Integration by Stealth: On the Exclusivity of Community Competence

A Comment on the Ronald van Ooik Contribution

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1 Introduction[1]

If there were one topic that may be said to form the core of what students of European law spend their time on, it would be the division of competence between the Community/Union and the Member States. After all, what the Community claims to possess in terms of competence is in a constant struggle with the sovereignty the Member States wish to preserve. In this debate, the 'legal basis' forms the pivot around which everything is decided. In that respect, it is striking that there are virtually no publications in which this issue is explicitly addressed and the different forms of competence are presented in a coherent fashion. In addition, not so many authors have taken up the task of investigating the decisive role of the European Court of Justice in this area.

Following some of his earlier work on the legal bases,[2] Ronald van Ooik has made up for this shortcoming by not only depicting the various competence of the Community/Union, but also by analysing them in the light of judgments delivered by the Court of Justice. He adopts the four categories of the EU/EC powers stipulated in the 2004 Constitution for Europe: exclusive EU/EC competence, competence shared between the EU/EC and the Member States, complementary EU/EC competence and residual competence of the Community/Union. One may argue that it does not make much sense to focus on a treaty for which the future still looks dim. On the other hand, this treaty has been signed by twenty-five Member States and can be seen to reflect the current stage in European integration. In any case, the categories do seem to cover the wide array of competence that already exist on the basis of the current legal regime.

In this reaction on Van Ooik's paper, I will follow the structure of his contribution and briefly address shortly four categories of the EU/EC powers: exclusive, shared, complementary, and residual competence. While I do agree with the overall analysis presented there, I will try and argue that there is more integration, or more exclusivity (if one prefers) and that despite the current focus on the subsidiarity principle and Member State competence, the decision-making autonomy of the parties to the EU Treaty is quite restricted, even in the areas where the Community has no exclusive competence. In that respect, my approach comes close to the old-fashioned neo-functionalist thought that dominated the integration debate in the 1960's and which returned recently in the discussion on the preparation of a Constitution for Europe.[3]

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[2] See in particular Van Ooik, R.H., *De Keuze der Rechtsgrondslag voor Besluiten van de Europese Unie,* (Kluwer, Deventer 1999).

[3] See *e.g.* the Special issue of the *JEPP* 2005, 12:2.

2 Exclusive competence

The EC exclusive powers are usually related to fears of the Member States or their populations to losing sovereign powers in an increasing number of areas. Van Ooik argues rightfully that over time the Court has pulled more areas into the exclusive realm of the Community, but still the scope is limited to five areas: (1) Common Commercial policy; (2) protection of maritime resources and the conservation of marine biological resources; (3) competition rules necessary for the functioning of the internal market; (4) monetary policy (for the Euro-zone); and (5) the customs union.

In relation to a definition of the area of the EC's exclusive competence, the argument seems to be that cross-border effects must exist and that purely internal regulation of the matters confined to a single Member State will not be covered. One could, however, wonder whether purely internal regulation could still effect, for instance, competition rules; after all, when a policy regulation has not been fully exhausted by the Community, there may still be room for (harmful) national legislation. Thus, even internal rules meant to govern the domestic market may trigger the Community to safeguard the internal market principles and to limit the discretion of the Member States in this area. In relation to the exclusivity of external relations, Van Ooik seems to argue that the Court become to be reluctant to accept exclusive competence.[4] At the same time, however, other terrains that traditionally fell entirely outside the scope of Community law are now presented as possible candidates for exclusivity. The prime example is the communitarisation of private law, which leads Van Ooik to conclude that the Community must become a member of The Hague Conference on Private International Law, possibly even to the exclusion of its Member States. So, while in traditional areas, the Court indeed seems to be more reluctant to exclude the Member States, new terrains emerge in which a creeping integration may even result in exclusivity.

Another relevant issue concerns the increasing use by the Council of the European Union of its competence to conclude international agreements on the basis of Article 24 EU in the area of its foreign and security policy (CFSP) or Article 38 EU in the domain of the police and judicial cooperation in criminal matters (PJCC). The debate on the Union's legal personality and its treaty-making competence has not prevented it from engaging actively in legal relations with third states and other international organizations. The discussion on whether such agreements are concluded by the Council on behalf of the Union or on behalf of the Member States seems to be superseded by the

4 Cases C-467/98 *Commission* v. *Denmark* [2002] ECR I-9519; C-468/98 *Commission* v. *Sweden* [2002] ECR I-9575; C-469/98 *Commission* v. *Finland* [2002] ECR I-9627; C-471/98 *Commission* v. *Belgium* [2002] ECR I-9681; C-472/98 *Commission* v. *Luxemburg* [2002] ECR I-9741; C-475/98 *Commission* v. *Austria* [2002] ECR I-9797; C-476/98 *Commission* v. *Germany* [2002] ECR I-9855; C-466/98 *Commission* v. *United Kingdom* [2002] ECR I-9427. Opinion 1/03 was delivered on 7 February 2006, http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=62003V0001&lg=en.

fact that the Union as such has become a party to some eighty international agreements concluded on the basis of Articles 24 and 38 EU.[5] While 'mixity' has become the solution in the Community to overcome the division of competence, the international agreements concluded under the CFSP are – perhaps ironically – exclusively concluded by the European Union. It would, of course, go too far to conclude that the Union has gained exclusive competence on this basis. In fact, the whole system of the CFSP points to the existence of 'shared', or better, 'parallel' competence: both the Union and its Member States are competent to conclude treaties in the area of the CFSP (including the European Security and Defence Policy, ESDP). However, this implies that, once the Union has concluded an international agreement, there is no direct legal relationship between the Member States and the contracting third party. In a sensitive area such as the CFSP, this is certainly a development that was not foreseen by most Member States at the time of the creation of the Union.

3 Shared competence

The different position of the CFSP returns in the listing by the Constitutional Treaty of eleven principal areas in which competence are to be shared between the Union and its Member States: (1) internal market; (2) parts of social policy; (3) economic, social and territorial cohesion; (4) agriculture and fisheries (excluding the conservation of marine biological resources); (5) environment; (6) consumer protection; (7) transport; (8) trans-European networks; (9) energy; (10) the area of freedom, security and justice; and (11) some common safety concerns in public health matters. Indeed, this category seems to have the broadest scope as it includes all areas that have not been categorised as the EC/EU exclusive powers. However, none of these categories relate to the CFSP, as Article I-12 includes a separate paragraph referring to a 'competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.' As Cremona has already indicated, it is difficult to comprehend what kind of competence this could be if it does not belong to one of the categories stipulated in the EU Constitution.[6] However, the simple fact that once again a special status is introduced for the CFSP is striking, in particular now when even the Commission has argued that CFSP decisions may be 'of a general legislative nature'.[7]

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5 See Wessel, R.A., 'The European Union as a Party to International Agreements: Shared Competence, Mixed Responsibilities?', in: Dashwood, A. and M. Maresceau (eds.), *Recent Trends in the External Relations of the Union*, (Cambridge University Press, 2007, forthcoming).

6 Cremona, M., 'The Draft Constitutional Treaty: External Relations and External Action', *CML Rev* 2003, p. 1347, at p. 1353.

7 See the action brought on 21 February 2006 by the Commission against the Council of the European Union, Case C-91/05 (still pending) *Commission* v. *Council* [2006] OJ C 115/10. This (CFSP) case is comparable to earlier cases in which the Commission questioned the legal basis of decisions taken in

Whenever a competence is shared, this means that the Union and the Member States may legislate and adopt legally binding acts in that area. But shared competence may only be exercised by the Member States to the extent that they are not exercised by the Community (*cf.* Article I-12(2) of the Constitutional Treaty). This means that shared competence may become exclusive once the Union/Community has made use of them. And, in some of these areas the Community is increasingly active (for instance consumer protection, the area of freedom, security and justice, environmental policy and even social policy). In other words: what is a shared competence now, may be a *de facto* exclusive competence in a couple of years.

This seems to be confirmed by recent the case law of the Court which sets a number of limits to shared or parallel competence existing in the area of the external relations of the Community and its Member States. In Opinion 1/03 – on the conclusion of a new Lugano Convention on cooperation in the area of civil law – the Court even seems to call upon the Member States to take future developments into account when deciding on their external competence. Exclusivity may also exist when the Community has not yet acted:

> 'It is also necessary to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis.' (Par. 126). Perhaps even more striking is the function of Article 10 EC in limiting the external competence of Member States. The 'duty of genuine cooperation' demands that Member States be loyal to plans the Community may have in relation to the conclusion of international agreements:
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> '57 Article 10 EC requires Member States to facilitate the achievement of the Community's tasks and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty.
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> 58 That duty of genuine cooperation is of general application and does not depend either on whether the Community competence concerned is exclusive or on any right of the Member States to enter into obligations towards non-member countries. [...]
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> 60 The adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires, for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation.'

This may seriously limit the external competences of the Member States in the areas that would normally fall under the heading of shared competences. In this

the third pillar, *e.g.* cases C-176/03 *Commission* v. *Council* [2005] ECR I-7879 (on the framework directive on environmental sanctions) and C-170/96 *Commission* v. *Council* [1998] ECR I-2763 (*Airport Transit*).

case, Germany and Luxemburg were not allowed to ratify an international agreement that had already been concluded.[8]

In his contribution, Van Ooik favours the so-called flexible interpretation: the Member States may continue to supplement Community policies. As the above examples reveal, however, this may result in a variety of national decisions in the same area as has already been covered – or may be covered – by the Community. Indeed, this may result in a pull towards more exclusivity.

Also, in relation to the exceptions to the system (research and technological development, space policy, development cooperation, humanitarian aid), which indeed seem to give some leeway to the Member States, a certain creeping integration is not excluded. After all, whenever these national policies conflict with Community policies, priority should be given to the Community rules, keeping in mind the primacy of Community law and the 'genuine duty of cooperation' laid down in Article 10 EC.

4 Complementary competence

In the case of complementary competence, the Union/Community can only complement and assist the Member States in their action. In other words: here we are dealing with the areas in which the Member States were not willing to limit their freedom of action. Complementary competence exist in areas such as the protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection and administrative cooperation. Van Ooik concludes that the main idea behind this category is the prohibition on harmonisation of national legislation.

Nevertheless, even in relation to this category, a steering of the integration process is perfectly possible, in particular by means of judicial activism. Over the past few years, we have witnessed judgments by the Court in the areas of higher education (*Bidar*), social policy (*Trojani*), citizenship rights affecting national immigration policies (*Chen*) or the cases where health issues are linked to the internal market logic (*Müller-Fauré/Van Riet*), revealing a more than 'complementary' role for Community law.[9] On some occasions, domestic rules had to be set aside in favour of (an interpretation of) Community rules. While harmonisation as such may be excluded in relation to these domains, judgments by the Court of Justice may establish a similar effect.

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8 See Opinion 1/03, 7 February 2006 (*supra*) and Cases C-266/03 *Commission* v. *Luxemburg* [2005] ECR I-4805 and C-433/03 *Commission* v. *Germany* [2005] ECR I-6985. Many thanks to Prof. Christophe Hillion for drawing my attention to these examples.

9 See respectively Case C-209/03 *Bidar* [2005] ECR I-2119; C-456/02 *Trojani* [2004] ECR I-7573; C-200/02 *Chen* [2004] ECR I-9925; C-385/99 *Müller-Fauré and Van Riet* [2003] ECR I-4503.

5 Residual competence

Residual competence are foreseen by the Constitutional Treaty for 'unforeseen situations'. Van Ooik points to the fact that this is not new and that an echo of the current Article 308 EC can be heard loudly in the new Article I-18(1): 'If action by the Union should prove necessary within the framework of the policies defined in Part III to attain one of the objectives set by the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall take the appropriate measures'.

While we have grown accustomed to an inventive use of Article 308 EC by the Court in relation to Community competence to reach the Community objectives, more recently we recently witnessed the application thereof to cross-pillar issues. This 'residual competence' may have far reaching consequences for the freedom of the Member States and their nationals, as shown in the *Yusuf* and *Kadi* cases.[10] In these judgments the CFI, *inter alia*, took some bolds steps in presenting new views regarding its own competence to scrutinize UN Security Council Resolutions. At the same time, the Court held that the 'residual competence' as phrased in Article 308 EC cannot only be used in relation to attaining the objectives of the Community, but also of the Union. Van Ooik rightfully points to this development as it reveals the unity of the Union's legal system, in which areas that were once deliberately placed outside the Community legal order, cannot be approach in complete isolation from that same Community. Obviously a 'residual' power of the Community exists to freeze the assets of individuals and, in other words, to impose financial sanctions on EU citizens on the basis of non-Community objectives. At the same time, it has become clear that a harmonisation of domestic criminal law (a third pillar issue) is not excluded, once a direct relation exists with a Community competence.[11]

6 Conclusions

In the interplay between EU law and national law, the division of competence and – perhaps above all – the interpretation of the European Court of Justice of this division plays a pivotal role. The analysis by Ronald van Ooik is a valuable contribution to legal thinking in this area. While his purpose is to stress the differences between the distinct categories of competence, I have tried to follow-up on this analysis by emphasising certain developments that may be seen as blurring the boundaries between the categories of the EU/EC competence. Indeed, as Van Ooik argues we need a better understanding of the

[10] Cases T-306/01, *Ahmed Ali Yusuf and Al Barakaat International Foundation* v. *Council and Commission* [2005] ECR II-3533; and T-315/01, *Yassin Abdullah Kadi* v. *Council and Commission* [2005] ECR II-3649.

[11] Case C-176/03 *Commission* v. *Council* [2005] ECR I-7879.

exact meaning of each type of competence as they define who can do what and when. It may also be true – as submitted by Van Ooik – that we cannot go much further in attributing new powers to the Union as the competence limits have already been reached. Still, those categories do not seem to provide an ultimate solution for the exact meaning of each type of the EU/EC competence.

The Constitutional Treaty reinserts the attribution of powers principle, which is currently laid down in Article 5 EC, by virtue of its first provision (Article I-1): 'Under the principle of conferral, the Union shall act within the limits of the competence conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution'. This underlines the importance of this key principle in the relationship between the Community/Union and its Member States. Nevertheless, my conclusion after reading the interesting overview presented by Ronald van Ooik is that on the basis of the principle of implied powers, the duty of genuine cooperation (Article 10 EC) and above all the 'internal market logic' as interpreted by the Court of Justice, competence have been or can be transferred to the Community and the Union in a manner not strictly complying with the narrow boundaries of the attribution doctrine. Even in the areas that do not formally fall under exclusivity, the Member States have lost – and may continue to lose – influence. This puts the strict division between exclusive, shared, complementary and residual competence – as codified by the Constitutional Treaty – into doubt as the division of powers between the Community/Union and its Member States is ultimately seen in the light of the primacy of Community/Union law. Once the Community has made use of its – perhaps marginal – competence, this does limit the freedom the Member States believed to have on the basis of the categorical division. In other words: there seems to be more exclusivity than meets the eye.