principles of European Community Law* (Kluwer Law, Great Britain 2000), pp. 45-46.

⁸¹ Bernitz, U. & Nergelius, J. (eds.), *General Principles of European Community Law* (Kluwer Law, Great Britain 2000), p. 45.

to master. Since the Court, in times of political stagnation, has often shouldered the responsibility of pushing the Community forwards, the latter option has often prevailed.

Such matters may very well influence the scrutiny of which the Court approaches actions for annulment of Community acts.⁸² Depending on the circumstances of the action (an inter-institutional dispute or a dispute between the Community and a Member State etc.), the policy factors involved will not be the same. These considerations will often determine the intensity of the review to which the Court will subject to these actions.

A suppressed judicial review might give the Community institutions unrestrained legislative power, contrary to the idea of limited government. This would permit the Community to encroach on the powers of the Member States without having to give much notice of the limits set by the Treaty.

On the other hand, a too intensive review might impede the Community legislator from performing its duties effectively, e.g. removing barriers and distortions to trade. It would also deprive the Community much of its flexible nature that has played such an important role during the evolution of the Community legal order.

3.3 Who is the Ultimate Judicial Umpire of Community Competences?

One fundamental question that must be addressed before proceeding further seems, *prima facie*, to be rather straightforward, but nonetheless conceal complex issues of great importance. It is not the question of where the limits of Community competence are drawn, but the ‘*institutional*’ issue of *who* gets to decide on this question. This question is often referred to as the question of judicial *Kompetenz-Kompetenz*.⁸³ It can be described as follows: When the legality of a Community measure is challenged on the grounds of *ultra vires* who gets to make the final determination of its validity? Is it the European Court of Justice or the constitutional courts of the Member States?

Most national courts would probably now agree that Community law is supreme in those fields where the Treaty validly attributes competences to

⁸² Shaw, J., *Law of the European Union* (Palgrave Law Masters, 3rd ed, 2000), pp. 490-493.

⁸³ With *Kompetenz-Kompetenz* means legal power to define one’s own competence. More precisely, it may be divided into the question of *Judicial Kompetenz-Kompetenz* and that of *Legislative Kompetenz-Kompetenz* (the capacity of the polity to determine the extent of its own legislative competence). The issue of *Judicial Kompetenz-Kompetenz* is discussed thoroughly by J. H. H. Weiler and Ulrich R. Haltern in *The European Court and National Courts: Doctrine and Jurisprudence* (Hart Publishing, Oxford 1998).

the Community.⁸⁴ Conversely, it is also understood that Community measures that are ultra vires do not enjoy supremacy. However, the unresolved issue concerning the right to make that determination is still a contested one. The sensitivity surrounding this issue can be traced back to the expansion of Community jurisdiction in the 1970's and 1980's with the erosion of the principle of attributed competences. In *Van Gend en Loos*⁸⁵ the Court declared the importance of the principle of attributed competences, describing the Community as a “*new legal order [...] for the benefit of which the States have limited their sovereign rights, albeit in limited fields*”.

There is an anxiety among the Member States that this barrier towards jurisdictional expansion does not offer satisfactory protection from encroachment of the Community, i.e. that these fields are limited no more.⁸⁶ Presently, this concern lives on through under the notion of the ‘*creeping competences*’ of the Community, i.e. that the policies of the Community will expand under the guise of regulation. Given the vague limits of Community competences in the Treaty and the difficulties in defining the boundaries between valid measures and ultra vires measures, the question of judicial *Kompetenz-Kompetenz* thus becomes very important, and continues to be a source of uncertainty.

It is clear that the European Court of Justice considers itself to be the ultimate umpire of Community competences under the mandate provided by Article 220 EC Treaty.⁸⁷ The Court has presented two reasons for this monopoly.⁸⁸ First, only the Court is capable to uphold the uniformity of Community law since only the Court’s judgements are binding upon all the national courts. Secondly, only the Court is able to sufficiently protect the rights of defence of the Community institutions.

However, the Member States and the national courts are on the whole reluctant to abandon the possibility to review the exercise of Community powers in ways to ensure that the limits prescribed by the Treaty are not

⁸⁴ Slaughter, A. M., Stone Sweet, A & Weiler J. H. H. (eds.), *The European Court and National Courts: Doctrine and Jurisprudence* (Hart Publishing, Oxford 1998), Prologue vii.

⁸⁵ Case 26/62, *Van Gend en Loos* [1963] ECR 1.

⁸⁶ See Weiler, J. H. H, *Federalism and Constitutionalism: Europe's Sonderweg*, Harvard Jean Monnet Working Paper No. 10/00. In a recent piece, Gráinne de Búrca examines the ambivalent tendencies concerning this issue. He argues that the Member States participates in undermining the boundaries of its own state authority, acting contrary to their desire for clearer delimitation on Community competences. On this topic see de Búrca, G., *Setting constitutional limits to EU competence?*, Francisco Lucas Pires Working Papers Series, 2001/02.

⁸⁷ See Case 314/85, *Foto-Frost v. Hauptzollamt Lubeck-Ost* [1987] ECR 4199, especially at para. 15, where the Court conclude that national courts have no power to declare Community legislation invalid. According to J. H. H. Weiler and Ulrich Haltern, the Court’s view is also shared by most commentators. See Slaughter, A. M., Stone Sweet, A & Weiler J. H. H. (eds.), *The European Court and National Courts: Doctrine and Jurisprudence* (Hart Publishing, Oxford 1998), preface.

⁸⁸ See Chalmers, D., *European Union Law, Vol. 1: Law and EU government* (Dartmouth Publishing 1998), p. 537.

exceeded. It is quite clear that the Member States in this regard does not have much faith in the Community institutions, especially the Court, to respect the sovereignty of the Member States or the limits of Community competence. More importantly, the mistrust in the Court is threatening the legitimacy of the Court, along with the risk that the national courts may not be as willing to recognise the supremacy of Community law.⁸⁹ It has been a long-standing question if the Court will be able to answer to this threat to the its legitimacy.

3.3.1 The Maastricht Judgement

A challenge to the Court's notion on the judicial *Kompetenz-Kompetenz* issue and the supremacy of Community law emerged in 1993 by the well known Maastricht judgement of the German Federal Constitutional Court, the *Bundesverfassungsgericht* (BVerfG).⁹⁰ Here, the issue of judicial *Kompetenz-Kompetenz* found its way into the limelight as a result of the fact that the German ratification of the Maastricht Treaty depended on the outcome of the BVerfG's judgement.

The BVerfG approach to the issue of judicial *Kompetenz-Kompetenz* was to apply its notion of the Community as a body which should be examined in the context of international law.⁹¹ Accordingly, the Community institutions was only allowed to exercise those powers expressly transferred upon them by the *Bundestag* since the transfer of powers is regulated by the Act of Accession under the rule of international law. Similar to ultra vires acts of international organisations, any Community measures adopted violating the limits of Community competence prescribed by the Treaty would not be binding within the German territory. Moreover, it was declared that the BVerfG, and not the Court, would ultimately decide on which powers the *Bundestag* has transferred. The BVerfG claimed the right to "review legal instruments of European institutions and agencies, to see whether they remain within the limits of the sovereign rights conferred on them or transgress them".⁹² Thus, it rejected the Courts claim to exclusive *Kompetenz-Kompetenz* and declared that the limits to Community legislative

⁸⁹ The scholar J. H. H. Weiler has described this change in Member States compliance as the end of the Court's 'honeymoon': "*The ECJ has conspicuously failed to generate any confidence in its ability to put effective checks on the jurisdictional appetite of the Brussels' lawmaking apparatus. National courts, especially constitutional courts such as those in Italy, Ireland, and Germany might be tempted to step in themselves and place national checks on Community legislative expansionism, thereby precipitating a serious constitutional crisis.*" Weiler, J. H. H., *A Quiet Revolution. The European Court and its interlocutors*, 26 CPS (1994), p. 510-535.

⁹⁰ Bundesverfassungsgericht, Judgement of 12 Oct. 1993, (1993) NJW 3047; English translation in 1 CMLR, 57 (1994).

⁹¹ Slaughter, A. M., Stone Sweet, A & Weiler J. H. H. (eds.), *The European Court and National Courts: Doctrine and Jurisprudence* (Hart Publishing, Oxford 1998), p. 95.

⁹² 89 BVerfGE 155, *Manfred Brunner et al v. The European Union Treaty*, 1 CMLR 57 (1994), at 89.

competence was as much a matter of German constitutional law as it was a matter of Community law.

Hence, having underpinned German sovereignty, the powers of the BVerfG and the limits of the powers of the Community (especially the European Court of Justice), the BVerfG judgement was certainly to be understood as a warning to the Court to consider the legal limits of its own jurisdiction and its policy.⁹³ The message of the Maastricht judgement to the national courts was that Community acts could now be challenged and left inapplicable in Germany if rendered *ultra vires*. Although this has been taken up to the test,⁹⁴ any real challenge to the legitimacy of the Court has so far not emerged.

3.4 Review of Legality - Article 230 EC Treaty

Article 230 EC Treaty is the principal article of those provided by the Treaty which enables plaintiffs to challenge Community acts. Under this provision, the Court has jurisdiction review the acts adopted by the Council, the Commission, the European Parliament and the ECB to determine whether they are illegal or not.

There are essentially four conditions that must be satisfied before an act can be successfully challenged through an action for annulment. The disputed act must be open for challenge (Article 230(1) EC Treaty), the applicant must have standing to do so (Article 230(2-4) EC Treaty), there must exist an illegality covered by one or more of the grounds listed (Article 230(1) EC Treaty), and the challenge must be instigated within the prescribed time limit (Article 230(5) EC Treaty).

3.4.1 The Concept of ‘Reviewable Act’

Article 230(1) EC Treaty states that the Court shall review the legality of “acts [...], other than recommendations and opinions”. The acts which the provision refers to are those prescribed by Article 249 EC Treaty, which lists the acts of the European Parliament, the Council and the Commission as Regulations, Directives, Decisions, Recommendations and Opinions. The latter two have no binding force and, according to a strict reading of Article 230(1) EC Treaty, should not be susceptible to judicial review by the Court. However, Article 249 EC Treaty is not considered to provide a complete list of Community legislative measures as the Court has interpreted Article 230 EC Treaty somewhat wider than it was initially written.

⁹³ Dashwood, A., *The limits of European Community powers*, 21 EL Rev. (1996), p. 113.

⁹⁴ For example, in a case in 1996 by the German Financial Court of Hamburg (FinG Hamburg) on a challenge against Community Regulation 404/93 on banana import. The basis of the conflict concerned German constitutional law and the Community intervention on the banana market.

Instead of confining itself to review only acts mentioned in the Article, the Court has looked more at the substance of the measures adopted by the Community institutions.

In the *ERTA* case⁹⁵, the Court took on to interpret the term ‘act’ in Article 230 EC Treaty. The Court did not accept the argument that the provision only covered certain types of Community acts. Instead, the Court declared that “*an action for annulment must [...] be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects*”.⁹⁶ The crucial factor seems to be the binding nature of an act and that it in some ways altered the applicants legal status. If that is the case, then the adopted measure may be subjected to judicial review. These types of acts, which are not listed in Article 249 EC Treaty are often referred to as *sui generis*-acts.

The institutions which acts can be subjected to review are the Community institutions (except the Court and the Court of Auditors) and the European Central Bank (ECB). However, before the TEU, the European Parliament and the ECB was not among the listed institutions in Article 230(1) EC Treaty. The Court played an important part in extending this list through its case-law, and thus, laying the groundwork for the amendment of Article 230(1) EC Treaty by TEU. In the *First Les Verts* case⁹⁷, the Court stated that proceedings could be brought against the acts of the European Parliament under Article 173 (now Article 230 EC Treaty). To exclude the European Parliament from those whose acts could be contested “*would lead to a result contrary [...] to the spirit of the Treaty as expressed in Article 164 [now Article 220 EC Treaty]*” as well as to the system of Article 230 EC Treaty.⁹⁸ Since the Community is based on the rule of law and neither the Member States nor its institutions can avoid a review of the legality of the measures they have adopted. It therefore seems possible that even other Community organs, who could adopt such acts, could possibly be subjected to judicial review by the Court based on this principle. However, so far the court has gone the other way. The Court has judged that the acts of both the European Council⁹⁹ and COREPER¹⁰⁰ cannot be reviewed as they are not considered to be Community institutions under the Treaty.

3.4.2 Locus Standi

There are three categories of different applicants according to Article 230 EC Treaty. The first categories is often referred as the ‘*privileged applicants*’, which includes the Member States, the Council and the

⁹⁵ Case 22/70, *Commission v. Council* [1971] ECR 263.

⁹⁶ *Ibid.*, para. 42.

⁹⁷ Case 294/83, *Parti Ecologiste v. European Parliament (Les Verts)* [1986] ECR 1339.

⁹⁸ *Ibid.*, para. 25.

⁹⁹ See Case T-584/93, *Roujansky v. European Council* [1994] ECR II-585.

¹⁰⁰ See Case C-25/94, *Commission v. Council* [1996] ECR I-1469.

Commission. These privileged applicants may challenge any binding act adopted by an institution. They do not need to demonstrate any special interest to the challenged act, but are presumed to have a general interest as significant governmental bodies of the Community.

The second category was originally developed through case-law before it found its way into the third paragraph of Article 230 EC Treaty by the amendment of TEU. It gives the European Parliament, the Court of Auditors and the ECB the right to bring actions for the purpose of protecting their prerogatives. However, with the entry into force of the amendments of the Nice Treaty, the EP will be elevated to the status of '*privileged applicant*', at the same rank as the Member States, the Council and the Commission.¹⁰¹

The third category includes any natural or legal persons, who hold a more restricted right to bring an action to the Court. It is not possible for a legal or natural person to act in the general interest of the Community as the privileged applicants have standing to do. A natural or legal person may instigate an action if a Decision was addressed to that person, or where the applicant is a "*non-addressee*", if the applicant can prove that the Decision was of "*direct and individual concern*" to him. A Decision in the form of a Regulation may also be challenged, however, it must nonetheless still be of both direct and individual concern to the applicant.

The requirement of "*direct and individual concern*" has turned out to be very difficult for natural and legal persons to satisfy, and the Courts rulings has been somewhat inconsistent, which has attracted more attention to the other alternatives of challenging Community acts.¹⁰² Another problem has been that only Decisions (or Decision in the form of a Regulation) are allowed to be challenged under Article 230(4) EC Treaty, but then again, the Court has concentrated more on the substance of the act than its formal classification and has acknowledged that there is no reason, in principle, why not also a Directive could be challenged.¹⁰³

The Court has tried to clarify the meaning of "*direct and individual concern*" in a number of cases. As to the requirement of '*direct concern*', there has to be an adequate link of causality between the act in question and the impact on the applicant. The biggest obstacle, however, to most individual applicants is still that of '*individual concern*'. The Court sought to shed light on the this term in the *Plaumann* case.¹⁰⁴ According to the ruling of this case, '*non-addressee*' applicants may only claim to be individually concerned if "*that decision affects them by reasons of certain attributes which are peculiar to them or by reasons of circumstances in*

¹⁰¹ In Article 230, the second and third paragraphs will be replaced by the following: "*It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers*".

¹⁰² Shaw, J., *Law of the European Union* (Palgrave Law Masters, 3rd ed, 2000), pp. 505-506.

¹⁰³ For an example: Case C-10/95P, *Asocarne v. Council* [1995] ECR I-4149.

¹⁰⁴ Case 25/62, *Plaumann & Co v. Commission* [1963] ECR 95.

which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the persons addressed". However, as the language suggests, this test has turned out to be very restrictive.¹⁰⁵

3.4.3 The Grounds of Illegality

In exercising the power of judicial review, the Court is restricted to four grounds of illegality listed in Article 230(2) EC Treaty:

- 1 lack of competence;
- 2 infringement of an essential procedural requirement;
- 3 infringement of the Treaty or of any rule of law relating to the application;
- 4 misuse of powers.

The grounds of review are loosely based upon the grounds from French administrative law developed by the Conseil d'Etat (Supreme French Administrative Court), but any resemblance between them is long gone. The Treaty provides only meagre guidance to the Court on these grounds in the exercise of judicial review. There are no clear references to other Treaty provisions that could further clarify the range of illegalities covered by the grounds. Consequently, the Court has been required to develop its own interpretation of the specific illegalities covered by these grounds and which principles will influence that determination.

3.4.4 Time Limits

Another condition that must be satisfied, according to Article 230(5) EC Treaty, is that an action for annulment must be instigated within two months of its publication or notification to the plaintiff. In the absence thereof, the time limit may be set from two months from the day on which the applicant came to knowledge of the measure. However, these restrictions will not apply if the act in question is tainted by a particularly serious illegality.

3.4.5 The Consequences of Annulment

The right to annul a Community act, if the applicant's case is well founded, is prescribed by Article 231 EC Treaty. However, even if an act is found illegal, it does not necessarily mean that it must be declared invalid and non applicable (i.e. void). If the Court finds that the illegal act is better than no act at all, the Court may disregard to annul it while deciding that the Community institution shall as soon as possible correct the illegality.

¹⁰⁵ See Shaw, J., *Law of the European Union* (Palgrave Law Masters, 3rd ed, 2000), pp. 508-509.

Moreover, in the case of a illegal Regulation, the Court may rule that only parts of it will be declared void according to Article 231(2) EC Treaty. Article 233 EC Treaty complement that by stating that the institutions whose acts has been declared void must also take the necessary measures to comply with the judgement of the Court. The general rule is that all act declared illegal are void *ab initio* i.e. the notion of the invalidity is retroactive.

3.4.6 Other Ways of Challenging Community Acts

Another way of attacking a Community act can be done by a *plea of illegality* under Article 241 EC Treaty. This is not a direct and independent challenge of an act as provided by Article 230 EC Treaty, but a plea that can only be invoked when proceedings are already before the Court under some other Article of the Treaty. The challenged act must also be relevant for the case in question. The purpose of Article 241 EC Treaty is to give an individual applicant a chance to challenge an act that would otherwise not be possible through Article 230 EC Treaty. An action under Article 241 EC Treaty is therefore inadmissible if the applicant had opportunity to go through the direct challenge of Article 230 EC Treaty.¹⁰⁶ Moreover, according to Article 241 EC Treaty, plea of illegality can only be applied against Regulations, but the Court has extended its interpretation so it may encompass other binding acts with similar legal effects.¹⁰⁷ If the act is found illegal on the grounds set out in Article 230 EC Treaty, the Court will find it, not void, but inapplicable.

It is also possible to indirect challenge a Community act through Article 234(1.b) EC Treaty. The Article provides the option of getting a *preliminary ruling* from the Court “*on the validity and interpretation of acts of the institutions of the Community*” under scrutiny in a national court. The national court has to refer the matter to the Court since national courts have no jurisdiction themselves to declare a Community act invalid.¹⁰⁸ This way of challenging acts has become important to individual applicants who faces the difficulties of fitting the narrow criteria of Article 230 EC Treaty, as developed by the Court.¹⁰⁹ The chance for an individual applicant to obtain a judicial review via a national court than a direct challenge in the Court, is generally more optimistic.

¹⁰⁶ See Case C-188/92, *TWD Textilwerke Deggendorf GmbH v. Germany* [1994] ECR I-833.

¹⁰⁷ See Case 92/78, *Simmenthal SpA v. Commission* [1979] ECR 777, in which the Court allowed an action towards some ‘Notices of Invitation to Tender’ on the ground that these were similar to Regulations.

¹⁰⁸ See Case 314/85, *Foto-Frost v. Hauptzollamt Lubeck-Ost* [1987] ECR 4199.

¹⁰⁹ Craig, P. & de Búrca, G., *EC law: text, cases and materials* (Oxford University Press, 2nd ed., New York 1998), p. 499.

4 Defining the Community's Competence

4.1 The Concept of Legal Basis

Similar to a constitution, the Treaty tells us *who* possesses authority and *where* authority is located. It also regulates *what* the government may do and *how* this may be done. More specifically, this elements of authority is provided by Treaty through, what is in Community law-terms is referred to as *legal basis*. Each time the Community acts, it must do so on the basis of a specific Treaty provision which gives it the corresponding power. It is a fundamental rule of Community law that all Community action must be properly based upon a legal basis of a particular Treaty provision. Hence, in Community law, the concept of legal basis has two functions: (1) it enables the institution in question to adopt an act, as there for every legislative measure must exist a legal basis that attributes the competence to adopt the measure to the institution; and (2) it provides the limits in which this is to be accomplished by prescribing the legislative procedure for the enacting measure (e.g. “*in accordance with the procedure referred to in Article 251*”¹¹⁰) as well as the legal form to be used (e.g. directives or regulations).¹¹¹

4.1.1 The Requirement of Legal Basis in Community Law

Although Community law require that all Community action must be based upon a particular Treaty provision, this does not mean that the legal basis must point directly to a Treaty provision. A legislative measure can be founded on a legal act of the Community which is in turn established on a Treaty provision (providing the original competence to enact). In this context, the requirement of a legal basis is a fundamental rule of Community law, derived from the principle of legality, providing that all powers should be able to be traced back to its original authority. The Court has acknowledged the necessity of legal basis by concluding that an reference to a specific Treaty provision must be made, “*where, in its absence, the parties concerned and the Court are left uncertain as to the precise legal basis*”.¹¹² An absence of legal basis would make it difficult for the Court to assess if the objective of the measure is validly pursued. Accordingly, each legislative act must in some way indicate in its preamble which Treaty provision serves as its legal basis. An act that does not reveal which legal basis it is founded upon can be determined illegal through Article 230 EC Treaty, due to

¹¹⁰ See Article 95(1) EC Treaty.

¹¹¹ The distinction is taken from Barents, R., *The International Market Unlimited: Some observations of the legal basis of Community legislation*, 30 CML Rev. (1993), p. 92.

¹¹² See Case 45/86, *Commission v. Council* [1987] ECR 1493.

infringement of an essential procedural requirement.¹¹³ Moreover, it has been declared that the issue of correct legal basis is not to be considered a matter of legislative discretion, but must be based on objective factors which are susceptible to judicial review by the Court.¹¹⁴

4.1.2 Incorrect Legal Basis or Lack of Competence?

In practice, the issue of whether the Community enjoys competence or not usually arises in proceedings before the Court on disputes over the legal basis of a particular piece of legislation.¹¹⁵ However, these litigations are not necessarily framed as lack of competence actions, instead they may simply be targeted against the *choice of legal basis* of the enacted measure. The dispute in such cases has often been between two Community institutions cast as a tug-of-war over the legal basis which the institutions believes protects its own best interests.¹¹⁶ If the measure is found to be based on a wrong legal basis, this does not however automatically mean that the Court will find the act to be ultra vires and illegal on grounds of *lack of competence*. One reason for this is that it is possible for an act to have more than one objective, and when pursuing one primary objective, additional objectives could be achieved too. The issue then will often be concerned with which is the true objective of the act (the '*centre of gravity*' of the act), and whether the chosen legal basis was correct under that objective. In such cases, the Court has often just simply declared that the measure should have been adopted under another legal basis instead of ruling it illegal due to lack of competence.¹¹⁷ It is also possible that in pursuing one valid objective, the act targets other objectives which are beyond its competence. Under such circumstances, it may be argued that the pursued illegal objective ought to invalidate the act. However, the fact that it serves an objective which is ultra vires does not necessarily make it illegal if it can be shown that the act has a valid basis in the Treaty.¹¹⁸

These quarrels over the correct legal basis should therefore not be mistaken for straightforward ultra vires issues. Matters of ultra vires/lack of

¹¹³ See C-325/91, *France v. Commission* [1993] ECR I-3283, para. 26.

¹¹⁴ "... the choice of 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." Case 45/86, *Commission v. Council* [1987] ECR 1493, p. 1520. This rule has been emphasised by the Court in Case C-300/89, *Commission v. Council (Titanium Dioxide)* [1991] ECR I-2867 and also in Case C-155/91, *Commission v. Council (Waste Directive)* [1993] ECR I-939.

¹¹⁵ For example: Case C-300/89, *Commission v. Council (Titanium Dioxide)* [1991] ECR I-2867; Case C-155/91, *Commission v. Council (Waste Directive)* [1993] ECR I-939; C-376/98, *Federal Republic of Germany v Parliament and Council* [2000] ECR I-8419.

¹¹⁶ See Shaw, J., *Law of the European Union* (Palgrave Law Masters, 3rd ed, 2000), pp. 289-290.

¹¹⁷ For example: Case C-300/89, *Commission v. Council (Titanium Dioxide)* [1991] ECR I-2867.

¹¹⁸ Bernitz, U. & Nergelius, J. (eds.), *General Principles of European Community Law* (Kluwer Law, Great Britain 2000), p. 40.

competence is more about where the Community institutions has transgressed the specific limits of their competence and thereby encroached upon the powers or prerogatives of other institutions or of the Member States. Conversely, legal basis disputes concerns the choice of correct legal basis, or if you will, claims that the institution has acted on the ‘wrong competence’ and not whether there has been a direct illegal conduct involved in the adoption of the measure. The Court has seen this problem of identifying the ‘correct’ legal basis as a conundrum which is inherent in the Treaty.¹¹⁹ However, the issue of *ultra vires* may not only arise where the Community institutions has violated the limits of their competence, but also when there is no legal basis at all. If no legal basis exists for the adoption of a legal act, the institution entirely lack competence to adopt the measure. Consequently, if the measure is adopted anyway, it is considered *ultra vires* and can be annulled for lack of competence by the Court.

4.2 The Jurisdiction of the Community

In the context of the concept of legal basis and the principle of attributed competences it might be useful to sketch the jurisdictional landscape of the Community with regards to the Member States. Generally, the map of competences may be summarised as follows:

- 1 *Exclusive Community jurisdiction*; the areas of activity in which only the Community may adopt binding measures.
- 2 *Cuncurrent or shared jurisdiction*; the extensive areas of activity where Community and Member State competences overlap and interrelate. In such area of competence, either the Community or the Member State have have to act, but not both.¹²⁰
- 3 *Exclusive Member State jurisdiction*; those areas of activity where the Community has no jurisdiction whatsoever.

If the principle of attributed competences where to be strictly interpreted and applied, this demarcation would, in principle, only change with amendment to the Treaty. However, the demarcation of jurisdiction has not been (and is not intended to be) an immutable limit, as has previously been pointed out.

¹¹⁹ “Under the system governing Community power, the powers of the institutions and the conditions on their exercise derive from various specific provisions of the Treaty, and the differences between those provisions, particularly as regards the involvement of the European Parliament, are not always based on consistent criteria”, Case 242/87, *Commission v. Council* [1989] ECR 1425, p.1452.

¹²⁰ *Convention Bulletin Edition 08-31.05.02*, European Convention (CONV47/02), para. 1(9.b).

4.2.1 The Division of Powers

The principles and concepts that provides for the notion of the division of powers has already been accounted for, but it is nevertheless useful to summon them here in the context of the divisions of powers as to complete the picture.

In the Community, as in all government systems that entail more than one level of decision-making, there must be some sort of mechanism for dividing competence and responsibility between those different levels of government. In the Community, this is done through a division of powers, in accordance with the concept of legal basis and the relevant principles of Community law: the legal basis provisions enables the powers to be allocated and defines their formal limits, which are further underpinned by the principle of attributed competences and maintained by the concept of institutional balance.

In the first place, this determines the ‘*vertical*’ division of powers between the Community and the Member States, since where the Community is not authorized to act (i.e. where the Treaty does not contain a legal basis), the Community institutions has no competence to act. That is ultra vires-territory, so to say. In that field of activity, the Member States enjoys residuary competence. Conversely, where there exists a legal basis that confers competence to the Community, the question on whether the Community may act on that competence is settled by other principles, which governs the exercise of Community powers, particularly the principle of subsidiarity and the principle of proportionality of Article 5(2) and Article 5(3) EC Treaty (which however is another story). In addition, as the legal basis decides the procedure to be used, it will also determine the ‘*horizontal*’ division of powers between the institutions, which sets the balance of powers between the institutions on that matter.

Accordingly, for a Community institution to adopt a valid act, it must enjoy both (1) ‘*internal*’ competence among the Community institutions, as well as (2) ‘*external*’ competence in regards to the Member States.¹²¹

If the competence to act rests either with another Community institution or with the Member States, the adopted measure is ultra vires and may be ruled illegal on the grounds of lack of competence. However, this outline of the division of powers does only provide a description in black and white; the current system is much more complicated, as we will see. The lack of judicial interference from the Court has left the division of powers to be determined rather fluidly by the other institutions of the Community.¹²² As the relevant provisions are dispersed widely around the Treaty, the system is characterised by a complex mixture of various objectives, specific

¹²¹ The terms used for this illustration is not to be confused with the theory on the internal and external competence of the Community as a whole.

¹²² de Búrca, G. &, de Witte, B., *The delimitation of powers between the EU and its Member States* (Robert Schuman Centre of Advanced Studies, 2001), p. 1.

competences and functional competences, that has made it somewhat difficult to comprehend and to identify *who does what* in the Community.

4.2.2 The Scope and Limits of Community Competence

The formal limits of Community competences are, as pointed out, provided by the many specific legal basis provisions of the Treaty, which prescribes which powers the Community are restricted to and the means in which they may be exercised by. These limits are further underpinned by Article 5(1) EC Treaty and reinforced by Article 7(1) EC Treaty, as the principle of attributed competences. However, this restraint does not in reality serve as a actual boundary to Community competence despite its *prima facie* straightforwardness. Instead it functions more as a beacon which the Community should guide its actions from.

The reason for this is partly due to the ambiguous and evolutionary nature of Community law. Although, in principle, the Community may only act within the limits of those powers attributed upon it by the Treaty, this boundary has been diminished, mainly for two reasons. First, the Court has accepted a wide interpretation of the Community's competence, partly through the acknowledgement of the concept of implied powers. Secondly, the use of wide-ranging legal basis provisions, in particular Article 308 EC Treaty, has widen the scope of Community competences.¹²³ Moreover, the competences of the Community has continuously expanded through the various amendments of the Treaty; the SEA, the TEU and the TOA have added considerably to the subject-matter competence of the Community. Combined with the complexity of the division of powers, all these uncertainties makes it hard to measure which effects flow from the principle of attributed competences.¹²⁴

However, in reality, the limits of Community competences have already been decided by the legislative institutions. Judicial intrusion by the Court has been relatively scarce except maybe for those cases concerning the division of powers between the different Community institutions.¹²⁵ Thus, the legislature of the Community has rather unhindered been able to expand its jurisdiction to new fields of competence through inventive interpretation of the Treaty. Since this approach has rarely been defied by the Court, it has almost always been possible for the legislature to find a legal basis for a Community act (e.g. in Article 308 EC Treaty or other vaguely delimited provisions like Article 94 and Article 95 EC Treaty).

¹²³ Hartley, T. C., *The foundations of European Community law* (Oxford University Press, 4th ed., New York 1998), p. 102.

¹²⁴ Dehousse, R., *The European Court of Justice* (Macmillan, London 1998), p. 56.

¹²⁵ Chalmers, D., *European Union Law, Vol. 1: Law and EU government* (Dartmouth Publishing 1998), p.485.

4.2.3 Community Competences

There are three types of identifiable powers enjoyed by the Community, depending on the mode of attribution: (1) *Express powers*, (2) *Implied powers* and (3) *Subsidiary powers*.¹²⁶ In principle, the actions of the Community are based on a specific legal basis provision in the Treaty which confers the competence to act. *Express powers* are those which are clearly enumerated and defined by the Treaty. The aims and means which may be employed to attain them are clearly prescribed and acts as a demarcation of the powers. These are powers which are enacted within the secured limits prescribed by the principle of attributed competences. However, as the language of the Treaty is in many regards both unclear and open-ended, the question of whether the Community is restricted from acting in a certain field is dependent upon the textual interpretation of the Treaty provisions. The Court has also in the past acknowledged a wide interpretation of such *subsidiary* provisions as Article 308 and *open-ended* provisions such as Article 95 EC Treaty. Moreover, it has also been accepted that the Community enjoys powers not only when expressly granted by the Treaty, but also when such powers are implied by the Treaty.

4.2.3.1 Implied Powers

Not all powers of the Community are expressly originated from the Treaty but are drawn by implication from others, which is the case of implied powers.¹²⁷ The concept of implied powers is no new innovation of Community law but a recognised theory in both French and English law as well as an acknowledged principle of international law. The Court accepted the existence of implied powers as early as 1956. However, a wider formulation of the concept was acknowledged in 1987 providing that it also included legislative powers indispensable to carry out the task.¹²⁸

According to the Court, the Community has not only competence where explicitly granted by a Treaty provision, but also has implied competence to carry out the tasks it has been expressly allocated. The Court has used this notion both internally and externally to extend the competences of the Community.¹²⁹ In Opinion 2/91, the Court proclaimed that authority to enter into international commitments “*may not only arise from an express attribution by the Treaty, but may also flow implicitly from its provisions*” and in particular whenever an institution enjoyed power internally for the purpose of attaining a specific objective, it also has authority to “*enter into*

¹²⁶ These are the Community’s ‘internal’ powers. The Community’s external competence, i.e. competence to act outside the sphere of EU, will not be addressed here.

¹²⁷ “*Such authority arises not only from an express conferment by the Treaty [...] but may equally flow from other provisions of the Treaty and from measures adopted within the framework of those provisions, by the Community institutions*”, Case 22/70, *Commission v. Council (ERTA case)* [1971] ECR 263, para.??

¹²⁸ See Cases 281, 283-85, 287/85, *Germany v Commission* [1987] ECR 3203, para. 28.

¹²⁹ See Shaw, J., *Law of the European Union* (Palgrave Law Masters, 3rd ed, 2000), pp. 216.

the international commitment necessary for the attainment of that objective even in the absence of an express provision in that connection”.¹³⁰

Although this seem somewhat contrary to the idea stated in Article 5 EC Treaty, the reference in that provision to the objectives assigned to the community would suggest an opening for such powers. Even so, the implied powers doctrine was introduced before the Article 5 EC Treaty.

4.2.3.2 Subsidiary Powers and Open-ended Powers

In the context of the present delimitation of Community competences, the two Treaty provisions Article 95 (ex 100a) EC Treaty and Article 308 (ex 235) EC Treaty, are in particular in focus and have amounted most controversy.¹³¹ Though they have been extensively used by the legislature for a long time, the existence and application of these two legal basis provisions are nonetheless highly controversial, mainly because of their ‘double-edged’ nature. While they on one hand provide the Community legal order with an instrument to “*react to fresh challenges*”, they have also functioned as a basis for the “*creeping expansion of competences*” on behalf of the sovereign powers of the Member States.¹³²

Both Article 95 EC Treaty and Article 308 EC Treaty differ from many other legal basis provisions of the Treaty, which are often defined in terms of specific areas arranged under different titles or chapters in the Treaty, whereas Article 95 EC Treaty and Article 308 EC are defined in cross-area objectives to be achieved.¹³³ Thus, although the essential objective of these provisions is mainly the establishment and functioning of the internal market, they might also intrude on policy areas which is not assigned to the Community, which is an major underlying factor behind the many legal basis-disputes involving these open-ended articles. However, the scope of these two provisions has been progressively circumscribed under the last years (as we will see later on), but they still provide a nuisance to those demanding a more precise delimitation and a few words on their particularities may still be warranted.¹³⁴

Article 95 EC Treaty was introduced by the amendment of the SEA in 1986 as an instrument to boost the establishment of the internal market. In the period following the SEA, Article 95 EC Treaty was used effectively and expansively to accomplish the goals set by the SEA. However, after the completion of the program set up by the SEA, the Article has been applied in areas with less affiliation to the internal market which has lead to disputes

¹³⁰ Citations from Opinion 2/91, *Re ILO convention* [1993] ECR I-106, p. 1076.

¹³¹ de Búrca, G. &, de Witte, B., *The delimitation of powers between the EU and its Member States* (Robert Schuman Centre of Advanced Studies, 2001), pp. 3-4.

¹³² Quotations from: Conclusions of the Presidency, European Council in Laeken 14 and 15 December 2001, *Laeken Declaration on the Future of the European Union*, Annex I, p. 22.

¹³³ de Búrca, G. &, de Witte, B., *The delimitation of powers between the EU and its Member States* (Robert Schuman Centre of Advanced Studies, 2001), p. 14.

¹³⁴ de Búrca, G. &, de Witte, B., *The delimitation of powers between the EU and its Member States* (Robert Schuman Centre of Advanced Studies, 2001), p. 15.

about its validity as a legal basis for measures encroaching on other policy fields than originally intended.¹³⁵ Article 95 EC Treaty enables the Community to adopt harmonisation measures under the stipulation that they have as objective the establishment and functioning of the internal market. As the Article is a residual provision, it may only operate “*save where otherwise provided in this Treaty*”. If examined, the measure must therefore be seen as actually contributing to the well-functioning of the internal market, or it will face the risk of annulment.¹³⁶

Article 308 EC Treaty still remains the most general legislative power in the Treaty, in spite of the half-hearted attempts to delimitate it. Where the Community has no explicit or implicit powers to achieve a Treaty objective, Article 308 EC Treaty provides the Council with an subsidiary power which enables it to take the measures it considers necessary.¹³⁷ The nature of the Article has been problematic considering the manner in which it has previously been employed. While the underlying scheme of the Community rests on the notion of limited government, Article 308 EC Treaty contain a severe objection to that concept, and in particular to the principle of attributed competences. According to the Court the Article is “*designed to fill the gaps where no specific provision of the Treaty confer on the Community institutions express or implied powers to act*” under condition that it is “*necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down in the Treaty*”.¹³⁸ Since the objectives of the Community, set out in Article 2 and 3 EC Treaty, are widely constructed, Article 308 EC Treaty has been used expansively over the years to seize portions of competence from the Member States.

4.3 Imposing Limits on the Competences of the Community

The rules on the division of powers between the Community and the Member States has often been criticised, although, from two different viewpoints; one questioning the open and uncertain division of powers as provided by the Treaty, arguing for a clearer division through the amendment of the Treaty into a Constitution;¹³⁹ the other focuses on the

¹³⁵ For example: C-376/98, *Federal Republic of Germany v Parliament and Council* [2000] ECR I-8419.

¹³⁶ Dashwood, A., *The limits of European Community powers*, 21 EL Rev. (1996), p. 120.

¹³⁷ Article 308 EC Treaty provides : “*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 [...] take the appropriate measures.*”

¹³⁸ Opinion 2/94, *Accession to the ECHR* [1996] ECR I-1759, [1996] ECR I-1759, para. 29.

¹³⁹ This opinion is gaining support inside the EU. The Committee of Regions published a report in 1999 requesting an amendment of the Treaty in this way. See *Report of 11 March 1999 of the Committee of Regions*, doc. CdR 302/98. The European Parliament has also expressed that same opinion on its view of the future of EU.

Court and its 'pro-integrationist' agenda, calling for a more intense review of important Community acts to ensure the observance of the Treaty in its present shape, thus maintaining the dynamic nature of the Treaty which has been so important in the early evolution of the Community.¹⁴⁰

In the future, the issue concerning the competences of the Community will undoubtedly in one way or another undergo several changes in the direction towards clearer rules on the division of powers and clearly defined competences leaving no or little room for the Community to encroach upon the powers of the Member States. Hopefully such changes will add more transparency and democratic legitimacy to the decision-making process. However, there are already clear signs that the Community is now moving in that direction: (1) through the latest (although somewhat ambivalent) amendments to the Treaty, (2) the decisions taken by the Court during the last decade suggests that the Court has absorbed some of the criticism, and (3) the on-going debate on the future of EU regarding a catalogue of competences and an European Constitution in the context of the delimitation issue.

4.3.1 Amendments to the Treaty

The Maastricht Treaty was a turning point in limiting the scope of Community competence by the introduction of new restrictions. The Community was excluded from acting in certain field in which harmonisation would have previously been possibly under Article 308 EC Treaty, such as in the field of education (Article 149 EC Treaty), culture (Article 150 EC Treaty) and public health (Article 152 EC Treaty). However, the TEU also added a large number of new competences in various fields. To compensate for the growing jurisdiction of the Community, TEU introduced Article 5 EC Treaty to further emphasise that the powers of the Community are limited and of attributional nature. Alongside came also the introduction of the principle of subsidiarity, to further stress the need for justification of Community action, and the proportionality principle. Thus, the TEU entailed mixed signals; while on one hand laying down a basis for further transformation and growth of Community jurisdiction, it also introduced new means to place limits on further expansion.

There has also been attempts to enhance the quality and quantity of parliamentary democracy in the Community during the two last decades to reduce the democratic deficit.¹⁴¹ With the amendments of the Treaty of Amsterdam in 1997, the institutional balance between the Council, the

¹⁴⁰ For example see a contribution by Hjalte Rasmussen in Bernitz, U. & Nergelius, J. (eds.), *General Principles of European Community Law* (Kluwer Law, Great Britain 2000), p. 43.

¹⁴¹ Fernandez Esteban, M. L., *The Rule of Law in the European Constitution* (Kluwer Law, London 1999), p. 158.

Commission and the EP changed considerably. The new co-decision procedure enhanced the role of the EP and eliminated the procedural imbalances between the EP and the Council. Since co-decision procedure is now the standard legislative procedure, the EP has certainly gained in influence vis-à-vis the Council and the Commission. This means that the acts of the Council and the Commission will possibly be submitted to more scrutiny and be admitted less latitude, especially if politically important to the Member States. However, despite the steps taken to enhance the democratic legitimacy of the institutions, there is still an imbalance between legislative powers of the Council and those of the EP.

Lately, the question of reforming the present system of delimitation of competences has been elevated to the top of the Community's agenda. The Nice and Laeken Declarations on the future of the Union requested that the delimitation of competence between the EU and the Member States be looked into at the IGC in 2004 for the purpose to examine the possibility of establishing more precise rules and a means of monitoring compliance with that limitation. The Laeken Declaration also put forward the question whether Article 95 EC Treaty and Article 308 EC Treaty ought to be reviewed in the light of the '*acquise jurisprudentiel*'.¹⁴² Thus, the scope of these two provisions might be the target of future reforms. However, it is clear that while an agenda set to end the '*creeping expansion of competences*' is widely supported, few wants to exclude the possibility for the Community to address new developments by the means provided by Article 95 EC Treaty and Article 308 EC Treaty, thereby stripping the Community of some of its flexibility.¹⁴³

4.3.2 The Court's Role in Establishing Clearer Rules of Delimitation

Although the Court has often been accused for giving preference to the interpretation of Community law which entails further integration and enhances the powers of the Community, the Court have in a series of decisions and opinions during the last decade made an effort to put some constraints on the scope of Community competences. For instance, in 1994 by Opinion 1/94¹⁴⁴ on the treaty-making powers of the Community and in 1996 by Opinion 2/94¹⁴⁵ the use of Article 308 EC Treaty was overseen by the Court. Until 1996 the only control upon the use of Article 308 EC Treaty was that any action based on the provision required the approval of all Member States. However, in Opinion 2/94, the Court took a step to prevent the abuse of Article 308 EC Treaty and in so doing strengthened the concept

¹⁴² Conclusions of the Presidency, European Council in Laeken 14 and 15 December 2001, *Laeken Declaration on the Future of the European Union*, Annex I.

¹⁴³ *Convention Bulletin Edition 08-31.05.02*, European Convention (CONV47/02), para. 24(4.b).

¹⁴⁴ Opinion 1/94, GATT/WTO [1994] ECR I-5267.

¹⁴⁵ Opinion 2/94, *Accession to the ECHR* [1996] ECR I-1759.

of limited government. The Court expressed the view that in a system based on the principle of attributed competences, Article 308 EC Treaty “cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and activities of the Community”.¹⁴⁶ Such a use of Article 308 EC Treaty would, in substance, be to amend the Treaty without following the procedure provided for that purpose. A similar restraint was placed on Article 95 EC Treaty in the *Tobacco Advertising* case in 2000, examined later on.¹⁴⁷

4.3.3 An European Constitution and/or a Catalogue of Competences?

In later years more and more political support has gained for the idea of an European Constitution, in which the collected Treaties would be merged into one consolidated simplified text. It is generally acknowledged that such amendment would provide more transparency and democratic legitimacy to the decision-making process. Also, the competences of the Community in respect towards the Member States (and between the institutions) would be better defined through a catalogue of competences than, as presently, a system of attributed competences. The advocates for this solution argues that a clearer and precise catalogue would result in more precisely defined competences attributed upon the Community institutions, and thereby less latitude left for flexible interpretation and discretion.

Conversely, the opponents of such amendment (which include many scholars) has objected such an amendment, which is generally viewed as an undesirable steep for the Community. The main rationale against such a development is that the advantages of flexibility and adaptability of the Community might be lost.¹⁴⁸ It is also argued that the desired changes could very well be accomplished without any radical alterations in way of smaller amendments to the Treaty and more effective monitoring.

The issue of a constitution is also problematic since EU can not be considered to enjoy the rank of a State - a concept which is almost equivalent with that of a constitution. However, the Court has claimed similar sovereignty for the Community and regards the powers of the Community to be of sovereign character.¹⁴⁹ Thus, the judicial obstacle may not be so problematic, but there is also a political aspect to this issue which presents a much greater challenge. There is a grave concern amongst many Europeans that a constitution may be the first step in the direction towards a

¹⁴⁶ *Ibid.*, para. 30.

¹⁴⁷ C-376/98, *Federal Republic of Germany v Parliament and Council* [2000] ECR I-8419.

¹⁴⁸ de Búrca, G. &, de Witte, B., *The delimitation of powers between the EU and its Member States* (Robert Schuman Centre of Advanced Studies, 2001), p. 23.

¹⁴⁹ As stated in the *Van Gend en Loos* case: “new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit in limited fields”. Case 26/62, *Van Gend en Loos* [1963] ECR 1.

‘United States of Europe’, which is a step that few European leaders seem ready to give their full-hearted support to.¹⁵⁰

The question of an European Constitution is however not only a highly sensitive issue, but there is also the basic question if there is not already a such a charter – the collective treaties of the EU – not in the traditional formal sense, but in a functional sense (i.e. ‘a constitution in practice’).¹⁵¹ It has already been stressed that Community law is a legal order on its own, with its own form of constitution that provides basic rules on the Community legal order. Interestingly, the Court has already emphasised the constitutional status of the Treaty, referring to it as a “*constitutional charter*”.¹⁵² If so, is there any need for a constitution and/or a catalogue of competences?

¹⁵⁰ Joschka Fischer started the debate in a speech in May 2000 concerning the future of EU, arguing for a more federalist model of EU calling for a “*clear definition of the competencies of the Union and the nation-states respectively in a European constituent treaty*”. The speech was followed by speeches of the French President Chirac in June and of the British Prime Minister Blair in October same year, where both tried to diminish the political importance of the Fischer-speech. The Swedish government has also expressed strong doubt about such a model (e.g. see Dagens Nyheter, 25/5 2002, p. 13). However, the issue has not lost its place in the limelight of EU politics and will stay there until being settled ones and for all.

¹⁵¹ On this topic, see Douglas-Scott, S., *A Constitution for Europe: In defence of public reason*, Francisco Lucas Pires Working Papers Series 2001/04; MacCormick, N., *On the very idea of a European Constitution: Jurisprudential reflections from the European Parliament*, JT 2001-02, p. 529-541

¹⁵² Case 294/83, *Parti Ecologiste v. European Parliament (Les Verts)* [1986] ECR 1339, para. 23; cf. Opinion 1/91, *Re European Economic Area* [1991] ECR I-6079, where the Court announced that “*the EEC Treaty, albeit concluded in the form of an international agreement, non the less constitutes the constitutional charter of a Community based on the rule of law*”.

5 Lack of Competence

5.1 The Lack of Competence Ground of Article 230 EC Treaty

Lack of competence is one of the four grounds of review which may be claimed before the Court.¹⁵³ An action based on this ground primarily alleges that the Community institution in question has acted beyond its competence attributed under the Treaty. In this context, lack of competence embodies the *principle of attributed competences* prescribed by Article 5 EC Treaty (and Article 7 EC Treaty) - that the institutions of the Community may only exercise those powers which have been conferred to them by the Treaty. Above all, this means that if an ultra vires act infringes the principle of attributed competences or disturbs the institutional balance as prescribed by Article 7 EC Treaty, it can be determined illegal through the procedure of judicial review of the Court as prescribed by Article 230 EC Treaty, and declared void under Article 231 EC Treaty on the ground of lack of competence. However, in reality it is not that straightforward. In view of the complexity of the division of powers, the Court's wide interpretation of Community competences and the otherwise ambiguous nature of the Community, it makes it difficult to ascertain what really constitutes lack of competence.

The question of lack of competence is intimately related to the issue of the scope and limits of Community competences vis-à-vis the Member States, as well as to the scope and limits of the powers of the institution vis-à-vis the other Community institutions. Thus, it is a question of the Court's handling of the principles and concepts regulating those areas of Community law, i.e. *the principle of attributed competences* and *the concept of institutional balance*. To examine the ground of lack of competence it is not enough to consider the formal limits of Community competences, but one must also analyse those limits as they are interpreted by the Court, which is a whole other thing. The Court's handling of the ground of lack of competence is not so much about what constitutes an invalid act on that ground, but a question of where the limits of the competences of the institutions and the Community as a whole are drawn (or should be drawn).

5.1.1 Distinguishing Lack of Competence from the Other Grounds of Review

The Treaty provides little guidance to the application of the different grounds of review provided by Article 230(1) EC Treaty. There is no

¹⁵³ The ground of Lack of competence is also available under the ECSC Treaty under Article 33 (1) and Article 38(3), and in the Euratom Treaty under Article 146(2).

explicit hierarchy amongst them and little orientation is provided on their scheme and exercise. Instead, the existing relationship and structure between them has been developed by the Court, and thus bear little resemblance to the original grounds developed by the Conseil d'Etat.

The grounds of review enumerated in Article 230 EC Treaty are broadly constructed and are sometimes difficult to distinguish from each other. They have the capacity to overlap each other, and subsequently, the applicants have the option to invoke more than one ground as an alternative or in combination, just to be sure. Moreover, the Court has not made it any easier to distinguish the different grounds from each other through its decisions. The Court does not generally mention which particular ground is concerned when it declares a Community act invalid.¹⁵⁴ For this reason, it does not matter much which specific ground is invoked by a party; the main issue concerned by the Court is the existence of a particular illegality. According to the Court it may be sufficient to express the invoked grounds in terms of substance rather than by legal classification as long as it is clear which of the grounds is referred to.¹⁵⁵ Consequently, the formal classification of the illegalities has more or less lost its importance. However, the formal grounds still serve the important purpose of providing a point of reference to what sort of course action might be considered as illegal conduct. In that context, the classifications provides a useful orientation to both decision-makers, applicants and the Court.

The problems of distinguishing the grounds from each other is above all due to the wide scope of the third ground, *infringement of the Treaty or any rule relating to its application*, which encompasses the first two (lack of competence and infringement of an essential procedural requirement), since they always amount to violation of Community law. If given an extensive interpretation, the third ground could very well cover all other three grounds.¹⁵⁶ Before the TEU it would very well look as if lack of competence served as a somewhat superfluous ground for attack, providing the only useful function of clarifying the specific illegality by means of its legal classification. However, with the introduction of Article 5 EC Treaty and the principle of attributed competences, the ground has become intertwined with a paramount principle of Community law. As a result, the ground of lack of competence has certainly gained more weight and independence as an action for annulment. Moreover, the recent political and legal developments suggests that the Community is heading towards an increasing amount of legal actions on questions of competence with the result that more pleas concerning lack of competence can be expected.¹⁵⁷

¹⁵⁴ Hartley, T. C., *The foundations of European Community law* (Oxford University Press, 4th ed., New York 1998), p. 410.

¹⁵⁵ Schermers, H. G. & Waelbroeck, D., *Judicial protection in the European Communities* (Kluwer Law, 5th ed., 1992), p 193.

¹⁵⁶ Hartley, T. C., *The foundations of European Community law* (Oxford University Press, 4th ed., New York 1998), p. 410.

¹⁵⁷ van Erp, S., *Editorial: Ius Commune: A European Civil Code?*, EJCL Vol. 4.4, December 2000.

Although the Court does not always care to draw a distinction between the formal grounds, there are certain features which sets the grounds apart. According to theory, they may be divided into two categories: the first concerns the *external illegality*¹⁵⁸ of an act (lack of competence; infringement of an essential procedural requirement) and the other concerns the *internal illegality*¹⁵⁹ of an act (infringement of the Treaty or of any rule of law relating to the application; misuse of powers). Issues concerning *external illegality* of an act may be examined by the Court of its own motion even though none of the parties has asked it to do so, while the grounds concerning *internal illegality* may not and must be pleaded by the parties.¹⁶⁰

5.1.2 Ultra Vires in Theory

The competence of the Community is always limited substantively and geographically, and also sometimes in time. An act may be annulled on the ground of lack of competence from a transgression of any of these limitations. Theoretically, there are four ultra vires scenarios associated with these limitations where lack of competence may be applicable. Two of these situations distinguishes as particularly imperative concerns *substantive ultra vires*: issues concerning competence *ratione materiae* ('subject matter jurisdiction') and competence *ratione personae* ('personal jurisdiction'). The illegality here mainly concerns violations of the division of powers, either between the Community and the Member States or between the Community institutions. These illegalities may involve severe violations of the Treaty since they might seriously disturb the institutional balance or violate the limits of Community powers, which both could produce far-reaching consequences to the concerned parties and the Community legal order. Thus, the Court has acted more strenuously on such issues, in particular when the powers of an institution has been encroached. There are two other scenarios in which lack of competence might be applicable: issues concerning competence *ratione loci* (geographically) and competence *ratione temporis* (in time). However, illegalities of these kinds seems to be less seldom (if ever) claimed before the Court and their nature of infringement are also of less 'constitutional' nature. The illegality is more likely to be of a technical nature than a severe violation of the Treaty, and does not concern the division of powers per se.

¹⁵⁸ *Légalité externe*

¹⁵⁹ *Légalité interne*

¹⁶⁰ See Opinion of Advocate General, Case C-210/98 P, *Salzgitter AG v Commission* [1998] ECR II-609, para 135 and 136.

5.1.3 Why so Rarely and Unsuccessfully Invoked?

The ground of lack of competence has only been successfully invoked on a few occasions which may seem surprising considering the impressive amount of adopted measures,¹⁶¹ the time span under which this ground has been open for invocations and the tensely disputed area which it covers.¹⁶² This might be explained in part but not entirely by the lack of good opportunities presented to the Court by legal action. However, if compared with the other grounds of review, lack of competence is not only just rarely invoked, but it is also arguably the most difficult to establish (except in the case of delegation of power, perhaps).¹⁶³ Although it raises fundamental issues concerning the scope and limits of Community competence, institutional balance etc., the Court is without doubt responsible for the difficulties a party will encounter in establishing ultra vires. The wide-ranging character of Community competences has meant that they are rarely challenged. Through the Court's previous inclination toward giving those provisions of the Treaty conferring powers a wide interpretation, establishing the concept of implied powers and allowing the use of the open-ended Article 308 EC Treaty – the possibility of invoking lack of competence has been all the more circumscribed. When the validity of Community measures is in question on ultra vires grounds, there has almost always been a way out for the Court to escape the unpleasantness of finding an act of a fellow Community institution invalid.¹⁶⁴ The Court has earned a reputation for almost never striking down on any acts of real political importance.¹⁶⁵ Although there has been seriously attempts in recent years from the Court to regain lost legal terrain by limiting the scope of Article 308 and establishing guidelines for the doctrine of implied powers, the 'constitutional' problems related to these powers is yet to be solved. More critically, the difficulty in establishing ultra vires measures of the Community has threatened to evolve into a widespread doubt amongst the Member States and the national legal systems in the Court's ability and willingness to protect the interests of the Member States.

¹⁶¹ For instance, in 1996 the Commission adopted 2,341 regulations and 2,806 directives, while the Council adopted totally 484 legal acts.

¹⁶² To my knowledge the Court has only found that a Community act is illegal on reasons of lack of competence *ratione materiae* (not counting those four provided for in this thesis) on three occasions: Case 242/87, *Commission v. Council* [1989] ECR 1425; Case C-295/90, *European Parliament v. Council* [1992] ECR I-4193; Case C-303/90 *France v. Commission* [1991] ECR I-5315. In Cases 281, 283-85, 287/85, *Germany v Commission* [1987] ECR 3203, the Court annulled the decision on the grounds that the Commission had 'exceeded its powers' - not that the Community lacked competence on the subject matter. Conversely, lack of competence *ratione personae* seems somewhat easier to establish, if you compare the two, in view of that the rules in that area has already been well established.

¹⁶³ Craig, P. & de Búrca, G., *EC law: text, cases and materials* (Oxford University Press, 2nd ed., New York 1998), p. 502.

¹⁶⁴ Hartley, T. C., *The foundations of European Community law* (Oxford University Press, 4th ed., New York 1998), p. 411.

¹⁶⁵ Bernitz, U. & Nergelius, J. (eds.), *General Principles of European Community Law* (Kluwer Law, Great Britain 2000), p. 39.

The situation above does however not seem relate to the issue of illegal delegation of powers. This area was regulated a long time ago and has been fairly undisputed and unchanged ever since.

5.2 Lack of Competence Ratione Materiae

As the ‘*acquise jurisprudentiel*’ of the Community is (as in the case of all dynamic legal orders) characterised by a transient and transforming nature, any derived knowledge thereof is as best when served fresh. Thus, the cases examined here are first of all issues of ultra vires character which the Court has decided on under the last ten years. Thus, it includes the cases which followed on the German Maastricht case and thus also serves as to illustrate the ‘*climb up*’ from the explosive Maastricht judgement.

5.2.1 Case C-327/91 (Re Competition Agreement Case)¹⁶⁶

In the *Re Competition Agreement* case the Court displayed a new found restraint as it waived a possibility to maintain the act under the doctrine of implied powers on the rationale that such reasoning could not be applied as to alter the division of powers between the institutions. It also stressed the limit set by Article 7(1) EC Treaty which was not to be loosely interpreted or easily brushed aside.

5.2.1.1 Case Background and Legal Issue

On 23 September 1991, an Agreement by the Commission and the Government of the United States of America regarding the application of their competition laws was signed. The purpose of the agreement was to promote cooperation and lessen the possibility or impact of differences of the competition laws of the parties.

Shortly thereafter the French Government brought an action under Article 173 (now 230) EC Treaty for annulment of the Agreement, claiming, *inter alia*, that the Commission was not competent to conclude the Agreement under Article 228 (now 300) EC Treaty.¹⁶⁷ The Article in question provides a particular method for the negotiation and conclusion of international agreements. Essentially, the Commission *negotiates* under authorisation from the Council, while the Council itself *concludes* the agreement.

One of the obstacles to the action instigated by France was on the question of admissibility. The Court found from its examination that the Agreement was really intended to produce legal effects and thus available for an action

¹⁶⁶ Case C-327/91, *France v. Commission* [1994] ECR I-3641.

¹⁶⁷ France raised three pleas: lack of competence on part of the Commission; lack of statement of reasons for the Agreement and that the principle of legal certainty had been contravened; and, third, that Community law had been infringed. However, the Court did never address the two latter pleas.

for annulment. However, under Article 173 EC Treaty, an act had always been assumed to be unilateral, and given that an annulment could result in violation of an international law obligation towards a third state, there were doubts whether international agreements could be reviewed. Therefore, the Commission claimed in its defence that an international agreement was not open for judicial review under Article 173 EC Treaty, since it is bilateral (concluded by a non-member country).

The Commission's argument was promptly dismissed by the Court. Instead, the Court followed its previous path, originally laid down in the *ERTA* case, where the Court introduced a more functional view of which Community measures could be susceptible to a judicial review.¹⁶⁸ The Court simply held that the French action should be understood as being directed against the decision to conclude the agreement, and subsequently, that “*the act whereby the Commission sought to conclude the Agreement must be susceptible to an action for annulment*”¹⁶⁹. Hence, the Court concluded, the exercise of powers bestowed upon a Community institution in international matters (i.e. the Commission, acting under authorisation from the Council) can not escape a judicial review of the legality of the acts adopted.

5.2.1.2 The Judgement

The outcome in the case became dependent upon the interpretation of the procedure provided by Article 228 (now 300) EC Treaty, and in particular an exception regarding the power to conclude an agreement.

Article 228 EC Treaty lays down general rules on the specific procedure to be followed when any treaty-making power is exercised. The Commission negotiates the agreements, after it has been given authorisation from the Council, which in turn concludes it after consultation with the European Parliament. The Agreement with the United States had been *negotiated as well as concluded* by the Commission, a fact which France claimed violated the procedure provided for by Article 228 EC Treaty. However, the Commission alleged that its action to conclude the agreement was covered by an exception to the rule. Article 228(2) EC Treaty provides that the power to decide to conclude the agreements is conferred on the Council “*subject to the powers vested in the Commission in this field*”.

France claimed that the provision expressly reserves the power to conclude international agreements to the Council, and no such powers were vested in the Commission by the Treaty.¹⁷⁰ The Commission, in reply, argued that the exception (*subject to the powers vested ...*) should not be interpreted restrictive and that the Commission could derive its powers from other sources than the Treaty, such as practices followed by the institution.¹⁷¹

¹⁶⁸ The Court held that it would be inconsistent with the Rule of law to restrict the availability to judicial review merely to the categories of acts referred to by Article 249 EC Treaty. See Case 22/70, *Commission v. Council (ERTA)* [1971] ECR 263, para. 40 and 41.

¹⁶⁹ Para. 15 of the judgement.

¹⁷⁰ Para. 20 and 29 of the judgement.

¹⁷¹ The Commission, relying on the French version of Article 228 EC Treaty, claimed that if those who drafted the Treaty really had sought to limit its power to conclude treaties it should have read “*sous réserve des compétences attribuées à la Commission*” instead of

This argument was soundly rejected by the Court referring, *inter alia*, to Article 4(1) (now 7(1)) EC Treaty that “*each institution shall act within the limits of the powers conferred upon it by this Treaty*”, which according to the Court provides for a restrictive interpretation of the exception in Article 228 EC Treaty and thus clearly irreconcilable with the Commission’s claim to be able to derive its powers from other sources than the Treaty.

The Commission also put forward an argument that it enjoyed implied power under the EC Treaty to conclude international agreements. It claimed that since it has *internal competence* in the field of EC competition law to take individual decisions applying rules of competition (an area covered by the agreement), it should also have *external competence* to conclude an agreements in this field. This line of reasoning had been successfully argued previously before the Court.¹⁷² However, this argument was also rejected. According to the Court the internal competence referred to by the Commission was “*not such as to alter the allocation of powers between the Community institutions [i.e. the Council and the Commission] with regards to the conclusion of international agreements, which is determined by Article 228 of the Treaty*”¹⁷³. Thus, the Commission had no implied power to conclude international agreements, even on subject matters such as competition, which it had internal executive power as the power to conclude lay with the Council and not the Commission under the Treaty system. The Court therefore stated that the plea alleging lack of competence on part of the Commission to conclude the Agreement had to be upheld, and the act whereby the Commission sought to conclude the Agreement was to be declared void.

The Court rejected both arguments of the Commission on grounds which expressed concerns for the institutional balance between the institutions. Following Article 7(1) EC Treaty, the division of powers between the institutions, as laid down by the Treaty, was not to be circumvented without proper cause and the prerogatives of other institutions was not to be encroached upon. The case was however not as straightforward as it may seem. It seems that the Court could very well have accepted the latter argument of the Commission and applied the implied powers doctrine in this case, which it has not been indisposed to extend this powers through before. However, it is clear that the Court takes a stricter approach on issues concerning division of powers between the Community institutions while going somewhat out of reach to review the act.

"*reconnues à la Commission*". The Court, comparing the language of the Danish (“*tillagt*”), German (“*besitzt*”) and English (“*vested*”) versions of the provision, found that the used term suggested “*attribuées*” rather than “*reconnues*”. See para. 30 and 35 of the judgement.

¹⁷² See Shaw, J., *Law of the European Union* (Palgrave Law Masters, 3rd ed, 2000), pp. 217.

¹⁷³ Para. 41 of the judgement.

5.2.2 Case C-57/95 (Re Pension Funds Communication Case)¹⁷⁴

A number of cases involves situations where a Community institution has tried to pass legal acts, which it has not been empowered to, under the guise of an administrative measure which it was competent to issue. The particular situation in the *Re Pension Funds Communication* case came about after the Commission had failed to get the Council to approve a proposal for a directive. Instead it tried to issue the measure (although somewhat revised) in the form of a communication. The issue on *legal effects* was central in this case, which shows that the wording of a measure is a factor the Court may take in consideration.

5.2.2.1 Case Background and Legal Issue

On 17 December 1991, the Commission published Communication 94/C360/08¹⁷⁵ on an Internal Market for Pension Funds, dealing with investment management and custody services and with freedom of investment of assets, in the Official Journal. Unsurprisingly, the Commission had earlier tried to reach an agreement in the Council on a proposal for a directive relating to the freedom of management and investment of funds held by institutions for retirement provision, which was very similar to the issued Communication, but had failed to do so.¹⁷⁶ By application, France brought an action claiming, *inter alia*, that the Communication was in fact a *disguised directive* and thus illegal since the Commission did not have competence to adopt it.¹⁷⁷ The contested measure should instead have been adopted by the Council (or by the Council in cooperation with the EP). Thus, France applied to have the measure annulled. The Commission on the other hand, held in its defence that the Communication per se was not open to an action for annulment under Article 173 (now 230) EC Treaty. Besides, since the Communication had not been designed to have any *legal effects* it did not therefore constitute a challengeable act. According to the Commission, the Communication was just intended to make known the Commission's general approach with regard to the application of the fundamental principles of the Treaty to institutions for retirement provision.¹⁷⁸ Thus, it was merely an interpretative communication which added no new obligations on the Member States. The Court stated, as it has done before, that an action for annulment is available in the case of all measures intended to have legal effects.¹⁷⁹

¹⁷⁴ Case C-57/95, *France v. Commission* [1997] ECR I-1627.

¹⁷⁵ Communication 94/C360/08 on the freedom of management and investment of funds held by institutions for retirement provision [1994]. Published in O.J. C360/7.

¹⁷⁶ See Proposal for a Council Directive relating to the freedom of management and investment of funds held by institutions for retirement provisions [1991], O.J. C312/3.

¹⁷⁷ France raised three pleas: lack of competence on part of the Commission; infringement of Article 190 for want of legal basis; and infringement of the principle of legal certainty. However, the Court did never address the two latter pleas.

¹⁷⁸ Para. 9 of the judgement.

¹⁷⁹ See Case 22/70, *Commission v. Council (ERTA)* [1971] ECR 263, para. 40 and 41.

The issue at stake in the case thus turned to whether or not the Communication constituted an act intended to have legal effects of its own. Consequently, the outcome depended primarily on whether or not the Court found the application to be admissible as it was already evident that the Commission was not competent to adopt such an act; the Treaty provided only that directives were to be adopted in the issued field of competence and by the Council only, acting under Article 57(2) (now 47(2)) EC Treaty and Article 66 (now 55) EC Treaty.

5.2.2.2 The Judgement

France maintained that the Communication was a binding act, on the ground that it was *clear from the wording* that it imposed new obligations on the Member States. As a result, it should have been founded on a specific legal basis in order to enable the Court to review its legality.

The Court took on to examine if the Communication was confined with *giving expression* to the Treaty articles on freedom to provide services, freedom of establishment and free movement of capital, which were applicable to institutions for retirement provision, or whether they laid down *specific obligations* in relations to those articles.¹⁸⁰ After an analysis of the relevant provisions of the Communication, the Court observed that a number of those provisions could not be considered already inherent in the articles of the Treaty which were applicable to institutions for retirement provision. Neither could it be regarded, as claimed by the Commission, that they only sought to clarify the proper application of those articles.

Additionally, the Court took in account the language of the act as a factor in examining whether the act appeared to alter the legal position of the concerned party (i.e. the Member States). The Court found that several of the provisions were characterised by a mandatory language (such as “*the Member States shall...*”)¹⁸¹, that would indicate that they in fact were intended to impose obligations. Under those circumstances, in particular, the Court concluded that the act “*intended to have legal effects of its own, distinct from those already provided for by the Treaty on freedom to provide services, freedom of establishment and free movement of capital*”.¹⁸² Thus, the Communication was open to an action for annulment. The Commission did not enjoy competence to adopt an act, imposing obligations on the Member States not provided by the Treaty itself. Only the Council was empowered to issue such directives as for the coordination of Member States’ rules governing access to and pursuit of activities as self-employed persons. Accordingly, the Court ruled that the action for annulment was both admissible and well founded, and consequently annulled the Communication on the grounds of lack of competence.

¹⁸⁰ Para. 13 of the judgement.

¹⁸¹ See Opinion of the AG in Case C-57/95, *France v. Commission* [1997] ECR I-1627, para. 16, as reported in [1997] 2 C.M.L.R. 935-953.

¹⁸² Para. 23 of the judgement.

5.2.3 Case C-106/96 (The Poverty 4 Case)¹⁸³

The Community measure at issue in Case C-106/96 can hardly be said to have been particularly noteworthy or politically sensitive to begin with, although it was drafted as a social policy measure. However, the case came to involve details on the budget procedure Community which is politically important and that concerned the prerogatives of the Community legislator. The case is a rather straightforward example on the proper functioning of a judicial review as it probably was intended: the Court established the existence of an illegality and at the same time presented its view on the correct application of Community law. The ruling clarified the rules of delimitation for the use of budgetary powers. Accordingly, it forced the Commission to review its previous actions in light of the Court's judgement. The judgement also reflects the importance that the Court places in safeguarding the institutional balance of the Community. An institution should not be permitted to circumvent rules which are provided as to guarantee some measure of intra-institutional control over the process.

5.2.3.1 Case Background

The case concerned the Community's efforts on reducing poverty and social exclusion in the Member States. Social projects of financial support (the Poverty 1, 2 and 3 projects) had been instigated and administered by the Commission on the legal basis of Article 235 (now 308) EC Treaty ever since 1974. However, in September 1993, a fourth program (Poverty 4, which essentially was supposed to take of where the previous Poverty program had ended)¹⁸⁴ was never adopted by the Council as a result of resistance from United Kingdom and Germany. Instead, the Commission tried to slip the Poverty program through the 'backdoor', to get round the blockade in the Council to the Poverty 4 program.

The 1995 budget of the Community included, under budget line B2-1403, means for fighting poverty and social exclusion. In a press release 23 January 1996¹⁸⁵ the Commission announced the funding (from budget line B2-1403) of a number of European projects under a program aimed against precisely poverty and social exclusion.

An action was instigated by the United Kingdom (supported by Germany, Denmark and the Council) for annulment of the Commission's decision, to fund the projects.

5.2.3.2 The Legal Issue

The United Kingdom submitted three pleas in which the main allegation contended that the Commission had *lacked competence* to commit the expenditure for funding the projects, and had consequently acted in breach of Article 4 (now 7) EC Treaty. The claim of lack of competence was based

¹⁸³ Case 106/96, *United Kingdom v. Commission (Poverty 4)* [1998] ECR I-2729.

¹⁸⁴ See Hervey, T. K., *Case 106/96, United Kingdom v. Commission (Poverty 4)*, 36 CML Rev. (1999), 1079.

¹⁸⁵ Press release issued by the Commission, IP/96/97.

on the fact that Community expenditure requires a *dual legal basis*: (1) entry in the budget, and (2) secondary legislation authorising the expenditure (i.e. a '*basic act*'). In the case of the funding projects, the Commission had an entry in the budget,¹⁸⁶ but was missing the support of a *basic act*, which to provide a legal basis for the action and for the implementation of the corresponding expenditure entered in the budget. According to the United Kingdom, the task of enabling such authorisation was not within the powers of the Commission, as that was an issue for the legislative authority of the Community. Thus, it was claimed that the Commission had acted in breach of Article 4 (now 7) EC Treaty, that each institution is only competent to act within the limits of its powers.

The Commission on the other hand claimed that the project in question ought to be considered as '*non-significant*' (i.e. a type of action that can be implemented without prior adoption of a legal base).¹⁸⁷ Such action would then fall within an exception to the principle of dual legal basis for Community expenditure, granting the Commission the authority to commit funding to the projects on the sole basis of the budgetary provisions. Thus, the key issue in the case became whether or not the action concerned were to be considered '*non-significant*' and the definition of such action.

5.2.3.3 The Judgement

The Court held that the Commission had the burden of proof to show that the projects to be funded were non-significant. However, the arguments put forward by the Commission failed to convince the Court that such was the case. According to the Opinion of the AG the Commission's approach on characterising the funding of the projects as non-significant even fell "*somewhat short of respect for the principle of legality*".¹⁸⁸ The Court thus ruled that the Commission was not competent to commit the expenditure to fund the projects referred to in the contested press release and that it had acted in breach of Article 4(1) of the Treaty.¹⁸⁹ Hence, the decision to commit the expenditure had to be annulled. However, in respect to the principle of legal certainty the Court used its powers to preserve the validity of those payments already made.

The ruling clarified the legal requirements for the execution of the Community budget and principle of dual basis for Community expenditure; any expenditure relating to Community action requires both a budget entry as well a legal basis authorising the expenditure (*basic act*).

¹⁸⁶ Under Article 274 (ex 205) EC Treaty, the Commission has power to implement the Community budget.

¹⁸⁷ Article 22 of the Financial Regulation (O.J 1977, L 356/1) states that "*the implementation of appropriations entered for significant Community action shall require a basic act*". Thus, secondary legislation authorising the expenditure is not required if an Community action is considered to be '*non-significant*'.

¹⁸⁸ Opinion of the AG, Case 106/96, *United Kingdom v. Commission (Poverty 4)* [1998] ECR I-2729, para 30.

¹⁸⁹ Para. 36 and 37 of the judgement.

Although the main issue in the case concerned the definition of ‘significant’ versus ‘non-significant’ action, it was the Court’s ‘constitutional’ concerns that settled on the outcome. The case makes it clear that non-significant action is very much the exception since such action overrides the role of the Community legislator.¹⁹⁰ The institutional balance, set up by Article 7(1) EC Treaty, could be disturbed if the Commission had unrestricted power to expend Community finances without the legal basis of a basic act, duly decided by the Community legislature. The Court acknowledged this fact by stating that although no definition of what constitutes a ‘significant’ action was present, “*the requirement that a basic act is must be adopted before an appropriation is implemented derives directly from the scheme of the Treaty, in accordance with which the conditions governing the exercise of legislative powers and budgetary powers are not the same*”.¹⁹¹ Failure to adopt a basic act in advance constitutes a violation of the institutional balance prescribed by the Treaty and the prerogatives of the Community legislator, in particular the Council and the EP. Thus, by circumventing the Community legislator, acting outside its competence, the decision by Commission to fund the project was accordingly illegal.

The judgement established, not only, that the Commission lacked competence, but it also set clearer rules of delimitation for the use of budgetary powers. As a result of the judgement, the Commission launched a review of budget lines without a legal basis and decided to suspend their execution temporarily. However, any other political implications were negligible as the Court preserved the validity of those payments already made.¹⁹² The recipients of those payments was not affected by the Court’s decision.

5.2.4 Case C-376/98 (The Tobacco Advertising Case)¹⁹³

Before the Tobacco Advertising case, there had not been one single prior occasion where a Council measure had been annulled by the Court on ultra vires grounds. In view of that and other things, the judgement has been hailed as a one of the most important decision of the last decade.¹⁹⁴

For instance, the ruling confirms that Article 95 is indeed a specific legal basis provision; it is still wider than most legal basis provisions, but it clearly not to be considered a general provision in the sense of Article 308 EC Treaty.¹⁹⁵ It has also seems that the Court has moved considerably

¹⁹⁰ See Hervey, T. K., *Case 106/96, United Kingdom v. Commission (Poverty 4)*, 36 CML Rev. (1999), p. 1086.

¹⁹¹ Para. 27 and 28 of the judgement.

¹⁹² The Council, the Commission and the EP did however draft an inter-institutional agreement on legal bases and implementation on the budget to clarify the rules as an consequence of the *Poverty 4 case*.

¹⁹³ C-376/98, *Federal Republic of Germany v Parliament and Council* [2000] ECR I-8419.

¹⁹⁴ Eds., *Editorial Comments: Taking (the limits of) competence seriously*, 37 CML Rev. (2000), 1302.

¹⁹⁵ Hervey, T. K., *Community and national competence in health after Tobacco advertising*, 38 CML Rev. (2001), p. 1445.

towards taking the limits of competences more seriously by way of exercising its powers to check whether the conditions for legality are really met by the enacting authority.

5.2.4.1 Case Background

The so called *Tobacco Advertising Directive*¹⁹⁶ was adopted in 1998 by the Council after almost ten years of intense discussions and drawbacks. Before the passing of the Directive, it had gone through several amendments and postponements dragging the legislative process almost to an halt. During that same time it had also been pursued by the unpleasant notion that the choice of Article 95 (ex 100a) EC Treaty as a legal basis was unsound;¹⁹⁷ that it was stretching the boundary of Community competence to its absolute limits, ignoring the *principle of attributed competences*.¹⁹⁸ Nevertheless, a narrow majority of the Member States representatives in the Council continued to push it through, against the heavy resistance from the Tobacco industry, supported by a few Member States (Germany in particular).

The Directive was said to be aimed at setting common rules for the advertising and sponsorship of tobacco products in EU. The preamble of the Directive proclaimed that the primary concern of the measure was to eliminate barriers to the free movement of tobacco advertising media products and the freedom to provide services in that area, and distortions to competition, due to differences between national laws on tobacco advertising and sponsorship. However, there was little doubt amongst the spectators that the true objective of the Directive was the protection of human health and not to eliminate barriers to the free movement.¹⁹⁹ The Directive basically set out to prohibit most forms of tobacco advertising and sponsorship, with some exceptions, rather than facilitating free movement or competition.

Soon after the political process of adopting the Directive had ended, the adversaries of the act continued to challenge its validity through legal means. The German government, which had voted against the adoption of the Directive in the Council, brought an action against the European Parliament and the Council on the grounds of *lack of competence*, along with some other pleas (which the Court though never addressed).²⁰⁰ In addition to that, another action was brought before the Court in the form of a

¹⁹⁶ Directive 98/43/EC, published in the Official journal (O.J. 1998, L213/9).

¹⁹⁷ The Directive was not just adopted on the legal basis of Article 95 EC Treaty, but also on the basis of Article 57(2) EC Treaty (now Article 47(2) EC) and Article 66 EC Treaty (now Article 55). However, the applicants claim of infringement of these two latter provisions was not investigated by the Court. Instead, the Court concentrated on whether the provisions all together constituted a proper legal basis.

¹⁹⁸ de Búrca, G., *Setting constitutional limits to EU competence?*, Francisco Lucas Pires Working Papers Series, 2001/02, p. 7.

¹⁹⁹ Even the Council's own legal service shared this opinion. See Bernitz, U. & Nergelius, J. (eds.), *General Principles of European Community Law* (Kluwer Law, Great Britain 2000), p. 46.

²⁰⁰ See para. 9 of the judgement.

reference for a preliminary ruling submitted by the High Court of Justice of England and Wales, requested by Imperial Tobacco Ltd. However, in the light of the Court's decision in the case instituted by the German government, the Court later held that there was no need to give a second ruling on the question.²⁰¹

5.2.4.2 The Complex Nature of the Case

In view of the difficult and long road of passing the Directive, along with a strong support of critics, brought together under the notion that the Directive lacked proper legal basis in the Treaty, made the case one of the most anticipated and high-profile case in years.²⁰² Moreover, in context of the European Constitutional Charter-debate and the resentment amongst many Member States against the increasing use and broad interpretation of Community competences, the outcome of the decision was not only of judicial interest but also of great political importance.

Hence, one interesting aspect of the dispute is when taking into account the political background and implications of the Court's previous case-law, which if anything have given rise to much of the scepticism and criticism, especially targeted at what is perceived as a unrestrained and unbalanced judicial activism of the Court. At the time of the case, this critique had followed the Court around for more than a decade and there was a buzz in the air that maybe a change of course would come with this case, thereby averting a possible confrontation between the Community and several national legal orders (in particular with the applicant Germany and the Maastricht judgement in mind) that seemed to threat status quo.²⁰³ It was almost seen as a trial where the Court was placed on the stand and was asked to attest that it was indeed serious about safeguarding the limits set by the Treaty.

One of the interesting features of the politic game surrounding the issue was the support for the Directive from several Member States, both during the legislative process as well as in the judicial process.²⁰⁴ This in spite of the obvious contradiction, that the legal basis of the Directive was designed to accomplish just what the Member States in Maastricht a few years earlier had agreed to prevent, by excluding the Community from harmonising national laws in the field of public health, through the amendment of Article

²⁰¹ Case C-74/99, *Secretary of State for Health v. Imperial Tobacco Ltd* [2000] ECR I-8599, para. 5.

²⁰² See Bernitz, U. & Nergelius, J. (eds.), *General Principles of European Community Law* (Kluwer Law, Great Britain 2000), p. 46.

²⁰³ See Bernitz, U. & Nergelius, J. (eds.), *General Principles of European Community Law* (Kluwer Law, Great Britain 2000), pp. 45-46.

²⁰⁴ The United Kingdom, the French and the Finnish government intervened in support for the Council and the European Parliament, all claiming that the Directive was validly adopted under Article 95 EC Treaty. This is an example of the ambivalent tendencies highlighted in a piece by Gráinne de Búrca, see note 85, p. 30 in this thesis.

152 EC Treaty.²⁰⁵ However, one must review this in the light of the positive social and health impact a ban on tobacco advertising could have, and the appeal such argument has on the polity of the Member States.

5.2.4.3 The Legal Issue

The decisive legal issue related to the Directive's multiple objectives; the mixture of concern for the free movement of media, which was a legitimate objective under Article 3(c) EC Treaty, and the concerns for public health, which in view of Article 152 EC Treaty was an illegitimate objective.

The question presented before the Court was then whether the Directive could validly be adopted under Article 95 EC Treaty as its legal basis, i.e. whether the internal market on its own constituted a sustainable legal basis for the Directive.²⁰⁶ Article 95(1) EC Treaty provides in that "*the Council shall [...] adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their objective the establishment and functioning of the internal market*". Basically, this means that a Directive may be adopted if there is a need to harmonise national laws in order to improve the functioning of the internal market.

The specific problem raised in the case was if the measure directed at tobacco advertising was validly concerned with the promotion of the internal market, or was it, as the applicant claimed, concerned with the protection of public health. The outcome of this question concerning the Directive's true objective was essential, since the first indent of Article 152(4) EC Treaty on public health exclude harmonisation of national laws in the field of public health protection. Other provisions may not be used to circumvent the exclusion of such harmonisation measures prescribed. However, this does not mean (as the Court has previously acknowledged) that harmonisation measures adopted under other Treaty provisions can not have (incidental) impact on the protection of human health.²⁰⁷ Thus, the question did not only concern the validity of the chosen legal basis for the measure, but also the choice between Community competence (conferred under Article 95 EC Treaty) and national competence (safeguarded under Article 152(4) EC Treaty). It was also a question whether Article 95 EC Treaty was to be

²⁰⁵ This Article did not exist in 1989, at the time of the original proposal of the Directive, but had been amended to the Treaty by the time the Directive was finally adopted.

²⁰⁶ In the words of the General Advocate: "... *the real issue in the present proceedings is not whether health protection figured prominently in the motivation of those promoting its adoption, but whether the internal market constitutes, on its own, a sustainable legal basis for the Directive*", See Opinion of the A.G., Case C-376/98, *Federal Republic of Germany v Parliament and Council* [2000] ECR I-8419, para. 80. Accordingly, the Court did not engage in a 'centre of gravity' analysis of the Directive. It rather assumed that the directive was a health measure.

²⁰⁷ The third paragraph of Article 152(1) EC Treaty provides that health requirements form a constituent part of the Community's other policies and also, Article 95(3) EC Treaty provides that a high level of human health protection is to be ensured in the process of harmonisation.

considered as granting a *general power* to regulate the internal market, or was it a *specific* legal basis provision.

5.2.4.4 The Court's Analysis

The Court began its analysis by stating that Article 152(4) explicitly excludes any harmonisation of laws and regulations of the Member States designed to protect and improve human health, and other provisions may not be used to circumvent that restriction to Community competence.²⁰⁸

The Court proceeded to investigate the nature of Article 95 EC Treaty by essentially departing from its earlier 'functional' interpretation of the provision. It established that the provision, read together with Article 3(c) EC Treaty, is intended to improve the conditions for the establishment and functioning of the internal market.²⁰⁹ But more importantly, the Court went further on by stating that:

*“To construe that article [Article 95 EC Treaty] as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions [Article 95 and 3(c) EC Treaty] but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it.”*²¹⁰

In the next paragraph, the Court held that a measure adopted on the basis of Article 95 EC Treaty “*must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market*”. In the light of this, the Court then proceeded to examine whether the Directive in fact pursued the objectives stated by the Community legislature, to verify whether it was justifiable or not for the Directive to be adopted on the basis of Article 95 EC Treaty.²¹¹ More specifically, the Court argued, that for this to be the case, the Directive must actually contribute to “*eliminating obstacles to the free movement of goods and to the free movement to provide free services, and to removing distortions of competition*”.²¹² Moreover, the Court also required (citing the *Titanium Dioxide* case, para. 23, concerning the *de minimis* rule)²¹³ that the distortions of competition which the measure purports to eliminate must be *appreciable*, since that without such a requirement, the powers of the

²⁰⁸ See para. 77 and 79 of the judgement.

²⁰⁹ Article 3(c) EC Treaty reads: “*For the purposes set out in Article 2 EC Treaty, the activities of the Community shall include, as provided in this Treaty [...] an internal market characterised by the abolition [...] of the free movement of goods, persons, services and capital.*”

²¹⁰ See para. 83 of the judgement.

²¹¹ The same reasoning and test was also considered to apply to the interpretation of the two other legal bases of the Directive - Article 47(2) EC Treaty, read in conjunction with Article 55 EC Treaty.

²¹² See para. 95 of the judgement.

²¹³ Case C-300/89, *Commission v. Council (Titanium Dioxide)* [1991] ECR I-2867.

Community legislator would be practically unlimited, incompatible with the principle of attributed competences.²¹⁴

The Court was not satisfied on any of these accounts. First, concerning the free movement of goods, the Court concluded that a complete prohibition of tobacco advertising in certain products could not be read as a measure intended to facilitate trade in the goods concerned.²¹⁵ Secondly, as to distortion of competition, the Court found that any gained effects of harmonisation would be to remote and indirect and could therefore not be considered as appreciable distortions on competition. However, the Court acknowledged that differences between certain regulations on tobacco advertising e.g. on sponsorship, may give rise to such appreciable distortions which could validate recourse to Article 95 EC Treaty, but it could not justify an outright prohibition of advertising such as imposed by the Directive.²¹⁶ Since the Directive failed the tests applied by the Court, it was not seen to be suited to pursue the stated objectives, and was consequently established upon an improper legal basis. The Court refrained from upholding certain parts of the Directive, since it considered that given the general nature of the prohibition laid down in the Directive it would entail amendment by the Court of provisions of the Treaty. Thus, the Court annulled the Directive in its entirety on the grounds of lack of competence.

5.2.4.5 The Implications of the Judgement

There is no doubt that the Court's ruling is somewhat of a landmark judgement (or at least has the potential of becoming one), however, in the context of the clear violation in combination with the ambivalent support for the final draft of the Directive (even within the Community institutions that passed it), the Court lacked judicial and political latitude to preserve the Directive, even if it wanted to. With that in perspective, and taking in account the Court's past record and endured criticism, it hardly seems that the Court had any choice but to find the Directive invalid.

Nevertheless, the case was the first in which the Court ruled that the Community lacked competence to adopt a health protection measure, instead of side-stepping the issue by claiming that the measure had been adopted under the wrong legal basis.²¹⁷ More importantly, it was also the first time that the Court has struck down on a Council measure on ultra vires grounds. The Court explicitly stated that internal market provisions may not be used to circumvent the exclusion of harmonisation measures in the field of public health in Article 152(4) EC Treaty. However, the Court did not close the door for the adoption of measures which could have incidental impact on the protection on human health. Both Article 152(1) EC Treaty and Article 95(3) implies that health considerations should be a proper part of

²¹⁴ See para. 106 and 107 of the judgement.

²¹⁵ See para. 99-101 of the judgement.

²¹⁶ See para. 111 of the judgement.

²¹⁷ Hervey, T. K., *Community and national competence in health after Tobacco advertising*, 38 CML Rev. (2001), p. 1441.

Community laws and policies.²¹⁸ Thus, the Court did not construct an absolute ban to any future Community legislation with an anti-tobacco facet.²¹⁹

Then, which are the implications of the Court's judgement? On the one hand, it seems to send a strong message that the Court is prepared to exercise its judicial review powers in either direction; not only clamping down on national laws in breach of the Treaty, but also Community measures violating the division of powers between the Community and the Member States.

The Council will also likely think twice when considering the formal legality of its measures as it probably can not count on the leniency of the Court as it has sometimes done before. Thus, maybe the Council will now be more disposed to follow its own recommendations on the correct application of Article 5 EC Treaty.²²⁰

It also seems that the Court has strengthened its position on the question of judicial *Kompetenz-Kompetenz* by moving a step closer to the role of a constitutional court and guardian of the Treaty, and at the same time averting another conflict with the legal orders of the Member States. Also a new interpretation of Article 95 EC Treaty has emerge out of the judgement. The Article is now aptly secured to Article 5 EC Treaty. It seem that Article 95 EC Treaty has been more or less routed towards subject matters which are more genuinely aimed with the completion of the internal market. Community measure adopted under Article 95 EC Treaty will have to show that its main objective is the facilitation of the internal market, thereby excluding the risk of having measure primarily adopted with an ultra vires objective in mind. Thus, the Court's method of establishing whether the measure validly pursued the objectives stated is not only relevant in this case, but it has established a test or a standard to which future measures under Article 95 EC Treaty will most likely be reviewed under.

5.3 Lack of Competence Ratione Personae

In the case of an illegal delegation of Community powers, the delegating institution has transferred powers to the delegated body which it was not allowed under the Treaty. Consequently, the delegated body will not be competent to exercise these powers. For example, lack of competence *ratione personae* might be an issue when an institution, having some

²¹⁸ Hervey, T. K., *Up in smoke? Community (anti)-tobacco law and policy*, 26 EL Rev. (2001), p. 124.

²¹⁹ As the Court admitted, a Directive banning certain forms of sponsorship could be adopted on the basis of Article 95 EC Treaty. See para. 111 and 117 of the judgement.

²²⁰ Op. cit. chapter 2.4.2, Conclusions of the Presidency, European Council in Edinburgh 11 and 12 December 1992, *Overall approach to the application by the Council of the Subsidiarity principle and Article 3b of the Treaty on European Union*, Annex 1 to Part A, p. 19.

competence in regard to the subject matter, have exceeded its power when delegating it to another body.

5.3.1 Delegation of Powers

Community law in the area of delegation of powers has been greatly influenced by the Court. One may suspect that the reason the Court has more actively interfered on issues concerning delegation of powers is that it relates to the inter-institutional relations of the Community, which the Court has generally been more willing to keep in check than the loose boundaries of the Community's powers vis-à-vis to the Member States. There is no doubt that institutional balance plays a major role in the area of Community law relating to the delegation of powers. However, this area of law was settled early on by the Court and has not changed more than noticeably ever since. It is a fact that institutional changes are kept under tight control in the Community.

There are two kinds of delegation according to theory: *external delegation* which refers to the transfer powers to outside bodies, including Member States; and *internal delegation* which refers to the transfer of executive powers from the Council to the Commission.²²¹ This basic distinction in matters of delegation between Community bodies and outside bodies has been made by the Court. While the Court has made the exercise of delegated powers to outside bodies subject to severe constraints, it has been more lenient when it comes to delegation to the Commission.

Although the Treaty does not explicitly provides for the creation of *outside bodies*, such as agencies, they are nevertheless widely accepted since their benefit surpasses the difficulties associated with their establishment.²²²

Even the Court has acknowledged that it cannot be excluded that powers might be transferred to outside bodies which are not provided for by the Treaty.²²³ The benefit of efficiency and expertise, i.e. by spreading the workload, assigning tasks to those more competent etc., weighs heavy in the Community. Accordingly, since 1990, there has been a huge increase of independent agencies established under the Treaty.²²⁴

Conversely, delegation of powers to *Member States* is relatively rare since there is hardly ever any reason for powers to be transferred in that direction.²²⁵ To delegate powers to the Member States, which has already been given up in favour of the Community, does hardly make much sense. It could also open the door for a re-nationalisation of Community policy. However, the incentives of expertise and efficiency weigh heavy also in this area when deciding on such issues.

²²¹ Xénophon, A. Y., *Delegation of regulatory authority in the European Union*, Harvard Jean Monnet Working Paper No. 03/01.

²²² See Vos, E., *European Administrative Reform and Agencies*, RSC No 2000/51, p. 8.

²²³ Case 9/56, *Meroni & Co. v. High Authority* [1958] ECR 133, p. 151.

²²⁴ See Shaw, J., *Law of the European Union* (Palgrave Law Masters, 3rd ed, 2000), p. 147.

²²⁵ Hartley, T. C., *The foundations of European Community law* (Oxford University Press, 4th ed., New York 1998), p. 119.

Two Articles provides the basis for the Council to delegate powers to the Commission. First, Article 202 (ex 145) EC Treaty confers competence to the Council to delegate powers to the Commission to implement provisions laid down by the Council.²²⁶ Secondly, Article 211 (ex 155) EC Treaty provides that it is the task of the Commission to exercise these powers in order to ensure the proper functioning and development of the common market. While the Court has given the concept of implementation a wide interpretation, it has accepted that the powers delegated between the institutions (in contrast to external delegation) can be extensive.²²⁷ Thus, so far, the Court has never found the Council to have delegated to wide powers to the Commission.

5.3.2 Case 9/56 (The Meroni Case)²²⁸

In the famous Meroni judgement, the Court set out the rather restrictive conditions that had to be met if delegations of power to bodies, not mentioned in the Treaty, were to be admissible. Although the case was settled as early as 1958, it is still the most important case on delegation to agencies and other outside bodies. The ruling was given in the framework of the ECSC Treaty, but it is nonetheless generally considered to apply by analogy to all European Treaties. Another interesting aspect of the judgement is the Court's early concern for the institutional balance which also plays a decisive factor on the outcome of the case.

5.3.2.1 Case Background and Legal Issue

In the 1950's, scrap shortage lead the High Authority (now the Commission) to set up the scrap equalization fund in order to bring down the prices of imported scrap. The funding for this was attained by a levy on all scrap users in the Community. The High Authority had competence under Article 53 ECSC to make financial arrangements common to several undertakings. On that basis, two agencies was set up by a general decision (Decision No. 14/55) of the High Authority and delegated power to run the scheme: *Office Commun des Consommateurs de Ferrailles*, which organized the imports, and the *Caisse de Péréquation des Ferrailles Importées*, which was in charge of the funding i.e. imposing levy and distributing subsidies. The dispute that lead to the case arose when Meroni, an Italian steel producer, refused to cooperate with the *Caisse* in assessing the levy Meroni was to pay. *Caisse* then turned to the High Authority and obtained a decision forcing Meroni to pay a levy on the basis of the *Caisse*'s own estimated figures. The High Authority took the decision by merely rubberstamping the demand of the *Caisse* without further examination of the case.

²²⁶ No such express authority existed before the amendment of 202 EC Treaty by SEA in 1987.

²²⁷ For example: Case 25/70, *Einfuhr- und Vorratstelle v. Köster* [1970] ECR 1161; Case C-478/93, *Netherlands v. Commission* [1995] ECR I-3081.

²²⁸ Case 9/56, *Meroni & Co. v. High Authority* [1958] ECR 133.

Meroni brought an action to the Court to set the decision aside claiming that the decision taken by the High Authority involved an illegal delegation of competence. Therefore, the *Caisse* and the *Office Commun* to which the powers had been delegated was incompetent to exercise them and the decision should thereby be annulled.

5.3.2.2 The Judgement

The Court found that the delegation was in fact illegal. It held that the powers delegated had been wider than what the High Authority enjoyed since some of the limitations which applied to the High Authority in that same context did not apply to the *Caisse* and the *Office Commun*.²²⁹ Moreover, the decision delegating the powers did not transfer any specifically power to assess the levy on the basis of its own calculations. Finally, the Court considered if the High Authority in fact had any powers at all which it could validly delegate. The Court declared that “*the consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers [...] or whether it involves a discretionary power, implying a wide margin of discretion*”²³⁰. They must therefore be treated differently and be subjected to different rules. The Court made it clear that the High Authority could only delegate powers which are *narrowly defined* and *executive* in nature (‘non-discretionary’ powers). Delegation of a discretionary power was to be excluded in all cases, since it brings about a transfer of responsibility by replacing the choices of the delegating institution by those of the delegated body.

The reason for this distinction between non-discretionary and discretionary powers was based on concerns for the balance of powers which the Court declared “*is characteristic of the institutional structure of the Community*”, and “*a fundamental guarantee granted by the Treaty in particular to the undertakings and associations to which it applies*”.²³¹ According to the Court, the Treaty has established specific bodies to effect and supervise the exercise of discretionary powers within the limits of its own authority. Thus, the balance of powers would be rendered ineffective if the delegating institution was allowed “*to delegate a discretionary power, by entrusting it to bodies other than those which the Treaty has established*”.²³² In view of that, the Court also required that the exercise of the transferred powers be subjected to strict review based on objective criteria determined and entirely under the supervision of the delegating institution (i.e. the High Authority). Thus, the delegating institution was also held to be responsible for the powers it delegated in accordance with the concept that the powers of any body should be traced back to its authority.

²²⁹ For example, the obligation to give reasons for its decisions.

²³⁰ Page. 152 of the judgement.

²³¹ *Ibid.*

²³² *Ibid.*

5.3.2.3 The Meroni Doctrine

The Court made it clear in the Meroni case that the Commission could delegate tasks to outside bodies (such as administrative agencies), but only subject to the restrictions that: (1) the delegating institution may only delegate powers which have been attributed to them under the Treaty; (2) the transferred powers must be narrowly defined and executive in nature (non-discretionary powers); (3) the exercise of the those powers must be entirely under the supervision of the delegating institution which will consequently also be held responsible for the way in which it is carried out; and (4) the delegation of powers may not disturb the institutional balance of the Community. This is the core of the Meroni doctrine which enjoys a widespread recognition within Community law in the field of delegation.

In addition to this, the Court declared that, since the delegating institution could not transfer any powers other than those it had already been attributed under the Treaty, the delegated powers must be subjected to the same conditions that would have applied if the power had never been transferred in the first place. Hence, the duty of giving reasons, the Treaty rules on publicity and the possibility of judicial review can not be circumvented through delegation to outside bodies.

5.3.3 Case 23/75 (Rey Soda Case)²³³

The test on the extent of powers which may be delegated to Member States is similar to that applied in the Meroni case on agencies (especially in regards to the *Caisse*). The leading case on this topic is the *Rey Soda* case, which also serves as to illustrate the differences in which powers are transferred on the Commission on one hand, and on the Member States on the other hand.

5.3.3.1 Case Background and Legal Issue

In 1967 the Council adopted Regulation 1009/67/EC on the sugar market sector. The Regulation enabled, *inter alia*, the Commission to adopt necessary measures to in order to prevent disturbances in the sugar market from the alteration in price levels. Article 37(2) of the Regulation provided that “*the requisite provisions to prevent the sugar market from being disturbed [...] may be adopted in accordance with the [consultation procedure of the management committee²³⁴]*”. When the sugar prices in Italy rose in 1974 the Commission adopted a regulation, on the basis of Article 37(2) of the Council regulation, in which it delegated to the *Italian government* the powers to take measures to prevent any disturbances in the market due to the increase in prices. Under Article 6 of that regulation, the

²³³ Case 23/75, *Rey Soda v. Cassa Conguaglio Zucchero* [1975] ECR 1279.

²³⁴ The Management Committee was organised as to give opinions on draft measures proposed by the Commission in order to guide the Commission in the exercise of the powers conferred upon it by the Council and to inform to the Council of the measures taken by the Commission.

Italian government announced a tax on stocks of sugar to discourage producers from excessive stockpiling of sugar. Rey Soda, one of the companies that was charged with a levy, instigated an action on the validity of the Commission Regulation. The case was referred to Court to decide whether the sub-delegation to the Italian government was in fact valid. Rey Soda held that the Commission could not amend or exceed the powers conferred upon it in delegating it to a Member States. Such actions would in effect alter the balance of powers between the institutions if allowed.

5.3.3.2 The Judgement

The Court held that the notion of implementing measures had to be given broad interpretation; the Council could thus confer wide powers of discretion and action upon the Commission. Hence, the delegation by the Council to the Commission was valid. However, according to the Court, the Commission had no power to delegate discretionary powers itself to the Italian government. Only strictly defined powers of executive nature could be transferred and therefore the sub-delegation to the Italian government was illegal (cf. The Meroni case above). Moreover, one effect of the sub-delegation had been that the supervision of the management committee over the exercise of powers had been removed. According to the Court, Article 37(2) of the Regulation could not be interpreted as empowering the Commission to impose upon the Italian government an “*obligation to draw up, under the guise of implementation measures, essential basic rules which would not be subject to any control by the Council* [under the management committee]”.²³⁵ Under the system established by Article 37(2) of the Regulation, it was for the Commission itself to determine in a precise manner the essential basic rules. The Commission should have regulated the conditions under which the tax was to be levied (such as have fixed the basis of the calculation of the tax). In refraining to do so the Commission had discharged itself from its own responsibility.²³⁶ The Court therefore ruled that the Commission had delegated too wide powers to the Italian government and thus had acted ultra vires.

²³⁵ Para. 25 of the judgement.

²³⁶ Para. 49 of the judgement.

6 Conclusion

'*Out of bounds*' is a well known phrase to those who play golf (and even more so for those less talented in the game). Rule 27 of USGA Rules of Golf defines '*Out of bounds*' as "*beyond the boundaries of the course or any part of the course so marked*". In view of the abstract concept of ultra vires, it might be helpful to picture it by an analogy, in which the course signifies the allowed (*intra vires*) field of activity for the Community. In this sense, the definition above captures the essence of ultra vires in more than one way.

An act outside the scope allowed by the Treaty is considered as ultra vires - it is then truly *out of bounds*. What defines ultra vires is the legal limits of the Treaty, or rather where the Court has marked those limits to be. The problem in respect to Community law has been that the whereabouts of these boundaries has constantly been changing; partly through the various amendments and numerous legal acts, and partly on account of the somewhat erratic and ambivalent judicial checks of the Court. As the conditions for the game are seldom the same, it has been difficult for the involved parties to calculate, when drafting an act or taking legal action, when they are *out of bounds* and when they are not. Unsurprisingly, this has given rise to both doubt and dissatisfaction over the lack of delimitation and over the protective qualities of the principles of Community law, which ultimately goes to the state of the Rule of law in the Community.

The notion of ultra vires emanates from the recognition of the Rule of law, in the sense that the Rule of law only allows for *intra vires* actions. The recognition of the Rule of law entails that all Community actions are amenable to judicial control to make sure that they meet the conditions for legality, and if they are not, that there are sufficient remedies to undo those actions. One of the most fundamental requirement for legality is therefore that the institution adopting an act must have competence to do so while the Community has no power, except for those powers which it has been specifically attributed through the Treaty. Where the Community acts without having been granted powers, it acts in ultra vires territory. This is consequential since, in principle, the acts of the Community are only supreme when enacted within the limits prescribed by the Treaty - ultra vires acts negates the Member State's obligation to submit to Community law.

However, the notion of ultra vires is not only accessible through abstract reasoning in terms of principles and values of constitutional law. It seems clear that there are at least two Treaty provisions that more than any convey the rationale behind ultra vires. Article 5(1) EC Treaty and Article 7(1) EC Treaty lays down two limits for the actions of the Community institutions, cast into one fundamental principle stipulating that the institutions may only act within the limits of their powers conferred upon them by the Treaty - the principle of attributed competences. The two articles embodies the idea of

limited government, inherent in all democratic societies, and are established as to ensure that the limitations entrenched in each individual legal basis provision is respected. When transgressed - they provide for the notion of ultra vires in Community law.

However, in reality, an act is only ultra vires when the Court says it is, i.e. when the Court rules it to be illegal on the ground of *lack of competence*. In that sense the term has little practical value in Community law other than as a theoretical denotation of the ground of lack of competence.

As previously illustrated, the occasions where the Court has annulled Community measures on grounds of lack of competence are easily remembered, at least when it comes to lack of competence *ratione materiae*. There are a number of different reasons for this, and I have touched upon some of them during the course of this study, but the main root of the problem is the lack of delimitation on the competences of the Community. This is duly acknowledged by the Community and will be a central issue at the IGC in 2004. However, the root to the problem would not be such a concern if the Court had 'trimmed the tree' ones in a while, instead of passively accepting the powers of the Community to grow freely, without any serious interference. The development of a broad doctrine of implied powers and the flexible use of functional legal basis provisions such as Article 308 EC Treaty, that has extended the jurisdictional scope of the Community, had not been possible without sanction from the Court. Still, one might understand the need for such flexible instruments to realise the greater visions set out in the preambles of the Treaties and to react to fresh challenges (without getting deep into constitutional theory). While Community law is not stable, but dynamic, the boundaries of the Community move with the adoption of legal acts and Treaty amendments. There must be room for a certain degree of flexibility that enables the Community to adapt to changes in the political and judicial landscape. Admittedly, the Court has also been fairly receptive to inputs pulling in the other direction. Ever since the German Maastricht judgement in 1993 the Court has little by little placed limits on the scope of some of the wide Treaty articles that has been a source of worry to the Member States.

Instead, where the Court has faulted as a 'guardian of the Treaty' is where it has failed to *ensure compliance* with the delimitation of competences. Or more precisely, where the Court has been less successful is where it has declined to give preference for solutions that would voice the importance of the concept of limited government. The Court has conspicuously failed when it comes to sustaining the strength of the principle of attributed competences, as to make it a 'respect-able' limit to the Community institutions.

The protective quality of the principle of attributed competences has been meagre, at least pertaining to the sovereign powers of the Member States. Hence, the anxiety over the 'creeping competences'. Conversely, the 'inter-institutional' facet of the principle has been better enforced, at least in regards to the cases examined here. When it comes to inter-institutional

litigations, the increasing number of successful actions during the last decade, instigated on grounds of lack of competence *ratione materiae*, are noticeable when compared to the previous record on such annulment actions.

Some of the presented cases in this study has concerned the Commission's lack of competence *ratione materiae* where it has adopted binding acts, not authorised to, under the guise of its administrative powers. The particular circumstances under which this has occurred has often preceded by a failure to pass the measure through the legislature (mostly due to resistance in the Council) followed by an attempt to issue the (somewhat revised) measure as a communication (*Re Pension Funds Communication* case) or as press release (*Poverty 4* case). It might be that the Court has thought it to be necessary to react more forcefully on issues where an institution has tried to circumvent the 'horizontal' division of powers or encroach upon the prerogatives of another institution (such as the Council). Of those four cases presented in this study concerning lack of competence *ratione materiae*, the Court found, in three of those (*Re Competition Agreement* case, *Re Pension Funds Communication* case and the *Poverty 4* case) the measures to be illegal on the basis that they infringed the division of powers between the institutions as provided by the Treaty. In those cases, Article 7 EC Treaty was expressly or implicitly referred to as the decisive Treaty provision which the enacting institution blatantly failed to observe. While, in this context, the Article expresses the facet of the principle of attributed competences which oversees the horizontal division of powers, it simultaneously provides the notion of institutional balance which provides the rationale for striking down on such transgressions. Thus, the Article has a twofold function - as a principle of demarcation and as a structural principle.

That concerns for the institutional balance is a factor that governs the Court in issues regarding lack of competence is clear when it comes to illegal delegation of powers. In both the *Meroni* case and *Rey Soda* case, the Court annulled the contested acts given that the balance of powers would be rendered ineffective if powers were to be delegated without limitations and due accountability, that should follow with authority. The Court has used the concept of institutional balance as a multitalented instrument to restore the balance among the institutions as established by the Treaty when an institution has adopted a measure that threatened to disturb it. In this respect the Court exercises a supervisory control which keeps the institutions in a state of equilibrium; the concept of institutional balance serves as to maintain the complex division of powers among the institutions to ensure that no changes are allowed and no powers are transferred within the system, other than those duly granted by the Treaty.

While Article 7(1) EC Treaty provides for the maintenance of the balance between the institutions of the Community as organised by the Treaty, Article 5(1) EC Treaty provides the same function as to preserve the

division of powers between the Community and the Member States as set by the Treaty, so that the main sense of balance is not violated. The greatest (or at least most palpable) threat to this balance has been the open-ended provisions of the Treaty. Although the Court has previously been disinclined to place limits on these wide-ranged Treaty articles it did so in the *Tobacco Advertising* case. The Court explicitly referred to Article 5 EC Treaty as to emphasize the limitations entrenched in the legal basis of Article 95 EC Treaty. Perhaps more important, it broke a long and unfortunate streak. It was the first time the Court annulled a Council acts, and probably the first time that an Community act of any real political importance was struck down on ultra vires grounds.

The *Tobacco Advertising* case is thus an example of the most clear form of transgression, i.e. when an institution has acted although it had no competences whatsoever in regard to the subject matter in question. In the *Tobacco Advertising* case the specific competence to act rested with the Member States and not with the Council. Thus, it was an obvious violation of the principle of attributed competences. Another, less serious instance of lack of competence, may occur where the institution has some competence vis-à-vis the subject matter, but has nonetheless gone beyond its powers. The two cases concerning delegation of powers, the *Meroni* case and *Rey Soda* case, illustrate that pattern. Additionally, lack of competence may also occur where the institution may have competence in regards to the subject matter, but is limited in means of exercising that power. This is apparent where the Commission has had no power to adopt a legal act on its own, and when encountered resistance in the Council, it has instead tried to pass the legal act disguised as a administrative measure. However, such attempts to circumvent the prerogatives of the legislator has been resolutely opposed by the Court, as shown in the *Re Competition Agreement* case, *Re Pension Funds Communication* case and the *Poverty 4* case. The Court has not shunned from utilizing its power of review in such cases to examine the legality of such Community measures as international agreements (*Re Competition Agreement* case), Commission communications (*Re Pension Funds Communication*) or even press releases (*Poverty 4*) which are not 'acts' per se. Thereby, the Court has simultaneously extended the notion of 'reviewable' acts. It seems that the Court has been prepared to engage a more intense scrutiny when a certain measure, alleged to be ultra vires, seems to affect the institutional balance negatively. However, it is to early to say, on the basis of the cases presented here, whether the Court has really become serious on the limits of competences in general, and is prepared to engage a more intensified review in regards to borderline acts, especially those of political importance. Such a move still has to be accompanied by an equivalent rise in respect for the limitations inherent in the Treaty on part of the institutions participating in the legislative process. However, the Community polity is obviously pressing in that direction as indicated by the agenda set by the recent European Councils. The increase of successful actions during the last decade on grounds of lack of competence suggests that these changes in the political landscape has not passed the Court entirely unnoticed.

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