The house that the Court built

The retained powers case law of the European Court of Justice and the constitutional structure of the Union

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Euroopan unionin perustamissopimusten katsotaan muodostavan EU:n valtiosäännön, jonka rajat ovat kuitenkin perustamissopimusten määräysten väljän muotoilun sekä Euroopan unionin tuomioistuimen tulkintakäytännön valossa epätarkat. Etenkin kysymys unionin ja sen jäsenvaltioiden välisestä toimivallanjaosta on EU-oikeudellisen tutkimuksen klassikoita.

Tarkastelen pro gradu -tutkielmassani unionin valtiosääntörakennetta ja unionioikeuden kokonaisvaikutusta jäsenvaltioiden toimivaltojen käyttöön erityisesti EU-tuomioistuimen ratkaisukäytännössään kehittämän niin kutsutun retained powers -doktriinin valossa. Kyseisen opin mukaan EU-oikeus asettaa vaatimuksia jäsenvaltioiden toimivaltojen käytölle myös niillä aloilla, joilla sääntelytoimivalta on jäänyt jäsenvaltioille eikä sitä ole jaettu unionin kanssa. Aiheen teoreettisen tarkastelun pohjalta analysoin Euroopaun unionin tuomioistuimen ratkaisukäytäntöä erityisesti yhtä säilytetyn toimivallan alaa, koulutusta, koskevissa tapauksissa pyrkien havaitsemaan typologioita tuomioistuimen ratkaisutoiminnassa.

Tutkimus noudattaa EU-valtiosääntöoikeuden metodologiaa. Keskeisenä lähdemateriaalina on siten käytetty unionituomioistuimen ratkaisukäytäntöä, joka heijastaa perustamissopimuksia tarkemmin unionin valtiosääntörakennetta. Oikeuskäytännön analyysi ja tulkinta on suoritettu peilaten sitä vasten unionin kehitystä markkinaorientoituneesta organisaatiosta yleismaailmalliseksi poliittiseksi unioniksi.

Tutkielmani loppupäätelmä on, että jäsenvaltiot ovat tietyissä rajoissa hyväksyneet unionituomioistuimen kehittämän doktriinin, ja unionituomioistuin on siten saanut aikaan tosiasiallisen muutoksen EU:n valtiosääntörakenteessa. Retained powers -doktriini on omiaan syventämään eurooppalaista integraatiota ja nostaa kysymyksiä toimivallanjaon merkityksestä unionioikeudessa, perustamissopimusten kyvystä heijastaa unionin valtiosääntörakennetta sekä unionituomioistuimen toiminnan poliittisesta luonteesta.

Asiasanat
EU-oikeus, valtiosääntöoikeus, konstitutionalismi, Euroopan unionin tuomioistuin, Lissabonin sopimus, integraatio -- Eurooppa, oikeuskäytäntö, koulutus

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1 Introduction

> *"Congress are authorised to defend the nation: ships are necessary for defence: copper is necessary for ships: mines necessary for copper: a company necessary to work mines: and who can distrust this reasoning who has ever played at 'this is the house that Jack built?'"*

The above quotation of Thomas Jefferson's letter to Edward Livingston of 30 April 1800,[1] criticising a broad construction of the Necessary and Proper Clause of the U.S. Constitution and the infinite expansion of federal powers, is easily transposed to a European framework. The constitutional unease surrounding the development of the division of competences in the European Union has produced numerous shelve meters of critical literature defending either the Union or the Member States against claims concerning erosion of national powers or lacking engagement in the Union project respectively. Yet, the question of competences in the European Union remains an evergreen classic without a definitive answer.

This study approaches the constitutional structure of the Union in relation to the limitation of Member State powers not strictly from the vantage point of the attributed powers doctrine but with focus on the overall effects of EU law on the use of power by Member States. The main object of study is the jurisprudence of the European Court of Justice (hereinafter "ECJ" or "the Court") linked to competence fields wherein the Member States have retained their regulatory powers, i.e. policy fields wherein a conferral to the Union has not taken place at all, or the Union has only been allotted an incremental role of supporting Member State policies. The Court has over the course of years developed within these fields a doctrine concerning the requirements posed by Union law on Member State behaviour when acting within the scope of Union law.

This jurisprudence of the Court is at odds with an understanding of the Treaties as a power-distributing device with clear-cut rules and contours. It is based on a teleological reading of the Treaties and the undertaking by the Member States to further integration between themselves. The jurisprudence on the use by Member States of their retained powers further captures effectively the way in which the substance of the Union is a question of perspective; the nature of the Union is dynamic, taking form in the constitutional dialogue between the Union and its constitutive Members. In this setting,

[1] "From Thomas Jefferson to Edward Livingston, 30 April 1800", The Papers of Thomas Jefferson, vol. 31, 1 February 1799–31 May 1800, ed. Barbara B. Oberg. Princeton University Press, 2004, p. 546–549.

this study seeks to establish how the construction of the nature of Union law by the Court has affected the *de facto* constitutional structure of the European Union.

The observation made in this study is that the Court has been successful in asserting its construction of the Union and affecting Member State behaviour in the fields of retained powers. The focal instrument employed by the Court in its argumentation is a maxim dubbed in scholarly works as the retained powers formula, according to which the Member States are under obligation to exercise their competences in accordance with EU law where a sufficient link to the scope of EU law has been established. This construction of Union law emphasises the role played by the Court: for, it is the Court who determines the width of the scope of Union law, as well as the substantial requirements incumbent upon Member States on the basis of the EU legal order.

The implications of the retained powers formula for the division of competences in the Union are intriguing. Firstly, it gives rise to a philosophical question concerning the essence of competence: is discretion an essential part of exclusive competence? Secondly, it raises concerns in relation to the constitutional development in the Union. It is visible that the Court is able to affect Member State behaviour more widely than in respect of the contentious political choice assessed by the Court at each time: retrospective control exercised by the Court "may also generate rule which can give prospective guidance to decision-makers."[2] Thus, in addition to indirect influence on domestic political choices, the Court's jurisprudence has also steered Treaty amendments towards deeper integration. While the task of the Court is to interpret the Treaties informed of the inherent tendency towards integration, the element of political choice present in the Court's action is a matter worthy of attention. Thirdly, the question arises whether the Treaties are lagging behind in relation to the constitutional development effected by the Court.

It shall also be observed that the construction by the Court, while being unconditional in the sense that it does not recognise any part of national policy-setting as immune to Union law, does not possess total permeability as some domains directly linked with the essence of nation-states seem more resistant towards interference by EU law than others.

[2] M Forovicz 2012, p. 13.

The view adopted in this study belongs to the family of scholarly work construing European integration "as a self-sustaining process that has steadily enhanced judicial authority and supranationalism -- vis-à-vis the authority of the Member States and intergovernmentalism --."[3] It also draws from the school of thought emphasising the connection between law and politics. The review of adjudication in the fields of retained powers is conducted on the basis of legal literature, forming a theoretical first part, and a case study of the Court's jurisprudence within the field of education, a domain rich with rulings by the Court touching upon the use by Member States of their powers closely linked with state budget and societal policies.

Falling within the field of EU constitutional law[4], this study places emphasis on the constitutional precedents set by the Court in its case law which reflect the best the shifting constitutional structure of the Union the codification of which is considerably slow due to political difficulty. The interpretation of the Court's case law is informed of the genesis of the European Union from a mainly market-oriented organisation towards a more universal political union and entails some comparative elements aiming at contextualising the Court's findings in a historical continuum. The body of cases in the field of education is analysed with view of detecting a typology in the Court's use of the retained powers formula in said field.

The study shall proceed as follows: Chapter 2 lays down the constitutional framework of the Union, discussing the division of powers on Treaty level and the competing constructions of the Treaties. Section 2.4 provides a normative evaluation of the constitutional theories explaining the role of the Court as a constituent actor within the Union. Chapter 3 introduces the retained powers formula on a theoretical level (Sections 3.1 and 3.2). Section 3.3 engages in a philosophical discussion of the justifiability of the formula as well as the Court's construction of the Union project. Section 3.4 observes Member State reactions on Treaty level to the developments in Union law in regard to the relation of the scope of Union law and attribution of powers. Chapter 4 assesses retained powers case law in the specific field of education, building on the findings of Chapter 3. Finally, Chapter 5 concludes by discussing the ultimate reach of the argument from the scope of Union law developed by the Court and the ability of the Treaties to depict the constitutional structure of the Union.

[3] A Stone Sweet 2010, p. 18.
[4] On methodology in EU constitutional law, see e.g. P Dann 2005.

2 Competence in the Treaties

2.1 The varying philosophies on competence

This Chapter shall provide an outline of the constitutional structure of the Union and introduce a hypothesis regarding constitutional developments in the EU as regards the role of the division of powers and the notion of the scope of Union law. I have dubbed the focal feature of this hypothesis as *the argument from the scope of Union law*. After a brief introduction possible theoretical explanations for the development at stake shall be observed and commented upon.

Let us begin at the root of it all – the Treaty articles laying down the competences of the Union and the Member States respectively. As shall be seen in the following, the TFEU has ”codified, rather than resolved, the strain between restricting Union powers and allowing some flexibility”[5] despite the apparent unambiguity in the systematics of attribution of powers inscribed in the Lisbon Treaty. This is partly because the Treaty is laden with articles that provide for room of manoeuvre when the Union is confronted with a competence quarrel, and also partly because of the competing interpretations given to the attribution of powers between the Union and the Member States.

As is well known, the limits and division of competence between the Member States and the EU are laid down in Articles 4–5 TEU.[6] As a mediating factor in situations where a line between the two domains needs to be drawn operates the principle of subsidiarity as laid down in Article 5(3) TEU.[7] The competences conferred upon the Union are further divided in categories provided in Article 2 TFEU: i.e. exclusive[8],

[5] L Corrias 2011, p. 18.
[6] Under Article 5(1, 2) TEU, the limits of Union competences are governed by the principle of conferral under which the Union is confined in its action to the limits of its attributed powers and the objective of the Treaties. As laid down in Articles 5(2) and 4(1) TEU, competences not conferred upon the Union in the Treaties remain with the Member States.
[7] According to the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union is only to act where the aims of the Treaties cannot be sufficiently reached on Member State level. The Lisbon Treaty sought to enhance the role of the principle through the adoption of the Protocol (No 2) on the application of the principles of subsidiarity and proportionality to the TEU.
[8] Under Article 3 TFEU, the areas in which the Union enjoys exclusive competence include the customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; common commercial policy; and the conclusion of international agreements when the conclusion thereof is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

shared[9], and supportive, coordinating or supplementary competence[10] as well as competences to provide arrangements for the coordination of the Member States' economic and employment policies[11] and to define and implement a common foreign and security policy[12]. In addition to this seemingly tidy division of powers, Articles 4(2, 3) TEU provide for certain more ambiguous rules of construction: the Union, on the one hand, is under obligation to respect the national identities of the Member States, while the Member States, on the other, are *inter alia* liable to facilitate the achievement of the Union's tasks and to refrain from any measure which could jeopardise the attainment of the Union's objectives. The latter obligation is due to the principle of sincere cooperation to which both the Union and the Member States are subject.

The interpretative disparities begin when the purpose of the conferring act is considered. In light of the defences brought forward by the Member States before the ECJ, the Court and the Member State seem to construe the function of the provisions on competence differently from one another: whereas the Member State are likely to view the competence articles through their restrictive, negative effect as safeguards for their remaining powers and the principle of conferral, the Court is inclined to regard them as provisions intended to provide the Union with tools to build integration, i.e. as positive utensils for furthering the Union aims.[13]

The latter view has also been endorsed in scholarly writings: according to Basedow "[w]hat is disregarded in most discussions about Community and Member State competences is the fact that the primary content of the Treaty is not the delimitation of competences, but the conferral of instructions upon the Community for the implementation of policies in certain areas identified in the Treaty."[14] Subscribing to the supremacy of the *purpose of the Treaties* as a guiding principle, Basedow's view is in

[9] Article 4(1) TFEU prescribes shared competence as the default category of Union competence. Article 4(2) TFEU further mentions as examples of areas of shared competence the internal market; social policy; economic, social and territorial cohesion; agriculture and fisheries; environment; consumer protection; transport; trans-European networks; energy; the area of freedom, security and justice; and common safety concerns in public health matters.
[10] The areas falling into this category under Article 6 TFEU include protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; and administrative cooperation.
[11] Article 2(3) TFEU.
[12] Article 2(4) TFEU.
[13] Observing Kelsenian perspectivism in the context of EU law, Tuori has contended that institutional juridical actors tend to adopt the perspective of the normative framework of their own jurisdiction; see K Tuori 2010, p. 40 and 43–44.
[14] J Basedow 2012, p. 69.

line with the traditions of interpretation of international conventions[15]: what is focal in the Union project (as a project originating in an international convention) is the effective attainment of what the Member States have once undertaken to achieve by co-operation. Placing such emphasis on the political aims function at the cost of the delimitation function is logical in the sense that the need to prescribe on competences in the first place has arisen precisely because the Member States have agreed to strive after a common goal, i.e. the purpose of the Treaties.

In the Treaties regarded first and foremost as an agenda-setting document the competences and their attribution between the Union and the Member States serve as a means of achieving a goal. The principle of conferred powers thus ”marks the line between the powers needed for the attainment of the goals and those that are additional, and thus (from this viewpoint) unnecessary and even dangerous.”[16] Consequently, the Union is free to act when claiming legal basis in the enumerated powers within the first-mentioned category, but questions as to the legality of its action arise as soon as it embarks on expanding its powers by arguing competence on the basis of the latter-mentioned.

Another source of disparity is encountered when considering the power-conferring potential of the conferring acts: is the Union to act within the literal content of the powers attributed only, or does the quest for attaining the purpose of the Treaties mandate a wider scope of action? In the early stages, the Union seemed more confined to the limits of the competence given to it by the Member States: e.g. in *Van Gend en Loos* the Court held that ”the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, *albeit within limited fields* --.”[17] However, since then worry over the so-called competence creep has entered academic discussion to stay: EU competences are said to expand due to a liberal construction of the legal bases provided by the Treaties.[18] Much of this creeping has taken place due to the case law of the Court in which it has introduced a wide range of

[15] L Corrias 2011, p. 19.
[16] idem.
[17] Case 32/84 *Van Gend en Loos* ECLI:EU:C:1985:104, p. 12 [emphasis added here]. See even J H H Weiler 1991, p. 2433–2434.
[18] A Prechal et al. 2011, p. 214. See also Weiler, who noted a change in the Court’s language already in 1991 in this respect, manifest in the notion of limited fields in *Van Gend en Loos* being replaced by a reference to the limiting by the Member States of their sovereign rights ‘in ever wider fields’. J H H Weiler 2003, p. 12, footnote 9.

features as intrinsic in Union law justifying expansive Union action.[19] As a consequence there exists some disparity between the constitutional setting as regards competences as found in the Treaties, i.e. the EU constitution in the formal sense, and in the Treaties including their interpretation by the ECJ, i.e. the EU constitution in the substantive sense.[20]

This brings us to the most contentious issues of them all as regards competence – the role played by the ECJ. As is widely recognised, the Court's active interpretation praxis has been the primus motor in the process in which the EU is said to have become constitutionalised.[21] The Treaties, unlike traditional international agreements between states, have been transformed into a legal regime conferring rights directly to individuals. In changing the nature of the Union towards more of a constitutional creature the Court has also managed to effect a fundamental change in the Union's status vis-à-vis the Member States: the Union, largely helped by the Court assuming the role of the sole authoritative interpreter of the Treaties, has become capable of itself affecting the constitutional structure and limits of competence laid down by the Member States.

2.2 Nature of the Treaties: dynamic and incomplete frameworks

The Union is a notably purpose-oriented establishment; this is easily observed in Article 1 TEU solemnly proclaiming as the aim of the European project the creation of an ever closer union among the peoples of Europe. This agenda setting entailing a striving towards a goal that is seen as constantly moving further, towards deeper integration, has lead scholars to conclude that "the framework established by the Treaty has to be seen as dynamic, not static"[22]. With regard to the Treaty as an embodiment of the constituted powers of the Union, i.e. powers given to it by the constitution[23], as well as of the scope of the Union project, the notion of dynamism is conceptually challenging: if a treaty defining the existence, purpose and powers of a body is to be seen as dynamic as in self-

[19] E.g. S Weatherill 2009, p. 22, has identified "a structural weakness which places few brakes on the motors of 'creeping competence' supplied by the Treaty text itself and by the institutional set-up of the EU" as the core of the 'competence problem' present in Union law.
[20] F Snyder 2003, p. 56.
[21] See e.g. J H H Weiler 1991, p. 2413–2422.
[22] J Basedow 2012, p. 72.
[23] L Corrias 2011, p. xii.

amending, this would entail that the very treaty is laden even with constituent power, i.e. power to give the constitution[24].

The principle of having regard to the *state of evolution* of EU law as a whole in the interpretation of individual provisions thereof was first articulated by the ECJ in *CILFIT*.[25] The concept of interpreting provisions of law in the light of the contemporary setting is of course nothing revolutionary as it can perhaps be seen as a basic requirement for keeping legislation once put in place viable and up-to-date, capable of answering today's problems, and it is easily accepted as regards the substantive law of the Union. But the Court's imperative goes beyond this as viewed in the express statement in *CILFIT* that said requirement of interpretation aware of the objectives and state of evolution of provisions of Union law applies to "*every provision of Community law"*, i.e. even the provisions embodying the fundamental constitutional setting of the Union.

Would this be acceptable in a practical national constitutional setting? My answer is hardly, as the constitution is traditionally seen to serve a three-fold purpose: it "*constitutes* a political entity, establishes its fundamental *structure*, and defines the *limits* within which power can be exercised politically."[26] The function of limitation is crucial in this respect: a constitution is considered to lay down definite limits for the legitimate use of power.[27] These limits are not evolutionary but can be changed only by the engagement of the legislator through amendment measures: the amendment is preceded by a political process which provides for the legitimacy of the amending act. From the vantage point of legal philosophy, however, the act of interpreting the limits of a given competence can be seen precisely as this kind of legal self-innovation by the entity in question – constituent power by definition has been said to be ultra vires.[28] But this sort of reasoning would seem untenable for the purpose of stretching the limits of competences awarded by a national constitution in practice.

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[24] L Corrias 2011, p. xii.
[25] Case 283/81 *CILFIT v Ministry of Health* ECLI:EU:C:1982:335, para 20.
[26] D Castiglione, *The Political Theory of the Constitution*, in R Bellamy and D Castiglione (eds), Constitutionalism in Transformation: European and Theoretical Perspectives (1996) p. 5–23 and 9–10, as cited in L Corrias 2011, p. 38 [emphasis in the original].
[27] As noted by M P Maduro 2003, p. 86, "[c]onstitutionalism is normally presented as a two-edged concept: empowering and limiting power." In a self-amending constitution, the limiting feature would be greatly affected.
[28] H Lindahl 2007, borrowing from Kelsen, p. 495. See even L Corrias 2011, p. 158: "The problem of 'creeping competences' can never be completely avoided because it is inherent in the concept of legal power itself, as moving between power in and power over the law."

What is noteworthy in the dynamic framework model is that it attempts to legitimise the expansion of the Union project through *law,* in denial of any 'extra-legal origin of the legal order'[29]. The findings of the Court are considered to stem from the Treaties, i.e. from the constitution itself. As put to words by Corrias, in this line of thinking "the legal order as it exists transforms into a more intense version of itself."[30] It is thus recognised that simply the political will expressed in the integration project does not suffice to redeem excursions into terrain outside the attributed competences of the Union but there needs to be a basis in the pre-existing law. In other words, the original constitution put in place by the founders of the Union with its division of competences does bear relevance after all, in spite of the ability of the Treaties to self-evolve: in order to be authoritative, the new power needs to build on and be coherent with the old legal regime.[31]

Thus, there are limits to what can be achieved by the Union on a political level; law needs to become involved. It is here where the Union as a political entity gets by with a little help from its friend, the Court – the authoritative interpreter of the Treaties. Where needed, the provisions of the Treaties are interpreted by the Court in a way which makes room for the Union's political aspirations by relying on a dynamic reading stressing the quest for further integration intrinsic in the Treaties. In this process, depending on which view one adopts, the Treaties either function dynamically and adapt to new circumstances, or the constitutional agenda is bent in accordance with the needs of the political will without the actual involvement of any political process. Politically speaking, a fluctuating agenda is not unheard of, and provided the involvement of the legislator as a result of a political process such evolution of the constitution would not raise any issues, but from a legal point of view, unless one accepts the suggested auto-evolutionary nature of the Treaties, the same put into effect by the judiciary poses some problems of legitimacy.[32]

Another way of perceiving the nature of the Treaties is their description as 'traités cadre', i.e. framework treaties which in regard to their substance are in need of further

[29] Formulation borrowed from L Corrias 2011, who in his work has attempted to transcend the dualistic division between constituent and constituted power, p. 38.
[30] idem.
[31] ibid. p. 77.
[32] In the context of the Union citizenship, see even M Dougan 2012, p. 128.

clarification.[33] To certain extent, this perception resembles the afore-mentioned dynamic framework model as it is based on murky competence clauses in which the Union ”finds” its competence to act. The skeleton of the Union is provided in form of the objectives set out in the Treaties. Drawing therefrom, the provisions of the Treaty are supplemented by the Union legislator and the Court by way of recourse to not only the express competences defined in the Treaties, but also to e.g. implied powers[34] as well as the functional provisions laid down in Articles 114 and 352 TFEU[35]. Here, we're beginning to touch upon the problematic nature of distribution of competences between the Union and the Member States: even if the Treaties, on a superficial glance, seem to be clear-cut in their division of competences by policy areas, the reality is far messier.

Another way in which the incomplete framework model functions to introduce new features to EU law is visible in policy setting by the Union: a case in point is the 'social market economy', a project adopted by the Union despite the evident lack of sufficient Union competence to fulfil it.[36] The lack of competence is partly due to the Union's original economic orientation, partly to the nationally sensitive nature of questions of social policy boiling down to a state's welfare regime even nowadays left outside the Union powers. In a situation such as the one at hand, the EU relies fully on the Member States in achieving the goals it has set for itself.[37] This may lead to thorny choices for the national governments between subscribing to a policy adopted at the Union level and potentially having the national social scheme affected by 'foreign' impulses as a result, or clinging to national preferences at the cost of the Union goal. In such a

[33] L Corrias 2011, p. 14.
[34] The implied powers doctrine was adopted by the Court first in the 1950s; see Case 8/55 *Fédération Charbonnière de Belgique v High Authority* ECLI:EU:C:1956:11, p. 299. Following a narrow reading it entails that the existence of a given power in the Treaties also presupposes the existence of any ancillary powers which may be necessary for the first power to have any meaning. According to a wider reading even a given objective in the Treaties implies the existence of any power necessary for the attaining of such objective. See P Craig & G De Búrca, EU Law, 5th edition, p. 77.
[35] The functional provisions of Articles 114 and 352 TFEU provide a legal basis for harmonisation and Union action respectively where no explicit power exists in the Treaties but the action is necessary for the attainment of the objectives laid down therein. These provisions may be seen as providing the Union legislator with a *carte blanche* legal basis in the quest for attaining the EU goals. As noted by Weatherill, even though they do not create any unlimited competence (Weatherill summarises the existing limits as a tie to market-making under Article 114 and a tie to the Union's objectives under Article 352; S Weatherill 2009, p. 19) for the Union, they do not tie down legislative action to particular sectors either. See S Weatherill 2004, p. 6.
[36] L Azoulai 2008, p. 1337.
[37] C Barnard 2009, p. 2.

situation the Court may be summoned in, to help the Member States govern themselves[38] in line with their commitment to the EU.

Both the dynamic framework model and the perception of the Treaties as a traité cadre require the active participation of the Court. The role of the ECJ under Article 19 TEU is to ensure that *the law* is observed in the interpretation and application of the Treaties; according to Corrias, in this lies the key to understanding the operation of the Court when deciding questions of competence.[39] What the ECJ perceives to be 'the law' as referred to in said Article is in the discretion of the Court itself, guided by its reading of the purpose of the Treaties. And as regards interpretation of the Treaties with the existence of applicable legal bases in mind, the Court has been held to be rather "'competence-enhancing' than 'competence-restricting'".[40]

An active 'responsibility for "finding" the law'[41] and filling the gaps left in the Union structure by the legislator is according to some commentators an inherent trait in the Treaty framework; e.g. Lenaerts and Gutiérrez-Fons have asserted that the degree of autonomy claimed by the Union legal order "could hardly be attained in a legal system that is not self-sufficient and coherent"[42]. While the reasoning of Lenaerts and Gutiérrez-Fons relies on a conviction that the Court is not exercising judicial activism while remedying the lacunae in the Treaties but merely fulfilling its task as the authoritative interpreter of Union law, it cannot be disregarded that a major part of the development, widening and deepening of Union law has taken place due to the discoveries made by the Court, prompted more often than not by individual litigants potentially purposefully seeking to push the Union envelope further into the domain of Member States' legislative realm.

2.3 Constitutional dialogues: harmony of the multitude?

2.3.1 Who holds constituent power in the Union?

Locating constituent power in the Union structure seems at a first glance a simple task: in the form of the principle of enumerated powers, the origin of Union competences seems clearly defined in the Treaties. Thus, some authors take it as something that has

[38] A Stone Sweet 2010, p. 11–12.
[39] L Corrias 2011, p. 14.
[40] S Weatherill 2009, p. 20.
[41] K Lenaerts and J A Gutiérrez-Fons 2010, p. 1632.
[42] idem.

”long been known” that the division of powers between the Union and the Member States is and needs to be established by the constituent treaties, by an act of conferral by the Member States (i.e. the Union does not have Kompetenz-Kompetenz).[43] Weiler has even pointed to that if the locus of constituent power would be with the Union instead of the Member States and we would still continue to adhere to the constitutional acquis developed through the Treaties and the Court’s praxis currently in force, the Union would quite likely obtain a *de facto* nature of a federal state.[44]

However, it is equally accepted that as the ECJ is the sole arbiter and authoritative interpreter of the Union acquis, where doubt exists as to the scope of EU law, it is incumbent upon the Court to rule thereupon.[45] In doing so the Court effectively decides upon the scope of its own jurisdiction.[46] Furthermore, as shall be seen in the following, the act of bringing a situation into the scope of EU law has an impact on the use of the Member State of their powers (and may even incrementally add to the Union’s powers without any input from the Member States[47]). This seems somewhat paradoxical, for the Court is called to rule on, and potentially expand its own powers in, an area explicitly left outside the enumerated powers of the Union. What is more, the Member States seem to have acquiesced with this claim by the Union to some degree of constituent power.

Consequently, the one-or-the-other type of constellation does not provide any fruitful response to the question of the locus of constituent power. Middle-road alternatives grounded upon the notion of constitutional dialogues have emerged to explain the relationship. E.g. Schiemann, himself a former judge of the ECJ, has contributed to the debate describing the Union as ”a non-sovereign polity or commonwealth comprising no-longer-fully-sovereign States” whose relationship to its Member States cannot be reduced to a “zero sum game of competition for sovereignty”.[48] He asserts that the ECJ on one hand and the Member States with their courts on the other both take themselves to be the ultimate rulers of Kompetenz-Kompetenz.[49] However, in order to avoid an

[43] C Barnard 2009, p. 3.
[44] J H H Weiler 2003, p. 7, addressing the contemplated introduction of a Constitution for Europe.
[45] L Azoulai 2008, p. 1342.
[46] A Prechal et al. 2011, p. 242.
[47] M Dougan 2012, p. 129.
[48] K Schiemann 2007, p. 486.
[49] The same schism has been depicted by Maduro; see M P Maduro 2003, p. 95.

outright collision and ensuing dissolution of the Union, the courts involved sidestep the issue altogether.[50] The status quo according to him is that of indecision.

As noted by Weiler, the inquiry seeking to locate the ultimate holder of constituent power in the Union is Kelsenian in the sense that it boils down to a search of a European *Grundnorm*. Weiler further observes that this search even has Schmittian features in that it focuses on finding a conflict-of-the-laws rule.[51] It should be noted in this connection that in the field of constitutional law, such quests in general seem doomed to failure: when tracing the origin of constituent power, one is inevitably faced with a 'the chicken or the egg?' type of dilemma in explaining the origin of the demos holding the constituent power. Yet, in the context of exploring power relations in the Union, it seems like a question worth asking.

Views placing both the Union and the Member States as each holding constituent power try to mitigate the difficulty in answering this question but, in my opinion, to some extent fail to address the circumstance that the Union has, after all, been created by the Member States without a clear mandate given to it to further self-evolve.[52] They rely on a perspectivism which is undoubtedly able to explain the reality of the European constitutional space – different actors perceive the EU legal order through the lens provided by the judicial framework and culture from which they stem, thus creating on a conceptual level their own version of the Union[53] – but it leaves the intriguing question of origin of power unanswered. This being said, these descriptions seem nevertheless to correspond to the reality in that they portray the indecision and

[50] idem.
[51] J H H Weiler 2003, p. 12–13.
[52] E.g. Weiler's Constitutional Tolerance approach insists on the power relations between the Union and its Member States to be based on a live-and-let-live type of harmonious co-existence in which both the Union institutions as well as the Member States are placed under a similar obligation of observing competing interests, and thus seems to claim that there is no need for locating a decisive norm which would lay down any hierarchical scheme between the two. Consequently, it does not explain where the Union derives its equal standing with the Member States from; see J H H Weiler 2003. This seems to be the enigma at the core of EU law; as noted by Maduro, "[t]he claim by Europe to independent political authority […] has never been fully legitimised. Instead we have moved directly into discussing how to legitimate the processes and institutional system through which the power derived from that claim is exercised." M P Maduro, as quoted in N Walker 2003, p. 31, footnote 13. Elsewhere, Maduro has emphasized that the very paradox is inherent in constitutionalism as an integral part of its checks and balances system and therefore *needs* not to be answered; see M P Maduro 2003, p. 96–97. I am inclined to subscribe to both of the above stances taken by Maduro; for the Union to be practically possible, it is required that neither the Union nor the Member States can subjugate the other. Yet, this outcome is somewhat unsatisfactory as it too sheers off the question of the origin of the Union's constituent power.
[53] See Tuori 2010, p. 43 and 46–47. The concept of constitutional dialogue is founded on this very phenomenon: to borrow a formulation of Weiler, Slaughter and Stone Sweet, a characterisation given by the Court or a national adjudicator to the Union in its rulings is "but an offer, a gambit that requires a response"; see J H H Weiler, A-M Slaughter and A Stone Sweet 1997, p. viii.

vulnerability of the balance struck between the Union and the Member States: a certain harmony of indecision seems to reign in the EU.[54]

It is perhaps this sensitivity of the question at hand which has lead to the *de facto* creation of competences through interpretation of the Treaties. For it is clear that the utilisation of the powers conferred by a constitution always includes some sort of demarcation; one has to identify the existence, and the limits, of the powers involved.[55] If one takes this interpretative exercise far enough, it may become creative; the line between interpretation and amendment is a fine one. In this sense, both the Union and the Member States act as interpreters of the competences involved in the Union project.[56] However, in this praxis the Court and the Member States are interdependent: the Court cannot render a decision which it knows the Member States would reject unequivocally, and a Member State cannot act in a blatant violation of Union law, without jeopardising the functionality and credibility of the entire Union.[57] The fact remains that the Member States have decided to curtail the areas they submitted to the integration project, leaving the fields closest to the notion of an autonomous state and their national identity off the list. Yet the Court, encumbered with the task of seeing to that the law is observed and that the integration is furthered, is itself under, and even creates, certain pressure towards deeper, limitless integration.

2.3.2 The argument from the scope of Union law

As noted above, the Member States and the Union seem to operate under divergent readings of the constitutional framework of the Union wherein they possess different constituent abilities: whereas the Member States continue to hold themselves as the source of any regulatory capability of the Union as the parties conferring the Union its

[54] The indecision may even be celebrated as a form of keeping both the Union and the Member States in check and preventing any undue expansion of the powers of either party; see e.g. A von Bogdandy and S Schill 2011, p. 1453, or for an American perspective, E Young 2002, p. 1712.
[55] E.g. Weiler has seen this act of finding by the Court accepted by the Member States as a renewal time and again by the Member States of their subordination to the European constitutional discipline, not as a result of a pressing legal doctrine, but on voluntary basis; J H H Weiler 2003, p. 21. I, however, beg to differ insofar as even though the Member States ultimately act pursuant to their own political decision to do so, the incentives provided by the Court are definitely in the guise of legal doctrine.
[56] Similarly Hofmann, who suggests that the principle of conferral should be observed in the context of an integrated legal system instead of attaching it to a conservative two-level structure in which ”the EU/EC legal order has been superimposed on the Member States’ legal systems” which has lost its explanatory power. The exercise of public powers by the Union and the Member States are, according to Hofmann, nowadays closely intertwined. H C H Hofmann 2009, p. 50–51.
[57] L Corrias 2011, p. 123.

powers, the Union has claimed the monopoly on construing the scope of Union law. This division can be read to produce different outcomes.

The reading emphasising the position of the Member States as Herren der Verträge amounts deciding on competence to simultaneously deciding where the EU becomes relevant: Union law is only to gain any effect over national law where the situation at hand has been identified as pertaining to the integration project through a reference to Union powers.[58] However, there is empirical evidence that this reading does not correspond to the reality of the Union, as witnessed by the worry over competence creep.

Alternatively, the division entails that the Union shall define the areas critical for the attainment of the integration goals in which Union law shall produce effects (i.e. the scope of Union law), whereas the Member States apply their Kompetenz-Kompetenz to decide whether the regulatory exercise aimed at realising the effects of Union law shall be conducted by the Union or the Member States. Irrespective of the locus of regulatory powers, it is accepted that Union law necessitates some degree of harmonisation and produces effects where its scope is entered into. This latter construction is the one adopted by the Court in its case law[59]. It emphasises the importance of the scope of EU law at the cost of the division of regulatory powers, buttressing the importance of the Court's role of the integration process.

This systematic practice of the Court has been identified by Prechal et al. as the primary method for the Union gaining further competences apart from Treaty amendment: the ECJ connects new situations into the scope of EU law, thus triggering the applicability of general principles of Union law even in the absence of concrete Union powers. It has been observed that when such connection has been made, the Union is likely to acquire additional powers; Prechal et al. have quite fittingly named the phenomenon as "trigger and creep".[60] The worry over the muddying of the limit between Member State and Union powers is therefore secondary to the issue of the scope of Union law.

[58] See J H H Weiler 1991, *supra* n 17.
[59] Weiler, who calls the phenomena 'absorption', has dated this constitutional development in the period of the 1970s and early 1980s; see J H H Weiler 1991, p. 2434–2435 and 2438–2441.
[60] A Prechal et al. 2011, p. 235.

According to Prechal et al., the ways in which additions into the scope of EU law create new powers to the Union are threefold.[61] Firstly, the entry is likely to trigger a legal basis that was not originally applicable to the situation at hand. Secondly, the authors have observed a shift from negative to positive obligations for the Member States, in that where the Member States are required to adhere to the general principles of Union law (i.e. mostly a negative obligation), this requirement ever more often entails a requirement for positive action. The Union thus dictates responsibilities on the Member States even in the absence of a tangible legal basis. And thirdly, though not considered as competence creep *proper* by Prechal et al., the entry into the sphere of Union law of a given situation has even effects on the limits of the powers of the ECJ; the Court gains new ground on which to supervise Member State action and potentially affect the policy judgments of the Member States. This study shall concentrate on these two latter-mentioned effects of the Court's construction of the scope of Union law.

The query to be made in this study is whether the interpretative choice made by the Court emphasising the pertinence of the scope of EU law over the division of competences has taken the upper hand in the dialogue concerning competence and produced a *de facto* amendment in the constitutional structure of the Union[62] that is not reflected in the text of the Treaties. Indication of such development is clearly present in the fields of retained powers, i.e. the portion of Member State competence which has not been conferred to the Union: the Member States seem to have consented to a reading of the Union legal system wherein the Member States are expected to take into account in their policy-making interests foreign to their national considerations even in fields where they enjoy exclusive competence, and wherein the Court holding the interpretative prerogative acts as the watchdog over sufficient observance of these interests, setting the standard on the basis of teleological interpretation. Whereas the reading departing from the principle of conferral would suggest a clear-cut division of responsibilities in which either the Union or the Member States regulate, the reading of the Court seems to transform the decision-making model more towards a system wherein the Union uses its competence where it has expressly been provided some, and

[61] idem.
[62] See, in this regard, Stone Sweet's theory of the ECJ as a trustee of the Member States which is capable of affecting its own 'zone of discretion' and consequently 'change the rules of the game': Stone Sweet observes constitutionalisation and the inauguration of the supremacy doctrine in Union law as an active deed by the Court expanding its zone of discretion and thus affecting its relation to the Member States. A Stone Sweet 2010, p. 13–14.

additionally imposes requirements on the Member States' use of their remaining competence, provided that the scope of Union law is touched upon.

The control over the scope of Union law is thus susceptible of causing an indirect expansion of the unwritten power of the Court, and consequently *de facto* Union competences: by controlling the scope of Union law, the Court is able to gradually shift the requirements posed to national use of competence and virtually affect Member State action even where the Union lacks regulatory powers. Such a shift seems to have taken place with the retained powers case law of the Court, and it seems to have sedimented not only in the Union perception of EU law, but to a large extent in the national legal cultures of the Member States as well.[63] Thus, the Member States have in this respect given their silent consent to the constitutional amendment and in part abandoned their reading of the constitutional framework resting strictly on the principle of conferral.

Is this use of constituent power by the Court in line with what is to be construed as law under the Treaties? There are two factors to be observed: the legitimacy as regards form, and legitimacy as regards content. As regards form, it will suffice in this context to refer to the lack of clarity as to the origin and content of the Union's constituent power touched upon above in Section 2.3.1. The question is utterly intriguing, but falls outside the scope of the present inquiry.

A material evaluation of the Court's praxis is equally challenging. Is the Court usurping the Member States' powers by entering sneakily through the back door created by teleological interpretation, or is it rather acting as a court engaged in a double role of both a constitutional court and a court providing protection of individual rights[64] should in order to give full effect to the acquis communautaire, so mandated by the Member States? It can hardly be contested that credible and truly effective integration requires the elimination of lacunae created by domains of Member State powers immune against the impact of the Union project; in this sense the assertion by the Court that the guiding principles of Union law are to be ever-present in Member State use of power affecting Union policies seems founded. Yet, it seems impossible to maintain this construction of the functioning of Union law and simultaneously hold that integration stemming from

[63] Analogically K Tuori 2010, p. 47.
[64] L Corrias 2011, p. 15.

the Union would be taking place within the bounds of the policy fields laid down in the Treaties.

The validity of the Court's partial upheaval of the principle of conferred powers hinges upon the definition that we are to give to the Union: what did the Member States agree to when they signed up for the game of European integration, and how far is the integration is ultimately destined to go? Or, what is *ultra vires* under a Treaty framework to be considered dynamic?[65]

What makes the question difficult to answer in legal discussion is that it is in fact not purely legal in nature – it involves a great deal of political choice, depending on the fancy of the person or body to whom the question is posed.[66] A supporter of wider integration or a federalist will likely cling to the purpose-oriented provisions whereas a nationalist is more inclined to emphasise the principle of conferral inscribed in the Treaties. It is possible to arrive at a multitude of solutions on the basis of deduction from the Treaties, vaguely formulated. What is more, the seemingly self-evident, yet crucial fact that the European Court of Justice is both a court and a European institution[67] entails that the Court might too be unable to avoid such bias.

Craig has contemplated upon the legitimation of the Court's creative interpretative praxis through subsequent endorsement by the Member States in Treaty amendments. He asserts, with some reservation, that the act of endorsement by the Member States simultaneously signals an approval of the legal principles (e.g. effectiveness) underlying such expansive reading, which can be translated into a finding that the Court has after all acted *intra vires*.[68]

I am torn about the applicability of this assertion in the case of the Court's scope praxis. The Court, when emphasising the decisive role of the scope of Union law, seems to advocate the effective fulfilment of the integration project. This, generally, is an aim accepted by the Member States; yet, it is not easily married to their initial claim to

[65] For an evaluation of the desired outcome of the European 'federalisation' from an American perspective, see E Young 2002, p. 1723–1730.
[66] Similarly S Weatherill 2009, p. 23: "It is accordingly hard to devise objections of a *constitutional* nature, transcending mere political disagreement about the virtues of a particular proposed measure, especially those advanced under the broadest of the provisions of the Treaty authorising legislative actions, Articles 95 and 308 [presently 104 and 352 TFEU]" [emphasis in the original].
[67] J Snell 2013, p. 109.
[68] P Craig 2011, p. 406–407.

power as Herren der Verträge as it is capable of stripping the division of powers of its fullest effect when paired up with the scope of Union law. The Member States have not reacted to the Court's praxis touching upon retained powers with Treaty amendment, but they nevertheless often live up to the Court's expectation in retained powers litigation and accept the claim that the scope of EU law cuts away from their discretion. However, as shall be seen in the following, the rationale advocated by the Court has not been accepted by the Member States entirely unqualifiedly. In sum, an agreement to further the Union aims seems to have watered down the Member States' perception of the importance of the division of powers to some extent, but the process of socialisation is still incomplete.

2.4 Theoretical reasoning behind the constitutional evolution

2.4.1 Neofunctionalism as explanation for the Court's expansive reading of Union law

The present Section shall deal with explanations developed in scholarly works for the expansion of the scope of Union law and the simultaneous erosion of Member State discretion in areas of retained competence brought forward by the case law of the ECJ. A credible one, in my opinion, is offered by the neofunctionalist theory, as applied by Burley and Mattli[69] who have transposed into the legal framework the political theory of neofunctionalism originally developed by Ernst Haas explaining European economic integration, and utilise it to explain the ECJ's use of Union law as a tool for furthering integration.[70]

The neofunctionalist approach relies on the concept of *spill-over*: according to neofunctionalist thinking the fulfilment of integration goals in one area inescapably requires integration in other related areas as well, causing a further need for approximation in more and more interrelated fields. This phenomenon is described as functional spill-over. Interestingly, Burley and Mattli are careful to note that the neofunctionalist theory "does not postulate an automatically cumulative integrative process"[71] but the initiation of the chain reaction is contingent upon actor response.

The position of the Court as the exclusive arbiter of and major contributor to Union law allows it to judicially validate the spill-over effect and thus further integration beyond

[69] A-M Burley and W Mattli 1993.
[70] For a critique of the neofunctionalist legal theory, see K Alter 2009. Alter herself proposes a closely related theory putting more focus on the inter-relations of judicial actors and on the political aspirations of the builders of the Union.
[71] A-M Burley and W Mattli 1993, p. 55.

the initial setting. The Court has expressly opted for doing so, and it further uses neofunctionalist language in order to justify and rationalise its interpretative (or, rather, policy) choices: when reasoning by ”or else” type of justifications, i.e. asserting that a certain interpretative angle is indispensable or else the entire system of Union law will become crippled, the Court in fact follows the very core of the spill-over theory with the exception that it presents the course of legal evolution as inevitable.

The Member States respond to the Court's integrationist praxis with what the neofunctionalist theory calls political spill-over: the expansive interpretations of the Court pushing the limits of Union law a bit further are, despite possible initial resistance, most often finally accepted by the Member States as a valid statement of the existing law and even adopted by them as the point of departure in future litigation before the Court.[72] This pattern has repeatedly surfaced in connection to the more profound policy rulings by the Court from the early decisions introducing the principles of direct effect and supremacy to the fundamental rights adjudication and the requirement for effective national remedies in cases of breaches of Union rights of citizens.[73] By adapting their behaviour in this way the Member States shift their legal expectations to correspond to the Court's reasoning, thus furthering the integration process for their part.[74] This adaption is crucial for the Court's jurisprudence to accrue any actual constitutional effect – a ruling of the Court cannot in and of itself produce constitutional changes[75], but the change only takes place if the Member States assume it as constitutional reality and act accordingly.

The flexibility shown by the Member States seems remarkable at times. Take *Van Gend en Loos* as an example: a staggering half of the then 6 Member States in their opposing observations in the case expressly referred to their will as drafters of the Treaty and stated that they had not meant for the Union to accrue the nature that was suggested in the case, i.e. for the Treaty articles to have direct effect.[76] Yet, the Court ruled against the Member States' express preference and the principle has since gained a firm foothold in EU law. A not entirely dissimilar ruling was given by the Court more

[72] ibid. p. 67.
[73] M Dougan 2012, p. 114.
[74] In Corrias' language, ”[s]omething new is formed in the acts that take up the old to transgress it, and then sediment”; L Corrias 2011, p. 82. The same has been noted by Weiler: “In many instances, constitutional doctrine presupposes the existence of that which it creates --. Thus, the empirical legitimacy of the constitution may lag behind its formal authority --.” J H H Weiler 2003, p. 9.
[75] A Stone Sweet 2010, p. 19.
[76] ibid. p. 20.

recently in *Daiichi Sankyo*, a case concerning the classification of Article 27 of the TRIPs Agreement as pertaining to either the competence of the Member States or the Union initiated after the inauguration of the Lisbon Treaty: the Court found against competing claims inserted by numerous Member States that "when providing in Article 207(1) TFEU that the 'commercial aspects of intellectual property' are now fully part of the common commercial policy, the authors of the FEU Treaty, i.e. the Member States, could not have been unaware that the terms thus used in that provision correspond almost literally to the very title of the TRIPs Agreement", and found consequently that the TRIPS Agreement fell within the field of the common commercial policy, i.e. the domain of the Union.[77]

These examples show that even though the outcomes of the processes before the ECJ at times cement legal interpretations of Union law which the Member States have not originally subscribed to, the Member States have adopted a habit of obedience[78] within the framework of the Union. The same is visible in the development in the fields of retained powers wherein the Member States have to a large extent accepted and absorbed the retained powers formula applied by the Court.

Just why do, then, the Member States adapt? The way the Court implies that the interpretation adopted is a direct result of the purpose of the Treaties and inherent in Treaty articles is of course a highly effective method of legitimisation in a Treaty system in which the contracting parties have undertaken to strive to fulfil the integration agenda, though originally in a limited field in regard to policies involved. What further enhances this effect is that the content of the promise made by the Member States still remains unveiled and continues to evolve.[79] Burley and Mattli attribute this binding of the Member States to a phenomenon within the neofunctionalist theory called the *upgrading of common interests*, by which they refer to "a process of reasserting long-term interest, at least nominally perceived at the founding and enshrined in sonorous phrases, over short-term interest"[80]. Some authors have suggested that a degree of autonomy of the Court and the Commission are "conspicuously required in order to

[77] Case C-414/11 *Daiichi Sankyo and Sanofi-Aventis Deutschland* ECLI:EU:C:2013:520, paras 55–57 and 61.
[78] J H H Weiler 1991, p. 2421.
[79] L Corrias 2011, p. 140: "Not unlike the concept of the common or internal market that forms the very core of European integration, the principle of loyalty reminds Member States of the promises they made for a common cause. What these promises entail, exactly, cannot be decided *a priori*, but only in the specific circumstances of the situation."
[80] A-M Burley and W Mattli 1993, p. 69.

provide an environment within which commitments can be extracted and enforced on a credible long-term reciprocal basis."[81] It is thus presumed that were the Union institutions bound by the Member States' will, the Union project would come to a halt.

Burley and Mattli consider the merit of the neofunctionalist theory as opposed to traditional legalist viewpoints to be that it admits that legal functions do not operate in an absolute political vacuum.[82] This being said, they note that legal decision-making with an integrationist agenda can seem to function unaffected by political aspirations and is in fact likely to be the most effective if it remains "within the apparent bounds of the law".[83] Indeed, what is at stake in the safeguarding of the integral features of the Union legal order (the unity of the integration project, the effectiveness of EU law etc.) seems to lie in the terrain between the normative and the factual: in order to ascertain that the legal framework of the Union remains consistent and can factually be adhered to by the Member States, the Court needs to "reconcile the normative demands of a uniting Europe with the factual, popular and political support of a united Europe."[84]

What is interesting is that the very judges of the ECJ behind the judgments and decisions spurring integration neither seem to explain the course of action taken by the Court with purely legalist viewpoints: the many examples[85] of writings of former ECJ judges brought forward by Burley and Mattli are tell-tale descriptions of the political thinking that was entailed in the deliberations of the revolutionary 1960s decisions that produced direct effect and supremacy among other focal principles of Union law.[86] This openness is most likely explained by the fact that the early spill-over was treated with acceptance by the academic discussion.[87]

[81] S Weatherill 2009, p. 26.
[82] A-M Burley and W Mattli 1993, p. 53. They define legalism as an approach which denies the existence of any ideological or socio-political influences on the Court's jurisdiction, ibid. p. 45, which definition shall be relied upon here.
[83] ibid. p. 57 and 69. For an American take on the politics involved in the interpretative praxis of the U.S. Supreme Court as opposed to the treatment of the subsidiarity principle in European context, see E Young 2002, p. 1678–1680 and 1713–1718. Young suggests that the political–legal dichotomy in evaluating a court's influence on competence disputes is false and that judicial review of limits of competence is feasible by recourse to statutory interpretation as opposed to deciding on the level of constitutional power.
[84] L Corrias 2011, p. 144.
[85] A-M Burley and W Mattli 1993, p. 66 (with reference to judge Pescatore), p. 71 and 73 (with reference to judge Mancini).
[86] See even K Alter 2009.
[87] With regard to the spill-over effect of the Court's readings of the primary Treaty provisions see M Dougan 2012, p. 130.

As a defence against accusations of judicial activism, it may be asserted that the non-political role of the Court is witnessed in the circumstance that the Court itself is not responsible for setting its agenda inasmuch the cases before it flow directly from national courts on the initiative of the latter. Even if this is the case, the Court still is in control of its own stances; the fact that the Treaties only enable the Court to take action when so requested by national courts merely entails that the Court has potentially lesser opportunities to intervene. When, however, a susceptible case finds its way to Luxembourg, it is in the Court's hands to decide whether to use judicial restraint or not. As any court making procedural choices, the Court is capable of active participation as also envisaged by the doctrines developed in its jurisprudence: the Court may, *inter alia*, point to Union legislation that the referring court has failed to take account of[88], reformulate questions posed to it in the reference for preliminary ruling or provide guidance to the national court even where it officially leaves the final decision-making power to the national level[89]. As has been noted by Weatherill, the European institutions tend to show an inclination towards seizing an opportunity for Union action rather than leaving something for the Member States to decide for themselves.[90]

Indeed, one can justifiably maintain that when dealing with areas of retained powers the teleological method of interpretation as such entails a policy choice; that of deciding between the promotion of integration on the one hand and respect of the principle of conferral on the other. The legalist explanation of teleology insisting that the expansive interpretations of Union law are, somehow similarly to orthodox religious reading, 'found' within the Treaties without any involvement of subjective actors is unconvincing, even more so as the intensity and extensive nature of the Court's interpretative praxis has fluctuated throughout the decades in clear synchrony with the political atmosphere in regard of integration. Indeed, it is by no means entirely clear what the *telos*, i.e. the ultimate end of the entire Union process, is;[91] could it even transform over time without the Treaties being touched at all?

Voices supporting the ECJ against claims of judicial activism tend to regard the subtlety and the sensitivity of the Court towards the current state of the integration process and

[88] See e.g. Case C-434/09 *McCarthy* ECLI:EU:C:2011:277, para 24.
[89] E.g. Case C-73/08 *Bressol and Others* ECLI:EU:C:2010:181, para 65.
[90] S Weatherill 2009, p. 22.
[91] L Corrias 2011, p. 16.

popular reception as a virtue.[92] This kind of responsiveness is, however, better suited to a political actor than to an adjudicator. It may serve well to buffer the Court against popular dislike and legitimise its actions as a part of the European body politic, but in regard to legal legitimacy the outcome might be the opposite. In a purely judicial view a judge should be an actor different from an elected politician – fear of losing popular support should not affect judicial reasoning. However, this is where the ECJ differs from a traditional European (constitutional) court: it cannot merely concentrate on ruling in accordance with the Treaties but needs to take account the sustainability of the Union as a political phenomenon.[93]

This is not to say that the teleological method of interpretation itself would be legally dubious; what is, rather, in my opinion is the way in which the Court seems to have developed its stance over the course of years, each time resting on the same teleological method claiming the source of the interpretation to be the initial purpose of the Treaties[94] *and* still making the pretence to be an objective fulfiller of the purpose of the Treaties. This contention needs to be separated from the widely accepted principle in EU law of dynamic interpretation: the issues of Union law might call for different solutions in different decades. But, as noted above, applying the same to constitutional law seems less founded; to uphold that the *same fundamental provisions establishing the Union* could enable interpretations at each time that are the polar opposites of one another does indeed seem incoherent.[95]

[92] M Dougan 2012, p. 121.

[93] With regard to the perception of the Court's action as political in nature, the observations of Davies concerning the purpose-oriented competences of the Union offer an interesting point of comparison. Davies has argued that the open-ended formulation of the functionally oriented competence clauses in the Treaties has lead to a technocratisation of Union law and the disappearance of the political from the legislative process on Union level; conflicts of interest are thus wiped out off the legislative menu as the means for the Union to fulfil its tasks, i.e. competences attributed to it in the Treaties, are innately geared towards one political inclination (see G Davies 2015). While Davies' observations concern positive integration and the actions of the Union legislator, a parallel may be drawn between this remark and the role assumed by the Court in negative integration adjudication as the guardian of the integration project: in the absence of clear demarcation of limits to integration in the Treaties and/or a definite balancing mechanism for national interests of Member States as opposed to integration aims, and where the central values of Union law are clearly oriented towards deepening integration, the Court is driven to assume the task of channelling competing interests in its praxis with tools that are innately pro-integration. What Davies downplays in his thesis is that the Treaties do also entail power-containing articles geared towards championing national interests (e.g. the principles of subsidiarity and respect of national constitutional identities); these delimitations, however, only introduce an exception to the main current of integration-oriented empowering clauses.

[94] For examples in the field of education, see Section 4.2.

[95] A prime example of this difference is provided by the description of Advocate General Ruiz-Jarabo Colomer in his Opinion delivered in Joined Cases C-11/06 *Morgan* and C-12/06 *Bucher* ECLI:EU:C:2007:174, para 3, in which he describes freedom of movement as "a fundamental premiss, *but one whose content varies, since it applies to a changeable situation*, which evolves in accordance with social needs, improved transport facilities, the increase in trade and so many other factors which

The Court has developed a way of argumentation resting on formulae developed in previous case law, which in turn has been justified with the purpose of the Treaties without clear positive legal basis.[96] This judicial law-making activity has brought the Court and EU law a long way from the point of departure, i.e. the Treaties, all along of course with the tacit consent of the Member States. The journey has admittedly furthered the aims enlisted in Art. 3 TEU. As, however, the Union remains a system based on a treaty which includes a codification of the principle of conferral and was initially limited to certain policy fields by the Member States, a (civil law) lawyer tends to long for some tangible legal basis.[97] Further, in situations such as is the case when dealing with areas of retained powers, when the actions of the Court seem to collide with Treaty articles regarding conferral of powers and the justification offered by the Court is the need to secure the fulfilment of the four freedoms or the genuine enjoyment of the citizenship of the Union, the teleological interpretative praxis seems to be more readily explained by neofunctionalist theory than by pure legalism.

2.4.2 Federalist viewpoints as explaining Member State adaption

Differing views have been expressed as to whether the Union can be described as a federal system.[98] Suffice it to say here that depending on the definition of 'federal' one is to subscribe to, the Union does at least border on a federal structure, as observed e.g. by Weiler[99]: while it is comprised of to some degree autonomous Member States with their own peoples wielding the constitutional power in each state, and lacking a demos of its own[100], the Union is simultaneously a system labelled by interdependence

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increase the mobility of individuals and their families" [emphasis added here]. As I see it, if freedom of movement, as described here, is understood as the rights conferred to individuals, its autogenous development poses no problems. However, if the concept is observed as a constitutional feature, i.e. if we concentrate on its power of bringing legal matters into the sphere of application of the Treaties and consequently generating obligations to the Member States, in my opinion it becomes more problematic.

[96] Weiler has quite fittingly described the constitutional scheme of the EU as a 'pastiche' that just came to being without a creator. J H H Weiler 2003, p. 12.

[97] This yearning lead to the proposed codifications of the principle of supremacy in the Constitution Treaty.

[98] For a historical account see e.g. R Schütze 2009, who advocates the abandonment of narrow European readings of the term federalism as referring to a federal super state and the adoption of a less stringent American counterpart focusing on the interplay of international and national traits in federal structures.

[99] Weiler names the allocation of powers as well as the principles of direct effect and supremacy as such tell-tale signs. J H H Weiler 2003, p. 8.

[100] Claims have been made that there would in fact already be a European public sphere based on a European public culture, see e.g. M P Maduro 2003, p. 82, footnote 11, as well as R Schütze 2009, p. 1099–1102. In the wake of the Eurocrisis with the experience of an evident lack of pan-European solidarity in e.g. the financial bail-outs of Greece, however, one tends to be a bit sceptical of the existence of a shared feeling of unity between the nations, or individuals, that make the European Union. In my opinion, Young's characterisation according to which "Europe appears to be moving toward an ever-closer Union while Europeans retain substantial attachments to their Member States" seems more in

between the Union and its constituent members. Irrespective of the label, the constitutional model developed in the Union seems to be some sort of a hybrid: in Weiler's words, what we have at work in the EU is "a 'confederal' institutional arrangement and a 'federal' legal arrangement" with a "top-to-bottom hierarchy of norms" and a "bottom-to-top hierarchy of authority and real power".[101] This observation is highly interesting in view of explaining the constitutional nature of the Union, as it seems to provide a model successfully pairing the Member States' meek acceptance of the Court's interpretative praxis with their simultaneous clinging to their status as Herren der Verträge.

The participation of the constituent members of a federation to the enactment of the federation's constitution is generally regarded as a mitigating factor as regards the circumstance that the federation itself is in charge of construing the limits of its powers.[102] In the sphere of EU law, the same constellation is often also seen as a paradox[103]: individual Member States readily complain the expansive behaviour of the Union legislator or the ECJ and yet, in respect to regulation, the collective of the Member States may have initially themselves given their blessing to the piece of legislation at hand when participating in the Union legislative process through the Council. Further, as regards discussion on the limits of competence of the Union and the widening of the scope of Union law, the Member States almost without exception tend to succumb the Court's rulings initially criticised and to agree on codifications of the same in Treaty amendments or secondary Union legislation, thus accepting the widening of the scope of the EU law and the possible consequent erosion of their own powers.

According to some authors, the Member States themselves have brought this scenario forward: Basedow contends that the very institutional framework laid down in the Treaties and agreed to by the Member States, with its preliminary ruling mechanics contained in Art. 267 TFEU, is "characterised by an inherent trend towards an extension of Community law as such".[104] This notion is, to some extent, self-evident, as the very

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check with reality; E Young 2002, p. 1735. Where the Europeans remain indifferent (or even oppose) to the constitutional structure of the Union, the active feature of democracy (e.g. *government* by people) is lacking and the notion of a European demos is diminished to a constitutional fable.

[101] J H H Weiler. p. 9–10. It should be pointed out that observers such as Schütze pinpoint this very feature as what in essence makes the Union a federal structure; see R Schütze 2009.

[102] O Beaud 2014, p. 26.

[103] H-W Micklitz & B de Witte 2012, p. V.

[104] J Basedow 2012, p. 67; similarly S Weatherill 2009, p. 26–27.

function of the Court is to produce interpretations of the body of EU law. However, with the extension of the scope of Union law in mind, it should be noted that it is by no means resolved[105] whether the Court would be under any obligation to explore the unknown and constantly find new fields of application for Union law; even if the referral process were inclined towards producing outcomes favouring the internal market development and widening the area of relevance of the Union, the Court still remains free to curb this integrationist enthusiasm on the basis of the limitations laid down in the Treaties. There are, after all, many other forms of cooperation which could lead to further integration than factual harmonisation through the Court's findings concerning the requirements posed by Union law where the Member States hold the power.[106]

While Micklitz and de Witte conclude from the paradoxical relationship of the Member States to the ECJ's expansive behaviour that the Member States accept the Court's praxis as necessary for furthering integration[107], the neofunctionalist theory would identify the phenomena as owing to the shifting of the Member States expectations. The latter explanation also serves as a point of departure for a review within the federalist conversation. What is actually taking place in the constitutional dialogue between the Union and its Member States is often an exercise in which the Court rules on a matter and the Member States subsequently adapt.[108] If, then, the role assigned to the Member States is *mostly reactive*, is the Member State input into the building of the European constitution sufficient to make up for that the Court has taken the harness in steering the furtherance of the Union law?

The Court has been for long recognised as a 'legislative catalyst'[109] in European integration. The reactive Treaty amendments made by the Member States have followed the trends which have surfaced in the case law of the Court[110] as it has navigated the Union towards deeper integration. The Court seems to think it knows what's best for the Union; and indeed, it has succeeded in identifying the areas critical for the continuation

[105] As noted above, the Court is indeed bound under Art. 19 TEU to ensure that 'the law' is observed; whether this obligation can be seen to amount to an active duty to promote integration cannot be directly inferred from the text of the Treaties.
[106] See e.g. P Craig & G de Búrca 2011, p. 86.
[107] *Supra* n 103.
[108] This is illustrated by case law in the field of education reviewed below in Chapter 4.
[109] P Craig 2012, p. 13.
[110] As regards the transition from the classical free movement of goods to other freedoms in the Court's case law, see e.g. ibid. p. 20.

of the integration process and laid the ground for wider harmonisation.[111] The ECJ fulfils the aim of integration in a way which the Member States are incapable of (e.g. the Court's activity during the empty chair crisis during the 1960s) or which they have not foreseen or been able to deduct from the Treaties (e.g. the sectorial entry to new policy fields in the case law of the Court which has only afterwards been succeeded by a Treaty amendment attributing the Union powers to act in said field).[112]

If the Union is seen as a system of co-operative federalism as depicted by Schütze, the Court as an emanation of the federal centre in doing so acts as one of the "mutually complementary parts of a single governmental mechanism" seeking to fulfil the pre-determined aim of the federation.[113] The problem surfacing in the form of Member State disobedience is rooted, yet again, in a difference of perspective: while from the vantage point of the Union the Member States with their national judiciaries and enforcement mechanisms indeed act as constituent parts of the Union, at Member State level the concept of state autonomy is perhaps deeper engraved. Against such an outset, a federal court seeking to guide a constituent member on an issue relating to a retained power can be seen to act either within or without the bounds of the federal structure, depending on how the powers held by the Member States are seen to relate to the federation. This difference is well illustrated by Schütze's observations in regard to the introduction to the Treaties by the Member States of competence clauses excluding harmonisation measures: while according to the theory of co-operative federalism the powers retained by Member States are part and parcel of the grand total of competences within the sphere of the Union project, in reality the Member States have introduced constitutional thresholds obstructing the Union's access to some domains in a way which undermines the functioning of the envisaged federalism.[114]

The Member States have, of course, committed themselves to pursuing the goals laid down in the Treaties, and accept the Court's active approach. Indeed, the Court is not to

[111] For a recount of the emergence of Union citizenship from the interpretation given to the term 'worker' in the Court's praxis, see M Dougan 2012, p. 140.
[112] The legal self-image of the Court in this respect is captured by Advocate General Ruiz-Jarabo Colomer in Joined Cases C-11/06 *Morgan* and C-12/06 *Bucher*, paras 1–3, where he notes that the Court identifies itself with an artist judge "who, using his hands, his head and his heart, broadens the horizon for citizens, without losing sight of reality or of specific circumstances […] especially now that the constant evolution of the ideas which inspired the creation of the Community has slowed down."
[113] See R Schütze 2006.
[114] ibid. p. 182–183.

be criticised for participating in the integration process[115], but rather its means of participation are what may cause some alarm.[116] For, if one adopts a wide perception of democracy, courts are generally accepted as legitimate mediators of competing societal values and rights ”within and above the nation-state” and in this role perceived as partaking to democratic governance rather than bypassing the legislative process.[117] But: with the principle of attributed powers in mind, the problematical nature of the ECJ's proactive stances in defining requirements posed by Union law is confined on the one hand in that such conduct by the Court indeed does bypass the legislative harmonisation by relying on a interpretation of the primary law solely arrived at by the Court[118] within areas expressly intended by the Member States to be decided on a level closer to their citizens.

On the other hand, as observed in more detail ahead, the requirement that Union law be adhered to favours the Union values and forces the Member States on the defensive even in the fields of wherein the Union lacks regulatory powers and in which the Member States in principle should be able to make their own value choices more freely.[119] Especially the difficulty which the Member States face in proving ex ante how the circumstances would have evolved had the Member State *not adopted* the challenged, allegedly overly restrictive policy has faced criticism.[120] This appears to contradict the principle of conferral, as such favouring is likely to lead to the inadvertent eradication of Member State powers and simultaneous expansion of EU influence within said field solely on the basis of the Court's value judgments and without political influence from the Union legislator.[121] After all, even though courts were regarded as legitimate mediators of societal values, the competence of a court as well as those very values should in principle emanate from a constitution or other products of the

[115] Indeed, as noted by Dougan, the Treaties neither mandate nor prohibit the Court's active participation in the creation of the Union's substantive economic or social policies, be it that such participation inevitably entails that the Court pronounces its binding interpretations on the matter at hand. M Dougan 2012, p. 118.
[116] Similar concerns voiced in the field of retained powers e.g. by N Reich, p. 91. See also L Boucon 2014, p. 175.
[117] D Kostakopoulou 2012, p. 175–176.
[118] A Prechal et al. 2011, p. 241.
[119] M Dougan 2012, p. 127. See even the Opinion of Advocate General Stix-Hackl delivered in Cases C-76/05 *Schwarz and Gootjes-Schwarz* as well as C-318/05 *Commission v Germany* ECLI:EU:C:2006:596, para 39: “It does not necessarily follow from the applicability of the fundamental freedoms that certain national legislation would not be compatible with Community law; however, the Member State in question must justify such legislation if necessary, which restricts considerably its margin of discretion in making policies falling outside Community competences.”
[120] D Damjanovic 2012, p. 161.
[121] M Dougan 2012, p. 126–127.

legislative process as initial expressions of democratic choice. Irrespective of which demos one is to see as relevant in Union context, that constituent body is sidestepped.[122]

The issue of sovereignty surfaces in the constitutional dialogue between the ECJ and national constitutional courts: in their assertions for foothold in steering the European integration certain national constitutional courts have made use of the principle of sovereignty as a brake against integration perceived as overly vehement.[123] The perspective conveyed by constitutional courts in their rulings is that the Member States, when joining the Union, have assented to a limitation of their sovereign rights, but not transferred their sovereignty to the Union; therefore, all legitimacy of the Union law stems from *national constitutions*, guarded by national constitutional courts mandated to review the compatibility of EU law with the fundamental principles of the national constitutional orders[124]. National constitutional courts have consequently claimed the final word in assessing the legality of the European integration process in light of the constitutions they interpret, with the German constitutional court notably going as far as claiming a right of *ultra vires* review.[125]

As noted by de Witte, the ECJ has not overtly opposed to this claim, even though it is in direct contradiction with its holding of its own status as the final arbiter of Union law and the limits of Union competences. The Court was, however, adamant in its stances in the forming years of constitutionalisation as regards the binding nature of the direct effect and supremacy doctrines, succeeding in bringing national constitutional adjudicators to principally recognise these focal tools of European integration, although subject to the above limitations.[126] National constitutional courts thus recognise the idea, but explain it on their own constitutional terms. The caveats made by national constitutional courts may seem strict when read in the dissenting judgments openly challenging the ECJ's reading of the Treaties; yet, these theoretical assertions are to certain degree watered down by a certain reluctance shown by these very courts in

[122] On the connection of the purpose-oriented nature of the Treaties with the experienced democratic deficit in the Union, see G Davies 2015.
[123] B de Witte 1997, M Wendel 2011.
[124] On the right of constitutionality review claimed by some national constitutional courts, see e.g. M Wendel 2011, p. 100–103.
[125] For an account of the classic jurisprudence of the German constitutional courts, see e.g. P Craig and G de Búrca 2011, p. 276–279. The prerogative of *ultra vires* review has subsequently been claimed by constitutional courts in other Member States as well: see M Wendel 2011, p. 99.
[126] B de Witte 1997, p. 182; for a concise account of the development of the Italian, French, German and British constitutional courts' stance, see A Stone Sweet 1997, p. 312–317.

engaging in full-blown attack against the Court's jurisprudence.[127] The results of this recognition are immense: in absence of a discursive intervention by a national constitutional court, the stances taken by the ECJ on the nature of the European constitution prevail.

This highlights one further problematic characteristic of the disposition of the ECJ as a party in the constitutional dialogue: whereas the initiatives of, say, the Commission are *political* in nature and thus only realised once officially approved by all parties, the 'initiatives' made by the Court, i.e. the Court's rulings, are *adjudication* and binding upon the Member States *ab initio*. Although even case law can be reversed, it follows from the fact that the ECJ decisions with the most effect on questions of competence tend to interpret primary Treaty articles or general principles of Union law that it might not be as simple for the Member States to resist and refuse from codification, i.e. posterior acceptance of the Court's policies.

Alter has shown that the political reality of changing the EU framework is one ridden with obstacles: even though there existed political will to reverse ECJ doctrine through legislative or Treaty amendment, procedural reality with a need to achieve consensus among the 28 Member States may impede action.[128] Furthermore, as noted by Weiler, even though there were no legal or factual impediments for a Member State that had originally voted in favour of a Union act to later resist upon its effects by recourse to an *ultra vires* claim, the political environment at time could render such conduct a political faux pas which any Member State would seek to avoid.[129] Also the central involvement of national courts in judicial law-making by the preliminary reference procedure poses powerful constraints on Member State intervention, as the national executive branch would thus stand against the judiciary.[130] It could be added that neither does the legal reality of the Union favour Member State crusades to challenge the ECJ doctrine before the Court – arguing before the final arbiter and authoritative interpreter of Union law that the construction reached by the latter is flawed or against the intentions embedded in the Treaties, the Member States suffer from a severe handicap at the outset. Member State adaption may thus be forced insofar they wish to continue as Union members as

[127] See e.g. P Craig & G de Búrca 2011, p. 268–296.
[128] See K Alter 2009, especially p. 124–128. Stone Sweet has similarly noted the unanimity required in Treaty amendments as a factor insulating the Court's constitutional jurisprudence from reversal; see A Stone Sweet 2010, p. 6.
[129] J H H Weiler 1991, p. 2450.
[130] ibid. p. 2421.

they are factually unable to bring about a change in the course of development of the Union acquis.

It should be noted, however, that depicting the Union and the Member States as adversaries in a race for more power and influence is also partly misleading. As noted by commentators such as Alter and Young, the erosion of Member State autonomy might even be a phenomenon benignly neglected by national politicians in search for immediate benefits from the Union; or, the involvement of the Union may be even welcomed by national politicians struggling to succeed in enforcing their preferred policies on the national level.[131] Weiler, on the other hand, has asserted that the Member States were able to stomach the constitutionalising jurisprudence of the Court in the first place mainly because of the simultaneous hijacking of Community decision-making process by the Member States.[132]

Yet, in the case of the argument from the scope of Union law and the retained powers formula, Member State response and adaption is in my opinion more likely explained by the first-mentioned considerations regarding difficulty of resistance or the incrementalism explanation brought forward by Weiler[133] than by the latter-mentioned utilisation views. Of course, a national politician might deem it beneficial for their own political pursuits that regulatory issues within the autonomous realm of a Member State were indirectly affected by EU law. However, this seems somewhat unconvincing as an explanation for such beneficial impact would be rather incidental and difficult to predict; would not such a national politician rather advocate the inclusion of such policy areas in the competences of the Union? Also, it is hardly believable that the Member States would have remained indifferent at the face of the argument from the scope due to their control over the Union legislation process, as the control over and conscious widening of the scope of Union law by the Court could hardly be harnessed by means of the powers of the Union legislator; it would require a more fundamental Treaty amendment.

[131] K Alter 2009, p. 118–121, and E Young 2002, p. 1691–1692.
[132] J H H Weiler 1991, p. 2423–2424 and 2428–2429. Weiler defines the Community decision-making process as (1) the political impetus for a policy; (2) the technical elaboration of policies and norms; (3) the formulation of a formal proposal; (4) the adoption of the proposal; and (5) the execution of the adopted proposal.
[133] According to Weiler, the constitutional change brought forward by the Court in the 1970s and early 1980s went largely unnoticed as instead of express statements in landmark cases ”there was a slow change of climate and ethos whereby strict enumeration was progressively, relentlessly, but never dramatically, eroded.” See ibid. p. 2447.

The above brief excursion to the origin of competences in the Union concluded that competence as well as use and limitation thereof are fluid notions in Union law. The elasticity of the contours of the scope of Union law emanates from the structural features of the Union, namely the dual role of the Court as both the mapper of the limits of the Union project as well the arbiter of adherence of Member States to the requirements posed by the Treaties. The construction held by the Court can be justified by reference to the telos of the Union project; yet, it does not enjoy straight-forward acceptance by the Member States on Treaty level.

3 Negative integration in the fields of retained powers

3.1 The retained powers formula

The present Chapter shall lay out a more in-depth description of the Court's activities affecting Member State competences with the most sensitive nature, objects of vigorous national interest – the area of retained powers. The constitutional structure advocated by the Court is embodied in the use of a so-called *retained powers formula* developed in ECJ praxis. I shall first explore the mechanisms utilised by the Court in engaging in dialogue with the Member States in the fields where the Union has only supportive powers, or no powers at all, and then move on to examine the position of the Member States as the holders of retained powers. A brief analysis of the issue on Treaty level concludes this Chapter.

We shall now turn to a phenomenon described by Azoulai as the most important development in EU law in the last decade[134]: the employment by the Court in negative integration[135] cases of a certain formula which presses the Member States towards streamlining their policies with the EU ideals in fields where according to the attribution of powers the Member States have kept their competence to regulate, i.e. the fields of retained powers[136].

[134] L Azoulai 2008, p. 1341.
[135] Negative integration is a form of harmonisation entailing the striking down of incompatible national legislation in order to remove barriers of cross-border trade, whereas positive integration entails harmonisation through Union legislative measures; see P Craig & G de Búrca 2011, p. 638.
[136] Competence in these fields either rests with the Member States exclusively, or the Union merely enjoys a supportive, coordinating or supplementary competence therein. As traditional fields of retained powers are often mentioned e.g. direct taxation (see e.g. Case C-279/93 *Finanzamt Köln-Altstadt v Schumacker* ECLI:EU:C:1995:31), education (Art. 165 TFEU), surnames (C-148/02 *Garcia Avello* ECLI:EU:C:2003:539), wartime compensation (C-192/05 *Tas-Hagen and Tas* ECLI:EU:C:2006:676),

First emerging in the rulings of the Court as early as in the 1960s[137], the retained powers formula has become systematically integrated in Union law in the 1990s.[138] The rationale and content of the formula is (with slight case-by-case variation) that although the Member States have retained powers in certain areas and are free as such to regulate therein, they must nevertheless respect EU law when exercising this power in matters falling within the scope of Union law. The underlying logic is that were the Member States able to act in controversy with their Treaty-based commitments on the pretext of their withheld sovereignty within a certain policy field, they would undermine the effective fulfilment of the Treaties.

This explanation provided by the Court is as such credible and sensible – one can hardly raise any objection to the assertion that a bona fide application of the Treaties as and of itself entails that the Member States refrain from adopting action which causes effects contrary to the very purpose of their commitments under the pretence that the activity was separate from the Treaty framework. The crux of the questions raised by the retained powers formula is, however, what the acceptance of such a feature of Union law entails in view of the constitutional structure of the Union built upon an idea of attributed competences. For, as the Court holds the authority in deciding where Union law becomes pertinent, what the requirements posed by Union law are, and whether a breach of Member State obligations has taken place, the formula has potential of shifting the constitutional boundaries of the Union project.

Boucon has observed the use of the retained powers formula as the other half of a two-fold mechanism applied by the Court when confronted with Member State behaviour within the fields of retained powers which is ill-fitting with the Union aims: in addition to finding a connecting factor to the scope of EU law and asserting in such a situation a Member State obligation derived from the Treaties in accordance with the retained powers formula, the Court has conceptually separated the scope of EU law[139] from the

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and nationality (C-135/08 *Rottmann* ECLI:EU:C:2010:104). The connections in which the Court has made use of the formula are, however, manifold; for an example concerning the protection of property ownership, see Case C-171/08 *Commission v Portugal* ECLI:EU:C:2010:412, para 64.

[137] See e.g. Joined Cases 6 and 11/69 *Commission v France* ECLI:EU:C:1969:68, paras 14–17.

[138] L Azoulai 2011, p. 197.

[139] A Prechal et al. 2011 define the scope of EU law as encompassing 1) measures implementing EU law; 2) measures in which the Member State relies on a permitted derogation under EU law; and 3) measures which fall otherwise within the scope of the law of the Union, p. 216.

scope of EU powers and found that express Union competence is not required for a question to be touched by Union law.[140]

In this regard the finding of Boucon (and also Azoulai[141]) is peculiarly formulated: it seems to embody the classical Herren der Verträge line of thought implying that for the scope of EU law and the area in which the Union may regulate to differ from one another, an active deed of conceptual separation by the Court was needed. However, it should not come as a surprise to the Member States that they incur obligations from the Treaties also outside the situations where the Union is competent to exercise power; this is present in the Treaty articles laying down the main features of the Union project.[142]

Even a brief look at the systematics of the division of competence between the Union and the Member States goes to show that the scope of Union law and the scope of Union powers are not one and the same, and that the Member States incur obligations from partaking in the integration project: the Treaties lay down e.g. a category of shared competence, in which the Member States are expected to actively participate in the completion of Union legislative projects, using their legislative power *within the scope of Union law*. Similarly in the process of transposition of directives the Member States may enjoy even a wide degree of discretion, whereby they actively use their regulating competence to implement Union law; even though the regulation does not stem from the Union legislator, the Member States are acting within the scope of application of Union law.[143] This has been reiterated by the Court time and again, e.g. in the earlier classics such as *Costa v ENEL*: ”the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.”[144]

In Boucon’s view even the Court in its earlier retained powers case law in the field of education has embraced the view requiring a strict correlation between the competences

[140] L Boucon 2014, p. 172.
[141] L Azoulai 2008, p. 1341.
[142] This, presumably, is also the reason why Prechal et al. have asserted that the use of formulae by the Court is ”not a matter of competence creep in a proper, or perhaps narrow sense.” A Prechal et al. 2011, p. 215.
[143] Similarly ibid. p. 215: ”The distinction between the ’scope of the Treaty’ and the ’competence of the EU institutions’ is often blurred, or both notions are − erroneously − conflated. Although there is an overlap, the former is broader than the latter. Matters within the scope of the Treaty are not per se matters on which the EU may act.”
[144] Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66, p. 593.

of the Union and the scope of EU law.[145] She finds her cue in the decisions given in *Lair*[146] and *Brown*[147], cases pertaining to the right of a Union citizen to receive assistance to students in a host Member State, where the Court has found that Union law shall apply in regard to matters pertaining to access to vocational training (including social assistance intended to cover the charges related to such access), but not to matters of assistance given to students for maintenance and training, as such assistance "is, on the one hand, a matter of educational policy, which is not as such included in the spheres entrusted to the Community institutions (see Gravier) and, on the other, a matter of social policy, which falls within the competence of the Member States in so far as it is not covered by specific provisions of the EEC Treaty"[148]. Although the way in which the Court has emphasised the fact that the latter-mentioned pertain both to educational and social policy of the Member States is considerably stronger than in more recent case law wherein the formula is stated almost laconically[149], I would be cautious to reach the conclusion that Boucon here does. For, instead of seeing Union competences in the field of vocational training as the decisive link, it is also possible to construe *the policy aim* (i.e. access to vocational training unrestricted by nationality) included in the Treaties and illustrated by the Community competences as the connecting factor bringing the situation into the scope of Union law[150], irrespective of who holds the power to fulfil this aim[151]. This reading would correspond to the present application of the retained powers formula in fundamental freedoms and citizenship cases.

Azoulai, on the other hand, has asserted that at the outset while employing the retained powers formula the Court recognised the partial nature of the European integration: he has observed that in its decision in *Steenkolenmijnen*[152] dating from the early 1960s the Court noted that Union institutions only enjoy limited ability of intervening with

[145] L Boucon 2014, p. 173–174.
[146] Case 39/86 *Lair v Universität Hannover* ECLI:EU:C:1988:322.
[147] Case 197/86 *Brown v The Secretary of State for Scotland* ECLI:EU:C:1988:323.
[148] Case 39/86 *Lair*, paras 12–15 and Case 197/86 *Brown*, paras 15–18.
[149] ibid. paras 15 and 18 respectively; cf. e.g. Cases C-73/08 *Bressol*, paras 28–29, and Case C-75/11 *Commission v Austria* ECLI:EU:C:2012:605, para 47.
[150] This has also been the Court's contention in education cases preceding *Lair* and *Brown*, as evidenced by the Court's finding in Case 152/82 *Forcheri v Belgian State* ECLI:EU:C:1983:205, para 17*:* "It follows that although it is true that educational and vocational training policy is not as such part of the areas which the Treaty has allotted to the competence of the Community institutions, the opportunity for such kinds of instruction falls within the scope of the Treaty."
[151] It is also noteworthy that the competence held by the Community under the EEC Treaty with regard to vocational training provided in Article 118 boiled down to the Commission's mandate to promote closer cooperation between the Member States; hence, that competence in fact closely resembled the competence the Union presently holds in certain fields of retained powers.
[152] Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority* ECLI:EU:C:1961:2.

incoherent Member State behaviour in the domains of retained powers, an ability which "may be insufficient to remove these infringements of competition which 'conflict with the general purpose of the Treaty'; but that is 'the inevitable and legitimate outcome of the partial integration which the Treaty seeks to attain'."[153] Azoulai takes this as a sign of the Court acknowledging that the Member States retain some discretion in the domains of retained powers and asserts that by the 1990s the tables have turned, in that the Court would have abandoned its initial, more lenient stance.[154]

In regard to the construction to be given to the Court's early stance in *Steenkolenmijnen* I beg to differ insofar as it seems that the Court *did* even there impose an obligation on the Member States to respect the requirements posed by the common market undertaking on the Member States discretion in the fields of retained powers: when addressing measures taken by a Member State in the domain of its retained powers under the provisions of Art. 67[155], the Court has noted that "[c]learly, action taken under such provisions cannot be what, in any form whatsoever, Article 4[156] declares to be incompatible with the common market for coal and steel and abolished and

[153] L Azoulai 2011, p. 198.
[154] ibid. p. 201.
[155] Article 67 of the Treaty establishing the European Coal and Steel Community prescribing Member State action as regards interference with conditions of competition in economic and social matters read as follows:
1. Any action by a Member State which is liable to have appreciable repercussions on conditions of competition in the coal or the steel industry shall be brought to the knowledge of the Commission by the government concerned.
2. If the action is liable, by substantially increasing differences in production costs otherwise than through changes in productivity, to provoke a serious disequilibrium, the Commission, after consulting the Consultative Committee and the Council, may take the following steps:
- if the action taken by that State is having harmful effects on the coal or steel undertakings within the jurisdiction of that State, the Commission may authorize it to grant aid to these undertakings, the amount, conditions and duration of which shall be determined in agreement with the Commission. The same shall apply in the case of any change in wages and working conditions which would have the same effects, even if not resulting from any action by that State;
- if the action taken by that State is having harmful effects on the coal or steel undertakings within the jurisdiction of other Member States, the Commission shall make a recommendation to that State with a view to remedying these effects by such measures as that State may consider most compatible with its own economic equilibrium.
3. If the action taken by that State reduces differences in production costs by allowing special benefits to or imposing special charges on the coal or steel undertakings within its jurisdiction in comparison with the other industries in the same country, the Commission is empowered to make the necessary recommendations to that State after consulting the Consultative Committee and the Council.
[156] Article 4 of Title I of the Treaty establishing the European Coal and Steel Community read as follows: The following are recognized as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty: (a) import and export duties, or charges having equivalent effect, and quantitative restrictions on the movement of products; (b) measures or practices which discriminate between producers, between purchasers or between consumers, especially in prices and delivery terms, transport rates and conditions, and measures or practices which interfere with the purchaser's free choice of supplier; (c) subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever; (d) restrictive practices which tend towards the sharing or exploiting of markets.

prohibited."[157] This statement is made prior to the acknowledgement that the ability of the High Authority to intervene in case of such breach, nevertheless, remains limited, as the Community does not arch over all the policy fields involved.

The observations Azoulai has made thus do not pertain to the Court's reading of the *scope of Union law*. Rather, they concern the ability of Union institutions to intervene, i.e. *the competence of Union institutions*: the High Authority has only been awarded a competence to recommend means of remedying a Member State's breach of Community law within a retained field, but this does not take away from the fact that a breach has taken place. Thus, what is at stake here is the familiar notion that the scope of Union law and the Union's powers are not identical. Nevertheless, the obligation of the Member States to abide by EU law was not made redundant as a result of lacking enforcement ability by the Community: as recounted by Azoulai, the notion of constitutionalisation with the operating idea that the individual citizens of the Member States derive rights directly from Union law has forced the Member States, through the opening of the possibility of challenges by private parties of Member State policies and legislation before national courts, to live up to their obligations as Member States of the Union even where the Union institutions lacked the power to compel them.[158]

Azoulai also asserts on the above premise that since this early opinion the Court has moved towards total integration, entailing that the retained powers formula bears with it a more thorough obligation for the Member States to respect Union law (which I have identified here present already in the Court's ruling in *Steenkolenmijnen*).[159] Even though the trend detected by Azoulai most likely is accurate, it is not without exception: the Court still remains prepared to acknowledge and identify boundaries encountered by the pervasive effect of Union law, such as the one referred to by Azoulai, even in contemporary case law. The Court's rather technical reading of Directive 2004/38/EC in *Dano* provides a recent example.[160]

[157] Case 30/59 *Steenkolenmijnen*, p. 22.
[158] L Azoulai 2011, p. 202–203. Notice that L Boucon 2014, p. 168, has attributed the entire phenomenon of retained powers case law to the Court's interpretation of the fundamental freedoms and EU citizenship. As will be argued ahead, I would rather connect the phenomenon to a deeper level, that is the Court's understanding of the nature of the Union project as a whole. I am inclined to think that the holding that the fundamental freedoms or Union citizenship, or the interpretation given thereto, would be at the root of the retained powers formula, might derive from the fact referred to by Azoulai here that individual Union citizens have been recruited by the Court in its constitutionalisation doctrine as watchdogs of Member State behaviour.
[159] L Azoulai 2011, p. 201.
[160] Case C-333/13 *Dano* ECLI:EU:C:2014:2358. For a short discussion of *Dano*, see Chapter 3.1.2.

A closer reading of Azoulai further reveals that his is a nuanced construction of the retained powers formula and its bearing on the competence relations of the Union and its Member States: similarly to Boucon who has observed some adjustments made by the Court to its traditional doctrine in the domains of retained powers[161], Azoulai has identified in the retained powers doctrine also a recognition by the Court of the need of the Member States to continue to be able to fulfil their essential state functions. He suggests that the Court is prepared to give even considerable leeway to the Member States by simply requiring them to exercise their retained powers in a reasonable way in order to also safeguard the interests of the Union.[162] This assertion, however, should be evaluated against the backdrop set by the jurisprudence of the Court as regards justifications and proportionality review in cases touching upon the retained powers considered ahead in Chapter 3.2.

From the more concrete viewpoint of case law, the consequences of the employment of the retained powers formula in its present form by the Court are various. As noted by Azoulai, the direct result of the triggering of the formula is not by any means an automatic extension of Union powers; rather, it is that of 'responsibilisation' of the Member State.[163] Thus, when the Court has identified a situation falling in the scope of EU law, firstly, a legal basis for interference in the use of Member State discretion by the Union law may be triggered.[164] The Member State can thus be prohibited from applying the contested restrictive measure; this, in turn, may lead to the creation of a legislative vacuum, as it is unlikely that an equivalent of the quashed national law would be adopted on the Union level.[165] Interference by the Court which at the outset is negative may even factually entail a commission to the Member State to take certain positive actions in order to adhere to the requirements derived in the case from Union law.[166] Alternatively, it may lead to the Union taking legislative action in novel fields in the case of fundamental freedoms by way of recourse to Art. 114 TFEU.[167] Even an ensuing widening of the Union competences has been identified as an indirect result of

[161] L Boucon 2014, p. 175–178.
[162] L Azoulai 2011, p. 217.
[163] idem.
[164] A Prechal et al. 2011, p. 235.
[165] C Barnard 2009, p. 274.
[166] A Prechal et al. 2011, p. 235.
[167] J Snell 2013, p. 123. See also L Azoulai 2011, p. 218.

the introduction of the requirements posed by Union law in the regulating domain of the Member States.[168]

The Court operates a number of techniques in evaluating whether a situation is within the scope of EU law.[169] In regard to the retained powers doctrine, a focal justification for the transgression of competence limits is the plea that the fundamental freedoms on the one hand, or the rights conferred to Union citizens by the Treaties, on the other, would not be fulfilled if Union law did not affect areas of retained powers of the Member States. This exercise serves to bring a situation into the scope of EU law, enabling intervention by the Court.

Common to the both bases is the presence of *an element of movement*: EU law has traditionally mainly been capable of intervening where Union citizens cross the border from one Member State to another. Notably, the types of movement eligible to trigger the formula are numerous: e.g. Nic Shuibhne has identified the less obvious categories of past movement, future and even potential movement, the movement of others, movement deliberately undertaken in order to trigger EU rights as well as 'passport movement', i.e. the mere holding by a Union citizen of another Member State's passport, as conditions which suffice for bringing a situation into the scope of EU law and subjecting the Member States to the requirement of consistent exercise.[170] The more recent trend in citizenship case law has furthermore introduced the genuine enjoyment of the substance of the rights conferred by Union citizenship to an individual[171] as an adequate link to Union law, whereby the cross-border element is no longer a *sine qua non* for the engagement of the scope of Union law.

The notions of fundamental freedoms or Union citizenship do not, in fact, merely relate to the principle of conferral or the division of powers, but rather to the intrinsic nature

[168] *Supra* n 60.
[169] A Prechal et al. 2011, p. 245; Prechal et al. mention as such techniques *inter alia* exercise of free movement under Article 21 TFEU, national restrictions to internal market provisions, the notion of undertaking in competition law as well as connecting factors binding the Member States to general principles of law. Azoulai, for his part, has observed a reliance by the Court on "the teleology included in the Treaty" in order to bring situations to the ambit of EU law; L Azoulai 2011, p. 204.
[170] N Nic Shuibhne 2009, p. 171–172. It should be noted in this connection that movement in and of itself is by no means necessary for triggering a connection to the scope of EU law; in this regard, see e.g. examples provided by Lenaerts who has noted on a more general level that the interpretation of adequate link to EU law opted for by the Court is a considerably broad one; see K Lenaerts 2010, p. 1343–1345.
[171] Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124.

of the EU law as prevalent, pervasive and inescapable.[172] As Member State decision-making within the areas of retained powers often occurs in situations where it also may affect the thorough fulfilment of fundamental freedoms or Union citizens' rights, the Union, even as it lacks legislative competence, develops an EU policy of sorts by circumscribing the Member States' margin of manoeuvre.[173]

Nic Shuibhne has further noted that an analysis of the question of remoteness, i.e. whether the alleged restriction or obstacle of free movement is actually too tenuous or indirect in the case at hand, is often omitted altogether in the assessment of free movement cases and more recently citizenship cases.[174] This is a natural continuation of the Court's liberal interpretation of the concept of movement, but may lead to lopsided outcomes: the interest present in Union law is ultimately not entirely relevant in the circumstances, but the assessment and application of the retained powers formula by the Court shows that the Member State nevertheless has failed to take sufficient account thereof.

It is indeed worth noting that when the Court finds a particular course of action necessary for the attainment of free movement goals, it in fact makes a policy choice. For, as noted by Corrias, when the Court uses formulas to "'derive' from the Treaty a principle that is said to be 'inherent' in it"[175], the Court in fact creates the law while it tells what the law says. Furthermore, the finding that a particular course of action not specified in the Treaties is recommendable *presupposes* the suitability of said action for the issue at hand[176]; that is, the Court actively proposes a solution and only then proceeds to "find" it in the Treaties. Again, in Corrias' words, the Court thus "refers to a past which has never been a present"[177].

[172] Similarly L Azoulai 2011, p. 203.
[173] S Weatherill 2009, p. 24. As has further been noted by Davies, Member State action within a retained power may also subsequently create Union competence to harmonise where a Member State succeeds in upholding e.g. on overweighing public policy grounds a national legislative choice that is discrepant with Union law as it poses an obstacle to free movement; see G Davies 2015, p. 13.
[174] N Nic Shuibhne 2009, p. 179–180. She has elsewhere tracked the lacking remoteness review to the historical background of the restriction doctrine. Whereas the original restriction evaluation conducted in competition cases was composed of an evaluation of a restriction as well as an empirical economic impact assessment, the latter quantitative part of the test was dropped when the restriction test was introduced in free movement law. See N Nic Shuibhne 2008, p. 783.
[175] L Corrias 2011, p. 130.
[176] ibid. p. 131.
[177] ibid. p. 133; see even H Lindahl 2007, p. 496.

In the following the concepts of fundamental freedoms as well as Union citizenship shall be addressed in more detail with regard to the division of competences between the Union and the Member States.[178]

The common market as a common undertaking

According to the Court's reasoning there can be no nook or cranny of national law which would remain immune to the common market regime with its free movement rationales because such immunity would undermine the systematics and the credibility of the entire Union legislature.[179] And indeed, as noted by Prechal et al., "the Treaty does not place particular sectors of the economy outside the scope of the fundamental freedoms".[180] According to Article 26(2) TFEU "[t]he internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties." One way of reading this provision is that both the Union and the Member States have committed to ensuring the functionality of free movement, each within the fields in which they hold competence.

If one adopts the view put forward by Prechal et al., it all almost makes sense: as the Member States have undertaken to further the cause of the internal market even in the fields in which they remain sole competence holders, it may be reasonable to presume that they would adhere to the requirements posed by the proper functioning of the internal market, i.e. to Union law. The formula employed by the Court becomes thus acceptable. However, there still remains something: as safeguarding the unity of Union law requires that Member States cannot themselves be the judge of what furthers integration and what does not, the Court is called to rule on the matter even when the area involved is in the Member States' realm, issuing *decisions* on what is to be construed as contrary to the Treaties and what not. Does this not risk taking away from the competences of the Member States?

[178] It should be noted that as A Prechal et al. 2011 show, entry into the scope of Union law not only entails the applicability of the retained powers formula, but it also enables positive action by the Union through a shift created in the competence limits; the Union gains regulative competence through obstacles to the fulfilment of the internal market. However, here focus shall be had only to the curbing effect on Member State discretion of negative integration.
[179] See e.g. K Lenaerts 2010, p. 1369.
[180] A Prechal et al. 2011, p. 227.

It has been noted by Davies with regards to positive integration that as a direct result of the intrinsically purpose-oriented nature of the common market competences prescribed in the Treaties, the Union legislator gains formidable momentum to intervene in any national legislation potentially obstructing the fulfilment of the common market. A link to economic activity triggers the applicability of these considerably broadly framed competences and often enables circumvention of the subsidiarity principle that the legislator would have to tackle were it to enact legislation on the basis of sectoral competences provided for in the Treaties.[181] A parallel phenomenon takes place in terms of negative competences as well: approaching national regulation with a common market angle the Court is better equipped to find a national policy incompatible with the integration aims than it would be interpreting e.g. the supplementary competence clauses in the Treaties granting only sporadically a say to the Union.

Further, there are the contours of *economic activity*. The case law of the Court has shown a great amount of flexibility and variance when deciding whether a situation is of commercial character.[182] More recently, a shift in the Court's interpretation has been observed: pointing at cross-border healthcare case law as a prime example, Boucon has noted that the required economic element has been replaced by a social dimension against which the Court now has moved on to assess the restrictive nature of Member State practices.[183] Thus, there are grounds to question the boundaries of the free movement regime and the subsequent scope of Union law.

The conception of fundamental freedoms as pervading all divisions of competence defies the restrictive view of conferred powers: rather than regarding the playing field of the Union as consisting of separate areas which the Member States have submitted through the Treaties to the Union to act within, the view advocated in the case law of the Court has reversed the scenario altogether and regards the entire jurisdiction of each Member State as being subject to the EU regime at the outset. This is illustrated also in the description of retained powers by Boucon as 'originally discretionary': in the beginning of the Union project, the exercise of their powers by the Member States in these areas has not been understood in any way as qualified, as the power as such has never entered the equation of division of powers between the Union and the Member

[181] G Davies 2015, p. 11.
[182] See A Prechal et al. 2011, p. 226–227.
[183] L Boucon 2014, p. 191–192, with references.

States (nor, according to Boucon, it seems, the scope of EU law). The jurisprudence of the ECJ has changed that scheme and made such restrictive understanding untenable.[184]

I am inclined to agree with Azoulai, rather than Boucon, on the question of whether or not Union law has been capable from the outset of pervading the entire Member State jurisdiction notwithstanding competence limits. Azoulai has asserted, with reference to Pescatore, that the initial purpose of the Union was a partial integration covering the economies of the Member States that was to lead to the creation of the common market. In such limited scope, the side effect of the internal market regulation, i.e. penetration of all national rules possibly in controversy with the common market project, was self-evident and tolerable as the source of such effect was clearly recognised and the phenomenon as such was foreseeable. According to Azoulai, this does not hold true in equal proportion for the present state of Union law where the scope of the pervasive effect has considerably widened and the Union is facing 'a regime of total integration'. On the contrary, the move of the Union into the field of Member State competence produces legitimacy problems.[185] The same has been noted by Maduro: "The spillover of market integration rules into all areas of national regulation raises a conflict between the functional legitimacy of market integration and the democratic legitimacy of national rules. The goal of market integration is no longer capable of explaining and legitimating the reach of EU law in national legal orders."[186]

It can be quite safely asserted that the Union and the Member States have moved forward from the afore-mentioned limited initial purpose to a wider joint undertaking encompassing various fields coinciding with the fulfilment of the common market goal, as has been evidenced by Treaty amendments.[187] This development is likely to spread the scope of areas affected by Union law and cause further spill-over; though in theory, the pervasive effect of the fundamental freedoms mostly remains contingent upon the

[184] ibid. p. 170. As a prime example of this development serve the Greek government's defences put forward in Case 147/86 *Commission v Greece* ECLI:EU:C:1988:150, as recorded by Advocate General Slynn in his Opinion. The Greek government sought to rely on the fact that the policy field at stake, namely education, was "not within the Treaty" which according to its argumentation caused that the national measures pertaining to the organisation of the Greek education system challenged by the Commission could not fall within the Treaty either. According to Greece, "education was deliberately excluded" from the Treaties; see p. 1648 of the Opinion (ECLI:EU:C:1988:2). This argument was, however, blankly rejected both by the Advocate General and the Court.
[185] L Azoulai 2008, p. 1340.
[186] M P Maduro 2003, p. 77.
[187] As noted by Nic Shuibhne, "[u]ntil Maastricht, the four freedoms were described in the EEC Treaty as the 'foundations of the Community' and not just (as at present) four among many Community tasks and activities"; N Nic Shuibhne 2009, p. 184.

presence of an element of economic activity. Where, however, an alleged obstacle of freedom of movement is found but such economic link is absent, recourse can be had by the Court to the rights conferred by Union citizenship to intervene.

Union citizenship as a wormhole

First introduced to Union law by the Maastricht Treaty, Union citizenship marked the transformation of the EC from a mainly economic community to a more comprehensive political union[188] and was designed to become the ”fundamental status of all citizens of the Member States”[189]. Today, it ”represents one of the major potential doctrinal gateways into areas which were previously regarded as clearly belonging to the Member States' realm.”[190] The legal implications of Union citizenship continue the gradual erosion of preserved national regulatory spaces first begun by the Union free movement law, although with intensifying degree.[191]

The ability of Union citizenship to act as a distinct source for additional rights[192] obscures the determination of a Member State's discretion in its policy setting and use of executive power: applied in combination with the prohibition of discrimination on grounds of nationality it has proven to be capable of creating a fast lane to Union rights for individuals not satisfying the requirements laid down in secondary legislation. The reformulation of Article 21 TFEU in the Lisbon Treaty may even be seen as adding to the expansive potential of Union citizenship.[193] According to Dougan, free movement of Union citizens has been elevated into a Union policy goal which overrides all legitimate manifestations of the national public interest[194]; thus, where inconsistencies exists between Member State policies in the field of retained powers and the freedom of movement of Union citizens, the latter trumps any interest of the Member States to maintain competence limits as the Court is prepared to apply Union citizen's rights ”with almost mechanical logic to any and every national rule which actually or potentially crosses the individual migrant's path.”[195]

[188] P Craig & G de Búrca 2011, p. 819.
[189] Case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458, para 31.
[190] H-W Micklitz & H Schebesta 2012, p. 6.
[191] N Nic Shuibhne 2009, p. 169.
[192] ibid. p. 167.
[193] A Prechal et al. 2011, p. 238.
[194] M Dougan 2012, p. 126–127.
[195] ibid. p. 123.

This pervasiveness of Union citizenship is what renders it extremely potent, to the point that the Union factually gains stronger foothold in the fields of retained powers: in the Court's praxis the very concept of Union citizenship, usually combined with the use of freedom of movement, has become capable of bringing a situation into the scope of application of Union law. As the full legal content of the Union citizenship is, however, still uncovering, the use by the Court of the fields of retained powers as a test laboratory for the development of the Union citizenship to a more universally meaningful legal status[196] also enables the Court to make policy choices *which then turn into the EU law* that the Member States are required to adhere to. In this underdeveloped state, where a national provision might act as a repellent for the Union citizens' use of their rights, it is *prima facie* contrary to Union law and the Member State in question is under burden of proving that this limitation is justified.[197]

One can only guess if the Court, let alone the Member States[198], originally foresaw the full meaning of the interpretation it gave to the Union citizenship in its case law. Although the Court voiced out in *Garcia Avello* the reassuring opinion that Union citizenship was not intended to "extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law"[199], an extension does seem to have taken place in situations with cross-border nature in that the sole exercise of the rights conferred to Union citizens by Article 21 TFEU has begun to bring situations within the material scope of Article 18 TFEU without any support from other material provisions of the Treaty.[200] In this, in my opinion, also lies the answer to why the question of retained powers has only become subject to wider academic interest in the last decade: as the freedom of movement of Union citizens nowadays is capable of bringing any situation into the scope of Union law both *ratione personae* and *ratione materiae*, the traditional division of competence has suffered a remarkable blow.

Kostakopoulou notes that although much criticised by the Member States at the face of the perhaps surprising erosion of their powers, the Court's perception of the necessary

[196] M Dougan 2009, p. 133.
[197] E Spaventa 2008, p. 21–22.
[198] P Craig 2011, p. 412.
[199] Case C-148/02 *Garcia Avello*, para 26.
[200] See e.g. Case C-333/13 *Dano*, para 58 with references. See also Opinion of AG Geelhoed delivered in Case C-209/03 *Bidar* ECLI:EU:C:2004:715, para 52: "Not only are EU citizens entitled to equal treatment with nationals of the host Member State in which they are lawfully resident with respect to matters coming within the scope *ratione materiae* of the Treaty, citizenship itself may provide a basis for bringing certain matters within that scope where the objectives pursued by the national measure correspond with those pursued by the Treaty or secondary legislation --."

effects of Union citizenship is ”both reasonable and consonant with the fundamental status of Union citizenship.”[201] She holds that the ECJ has opted for an approach to the interpretation of derogations from free movement provisions which is based on individuals' rights[202]; according to this view, the Court is in fact combatting state arbitrariness and utilitarian calculations.[203] Such an approach is of course beneficial both for the European integration process and the European individual as a representative of the unified European people, but is all state activity to be seen at the outset as an arbitrary restriction of free movement?[204]

The counter-argument could be made here that the Court's interpretation of the requirements posed by Union law for its part adds to the arbitrariness of the way in which regulation takes place in the fields of retained powers. For, the Court has introduced a novel obligation for the Member States to *take account of the personal circumstances of the individual concerned* when assessing the justifiability of their restrictive policies with the notion of Union citizenship.[205] This requirement subjects the acceptability of entire national policy considerations to the individual cases which happen to find their way to the Court and the different characteristics of which, if assessed by the Court, may acquire various implications affected by the then political atmosphere in the Union without a clearly definable line of reasoning. This contextualism seems to be at odds with the fact that there currently remain policy areas that are considered so closely related to each Member State's cultural heritage and tradition that they have been left in the Treaties to each Member State to answer for themselves.

In spite of solemn proclamations of the fundamentality of the Union citizenship as a status, the use of the Union citizenship as a vessel for furthering integration remains somewhat unpredictable. A classical cause of uncertainty in this respect is the attribution of the triggering of Union citizens' rights to the *use of freedom of movement*; the Court has to date been more inclined to give full effect to Union citizenship in cases

[201] D Kostakopoulou 2012, p. 183.
[202] ibid. p. 193.
[203] The effect of combating state arbitrariness has also been observed by Boucon; L Boucon 2014, p. 181. Maduro, for his part, offers an enlightening example of the power of inclusiveness of Union law; M P Maduro 2003, p. 93–94.
[204] This question is further emphasized by the nature of the restriction assessment conducted by the Court, elaborated upon below in Section 3.2: according to an observation made by Nic Shuibhne, the Court often relies on a gut-feeling rather than tangible empirical evidence when evaluating the restrictive nature of Member State action. See N Nic Shuibhne 2008, p. 783.
[205] L Boucon 2014, p. 181.

where there is a cross-border element at hand. The restriction contains a paradox: if the status of Union citizenship is to be fundamental, how can the use of freedom of movement render some Union citizens more privileged than others?[206] As for citizenship cases not involving an element of movement, the ECJ's rationale of enforcing Union citizen's rights solely in the event that Member State action risks to deprive an individual of the substance of the rights enjoyed by virtue of the status as a Union citizen has introduced a qualifying condition that has been more easily fulfilled by minor Union citizens than adults.[207] This amounts to confessing that the right-conferring potential of the Union citizenship is still limited.

Furthermore, even though the possible movement of a Union citizen need not be pursuant to an economic activity of any kind in order for it to fall within the scope of Union law, the economic element still maintains its power: recently in *Dano* the Court denied any pervasive effect of Articles 18 and 20(2) TFEU in matters of social security by ruling that a Union citizen who has stayed in the host Member State for over three months but under five years need not be supported by the host Member State's social security system in the same vein as a national of that Member State if that Union citizen is in no way economically active and does not seek for a job or education and doesn't have sufficient recourses for his/her own upkeep.[208] In such a situation the Member States retain their discretion when regulating of the conditions for the grant of 'special non-contributory cash benefits', a matter falling within the scope of Member States' retained powers.

Even though this judgment is rather consistent with the Union regulatory bases governing the harmonisation of social security schemes[209], it seems to be somewhat in discordance with the Court's earlier case law in e.g. *Trojani*[210] favouring free movement at the cost of the Member States' wish to limit the access to social security of non-

[206] E Spaventa 2008, p. 38.
[207] Cf. Cases C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639 and C-434/09 *McCarthy*.
[208] Case C-333/13 *Dano*, paras 60–83.
[209] The Union legislation applied in the matter included Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).
[210] Case C-456/02 *Trojani* ECLI:EU:C:2004:488, para 40: "In the present case, it must be stated that, while the Member States may make residence of a citizen of the Union who is not economically active conditional on his having sufficient resources, that does not mean that such a person cannot, during his lawful residence in the host Member State, benefit from the fundamental principle of equal treatment as laid down in Article 12 EC."

nationals and can also be seen to mirror the contemporary popular politics with the Member States adopting protective social assistance policies in the withering economy in the wake of the Eurocrisis.[211] The need to include even the non-mobile Union citizens as beneficiaries of rights has been noted by Dougan as a possible normative basis providing legitimisation for the Court to adopt a more proactive stance when encountered with a possibility to test Union citizenship against national policy choices within the area of welfare law, possibly at the expense of national discretion.[212] However, as shown in the social security case law of the Court, an EU invasion into the national welfare territory is not presently welcomed any more warmly by the Member States than the usual; therefore, the 'threats' posed by Union citizenship to national discretion in the field of social security law seem for now exaggerated.

3.2 Defending national interests

3.2.1 Derogations and justifications in the fields of retained powers

When a Member State faces charges of disregard to Union law in the use of its retained powers, it has a counter-argument to place: that of derogations or justifications. The Member State may assert that an alleged barrier of movement is acceptable under a derogation provided by the Treaties, or justifiable under the justifications accepted by the Court in its praxis. Both 'remedies' have been intended for enabling the Member States to defend crucial national interests.[213] The possibility of relying on a derogation or justification, however, does not remove a matter altogether from the sphere of EU law: as Azoulai has observed, "[t]he Court has rejected the idea that State derogations

[211] At para 77, referring to AG Wathelet's opinion, the Court points to the fact that "any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member State with regard to the grant of social benefits *is an inevitable consequence of Directive 2004/38*" [emphasis added here]. The Union legislator's (and simultaneously the Member States') wish is thus respected here, even though the lack of funding through the host Member State's social security system has a deterrent effect on any Union citizens who are not economically active and lack sufficient resources. What is more, the Court moves on to address the contentious issue of welfare-shopping more directly in the next paragraph, holding that the Member States remain free to refuse "to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement *solely in order to obtain another Member State's social assistance* although they do not have sufficient resources to claim a right of residence" [emphasis added here]. This seems to contradict the paradigm of Union citizenship as the fundamental status of each Union citizen, as certain kinds of use of that status are clearly and categorically condemned by the Court. Earlier attempts of the Member States to argue for their restrictive practices on the basis of abuse of Union citizenship or freedom of movement have been met with a more restrictive stance, with the Court requiring that suspected abuse be examined individually on a case by case basis and that exercise of the right to freedom of movement of itself cannot be regarded as an abuse, see e.g. Cases C-436/00 *X and Y* ECLI:EU:C:2002:704, para 42, and C-212/97 *Centros* ECLI:EU:C:1999:126, paras 25–27.

[212] M Dougan 2009, p. 133.

[213] C Barnard 2009, p. 273.

enshrine 'reservations of sovereignty'."[214] The function of derogations/justifications is rather that of balancing Union interests against considerations arising from the fact that the Member States are national states with sometimes differing national interests; notwithstanding its general presumption, in the fields of retained powers the ECJ operates on the premise that there are differences of weight in national legislation.[215] In the following, focus shall be had on the justifications developed in the Court's praxis.

In its case law[216] the Court has established the following requirements for a national rule posing restrictions to the traditional fundamental freedoms to be justifiable: the rule must be applied in a non-discriminatory manner; it has to be due to imperative requirements of general interest; it has to be suitable for the objective pursued; and it may not go beyond what is necessary for the attainment of such objective.[217]

Barnard has observed that the number of justifications available to the Member States has "proliferated as a direct response *to the increasingly expansive and dynamic use* of the 'restrictions' based approach to free movement."[218] The same has been noted by Snell: as the scope of Union law has expanded, the Court has begun to acquiesce in a wider range of defences put up by the Member States and has e.g. accepted purely economic justifications in the fields of retained powers, contrary to its usual approach in cases of fundamental freedoms.[219] Boucon furthermore adds to the list justifications that primarily seek to preserve purely national interests.[220]

However, at the same time, the actual applicability of a justification to the substance of a case has become the subject of a closer scrutiny by the Court; Barnard considers this development in the Court's praxis to serve to keep the power of deciding with the Court itself, rather than letting a national court to decide on the justifiability of the national measure on the basis of a proportionality review subsequent to the justification phase.[221] If this is indeed the case and the occasions on which a Member State's justification is

[214] L Azoulai 2011, p. 195.
[215] ibid. p. 208–209.
[216] Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* ECLI:EU:C:1995:411, para 37.
[217] C Barnard 2009, p. 276–277.
[218] ibid. p. 273 [emphasis added here].
[219] J Snell 2013, p. 124, referring to the need of a Member State to safeguard the financial balance of the national health care system.
[220] L Boucon 2014, p. 177.
[221] C Barnard 2009, p. 280–281.

accepted are more seldom than before, the leniency detected by Azoulai[222] might after all be an illusion.

All in all, the justification test seems to pose a hurdle to surpass. It should nevertheless be noted that the assessment of the leeway left to the Member States by the Court in the context of justifications cannot be analysed merely on the criteria whether or not the Court has accepted a Member State's plea for overriding national interests. A more substantial enquiry is required: namely, the situations in which national interests are to be defended come in all colours. On the one hand there are cases such as *Omega* where the national interest at stake is genuine and worth protection; and on the other hand it may happen that the national legislative scheme defended by the Member States is a mere relic from the past and in unambiguous, outright discrepancy with EU law, without any particularly weighty policy consideration which would necessitate its upholding. Furthermore, as observed by Nic Shuibhne, the defences brought by the Member States are at times clearly insufficient and cannot warrant a supportive decision of the Court.[223] In short – the Member States do sometimes make unfounded and even desperate claims.

3.2.2 Proportionality assessment in the fields of retained powers

The variety of justifications entertained by the Court shows that the Court does not turn a deaf ear to national policy concerns; another thing is whether it awards them any substantial weight when set against Union aims. Namely, even where the ECJ finds a national policy aim acceptable, it further conducts a review of proportionality of the restrictive measure effected by the Member State. Case law shows that the interpretation given by the ECJ to the principle of proportionality poses significant restrictions to the Member States' ability to legitimise their use of discretion.

The proportionality assessment entails two phases: a test of suitability, and a test of necessity. The court engaging in the proportionality test thus begins by assessing whether the national restrictive measure is suitable for achieving the end found legitimate in the preceding justification test. It then proceeds to weighing under the necessity test whether the adverse effects of the measure on the competing legal interest are justifiable in regard to the importance of the end pursued. In theory this model is

[222] *Supra* n 162.
[223] N Nic Shuibhne 2008, p. 783–784.

neutral towards the values subject to the weighing exercise. Thus, the four freedoms and Union citizens' rights are to be observed as principles capable of being balanced against competing Member State claims rather than as absolute rules.[224] Consequently, we have seen the four freedoms bend on Austrian motorways[225] and in German gaming halls[226] in front of national (fundamental rights) interests. Azoulai has noted the same doctrinal point of departure: "Rights and policy considerations compete on the same level in EU law."[227]

What the proportionality test as applied by the Court has been accused of in the fields of retained powers, however, is a bias in favour of the Union values and interests. The Court is seen by critics to apply the principle strictly when assessing the proportionality of national measures (and subsequently give more weight to considerations relating to the proper functioning of the internal market and a genuine enjoyment by Union citizens of their rights under the Treaties than to the competing national interest at hand), but to lessen the intensity of the review when assessing the legitimacy of Union measures.[228]

Also the fact that the Member States seem often to bear the entire burden of proof has excited criticism: some authors have detected an automaticity by which the onus is on the Member States to justify their actions.[229] This view needs to be qualified as for certain aspects. Firstly, the imbalance is not as flagrant in infringement proceedings, wherein the Commission cannot proceed on a presumption of infringement but must produce evidence of that a Member State has failed to fulfil its obligation.[230] Secondly, Member States are not required to prove exhaustively that the measure they have employed is the sole option for reaching the objectives sought after; the Member States need not prove a negative.[231] These considerations aside, the obligation of the Member States to establish the appropriateness and proportionality of their actions seems rather strict.

[224] See e.g. H C H Hofmann 2009, p. 53, and T-I Harbo 2010, p. 166.
[225] Case C-112/00 *Schmidberger* ECLI:EU:C:2003:333.
[226] Case C-36/02 *Omega* ECLI:EU:C:2004:614.
[227] L Azoulai 2012, p. 214.
[228] C Barnard 2009, p. 282.
[229] M Dougan 2012, p. 126–127.
[230] See e.g. Opinion of Advocate General Sharpston in Case C-542/09 *Commission v the Netherlands* ECLI:EU:C:2012:79, para 54 with references.
[231] ibid. paras 68–69.

Prechal et al. have further observed that the use of the proportionality principle by the Court even entails substantive and procedural requirements posed to the Member State in order for it to comply with said principle.[232] The novel procedural requirements have been also observed by Spaventa[233]: she refers to an alteration in the level of rigorousness required from the national court by the ECJ in citizenship cases depending on whether the Member State defending its policies is a host Member State or a Member State of origin. She asserts that particularly a host Member State is subjected by the Court to an extensive obligation to take into account the individual circumstances of the person relying on their rights as a Union citizen, which often leads to that the proportionality review by the national judge is heavily affected by the European interests and conducted on wholly different rationales than a purely national legislative review. The principle thus indirectly provides yet another manner of controlling Member State use of competence in the areas of retained powers.

Also the proportionality review conducted by a national court after a reference to Luxembourg is seen by some as steered by the Court; according to e.g. Harbo's[234] reading, instead of granting a margin of appreciation to the national court within which it would be free to adopt an inclination towards the national interests, the Court in fact lays down in its preliminary ruling a ready-made framework within which the national court is to render judgment on behalf of the Court. Other authors, quite on the contrary, have found that the Court has moved from the stricter approach to giving more leeway to the Member States in the proportionality assessment in order to ascertain that the Member States remain able to make use of their regulatory powers.[235]

Achieving a completely unbiased proportionality review may be ultimately impossible, for even the view on what is to be considered as 'neutral' in the exercise where a fair balance between multiple competing interests is striven after might vary depending on the actor involved.[236] What is more, some scholars expressly call for a proportionality review which is *not* blind but aware and opinionated of the value of the interests being balanced against one another, as a proportionality review lacking any guidelines as to the extent to which each interest should be enforced may produce irrational results.[237]

[232] A Prechal et al. 2011, p. 231.
[233] E Spaventa 2008, s. 39–40.
[234] T-I Harbo 2010, p. 177.
[235] L Boucon 2014, p. 180.
[236] T-I Harbo 2010, p. 169.
[237] ibid. p. 167.

The latter notion has its virtues − does not a court indeed adopt a stance on the weight and importance of each competing interest when it resolves the priority to be given to them? The assessment is without a doubt a task entailing *valuing*. What then remains a contentious issue is which values, those of the Union or those of the Member States, should be primarily favoured; should one give more emphasis to the principle of division of competences, or the scope of EU law?

Against the premise that any Member State action which could end up being subjected to a proportionality review necessarily runs counter with the fundamental freedoms and Union citizens' rights, and that such actions are always to be seen as an exception to the rule, a strict evaluation is understandable. Yet in the fields of retained powers we are dealing with Member State policy areas that by definition should be reflective of national value choices. Thus, even though a laissez-faire approach by the Court is unimaginable, an overly restrictive manner of categorically rejecting Member State attempts of utilising their regulatory competence within an area of retained powers as disproportionate is without a doubt likely to erode the Member States' discretion in policy-setting – perhaps even in an undue manner.

3.3 Can there be exclusive competence without free discretion?

In a statement of defence on behalf of the Union against claims of competence creep, Weatherill has maintained that "it is commonly the case that EC action is not designed to suppress State action" and that "[t]he type of action which the EU may take may be limited; the scope of residual national competence may be considerable (though unfortunately often ill-defined)."[238] But as we have seen is the case of the retained powers formula, even where the Member States hold the competence, they are effectively stripped from their full discretion when dealing within the scope of EU law.[239] This, surely, does not merely pertain to a lack of clarity in the formulation of the scope of the retained powers; rather, it is a result of a conceptual distinction between the existence of competence and the exercise thereof made by the Court in its praxis[240].

[238] S Weatherill 2009, p. 23.
[239] A Prechal et al. 2011, p. 242: "Once the matter is within the scope of EU law, the Court may seek to limit the exercise of Member States' powers."
[240] L Azoulai 2011, p. 200. See also the Opinion of Advocate General Stix-Hackl delivered in Cases C-76/05 *Schwarz and Gootjes-Schwarz* as well as C-318/05 *Commission v Germany*, para 3: "In an internal market 'characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', the Member States are no longer at liberty to ignore the constraints imposed by those matters on the definition and application of their national policies."

This attracts a conceptual question: can there be exclusive competence without free discretion?

Judge Schiemann has made a fitting observation in regard to the use of the term 'sovereignty' in inter-state relations: namely, "people in general find it easier to forget an idea than to forget a word".[241] One is left to wonder whether also the term 'exclusive competence', especially when the competences of the Member States are at hand, has suffered a similar substantive inflation: what is thought to entail limitless self-regulatory power in reality boils down to a regulatory competence strictly harnessed by a requirement of *loyalty* towards the EU. Quite ironically, the worry over the substance of the competences enjoyed by the Member States being turned into zero closely resembles the worry expressed by the Court as regards the genuine enjoyment by Union citizens of their Treaty-conferred rights – is a right a right, or a competence a competence, if it lacks any real substantive meaning?

As noted by Forowicz, the discretion granted to States has normative roots which are grounded in a legal basis. The limits of discretion enjoyed by the Member States are, however, further elaborated upon in the ECJ practice. Forowicz separates between prospective and retrospective control of Member State discretion: the existence and scope of discretion are determined *ex ante* as a normative exercise (with regard to the retained powers: the Member States retain powers in certain policy areas; however, those powers shall be exercised in accordance with Union law), whereas the *ex post* check is conducted by the ECJ in form of judicial scrutiny (posterior evaluation of Member State action in light of a proportionality review).[242]

Voices in support of the Union deny that this curbing would virtually rob Member State competence of its essence. Azoulai has been keen to point out that the pervasive effect is not equivalent to centralised action by the EU. His solution to consolidate the loss of Member State discretion is to see the Member State as a pro-active actor evaluating and amending its own policies on its *own initiative*, guided by the criteria provided to it by

[241] K Schiemann 2007, p. 476: "It is difficult for anyone in public life to accept, still less advocate, a loss of sovereignty. In consequence, developments in commercial and political life which have in fact resulted in a loss of power by the State to regulate what is going on inside that State have been described as sharing sovereignty. The expression may seem oxymoronic, but people in general find it easier to forget an idea than to forget a word. So we continue to use the word sovereignty long after it has lost its original meaning. None of this is productive of clarity of analysis."
[242] M Forowicz 2011, p. 13.

the internal market law. In his understanding, ”[the market freedoms] have first of all a ’review’ function: they help the Member States to ’recontextualize’ the decision-making process at national level to force them to take account of interests coming from or situated in other Member States, which are not only interests of firms but also of citizens, workers or students. They also have a ’re-programming’ function to the extent that they should lead the national authorities to adapt their policies to the objectives of integration.”[243]

Azoulai has even himself noted the potential weakness of this insertion[244] insisting that even though the Member State’s ability of free exercise is tampered with, the fact that it is the holder of the competence is not; the need to adjust might, against the contrary claim by the Court, in the end be equivalent to having one’s sovereignty undermined. Elsewhere, when commenting on the effects of EU fundamental rights protection on Member State competences, Azoulai has contemplated upon just how thorough the erosion of Member State discretion is. Describing fundamental rights protection on the EU level as a simultaneous reducer and vector of autonomy of Member States, Azoulai has identified three factors of Member State autonomy that are affected: firstly, *liberty*, i.e. ”the condition of being free form any European control”; secondly, *independence*, i.e. ”the power to act as an autonomous authority”; and thirdly, *identity*, i.e. ”the distinct legal features of the state”.[245]

At this stage, it may be taken as a given that as a part of the Union, the Member State have to a certain extent agreed to abandoning their claim for total liberty and independence. Indeed, of Azoulai’s three factors the last seems the most problematic: the requirements of EU law seem capable of impeding a Member State from acting in accordance with its legislative identity, even in the areas of retained powers.[246] In addition to negative restrictions to Member State discretion, the retained powers formula at times imposes *positive obligations* upon the Member States.[247] In a sense, in such a situation the Member State concerned does not merely act on its own initiative; the Union also acts through the Member State.[248] This is even more so in situations

[243] L Azoulai 2008, p. 1342; see even L Boucon 2014, p. 177.
[244] L Azoulai 2011, p. 210–211.
[245] L Azoulai 2012, p. 208.
[246] This observation seems discrepant with the Union obligation to respect the national identities of its Member States under Article 4(2) TEU, touched upon below.
[247] L Boucon 2014, p. 181.
[248] Similarly Advocate General Ruiz-Jarabo Colomer in Joined Cases C-11/06 *Morgan* and C-12/06 *Bucher*, para 96: ”Therefore, responsibility for regulating study grants does not lie exclusively in the

(even though rare) where the Member States are required to adopt arrangements foreign to their legislative tradition: even though some authors maintain that ”EU law does not oblige Member States to establish arrangements that do not already exist in their legal systems”[249], a glance at the outcomes of case law in the field of education[250] shows that the requirements of the EU law identified by the Court can run quite contrary to the traditions or policy choices of the Member States in the fields of retained powers, and the Court itself is perfectly aware of this outcome.[251]

Is, then, the ability of a Member State to legislate freely in accordance with its legal traditions such an intrinsic feature of the notion of competence that the situation at hand in the fields of powers retained by the Member States cannot, in fact, be described as the Member States enjoying exclusive competence? Interesting in this regard is Weiler's characterisation of European law as '*the interest of others'*: it is asserted that adherence to EU law as a rule requires observance of values and interest not inherent in the traditional national sphere, through a conduction of 'an unofficial European impact study', and in *choosing* to adhere to the EU law the Member States make a conscious decision of letting their decision-making become affected by a foreign element.[252] [253]

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hands of the national legislatures, since the Community provisions impregnate it with their philosophy of integration."

[249] L Boucon 2014, p. 180.

[250] See Opinion of Advocate General Jacobs delivered in Case C-147/03 *Commission v Austria* ECLI:EU:C:2005:40, para 53, as well as Opinion of Advocate General Sharpston delivered in Case C-73/08 *Bressol* ECLI:EU:C:2009:396, paras 108 and 120–121.

[251] In this regard the approach of the Court is sometimes ambivalent; consider e.g. the recommendations of Advocate General Sharpston in her Opinion delivered in Joined Cases C-523/11 *Prinz* and C-585/11 *Seeberger* ECLI:EU:C:2013:90, para 102: ”The national court may consider that the rule could be designed in a less restrictive manner without losing its ability to identify those students having a sufficient degree of integration in Germany. Possible alternative rules might be less restrictive but still effective. A different approach might incorporate more flexibility. I emphasise that I am not recommending any particular rule – that is the province of the Member State. I merely observe that it would be possible to construct less rigid, and therefore more proportionate, arrangements.” Thus, the message seems to be: we are not telling you what to do (as that would amount to using discretion on your behalf) – we are merely alluding that you ought to do something different than what you are doing now. One can ask whether the difference is that big in the end.

[252] J H H Weiler 2003, p. 22. Similarly Azoulai talks of the Member States' obligation to take into account in their decision making a "*transnational equity* to make sense of the protection of interests lacking representation under purely national regulatory systems"; L Azoulai 2011, p. 210.

[253] This view also seems to coincide with that adopted by the Court; see e.g. Opinion of Advocate General Poiares Maduro in Case C-446/03 *Marks & Spencer* ECLI:EU:C:2005:201 touching upon the limits set by Union law to the use by Member States of their fiscal powers, para 37: ”In an internal market 'characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital', the Member States are no longer at liberty to ignore the constraints imposed by those matters on the definition and application of their national policies. In that context the task of the Court is not to engage in challenging every rule of State origin having an indirect or wholly uncertain effect on the exercise of the freedoms of movement. It is not for it to review the political choices made by the Member States. Judicial review of measures likely to prohibit, impede or render less attractive the exercise of the freedoms of movement rather seeks to ensure that those choices take account of the impact which they may have on transnational situations. The policies adopted must not result in less favourable

The incentive for adherence for its part derives from the commitment made by the Member States "in favour of the creation of a Community that goes beyond the collection of States that make it up" as well as the fact that it is the Member States who exercise power within their territory, constituting a part of the Union[254]. And indeed, even the Court in connection to the earlier appearances of the retained powers formula referred to a "solidarity which is at the basis of [Member States'] obligations"[255].

I am inclined to think that Weiler's harmonious reading partly resembles a sugar-coated utopia as it relies on an assumption that all Member States continue to wish to remain members and neglects to mention the not entirely inconceivable situations in which observance of the interest of others by a Member State would be likely to trump its own focal interests considerably. But it is equally logical that a Member State cannot exercise cherry-picking as a part of the Union; having to show flexibility from time to time seems to be a part of the bargain.[256]

The high ideals of the interest of others as becoming a universal interest in the Union have recently suffered a blow in the form of the British popular demand for diminishing movement rights of the citizens of other Member States who wish to seek employment in the United Kingdom (though not the rights of British nationals wishing to go abroad), and some even calling for 'Brexit', the exit of the United Kingdom from the Union altogether.[257] This outbreak is possibly symptomatic of something completely different from the actual question of Union and Member State competences, but it poses a challenge in even this regard: if one Member State wished to make a robust use of its retained powers e.g. in the field of expulsion law and thus reverse for its part not only the development of the movement rights in the Union but also the constitutional structure built upon the argument from the scope of Union law, would it be able to do so and still remain a member?

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treatment being accorded to transnational situations than to purely national situations. Such, it seems to me, must be the objective and the context of the review. Only that interpretation is such as to reconcile the principle of respect for State competences and the safeguarding of the objective of establishing an internal market in which the rights of European citizens are protected."

[254] L Azoulai 2011, p. 211–213.

[255] Joined cases 6 and 11/69 *Commission v France*, para 16.

[256] Maduro has drawn a similar conclusion: "Identity is lost if it is not self-determined. On the other hand, such self-determination should not dispute the self-determined identity of the other legal orders. In my view, one of the consequences ought to be that each time a legal order changes the set of norms shared with the broader European legal community it ought to do so in a manner that can be accommodated by the other legal orders --." M P Maduro 2003, p. 99.

[257] See e.g. the British Prime Minister Cameron's proposal for stringent limitations on welfare rights of migrants: *EU migrants face four-year wait for benefits - PM,* in The Times, 28 November 2014.

In historical perspective, the promoters of European integration originally considered the ceding of their sovereign powers by the Member States in order to create a European alliance indispensable for the survival of European nation-states as it provided military protection, economic prosperity and spiritual security. What is more, the 1950s spokesmen for a unified Europe are said to have opposed a construction of the Union wherein each Member State would retain absolute control of certain pre-determined areas considered nuclear for the existence of a state; integration, or the 'evolution of the nation-state', was to proceed on its own weight and subsequent surrenders of powers would follow as required.[258] According to this interpretation of the original intent of the unifiers of Europe by Milward, the power conferring process would amount to drawing lines in sand and then moving them forward. This is, without a doubt, what would theoretically be required in order to bring the European nations ever closer to each other. But it does not represent truthfully the constitutional choices made by the drafters of the Treaty: the Member States chose to leave gaps.[259] And even in this line of thought, one can defend the idea that power rests with its holder as long as conferral has not taken place; yet, the reality in the EU seems that Member State powers start crumbling before the line is moved.

I am inclined to find that the phenomenon described by Schiemann is indeed at stake here: the equation of Member State competence and EU claims does not add up unless one recognises that the concept of competence is hardly as absolute as the expression 'exclusive competence' implies in the end. To revert to constitutional theory, as noted by Schiemann, "[t]he task of any Constitution is to see the degree of lack of freedom of the individual which is necessary in order to secure a broad measure of freedom for each."[260] Though their relationship is different, this is also applicable between the Union and its Member States: in order for the Union and its (autonomous) Member States to co-exists and enjoy meaningful competences, both must give way to the needs of the other; the Member States by respecting the retained powers formula, and the EU by adhering to its obligation to respect the national identities of its Member States under Article 4(2) TEU.

[258] A Milward 2000, p. 343–344.
[259] E.g. the emphasis on how national security remains the sole responsibility of each Member State in Article 4(2) TEU is a prime example of Member State resistance from the most recent Treaty amendment.
[260] K Schiemann 2007, p. 479.

Yet, the Member States seem to be the more flexible party in this relationship. An older example from the field of education of the retained powers formula employed by the Court accentuates the unbalance: in *Casagrande*[261] it was stated that "[a]lthough educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community institutions, *it does not follow that the exercise of powers transferred to the Community is in some way limited* if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training."[262] That is to say, whereas the exercise of their retained powers by the Member States is affected in a restrictive manner by the need to observe the interests of others portrayed in Union law, the exercise of its powers by the Union is not in the face of competing interests present in the Member States' policies.[263]

There is similarly a significant difference in the Article 4(2) TEU obligation on the EU and the retained powers obligation on the Member States as regards the binding effect they produce. The vague notion of national identities under Article 4(2) TFEU is considered to provide shelter for Member State autonomy in the Union constitutional structure[264]; yet, contrary to its language and background[265], Article 4(2) TEU as interpreted by the Court does not seem to set insurmountable restrictions for the Union influencing Member State use of power. Namely, the Court seems to treat the need to respect Member States' national identities as a factor to be taken in account in the weighing of proportionality of a Member State breach of Union law[266] rather than as a principle on par with the obligation of the Member States *at the outset* to use their powers in line with the Union requirements. Thus, the Member States cannot simply wield off accusations of non-compliance by reference to Article 4(2) TEU; their national identity interests are subjected to a proportionality review unlike the interest of the Union regarding the permeability of EU law. Also, the wording of Article 4(2) TEU limits the protective effect to identities inherent in *the fundamental political and*

[261] Case 9/74 *Casagrande v Landeshauptstadt München* ECLI:EU:C:1974:74.
[262] Case 9/74 *Casagrande*, para 12.
[263] As a concrete corollary of this difference in rank of Union and Member State interests, reference can be made even to the functioning of the proportionality review in retained powers cases: as pointed out by Davies, national policies obstructing common market rules "only survive free movement law if it can be shown that they cannot be adapted to serve their goals in less movement-obstructive ways, *whereas the party claiming free movement rights has no obligation to show that they cannot reasonably adapt to the measure* in casu" [emphasis added here]; see G Davies 2015, p. 12.
[264] G van der Schyff 2012, p. 564–565.
[265] See A von Bogdandy and S Schill 2011, p. 1426, tracing the drafting history of Article 4(2) TEU and noting that the purpose of the formulation was to "ensure that the EU respects certain central competences of the Member States."
[266] See e.g. Case C-208/09 *Sayn-Wittgenstein* ECLI:EU:C:2010:806, paras 81–93.

constitutional structures; this clearly confines the application of the Article to the protection of the constitutional core of a Member State's distinguishing traits.

On the other hand, differing visions have been presented as to the possibilities opened to national courts through Article 4(2) TEU to enforce national constitutional interests at the costs of the supremacy of EU law.[267] E.g. Timmermans has suggested a reading of Article 4(2) TEU "allowing a more absolute protection of member states' national identity excluding a balancing against other interests." [268] This interpretation acknowledging the existence of a hard core of Member State sovereignty is extremely ill-fitted to the constitutional ethos built up by the Court, for it reverses the idea of limitless integration intrinsic in the Union as depicted by the Court. It would, nevertheless, seem more consonant with the drafting history of the Article which implies a genuine intent by the Member States to erect firewalls[269]. While national constitutional courts may well adopt such a reading of the Article, I am rather sceptical that the ECJ would approve of such a construction overturning the entire tradition of European integration, given the vast evidence to the contrary as regards the reception by the Court of the latest constitutional amendments attempted by the Member States in the Lisbon Treaty[270].

It seems to me that ultimately the claim for full discretion for the Member States when dealing with retained powers cannot be reconciled with the reality of the Treaties and the argument from the scope of EU law in particular. As observed by Weatherill, "it is very hard to see how a rule could feasibly be devised that would shelter State autonomy from not only EC legislative action but also the Treaty provisions governing the internal market and competition policy."[271] But whether the plea for such sheltering in the end is in accordance with the obligation of loyalty towards the integration project of the Member States is another question.

3.4 Laeken to Lisbon – beating around the bush

As is well known, expressions of worry over the shift of power from the Member States to the Union have been recurring; yet, the Member States have been unable to codify in

[267] For the effect of Article 4(2) TEU on the supremacy doctrine, compare e.g. G van der Schyff 2012 and A von Bogdandy and S Schill 2011.
[268] C Timmermans 2014, p. 356–357.
[269] *Supra* n 265.
[270] See below Section 3.4.
[271] S Weatherill 2009, p. 32.

a satisfactory manner competence rules that would contain that shift so as to bring the discussion concerning competence creep to an end. The constitutional unrest of the Member States relating to the respect of the principle of conferral has been addressed in connection to intergovernmental conferences and voiced out e.g. in the Laeken Declaration[272] calling both for adequate powers for the Union to fulfil its mission and stricter adherence to the principle of attributed powers to prevent unwarranted competence creep and explorations by the Union into the domain of retained powers.[273] This Section takes a look at how the Member States have reacted to the constitutional praxis of the Court in the latest Treaty amendment, i.e. the drafting of the Lisbon Treaty.

Azoulai has observed a multitude of new formulations introduced in the Lisbon Treaty supposedly intended to limit the interference caused by EU law with the national retained powers. He asserts that the purpose of the Member States as the drafters of the Lisbon Treaty was not to elaborate on what is touched by EU law, but rather what is not; he considers the vigorous attempt by the Member States to set in stone the principle upon which competence is to be divided between the Union and the Member States to be in reality an attempt at containing the scope of EU law.[274] This construction of the amendments introduced in the Lisbon Treaty seems plausible if it is taken as a political manifesto on the residual powers by the Member States: the Union does not have the last word, but its creators do. However, if taken as a normative expression of the interpretation that the Member States hold as regards the fundamental nature of EU law, it doesn't seem quite right.[275] For, the rationale embodied by the retained powers formula has existed in the Court's praxis for a while now, and the Member States have become used to abiding by it; it even seems to be accepted as an intrinsic feature of Union law. Could the Member States nevertheless be so ill-informed by the *modus operandi* of EU law that they would attack this phenomenon by such a misplaced amendment?

[272] European Council, December 14–15, 2001, SN 300/1/01 REV 1, p. 21–22.
[273] On the competence questions debated at the time of the Laeken Declaration, see e.g. P Craig 2004, p. 323–326.
[274] L Azoulai 2011, also interestingly noting the referring in Article 4 TFEU to the internal market as a *competence* as a sign of the Member States wish to impose limits even thereon, p. 196.
[275] The following is asserted upon the assumption that the worry of the Member States is directed at the way in which the exercise of their competences is affected by the Union; as a separate matter, if the problem at hand was instead that the Union were felt to effect harmonising measures and issue legislation in fields wherein it lacks competence and that the target of the critique would thus be *the scope of Union powers*, an emphasis on the principle of attributed powers in better placed.

In my opinion it is firstly not entirely credible that the Member States, aware of the nature of Union law, would have taken a sudden change of heart and truly intended here to effect a change in the way the EU law is seen to bind the Member States as thus far they have been able to benignly adapt and streamline their policies in accordance with the requirements posed by EU law, irrespective of policy sector, without earth-shattering protests. Additionally, the formula has continued to appear in the Court's case law even post-Lisbon, without any of the Member States raising alarm of the Court setting aside the principle of conferral. Secondly, it is not credible that the manner chosen to achieve this end would have been adding emphasis on the principle of conferral, as *it must be known to the Member States* that said instrument does not serve as a brake pedal as regards the entry of new policy fields to the scope of EU law but only as regards the Union institutions' powers to act therein. Rather, what one imagines might have done the trick would have been tampering with the quest for an ever closer Union rhetoric in the Treaties and posing clearer limits thereupon.

There remains the option that the Member States would have made their statement fully aware of it not being fully effective in barring the application of EU law. For, although the Member States occasionally grow irritable of the required by Union law, they still might not be willing to get rid of the Union altogether. Could it be that in such a case the Member States would settle with effecting Treaty amendments that are rather pedagogic in nature and not actually touching upon the heart of the problem than genuinely revolutionary, in order to signal their worry to the Union institutions and, first and foremost, the Court?[276] After all, effecting such a fundamental change in the way in which EU law works would require more thorough remodelling of the Treaties.

As already observed, the principle of conferral is not entirely effective in imposing limits[277], and it is not even supposed to do so in the manner purported by the Member States: it is not intended to affect the scope of EU law but to decide who gets to act, the Union or the Member States. Furthermore, the division of competences and the manner of employing those competences are strictly bound by the *functional aim of furthering the integration agenda*. This surely has been known to the Member States for a while. For instance Articles 114 and 352 TFEU are a prime example of a manner of legislating that reflects the nature of the pervasive effect of the EU law, for they embody this

[276] Although this alternative is not entirely unimaginable, it must be noted that a full-fledged intergovernmental conference is perhaps not the most cost-effective way of achieving this end.
[277] A Prechal et al. 2011, p. 246.

functionalism. Although not as visible in the rest of the competence clauses of the Treaties, the functionalist view is said to be the root of the philosophy behind the division of competence between the Union and Member States. As recounted by Azoulai, Community competences were derived from the list of objectives associated with each policy area and the division was to be decided on the grounds of the dynamics of the system.[278] The jurisprudence of the Court tells the same tale: as noted above, the way in which the Court has asserted that Union citizens' rights can produce effects no matter which area of regulation is at hand favours functionalism at the expense of formalist division of competence based on policy areas.

Against the backdrop that the functionalist understanding has been clearly visible in Union law for decades, it does indeed seem strange that the Lisbon Treaty introduced a variety of new provisions emphasising the principle of attributed powers and administering competence to the Union and/or the Member States on the basis of material spheres of jurisdiction[279] while leaving e.g. Article 114 TFEU untouched. It having been asserted by Union judges ever since the late 1960s that there is no nucleus of sovereignty that the Member States can invoke in relation to Union competences, the newly fortified limitation grounds in substantial policy areas seem to have lost touch with the reality of the EU legal order. Why have limits on competence if it is known that they will not be strictly adhered to?

The legalist view of EU law clearly fails here, as a likely explanation is indeed that the division of competences in Treaty articles not only exists on the legal niveau; they are an embodiment of the Member States' political will to reassert their own status as the source of the competences conferred on the Union.[280] This further illuminates the political feature of the Court's action by showing the various readings of the virtues of the Union by the Member States on the one hand and the Court on the other: upon the birth of the Lisbon Treaty, the Union institutions received a clear signal from the Member States warning against any further curbing of their competences by the Union. Nevertheless, the Court has held on to the retained powers formula and the way of interpretation it has been developing ever since the founding of the Union – i.e., the

[278] L Azoulai 2014, p. 6.
[279] Naturally, the inclusion of new substantial policy fields in the competence clauses of the TFEU also affirms the will of the Member States to continue and deepen the integration project; in this regard, the competence clauses and the principle of attributed powers serve to define the party mainly in charge of effecting the harmonisation in said fields.
[280] Similarly S Weatherill 2009, p. 29.

division of powers does not inhibit 'the incoming tide'. Even though the Union lacks legislative power, it continues to affect the Member States' use of theirs.

As an attenuating factor one should observe the discarding of the 'hard lists' of either Union or Member State competences suggested by some interest groups during the drafting process of the later rejected Treaty establishing a Constitution.[281] As the Lisbon Treaty largely follows the outline set for the division of competences in the draft Constitution Treaty, it is somewhat informative that such restrictive propositions were not adopted in the drafting of the Lisbon Treaty either. This may be taken as a positive sign of approval of the margin of fluctuation in the limits of Union powers advocated by the Court in order to enable the Union to act effectively in the pursuit of the purpose of the Treaties.

The retained powers formula has been with us for decades now – and despite individual grumblings by Member States brought before the Court to defend their national choices running counter to Union policies, it does not seem to have been met with overbearing resistance and can thus be seen to form an established part of the Court's practice and hence EU law. Therefore, it would be more reflective of the legal state of affairs in the Union if the formula were codified in the Treaties. This could be achieved e.g. by means of including a reference to the reading which the Court seems to have given to paragraphs 2 and 3 of Article 4(3) TEU which presently refer to "obligations arising out of the Treaties" and "the attainment of the Union's objectives", supplementing that the loyalty expected from the Member States even touches upon the areas of retained powers. Politically speaking, however, this inclusion could pose some serious difficulties concerning popular acceptance, even though it would better reflect the state of affairs.

A formulation originally suggested by Maitrot de la Motte as an implicit, reversed reading of the Court's retained powers formula could also serve as a Member State friendly codification alternative. Reading as follows, the language of the suggested alternative asserts weight on the independence of a Member State in completing its state functions and could thus accrue popular support for the simultaneously presented notion that the fundamental principles of EU law indeed affect the Member States activity in areas of retained powers as well: "*If the areas of competence reserved to the Member*

[281] For a short account, see e.g. ibid. p. 31−32.

States are subject to the fundamental principles of EU law, the fact remains that, in applying those principles, the Court must respect and have due regard to the freedom of each Member States in exercising its powers."[282]

The downside of the latter formulation is that, if included in the Treaties, even though it would acknowledge the state of affairs in the Union, it would still leave unanswered the question of who gets to decide on what is to be considered as *due regard* to the discretion of the Member States and where the line with regard to the question of retained powers would ultimately be drawn. The problématique touched upon earlier as regards the holding of constituent powers in the Union is encountered once again: the effect of the retained powers formula is decided on a case-by-case basis by means of the proportionality assessment, conducted by the Court as the authoritative interpreter of the law in the European Union regime. Answering the question would thus require a fundamental decision on the nature of the EU as a whole.

Therefore, the pedagogic notion seems to be as far as one could go in the codification assignment. The consequences of the retained powers formula for Member State discretion are hard to forecast and the Court's stance seems to fluctuate depending on the contentiousness of the matter at hand. The constitutional division of discretion, if you will, thus would still remain in the hands of the Court even with a codification of the retained powers formula. Loosely quoting Judge Schiemann[283]: this is untidy – but untidiness corresponds to reality.

4 The retained powers formula in the education domain

4.1 General observations

4.1.1 Education in the Treaties

For a more concrete observation of the retained powers formula put in use, let us now turn to a specific domain of retained powers: education. Education as a policy field is closely connected not only to the cultural traditions of Member States but also to social policy and thus budgetary questions; from this nature it ensues that ECJ action touching upon education policies at times triggers deeper ideological questions than perhaps foreseen. Further, what makes said field interesting as an object of assessment for the

[282] A Maitrot de la Motte, *L'entrave fiscale,* in L Azoulai (ed), L'entrave dans le droit du marché intérieur (2011), as cited in L Azoulai 2011, p. 209−210.
[283] K Schiemann 2007, p. 483.

purposes of this study is that it captures the historical interplay between the traditional economic rights and the more recent rights conferred by Union citizenship and its effect on the Court's adjudicating praxis. It must be noted, however, that the non-exclusivity of Member States' competence in the field of education is a somewhat qualifying factor; the express powers[284] enjoyed by the Union shall be left without attention in this study. Instead, focus shall be had especially on student movement entailing access to education as well as to student benefits.

As highlighted by Advocate General Ruiz-Jarabo Colomer, there are certainly grounds for Union law to become activated in certain aspects of provision of education as seeking training often entails a strong cross-border element.[285] The ensuing gradual widening of the relevance of Union law in the field of education serves to show the development in Member States' stances towards how much independence they expect to enjoy in organising their educational systems, i.e. what is the level of discretion required by the Member States within a specific domain of retained powers. In the following observations shall be made first as regards the Court's negative integration approach in the field in general. Then we shall move on to observe the historical development of the Court's case law.

Education as a policy field was originally present in the Treaties merely in the limited and economically oriented form of vocational training and was only introduced in the Maastricht Treaty as a complementary Union power: the Member States specifically opted for excluding the organisation of their educational questions from the sphere of EU competences.[286] Today Article 165 TFEU continues to provide for this caveat, conferring to the Union a competence to support and supplement the Member States in their pursuit to develop quality education.

It can be easily observed that the entry of higher education into the scope of Union law took place in accordance with the classical spill-over model: the inclusion in the Maastricht Treaty resulted from proactive Court action in connection to fundamental

[284] Under Article 53 TFEU the Union enjoys a competence to issue directives regarding the mutual recognition of diplomas, certificates and other evidence of formal qualifications in order to make it easier for persons to take up and pursue activities as self-employed persons; and under Article 166 TFEU the Union shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.
[285] Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-11/06 *Morgan* and C-12/06 *Bucher,* paras 90–92.
[286] C Barnard & O Odudu 2009, p. 4.

freedoms adjudication. Yet, all the while the Court has asserted that questions of higher education touch upon the scope of EU law, the Member States' reaction seems on the Treaty level to have been only a partial constitutional adaption: the Member States have first introduced in the form of Article 126 EC and later upheld in the Treaties a straight-forward expression of will barring the Union from legislating in regard to questions concerning the national education systems.[287] As becomes evident below, even codifications of the Court's case law in secondary legislation have been remarkably meagre in that the Member States seem to have opted for the bare minimum in order to fulfil the requirements read by the Court in Union law.

Furthermore, in the course of the widening of the scope of the internal market project the free movement of students has been recognised and established as a central principle of EU law along with other fundamental freedom provisions.[288] Against this institutional background the behaviour of the Member States may seem rather ambivalent. On the one hand, free movement of students is accepted to count among the core values of the Union, yet the Member States cling to the exclusivity of their legislative competence refusing to codify the jurisprudence of the Court in secondary legislation or to admit on the Treaty level that adherence to the general principles of Union law may entail requirements and even needs of harmonisation in the organisation of national education schemes.[289]

The 'harmonisation' of Member States' educational policies has mainly taken place outside the Treaty framework through policy programmes such as Bologna and Erasmus/Socrates[290], which shall however be left outside the focus of this study. Along with the constitutional choices depicted in the drafting of Article 165 TFEU, the fact that the Member States have opted for this voluntary intergovernmental harmonisation outside the Treaty structure can easily be interpreted as evidence of the Member States' wish to control integration: the aims promoted by the Union are, as such, welcomed and acknowledged as desirable, but the Member States wish to integrate *on their own terms*, excluding the possibility of expansion of the effects of Union law within the educational domain which is closely connected not only to cultural and traditional values but also the national redistribution schemes in form of social assistance.

[287] D Damjanovic 2012, p. 150.
[288] ibid. p. 155.
[289] ibid. p. 156.
[290] For a brief outlook on these programmes, see e.g. D Damjanovic 2012.

Upon analysing the bearing of Article 165 TFEU, some authors place their emphasis on the features of the Article curbing Union competence and hold the Court responsible for advancing integration in spite of the statutory expression of will of the Member States: e.g. Barnard points to the Court's rationale in *Grzelczyk* as an example of the Court's willingness "to use expressly limited Community competence to justify removing limits on the application of the Treaty provisions on the four freedoms it itself had identified."[291] This is also the view presented by Damjanovic: she purports, basically, that Article 165 TFEU is an empty letter and that the Court would have decided the more recent education cases in the way it did irrespective of the formulation of the Article.[292]

Approached from another vantage point, the inclusion of the 'Maastricht caveat' of Article 126 EC in 1992, years after the Court delivered its judgment in *Gravier*[293], is seen by some to constitute Member State acceptance of the Court's findings in said case law establishing the link between education and the scope of Union law. Namely, as put forward by Lenaerts, the amendment did nothing to intervene with the negative integration effects appearing in the field of education and additionally introduced some amount of novel regulatory competence for the benefit of the Union.[294]

> *Gravier* revolved around the right of a citizen of a Member State to pursue vocational training (in the case at hand, studies in strip cartoon drawing) in another Member State where the individual concerned was not a worker nor a family member of a worker entitled to equal education possibilities under Regulation 1612/68 on freedom of movement for workers[295]; that is, the independent right of students to go study abroad on equal terms with the local students. The Court decided the case in favour of the applicant individual ruling that access to vocational training fell as such within the scope of the Treaties and thus the prohibition of discrimination on grounds of nationality then prescribed in Article 7 of the Rome Treaty prevented Member States from applying different conditions of enrolment to the nationals of the other Member States than they applied as regards their own nationals.

Additionally, Prechal et al. have indicated a loophole in the Treaty system: although the Member States have not provided the Union with direct powers to legislate in Article 165 TFEU, the provision of Article 21(2) TFEU, providing for the Council an ability to adopt Community provisions when Community action would be necessary to facilitate the exercise of free movement of Union citizens and the Treaty does not provide the

[291] C Barnard & O Odudu 2009, p. 5.
[292] D Damjanovic 2012, p. 161.
[293] Case 293/83 *Gravier v City of Liège* ECLI:EU:C:1985:69.
[294] K Lenaerts 1994, p. 7–8 and 37–40.
[295] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition, 1968 (II), p. 475).

necessary competence to take Community measures, could serve this purpose. According Prechal et al., "[o]ne does not need much imagination to see the potential spill-over effect in the area of European citizenship."[296] The potential of this Article is, however, not to be exaggerated; the adoption of new rules by the Council would after all specifically require a favourable stance of the Member States.

Be it as may, it has been noted by Prechal et al. that the apparent lack of direct regulatory powers of the Union as regards the content and organisation of education is likely to lead into legislative gaps as national discriminatory measures are set aside and no EU equivalent is available to replace the lacking law.[297] And indeed, the case law in the field shows a continuous chase between the national legislator, Union citizens and the Commission: the Court has repeatedly found national education schemes inconsistent with the Treaties, causing the Member States to adapt their legislation in line with the Court's findings only to have it challenged anew before the Court.

4.1.2 Education and the retained powers formula

When reviewing the activity of the Court in the field of education, one is first met with the somewhat striking finding that the retained powers formula in its full glory has only found its way in the Court's reasoning on said field in the new millennium.[298] But a more detailed study of the earlier education case law shows that the idea behind to retained powers formula is present even in the earlier decisions: the Court has systematically assessed whether the substance matter of a situation brought before it pertains to the scope of the Treaty, asserting that in such a case the general discrimination prohibition should apply and pose restrictions to Member State use of power. This is in fact tantamount to the application of the formula, only in a slightly more limited sense. What is more, the Member States have not even made claims related to their retained powers in majority of the education cases heard by the Court; this is most likely due to the early findings of the Court in the seminal education cases of the 1980s such as *Gravier* or *Lair* wherein Member States have raised the defence of educational matters being within the Member States' retained competences but the

[296] A Prechal et al. 2011, p. 238.
[297] idem.
[298] The *modus operandi* of the formula has appeared also in earlier cases, but it could be said that the Opinion of Advocate General Stix-Hackl delivered in Cases C-76/05 *Schwarz and Gootjes-Schwarz* as well as C-318/05 *Commission v Germany* was first to address the question of retained powers in the field of education more thoroughly.

Court has unambiguously ruled that the matter concerned nevertheless was touched by the scope of Union law.

As discussed above in Section 3.1, Boucon has maintained that the initial stance adopted by the Court in education cases in the 1980s would have been restrictive due to the sensitivity of the Court to the fact that the then Community lacked competence in educational questions. She counts the judgment in *Morgan & Bucher*[299] in 2007 as a turning point in the Court's case law in this respect.[300] Prechal et al. have similarly identified two scenarios in the Court's case law with regard to establishing whether a case in which the prohibition of discrimination on grounds of nationality has been pleaded falls within the scope of EU law: according to their finding, the Court employs in the determination either a 'competence approach' or an 'internal market approach'.[301] The first-mentioned refers to situations which are encompassed by an express Union competence, irrespective of whether said competence has been used in the situation at hand or if the 'competence' is formed in Treaty articles empowering or encouraging certain policies; also Prechal et al. attribute this approach to the Court's earlier jurisprudence. The second-mentioned in its turn refers to situations in which the interstate trade is potentially affected.[302]

As already argued above, I do not find this reading of the early education cases entirely convincing as the Court clearly in these cases, too, has separated between Union action and Union goals. In my opinion, argumentative techniques such as e.g. the cataloguing of Union measures in regard to vocational training present in some of the earlier judgments merely serve to prove that the issue at hand, i.e. equal terms of access to vocational training for all Union citizens, constituted a recognised Union policy and thus fell within the ambit of Union law.[303] The existence of a Union competence primarily serves to prove the inclusion of a matter in the substance of the integration project; thus, in the language of Prechal et al., the Court in fact only applies an internal market approach.[304] In this sense, according to my interpretation the Court clearly

[299] Joined Cases C-11/06 *Morgan* and C-12/06 *Bucher* ECLI:EU:C:2007:626.
[300] L Boucon 2014, p. 173–174.
[301] A Prechal et al. 2011, p. 219.
[302] ibid. p. 221.
[303] See e.g. judgments in Cases 293/83 *Gravier*, paras 18–23, and 152/82 *Forcheri*, paras 13–18. For a similar interpretation, see the Opinion of Advocate General Geelhoed delivered in Case C-209/03 *Bidar*, paras 49–50.
[304] Nic Shuibhne has, too, characterized the Court's work in the field of education as pertaining to a restriction-based approach to internal market law; see N Nic Shuibhne 2008, p. 772.

subscribes to the view represented by Basedow of the Treaties as an agenda-setting instrument.[305]

What the observation of Boucon and Prechal et al. on the other hand does embody is that the Court in earlier case law relied on express material policy considerations in order to establish that a situation fell into the scope of Union law; hence the references to Union policy sectors. In the field of education the development of the required link to the scope of Union law took off by the introduction of Union citizenship.[306] At first, the approach of the Court was more cautious in that it continued to require some sort of textual identification of education falling within the scope of the Treaties.[307] In *Bidar* the necessary link was found by the Court in a fashion described by Prechal et al. as ”creative”: inclusion in the scope of Union law was constructed by the Court through the fact that student benefits were indirectly touched upon in Directive 2004/38 allowing the Member States to limit the issuance of said benefits to citizens of other Member States in certain circumstances.[308]

However, with the establishment of Union citizenship the Court also began to issue decisions wherein the mere use by a Union citizen of their freedom of movement under Article 18(1) EC was sufficient to bring a situation both into the personal and material scope of EU law, whereby any national legislation irrespective of policy field capable of impeding the use of this freedom was submitted to the requirement of adhering to EU law.[309] What is more, Union citizens have also become capable of claiming this right against their home state on the premise that discrimination due to the fact that

[305] *Supra* n 14.
[306] According to Nic Shuibhne, Union citizenship as the critical factor enabling the Court to find competence and to overturn its earlier restrictive approach. By recourse to Union citizenship the Court has achieved to shake the national education solutions to the core in a way which would not have been possible by the legislator acting upon Article 149 TFEU alone; see N Nic Shuibhne 2009, p. 176 and 184.
[307] A common formulation of this idea is contained e.g. in the Court’s ruling in Case C-209/03 *Bidar* ECLI:EU:C:2005:169, para 32: “According to settled case-law, a citizen of the European Union lawfully resident in the territory of the host Member State can rely on Article 12 EC in all situations which fall within the scope *ratione materiae* of Community law --.”
[308] A Prechal et al. 2011, p. 225, referring to Case C-209/03 *Bidar*, paras 42−43. It is noteworthy that in its earlier interpretative praxis the Court had denied the existence of such link on closely related grounds: Advocate General Darmon in his Opinion delivered in Case C-109/92 *Wirth* expressly cited as a matter supporting the non-inclusion the fact that a host Member State was under no obligation to pay maintenance grants to students who benefited from a right of residence under Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students, which was annulled by the Court in Case C-295/90 *Parliament v Council* ECLI:EU:C:1992:294 due to erroneous legal basis, but whose effects were maintained. See AG Darmon’s Opinion in Case C-109/92 *Wirth* ECLI:EU:C:1993:312, p. I-6459, footnote 28.
[309] Case C-76/05 *Schwarz and Gootjes-Schwarz* ECLI:EU:C:2007:492, paras 86−87. See even Opinion of Advocate General Kokott delivered in Case C-192/05 *Tas-Hagen and Tas* ECLI:EU:C:2006:223, paras 29–33.

individuals have availed themselves of the right to free movement is likely to discourage Union citizens from using their rights under the Treaty.[310]

It is somewhat peculiar that the Court did not arrive at this interpretation of the features of Union citizenship already in the first education cases it decided under the new Treaty (i.e. *Grzelczyk* and *Bidar*) but that it continued to backup its rulings by a finding that education, too, fell within the scope of the Treaties; after all, a similar construction had been in place as regards freedom of movement of workers upon which the Union citizenship praxis built. All in all, with this turn, Union law has become virtually automatically triggered in situations of cross-border education as the decisive element is found in movement. The merely coincidental nature of that the situation also touches upon the power of organising education retained by the Member States has thus become even more accentuated than before.

As noted by Prechal et al., the reasons for migration are no longer important[311] as a migrant student is no longer to be seen merely as a student but also as a Union citizen, able to rely on Union citizens' rights just as every other Union citizen, unaffected by the earlier restrictions imposed by the Member States upon students' rights in a host Member State. Such a turn, of course, is likely to weaken the competence barrier erected by the Member States in the Treaties, and even to render it obsolete.[312] Formally, the power to decide on the organisation of higher education remains earmarked for the Member States, but as is largely accepted, the need to safeguard the fulfilment of the *effet utile* of Union law may amount to factual constraints and even substantial requirements for that organisation. In light of the more recent development, the Member States seem nevertheless to have accepted that the retained powers formula indeed has an effect on their competence to organise their education systems: the formula has even been referred to by the defendant Member States themselves.[313]

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[310] Case C-76/06 *Schwarz and Gootjes-Schwarz*, paras 88−89.
[311] A Prechal et al. 2011, p. 223.
[312] It also seems to run counter to the understanding of the Member States and the Union legislator of the logics of free movement law: see e.g. the formulation of Article 24(1) of Directive 2004/38/EC, which provides that all Union citizens *residing on the basis of this Directive in the territory of the host Member State* shall enjoy equal treatment with the nationals of that Member State *within the scope of the Treaty*. There is a clear redundancy in this formulation which can only be explained by that the drafters of this provision have not regarded the mere use of freedom of movement as capable of bringing any situation within the scope of the Treaties.
[313] See the contention of Germany cited in the judgment in Joined Cases C-523/11 *Prinz* and C-585/11 *Seeberger* ECLI:EU:C:2013:524, para 26.

4.2 Development of the education case law

4.2.1 Early years: educating workers

The right of Union citizens to access to education outside their home Member State has developed incrementally in the Court's case law, with bases for intervention developing from the free movement of workers and their families towards the more universal freedom of movement guaranteed to all Union citizens. In earlier access cases the questions proposed to the Court most often boiled down to a national requirement that foreign students should pay enrolment fees which were either higher than those charged from the Member State's own nationals or additional to those fees universally collected from all students irrespective of their nationality. Similarly to the trends detected above in Section 3.1, in the field of education Community law gained its pervasiveness through the free movement regulations: the issue was regarded by the Court first and foremost as one pertaining to migrant workers' rights under Regulation 1612/68 and the prohibition of discrimination on grounds of nationality triggered by the right to access to vocational training derived from Article 128 of the EEC Treaty, also connected to the furthering of worker mobility in the internal market.

It was settled by the Court already in 1974 in *Casagrande* that the right of a migrant worker's child to be admitted to educational courses under the same conditions as nationals in the host Member State under Article 12 of Regulation 1216/68 was to be construed as entailing not only the theoretical possibility of enrolling to education but also the financial support that made the material exercise of such right possible, and that Article 12 therefore referred "not only to rules relating to admission, but also to general measures intended to facilitate educational attendance"[314].

> The question posed to the Court in *Casagrande* concerned determining whether the denial of an monthly "inducational grant" generally available for children attending secondary school and lacking sufficient means to the children of migrant workers was in breach with Article 12. The Court left it for the referring German court to deduce whether the Bavarian legislation was incompatible with the Treaties, but the general guidance it provided was more than adequate for helping the national court to reach the conclusion that the Bavarian educational policy was in this regard discriminatory.[315]

[314] Case 9/74 *Casagrande*, para 9.

[315] ibid. para 14: "As regards Article 12 of Regulation 1612/68, although the determination of the conditions referred to there is a matter for the authorities competent under national law, they must however be applied without discrimination between the children of national workers and those of workers who are nationals of another Member State who reside in the territory." This treatment is not surprising given that the referring court had already preliminarily expressed as its view in its reference that the German legislation indeed was discriminatory.

The 1980s presented a time for the Member States to wake up to the requirements free movement law posed to their education systems.[316] The Court heard multiple cases brought by individuals and the Commission against Belgium and Germany in which the remarks made by Advocates General as well as the representatives of the Commission clearly show a Union-wide interest in an issue which was seen to impair free movement.[317]

The floor was opened by *Forcheri* (decided in 1983) wherein the Court found that the provisions concerning vocational education in the EEC Treaty, which provided the Community with at most a vague supportive and coordinating competence, served to prove that *the opportunity for vocational training* fell within the scope of the Treaty.[318] Similarly to its finding in *Casagrande*, it concluded that such training would not be equally accessible for all future workers if the Member States were able to charge enrolment fees which were higher than those demanded from their own nationals; hence, the prohibition of discrimination on grounds of nationality pervaded the competence boundary and forced the Member States to enact education policies which were in line with the Community aim of furthering access to vocational training. In this regard, the right produced to would-be-students was qualified: only education that was to be regarded as vocational training should be available on equal terms.[319] This being said, as observed by Lenarts, the qualification was nevertheless largely eradicated by a interpretative choice made by the Court rounding practically any form of university studies which could lead to occupational qualification and were not for the main part

[316] The claims related to education clearly increased in number in the beginning of the 1980s after *Casagrande* opened the gates for further litigation. As noted by the Court in *Gravier* (para 23) in 1985, the common vocational training policy referred to in Article 128 of the Rome Treaty was gradually established under the period. The developments not only took place before the Court, but the Commission and the Council were too involved in the shaping of Community policies; see the judgments in *Forcheri*, p. 2328–2330, and *Gravier*, para 22. As is revealed in the Opinion of Advocate General Slynn in Case 293/83 *Gravier* ECLI:EU:C:1985:15 (p. 595), the campaign targeting enrolment fees contingent upon the student's nationality had produced material results as such fees had by then been banished in all Member States apart from Belgium.

[317] See e.g. the Opinion of Advocate General Warner in Case 9/74 *Casagrande* ECLI:EU:C:1974:64, p. 783, and the observations submitted by the Commission in Case 152/82 *Forcheri* as summarised in the judgment, p. 2329–2330.

[318] Case 152/82 *Forcheri*, paras 17–18.

[319] This qualification led to a long line of case law intended for establishing the difference between vocational training and general education; see Cases 293/83 *Gravier*, 293/85 *Commission v Belgium* ECLI:EU:C:1988:40, 309/85 *Barra v Belgian State* ECLI:EU:C:1988:42, 24/86 *Blaizot v University of Liège and others* ECLI:EU:C:1988:43 and 263/86 *Belgian State v Humbel and Edel* ECLI:EU:C:1988:451.

aimed at improving the students' general knowledge as vocational training for the purposes of the Treaty.[320]

Quite expectedly, this case law was followed by individual students' claims for further rights: the Court was faced with the question whether the material right of access to vocational training entailed a further equal right for students to enjoy benefits issued by the host Member State to its own nationals intended not only for covering enrolment fees, but also their maintenance and training. The development here followed the same path as the right to access and equal enrolment fees: namely, the Court found in Article 7(2) of Regulation 1612/68 a wider legal basis for rights than it did in the Treaty provisions concerning opportunity for vocational training.

In *Lair* and *Brown*, the Court developed a two-levelled argument which embodies its perception of the different capability of access to vocational training on one hand, and equal rights of workers on the other, to bring situations into the scope of Union law. In the first part of its judgment in *Lair*, it contended that generally, i.e. for non-workers, assistance for maintenance and training granted by Member States fell within the scope of Union law only insofar as that assistance was intended for covering the costs of access to education; but as soon as such assistance was claimed by a worker who is a national of another Member State and has exercised his or her right as a worker to freedom of movement, the remainder of such assistance became a social benefit under Article 7(2) of Regulation 1612/68 and as such neatly slid into the scope of Union law.[321] [322]

In the Court's view, assistance awarded for a student's maintenance and training was "particularly appropriate from a worker's point of view for improving his professional qualifications and promoting his social advancement".[323] This formulation coincides to

[320] K Lenaerts 1994, p. 21.
[321] Case 39/86 *Lair*, paras 16 and 23–24. It should be noted that the right of a worker to assistance under Article 7(2) of the Regulation was qualified by the Court in *Brown* inasmuch it ruled that such a right does not exist in regard to educational assistance in a situation wherein the employment is ancillary to the studies to be financed by the assistance claimed; this outcome is rather perplexing, as in the same ruling the Court found that a student whose employment was in the similar sense ancillary to his future studies was nevertheless to be considered as a worker within the meaning of the Article. See Case 197/86 *Brown*, paras 24–28.
[322] Similarly in his Opinion delivered in Case C-109/92 *Wirth*, AG Darmon does not seem to encounter any difficulty posed by social policy pertaining to the competences of the Member States in theoretically assessing the requirements posed by freedom to provide services under Article 59 EEC; see AG Darmon's Opinion in Case C-109/92 *Wirth*, paras 58–68.
[323] Case 39/86 *Lair*, para 23.

a great degree with the argumentation submitted by AG Slynn in *Gravier* arguing in favour of the consideration of access to vocational training for non-workers as a matter promoting the mobility of workers within the Union and thus pertaining to the scope of Union law[324]; however, AG Slynn did not extend his earlier stance (i.e. genuine enjoyment of access also necessitates assistance on similar terms as granted to nationals of the host Member State) to assistance provided for maintenance of students[325]. This is a prime example of how in the earlier education cases the Advocates General have shown a veritable interest in the remoteness review claimed above in Section 3.1 to be missing in contemporary retained powers case law. Furthermore, both the AG and the Court seemed in *Lair* and *Brown* highly confined to the textual scope of the empowering legislation: they based the right of workers to assistance on a detailed analysis of the term 'social benefits' in Article 7(2) of Regulation 1612/68 and were not prepared to give an expansive reading to the passages concerning opportunity for vocational training in the Treaties. Clearly, the pain threshold of the Member States must have been reached in the question of social assistance for non-workers; hence the Court's references[326] to education and social security as pertaining to the regulatory realm of the Member States.

As we have seen, in early education cases the gateway for Union law to affect national policies was offered solely by the economic freedoms combined with the prohibition of discrimination on grounds of nationality. Here, the Court did not as such apply an express retained powers formula, but relied on a similar construction limited to the

[324] Opinion of Advocate General Slynn delivered in Case 39/86 *Lair* ECLI:EU:C:1987:373, p. 600: "[The Union institutions' decisions regarding access to vocational training] are equally, it seems to me, directed at ensuring that there should be mobility for labour within the Community. It seems to me that if a person wishes eventually to work in another Member State (and to exercise his rights under Article 48) or to establish himself in another Member State (and to exercise his rights under Article 52) or to 'provide services (and to exercise his rights under Article 59 as the provider of services) in a particular form of employment, he may well need to take a course or to obtain a qualification in that Member State. This may be just as true of skilled and unskilled trades, where particular techniques are used or practices are followed in particular countries, as it is of the professionally qualified man or woman who must satisfy the educational requirements of a professional body or those laid down by the State. To move in order to qualify, whether by a formal diploma or by the experience of undergoing a course of training, is a necessary incident of the right to move to work in a particular country. The one is preliminary to the other, and I would regard such form of vocational training as falling within 'the scope of the application of the Treaty' within the meaning of Article 7. There must not be discrimination on the grounds of nationality in regard to the terms upon which students from the Member States can undergo such vocational training."

[325] One could have taken the argument from *Gravier* further and claimed that monetary support intended for the completion of vocational training similarly furthered these aims, as the applicant in *Brown* had done; nevertheless, AG Slynn was of the opposite conviction: "Direct access to a vocational training course is within the scope of application of Article 7 of the Treaty; the means of subsistence, in the absence of more specific Community provisions, are not." See the Opinion of Advocate General Slynn in case 197/86 *Brown* ECLI:EU:C:1987:375, p. 3230.

[326] Case 39/86 *Lair*, para 15.

applicability of the prohibition of discrimination on grounds of nationality: a recurring format in the earlier education cases first establishes that the requirement of payment of fees which is contingent upon the nationality of the student is to be considered discriminatory for the purposes of Articles 7 or 48 of the Rome Treaty, *if* the situation in which it arises is encompassed by the scope of the Treaties, and then moves to inquire whether that is the case.[327] The technique operated by the Court therefore corresponds to a large extent to the more recent retained powers formula: when acting within the scope of Union law, the Member States are bound to observe the discrimination prohibition.

4.2.2 New era: Union citizenship

Banishing the worker prerogative

The education jurisprudence of the ECJ provides a delightfully clear depiction of the effects of the introduction of Union citizenship in the Maastricht Treaty for the discretion of the Member States, as well as the sharp contrast between the universality of the rights generated by Union citizenship on the one hand and those pertaining to the freedom of movement of workers on the other. The introduction of Union citizenship clearly provided the Court with a chance to re-examine its earlier stances and interpretations[328] given to the Treaty provisions and secondary law governing the rights of students in the Union.

The first test to the Union citizenship in the field of education was brought by the *Grzelczyk* case, decided 8 years after the introduction of Union citizenship in the acquis.

> The case concerned a claim made by Grzelczyk, a French national enrolled to vocational education and resident in Belgium, for a social benefit providing a general guarantee of a minimum subsistence allowance (minimex). Under Belgian law eligible for the minimex were Union nationals who qualified as workers under Regulation 1612/68; the challenge made against the national legislation relied on the fact Belgian nationals were entitled to the allowance without fulfilling such criteria.

The review by the Court was conducted following the same pattern as in the pre-citizenship cases: the conditions of the minimex were regarded to constitute discrimination on grounds of nationality and such discrimination was established to be prohibited under then Article 6 of the EC Treaty, provided that the situation at hand fell within the scope of application of Union law; this was to be determined by way of

[327] See e.g. Case 298/83 *Gravier*, para 15; Case 152/82 *Forcheri*, paras 10–13.
[328] P Craig 2011, p. 414.

reading Article 6 in conjunction with the provisions of the Treaty concerning citizenship of the Union.[329]

What the Court essentially did in *Grzelczyk* was that it merely uprooted the social benefit jurisprudence relying on Article 7(2) of Regulation 1612/68 from its basis, the status of an individual as a migrant worker, and reconnected it to the non-economic status of individuals as Union citizens similarly to the rationale adopted in *Martínez Sala*[330]. This did not as such entail a major renovation of the line previously followed by the Court in education cases, for the assistance at stake was not specifically related to student benefits but was one of a more general nature. This also enabled the Court to circumvent the social security barriers erected by the Member States in Articles 1 and 4 of Directive 93/96/EEC[331] codifying the Court's earlier rulings on the right of residence of students.[332] The Belgian legislator seems to have fallen prey of relying on the earlier vocational training case law with which it must have been painfully familiar: for, it seems that the national codification of the social benefit rule under Article 7(2) of Regulation 1612/68 was the triggering factor causing an obligation for Belgium to include even other Union citizens than those qualifying as migrant workers as entitled recipients of social assistance.[333]

The Court's approach is more interesting as regards its justifications for ruling that there had been such a development in Union law since its earlier finding in *Brown,* where it considered that education and social policy remained in the sole competence of the Member States, that students studying abroad had seized to be prevented from drawing rights relating to social assistance from Union law (i.e. free movement of students had entered the scope thereof). Namely, in addition to the Treaty amendments introducing Union citizenship and the then Article 149 EC providing the Union with a supportive competence in matters of education, the Court relied on the adoption of Directive 93/96 by the Council to show that the freedom of movement of students pertained to the scope of Community law.[334] This latter addition is a rather dubious basis for widening the scope of Union law as the Directive was first and foremost a codification of the Court's

[329] Case C-184/99 *Grzelczyk*, para 30.
[330] Case C-85/96 *Martínez Sala v Freistaat Bayern* ECLI:EU:C:1998:217, paras 62–63.
[331] Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59)
[332] Case C-184/99 *Grzelczyk*, paras 38–44.
[333] See the formulation of the first question referred for a preliminary ruling in para 14 as well as para 29 of the ruling in Case C-184/99 *Grzelczyk.*
[334] Case C-184/99 *Grzelczyk*, para 35.

earlier vocational training case law and did not show any intention by the Member States to expand the effects of Union law within the spheres of education or social policy; on the contrary, the Member States when drafting the Directive seem to have made use of every caveat the Court had indicated as permissible under Community law.[335] The curbing effect of Union law which the Court identified is therefore partly a product of judge-made law.

Further expansion of the scope of Union law

As the Court's findings in *Grzelczyk* show, Union citizenship first widened the scope of EU law *ratione personae.* Further development saw the inclusion of even students enrolled in secondary education, as opposed the earlier requirement of a vocational element in the training at hand, in another Member State as beneficiaries of the free movement provisions.[336] Finally in *Bidar*, the expansive trend lead to the now seemingly inevitable conclusion of a widening *ratione materiae* in that social assistance to students in higher education intended to cover their maintenance costs was also held by the Court to be encompassed by the scope of Union law. This ran counter to the previous, rather affirmed stance taken by the Court in vocational training cases.[337] The textual reasoning provided by the Court for the inclusion is not dissimilar from *Grzelczyk* but it is partly more convincing.

In *Bidar*, the Court took Article 24 of Directive 2004/38/EC as evidence of the development that had taken place in Union law justifying the conclusion that educational grants indeed had entered the scope thereof. Said Article provides that all Union citizens residing in a host Member State pursuant to the Directive are entitled to enjoy equal treatment with the own nationals of said Member State, except in regard to social assistance insofar as the Member States were not under any obligation to confer social security rights to such migrants prior to the fulfilment of certain time limits. However, Article 24(2) indeed provides that once a migrant student had acquired the right of permanent residence, the Member States no longer could rely on the derogation from Article 24(1) and *ipso facto* were under obligation to equal treatment. Thus, there

[335] Compare the findings of the Court in Case C-357/89 *Raulin v Minister van Onderwijs en Wetenschappen* ECLI:EU:C:1992:87, paras 38−40, and Articles 1 and 4 of Directive 93/96/EEC.
[336] Case C-224/98 *D'Hoop* ECLI:EU:C:2002:432, paras 29–34.
[337] Case C-209/03 *Bidar*, paras 38–43.

seems to be a right to study grants derived from Union law which brings the situation into the scope of Union law.[338]

On the other hand, the treatment the Court gave to the earlier Directives still at force at the time of the judgment seems to be more problematic: the Court found that although Directive 93/96 on the right of residence for students unambiguously barred migrant students from the right to student grants, such students were nevertheless not prevented from relying directly on Article 18 EC and claiming assistance pursuant to principle of equal treatment in Article 12 EC.[339] This is consonant with the Court's finding in *Grzelczyk* that students do not lose the rights which they have under the Treaty as citizens of the Union when they move to another Member State to study there and thus become students for the purposes of Union law.[340]

Observed from the vantage point of the Court seeking to secure the coherence of the Union legal system and perhaps promoting the rights of individual Union citizens, this outcome is reasonable and even recommendable. It reaffirms the description of Union citizenship as a fundamental status of all Union citizens: individuals are to primarily draw their rights from the free movement provisions, but where they fail to produce sufficient protection, a Union citizen can ultimately turn to the rights conferred by citizenship.[341] However, it expressly undermined the will of the Member States expressed in these Council Directives whereas, similarly as in the ruling in *Grzelczyk,* the Court seems to have purposefully exploited the gaps left by the Member States in the Directives, neglecting to take account of their obvious wish to exclude some parts of their social assistance schemes from the scope of the Union project.

A rather similar trend can be detected in more recent cases concerning national legislation extending the entitlement to maintenance grants even to studies conducted in other Member States. As the Member States remain in control of their social assistance

[338] Even though the textual support relied upon by the Court for its finding in this regard seems legitimate, in my opinion the explanation provided by AG Geelhoed relying on a logical deduction from the Court's earlier case-law is more convincing: "Where it is acknowledged that [maintenance assistance for students] comes within the scope *ratione materiae* of the EC Treaty for workers and given the rationale of this finding, it would seem to me artificial to exclude the same benefit from the scope of the Treaty for other categories of persons who are now also covered by the Treaty. The question whether these latter categories of persons are entitled to such benefits should be distinguished from the question whether the benefit itself is within the scope of the Treaty." See Opinion of AG Geelhoed in Case C-209/03 *Bidar*, paras 50–51.
[339] Case C-209/03 *Bidar*, paras 44–46.
[340] Case C-184/99 *Grzelczyk*, para 35.
[341] N Nic Shuibhne 2008, p. 774–775.

schemes, they are free to limit their student subsidy systems to studies conducted within the domestic education system. Some Member States, however, have even chosen to subsidise their nationals' studies abroad. What is interesting in these cases is that such national social assistance schemes already entail a voluntary nod towards furthering cross-border education; the Member States seem to think European when using their discretion in the field of education. According to the consistent stance of the Court, where such policy choice has been made, the scope of Union law is triggered and the Member State incurs an obligation not to apply selective granting criteria likely to obstruct free movement.

> In *Morgan & Bucher*, a German reference concerning the German student assistance scheme for studies abroad[342], the Court found that the condition that the education pursued in another Member State needed to be preceded by one year of studies within the same field in Germany posed an obstacle to free movement and was incompatible with the freedom of movement of Union citizens. The Court held that by creating such a possibility, which it was under no obligation of providing in the first place, the Member State submitted itself to the requirement of ensuring that "the detailed rules for the award of those grants do not create an unjustified restriction of the right to move and reside within the territory of the Member States".[343]
>
> A similar outcome was produced in *Giersch*, a case brought before the referring Luxembourg court by students whose parents worked in Luxembourg as frontier workers and who, on these grounds, claimed financial aid for their studies in other Member States from the Luxembourg state pursuant to the parasitic rights of the children of migrant workers under Article 7(2) of Regulation 1612/68. As Luxembourg typically has a high number of migrant and frontier workers, it had sought to restrict the entitlement to financial aid by means of a residence condition. Even though the Court maintained that the Luxembourgish objective of increasing the proportion of residents with a higher education degree was justifiable, it still contended that the limitation of beneficiaries to only those resident within the territory of Luxembourg upon the commencement of the studies affected posed too substantive a restriction to freedom of movement.[344] [345]

The policy choice made by the Member State which, in a way, extends the internal assistance scheme to a certain degree to cross-border situations, amounts to integration not necessitated by the Treaties, and is a result of discretionary use by a Member State of its competence within education and social security.[346] Against this background, the

[342] Judging by the defences made by the German government, furthering cross-border education seems to have been a genuine goal of the national policy. See Joined Cases C-11/06 *Morgan* and C-12/06 *Bucher*, para 41.
[343] Joined Cases C-11/06 *Morgan* and C-12/06 *Bucher*, para 28.
[344] Case C-20/12 *Giersch and Others* ECLI:EU:C:2013:411, paras 74–76.
[345] See even Joined Cases C-523/11 *Prinz* and C-585/11 *Seeberger*, paras 30–32, Case C-220/12 *Thiele Meneses* ECLI:EU:C:2013:683, paras 25–28, and Case C-275/12 *Elrick* ECLI:EU:C:2013:684, paras 28–29.
[346] This has also been noted by the German government defending the German scheme of student benefits for studies abroad in Case C-275/12 *Elrick*, para 27: "The German Government claims that the legislation at issue in the main proceedings does not restrict the freedom of movement and of residence, since the German legislature legitimately chose not to establish a right to an education or training grant for the type of course undertaken by Ms Elrick and EU law does not require it to do so. According to that government, the purpose of the [German student assistance law] is to carry out a qualitative selection of

finding by the Court that such action falls within the scope of the Treaties seems somewhat expansionist. Surely, the conditions of Union citizens who exercise their rights of free movement are touched upon, but mainly in a supportive sense and as a result of measures which the Member State is not required to take under Union law. The inconsistent part identified by the Court is that Member State action only promotes the free movement of some Union citizens, presumably on an illegitimately selective basis.[347] Thus the features of social assistance systems seeking to preserve some permanent link between the students and their Member State of origin become problematic. In his Opinion delivered in *Morgan & Bucher*, Advocate General Ruiz-Jarabo Colomer in fact seems to trace the source of the problematic character of such objective to the choice of the Member States to limit the harmonisation of education in Article 149 EC.[348] As a result, the Member States are pushed to 'internalise' situations of cross-border education to an even further degree even though it is agreed, in principle, that Member States should enjoy a wider margin of discretion in regard to granting such an advantage[349]. As noted by Dougan, the social policy of a Member State concerned is thus reshaped pursuant to "the framework of values judged legitimate under Community law -- where the final decision rests with the judges rather than any politicians."[350]

Qualifying periods for the economically inactive

Even though the rights of students were remarkably ameliorated by the introduction of Union citizenship, the citizenship case law has not awarded migrant students with an unconditional access into the host Member State's social assistance system; in this respect, Member State unease was acknowledged and respected by the Court. In *Bidar* the Court accepted the Member States' argument that in order to prevent an overburdening of the Member States' social security systems, a need exists to establish some degree of integration into the host Member State's society before an economically inactive student could enjoy social assistance, and that with regard to maintenance grants this integration could be ascertained by placing qualifying periods.[351] On a

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the types of education or training courses subsidised by the Federal Republic of Germany. Such a regulation does not constitute a restriction on the fundamental freedoms of movement and of residence."

[347] Nic Shuibhne has identified in this case law of the Court a tendency of "promoting, encouraging, or even rewarding free movement and not just facilitating it"; see N Nic Shuibhne 2009, p. 178.

[348] Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-11/06 *Morgan* and C-12/06 *Bucher*, paras 106–107.

[349] ibid. paras 72–77.

[350] M Dougan 2009, p. 129.

[351] Case C-209/03 *Bidar*, paras 56–59.

similar note the Court confirmed in *Förster* that the objective of ensuring integration of a student was a legitimate aim and that a qualifying period of 5 years was proportionate for this purpose.[352] The Court has further recognized the applicability of the same in situations where Union citizens studying in another Member State claim student grants from their home Member State.[353] The question had been boiling under already at the time of *Casagrande*[354] and would continue to raise further challenges before the Court.

Against the generally pro-movement stances adopted by the Court in cases concerning the rights of students as Union citizens, it would be imaginable that the Court would not have accepted precise numeral time limits as an appropriate means of measuring integration, but instead promoted measures similar to those suggested by Förster in her case: i.e., assessing in each individual case whether the person concerned demonstrates a sufficient degree of integration into the society of the host Member State, account being taken of personal factors.[355] However, it did not do so. This raises the following observation: the Treaties guarantee the freedom of movement and residence of Union citizens 'subject the to the limitations and conditions imposed by the Treaty and the measures adopted to give it effect'.[356] The Court bypassed this subjectivity when it contended that students may claim maintenance grants directly on the basis of Articles 18 and 12 EC despite a clear provision in Directive 93/96 that no right thereto exists thereunder; however, in regard to qualifying periods the Court has been prepared to make a concession to the Member States and uphold those limitations and conditions.

It has since then been found by the Court, however, that the justifiability of qualifying periods is not without exception: first, it was found in *Commission v Austria* that the measures which Member States can take in order to ensure a sufficient degree of integration vary on the basis of the nature of the benefit concerned.[357] The case concerned entitlement to reductions in public transport tickets, a benefit perhaps of lesser importance than maintenance grants. Yet, it would not be surprising if, with time,

[352] Case C-158/07 *Förster* ECLI:EU:C:2008:630, paras 49–54. The Court found support for the proportionality of the seemingly long period of 5 years in the fact that the same amount of time had been adopted in Directive 2004/38/EC as the milestone after which a migrant person could acquire the right of permanent residence, which in turn entitled migrants to study grants.
[353] Joined Cases C-11/06 *Morgan* and C-12/06 *Bucher*, paras 43–44.
[354] Opinion of Advocate General Warner delivered in Case 9/74 *Casagrande*, p. 783.
[355] See Opinion of Advocate General Mazák in Case C-158/07 *Förster* ECLI:EU:C:2008:399, para 93. The argument put forward by Förster has also been supported by AG Mazák; see paras 130 and 133 of his Opinion.
[356] Article 21(1) TFEU.
[357] Case C-75/11 *Commission v Austria*, para 62, and Opinion of Advocate General Kokott delivered in the same case (ECLI:EU:C:2012:536), paras 75–77.

the stiff integration test to which students applying for maintenance grants have been subjected would give way to a more individually oriented test; this would be in line with the more general trend detected in the Court's free movement case law of taking account of Union citizens' personal circumstances referred to above in Chapter 3.1.2.

And indeed, the rulings in the most recent education cases seem to point towards such a trend: in *Prinz and Seeberger,* cases concerning two German nationals claiming maintenance grants under the German scheme for studies in other Member States, the Court ruled that a strict requirement that a student should have resided in Germany for three consecutive years prior to the enrolment in studies in another Member State for to be entitled to student benefits for more than one year was incompatible with Articles 20 and 21 TFEU as it "unduly favour[ed] one element which is not necessarily representative of the real and effective degree of connection between the claimant and this Member State, to the exclusion of all other representative elements".[358] The grounds for this finding were the familiar notion that if national legislation places a Union citizen at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State, it constitutes a restriction on the freedom of movement under Article 21 TFEU.[359]

The qualifying period case law thus seems to show a similar development as took place in the Court's praxis with regard to the entitlement of students who weren't workers for the purposes of Union law to social benefits in the early 2000s, mapped out above. That is, the Member States have adapted their social benefit legislation to correspond with the earlier case law of the Court, in this case relying on the earlier express acceptance of qualifying periods as consonant with the Treaties.[360] The Court, however, strives further and gradually develops the requirements of Union law which the Member States have undertaken to abide by even when using their retained powers, thus limiting their

[358] Joined Cases C-523/11 *Prinz* and C-585/11 *Seeberger*, paras 36–38. For similar findings in the recent education cases, see e.g. Case C-20/12 *Giersch*, paras 74–78, and Case C-220/12 *Thiele Meneses*, para 40.

[359] Joined Cases C-523/11 *Prinz* and C-585/11 *Seeberger,* para 27. In my opinion, it is worth contemplation whether the risk of losing entitlement to financial assistance for students in the unforeseeable future truly is a factor which Union citizens would take into account when deciding whether to use their right of free movement possibly years before subsequently enrolling to an educational institute in another Member State, and whether it can affect their decision-making negatively. It is not entirely convincing that there exists such a direct causal link between these circumstances.

[360] In the case at hand, it should be noted that the requirement that the criteria applied for assessing the degree of integration should not be too general and exclusive in nature or unduly favour an element which is not necessarily representative of the real and effective degree of connection at the expense of more representative elements was already laid down by the Court in Case C-224/98 *D'Hoop*, para 39; it had not, however, previously been indicated that qualifying periods would be regarded as such.

residual discretion. The next step in this continuum would be for the Court to take the Member State adaption as proof of a widening of the scope of Union law or as an indication of the level of protection required from the Member States, and to build upon that to further deepen its interpretation of what adherence to Union law requires in the field of student maintenance.

Nevertheless, the breadth on which students moving as Union citizens are able to rely on the scope of Union law continues to be lesser than for those moving as workers: Union citizens who are able to base their claim on Regulation 1612/68 rather than the Treaties need not prove their integration to the receiving society before they are entitled to a more absolute degree of defence against discrimination. The Court has based this difference in treatment on the economic contribution of the migrant student to the receiving society: as economically inactive students do not accrue any budgetary surplus through taxation, their entitlement to benefits from the national re-distribution scheme may be made subject to conditions. But if a student succeeds in proving that they are to be regarded as a worker for the purposes of Union law, the receiving Member State's discretion is more limited when granting assistance.[361] As usual, the language employed by the Court when addressing this continued struggle of non-economic students implies that the future development might bring a change and further enhance the status of Union citizens as equal.[362]

In this regard, the development from the earlier finding in *Brown,* that a national of a Member State will not be entitled to a grant for studies in another Member State by virtue of his status as a worker "where it is established that he acquired that status exclusively as a result of his being accepted for admission to university to undertake the studies in question"[363], to a more recent case, *L.N.*, wherein it was established that the status of worker under Union law would not be revoked by the acquisition of the status of student and that a worker could rely on his rights under Article 7(2) of Regulation 1612/68 to maintenance grants even where the initial purpose of his movement to the receiving Member State would have been to pursue the studies in question[364], is rather interesting. The prerogative of workers to unlimited equality in regard to social assistance is upheld, but the acquisition by students of the status as a worker for the

[361] See Opinion of Advocate General Sharpston in Case C-542/09 *Commission v the Netherlands*, paras 86–95.
[362]ibid. para 92.
[363] Case 197/86 *Brown*, para 27.
[364] Case C-46/12 *L. N.* ECLI:EU:C:2013:97, paras 36 and 47.

purposes of Union law is made significantly less burdensome by the Court; if students from now on will be able to acquire the status of a worker even when entering the receiving Member State as students and thus escape abiding by the qualification period requirements, the Court may have created a backdoor into entitlement to social assistance.

4.3 Justifications and proportionality review in education cases

A review of education case law reveals that the Member States have first begun to argue justifications in the post-*Grzelczyk* era. This observation is, however, not entirely without exception: though not quite raised in a manner typical for justifications, Member States have made remarks concerning economic grounds and safeguarding the financial balance of the national education system in *Casagrande*[365] and *Gravier*[366] respectively. The justifiability review has consequently been missing in most of the earlier education cases heard by the Court; the Member States have instead focused on arguing that the cases were out of reach of EU law in the first place. A further probable explanation of the lack of justifiability review is the fact that the earlier cases more often than not concerned direct discrimination on grounds of nationality, whereby the burden of justification of the Member States would have been considerably heavy[367].

The first more comprehensive justification review in the field of education was conducted in *Commission v Austria*[368], wherein Austrian legislation requiring non-nationals to show their eligibility for higher education in their domicile for to be able to enrol in such education in Austria was considered to constitute indirect discrimination on grounds of nationality. Austria referred to three needs justifying its restrictive legislation: those of safeguarding the homogeneity of the Austrian higher or university education system; preventing abuse of Community law; and respecting the obligations of Member States under international conventions. The Court accepted, in theory, all but the third justification offered by Austria as circumstances eligible for justifying the restriction of free movement of students created by the domestic law, but nevertheless found that Austria had failed to show that the aims sought by the Member State could not have been achieved by recourse to less restrictive measures.[369]

[365] Opinion of Advocate General Warner delivered in Case 9/74 *Casagrande*, p. 783.
[366] Case 293/83 *Gravier*, para 12.
[367] See e.g. P Craig & G de Búrca 2011, p. 729. See also Opinion of Advocate General Jacobs delivered in Case C-147/03 *Commission v Austri*a, para 23, as well as Opinion of Advocate General Sharpston delivered in Case C-73/08 *Bressol,* paras 78 and 128–130.
[368] Case C-147/03 *Commission v Austria* ECLI:EU:C:2005:427.
[369] ibid. paras 66, 70 and 74.

The most interesting of the justifications raised by the Austrian government is the first-mentioned relying on the argument that not taking into account whether students would be eligible for education in their domicile would cause a flow of foreign students to Austrian courses, which in turn would generate structural, staffing and financial problems.[370] The Member State concerned has thus drawn an analogy from cases pertaining to the field of healthcare and justifications accepted by the Court therein. Although AG Jacobs in his opinion has opposed accepting this contention as legitimate under the Treaty[371], the Court has not made any remark as regards the ability of similar argumentation to provide a justification even in the field of education.

Historically, the justifications available for Member States in the fields of education and healthcare have not been parallel. The Court was invited to assess the comparability of the two fields when individuals seeking to ameliorate their chances of benefiting from Community law to its full extent began in the 1980s to submit in cases heard in Luxembourg that students should be treated as recipients of services and thus benefit from a significantly vaster array of rights conferred by the fundamental freedoms than that available for 'mere' students at the time. The invocation of the fundamental freedoms relating to services in education cases was intended to have the effect of bringing a situation into the scope of EU law, thus triggering the application of discrimination prohibitions contained in the Treaties. The cue to this claim was found in the Court's ruling in *Luisi & Carbone*, wherein the Court had established that the freedom to provide services secured in Article 59 of the EEC Treaty included the freedom for the recipients of services to go to another Member State in order to receive a service there without being obstructed by restrictions, and that *inter alia* persons travelling for the purpose of education were to be regarded as recipients of services.[372]

In *Gravier,* the applicant seeking relief from an additional enrolment fee imposed on foreign students in the Belgian educational system argued her case primarily as a services case; however, the Court dismissed the argument altogether and decided the matter on the grounds of Article 7 (prohibition of discrimination) alone without entering

[370] This worry is largely due to the geographical realities of Europe: Austria, similarly to Belgium, is neighbour to a significantly larger Member State with the same official language and a more restrictive intake policy in higher education.
[371] Opinion of Advocate General Jacobs delivered in Case C-147/03 *Commission v Austria*, paras 28–34.
[372] Joined Cases 286/82 and 26/82 *Luisi and Carbone v Ministero del Tesoro* ECLI:EU:C:1984:35, para 16.

the deliberation on whether publicly arranged education and training could be perceived as a service within the meaning of the Treaties. Advocate General Slynn, however, commented on the claim in his opinion, adopting a rejecting stance on the grounds of education financed by a state as a part of their social policy lacking the character of economic activity.[373] This argumentation was later adopted by the Court in *Humbel*.[374] Education provided against remuneration by private institutions operating on a profit-making basis, however, was seen as capable of constituting a service within the meaning of the Treaties.[375]

This framework survived the introduction of Union citizenship: in *Commission v Germany* as well as *Schwarz and Gootjes-Schwarz* decided on the same date the Court maintained that the freedom of movement of Union citizens is specifically applied in the provisions guaranteeing the freedom to provide services; thus, if the services regime was inapplicable to the matter at hand due to a lack of a *but lucratif*, recourse could be had directly to the freedom of movement of Union citizens and the prohibition of discrimination on grounds of nationality.[376]

The services jurisprudence of the Court raises interesting similarities between the treatment of Member State action concerning education on one hand and healthcare provision on the other. As for the situations where education could indeed be seen as a service, the Court has in *Commission v Germany* and *Schwarz and Gootjes-Schwarz* drawn a direct analogy between healthcare and education as regards the bearing of the retained powers formula.[377] Meanwhile, as for the situations not qualifying as provision of services, the view held by e.g. Advocate General Jacobs in *Commission v Austria* has been rather clear in that education could not in all respects be set on par with healthcare and that the use of discretion by Member States was therefore to be subjected to a somewhat different assessment.[378] Nevertheless, even though the Court has followed the Advocates General in that all education indeed cannot be seen as service provision, it has virtually stretched the restrictive effects of the services regime to even publicly provided education through the fact that it has awarded quite similar effects to Union

[373] Opinion of Advocate General Slynn delivered in Case 298/83 *Gravier*, p. 603.
[374] Case 263/86 *Humbel*, paras 17–18.
[375] Case C-109/92 *Wirth v Landeshauptstadt Hannover* ECLI:EU:C:1993:916, para 17.
[376] Case C-318/05 *Commission v Germany* ECLI:EU:C:2007:495, paras 32–34, and Case C-76/05 *Schwarz and Gootjes-Schwarz*, paras 34–35.
[377] Cases C-318/05 *Commission v Germany*, para 86, and C-76/05 *Schwarz and Gootjes-Schwarz*, para 70.
[378] Opinion of Advocate General Jacobs delivered in Case C-147/03 *Commission v Austria*, paras 32–35.

citizens' right of movement. Thus, even though the means of intervention are different, the outcome is quite likely to be identical.[379]

Some difference may, however, be found in the justifications available to the Member State: whereas breaches of Article 56 TFEU can only be justified by recourse to exact derogations provided in the Treaty or imperative reasons in the public interest, restrictions on the freedoms conferred by Article 21(1) TFEU on Union citizens can be justified if they are based on objective considerations that are independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions.[380]

A comparison between the justifications review in healthcare and more recent education cases shows that the fields are growing closer to one another. This can be observed in *Bressol*, where the Court seems to have accepted, in practice, that the aim of avoiding excessive burdens on the financing of higher education could provide a justification, where an actual risk of such overburdening exists.[381] Thus, by accepting these unconventional grounds of justification the Court has knowingly opted for a more lenient stance positively contributing to the width of the Member State's discretion when organising its education/social security system.

The Court has in principle accepted a variety of justification grounds pertaining to the nature of education as part of the social policy regime offered by the Member States to their nationals. Such justifications include *inter alia* ensuring that a Member State's resident population is highly educated and consequently promoting the development of the economy[382] as well as ensuring that the grant of assistance to cover the maintenance costs of students from other Member States, or native students pursuing education abroad, does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State[383]. As illustrated by these examples, even justifications with some economic connotations have been found

[379] The same finding has been made by Nic Shuibhne, who has even forecast a similar development in the field of healthcare. See N Nic Shuibhne 2008, p. 781.
[380] Case C-318/05 *Commission v Germany*, paras 95 and 132–133.
[381] Case C-73/08 *Bressol*, para 49. This contention has, however, raised some critique from within the Court; e.g. Advocate General Sharpston has asserted in her Opinion in Joined Cases C-532/11 *Prinz* and C-585/11 *Seeberger*, paras 54–64, that the risk for overburdening posed to a Member State's social system should need to be substantial for it to provide any justification for restricting the freedom of movement of Union citizens.
[382] Case C-20/12 *Giersch*, para 56.
[383] Joined Cases C-532/11 *Prinz* and C-585/11 *Seeberger*, para 36 with references.

permissible by the Court. However, the Court has remained keen to note that purely budgetary concerns cannot as such be the aim of the restrictive measure; i.e., the Member States may not claim that they cannot afford free movement of students.[384]

This finding marks a clear dividing line between Member State margin of discretion in abiding by classical free movement law and the requirements posed by Union citizenship and the rights of movement thereunder. In *Commission v the Netherlands*, the Court has explained this distinction with Article 24 of Directive 2004/38 which it considers to embody the difference in the absoluteness of the rights of economically active and non-active Union citizens.[385] Interestingly, similar economic justifications have nevertheless been accepted by the Court in cases pertaining to healthcare and the freedom of movement relating to services.

The economically oriented justifications entertained by the Member States encapsulate the dilemma faced in the field of higher education: that is, an intrinsic lack of faith of the Member States in the internal market project. This is visible e.g. in the Austrian government's attempted defence of its protectionist rules in Case C-147/03 by maintaining that the enormous influx of foreign students in medical education programs would result in the Austrian system producing numerous doctors and other medical professionals who would go on and practice abroad, whereas the host country would be left with the losing hand of standing for the costs of the education in return of a shortage of medical staff.

If the internal market was believed to function properly, Austria should not have to worry about having adequate human resources for sustaining its public health care system, as vacancies would be filled by jobseekers from other Member States.[386] But as we now find ourselves, the European market is still one entailing immaterial national borders created by e.g. social assistance schemes. This is also visible in the case law of the Court: while maintaining that the free movement of students "allows for a certain degree of financial solidarity as amongst nationals of the host Member State and nationals of other Member States", the Court recognises the political choice made by the Member States curbing the availability of social assistance in admitting that students

[384] Case C-20/12 *Giersch*, paras 51–52; Case C-220/12 *Thiele Meneses*, para 43.
[385] Case C-542/09 *Commission v the Netherlands* ECLI:EU:C:2012:346, paras 56–67.
[386] In the same vein, see the Opinions of Advocate General Sharpston in Case C-73/08 *Bressol*, para 119, as well as Joined Cases C-523/11 *Prinz* and C-585/11 *Seeberger*, para 123.

"should not become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence."[387]

The Court may be sensitive towards Member States' budgetary concerns; yet it seems to have taken a heavy grip of the justifiability and proportionality review in education case law. To begin with, the more recent education cases show an interesting detail as regards the substantial corollary of the retained powers formula: namely, in her Opinions Advocate General Sharpston has developed a systematic habit of comparing the justifications presented by a Member State before the Court in regards to a restrictive national measure with the original explanatory/preparatory material behind the national regulation at stake, and assessing whether the Member State is actually providing the Court with genuine information about the policy underlying the restrictive regulation.[388] This seems to operate as a test of bona fide of sorts: as the Member State has used its regulatory power in the field of retained powers at stake, has it genuinely taken interest of the EU law that it is obliged to observe?

The Court has seemed rather eager to keep the entire justifiability and proportionality review in its own hands; the way the Court jumped into this evaluation in e.g. *Bidar* was rather eye-catching as the referring court had expressly asked the Court for guidance as to what criteria *the national court* should apply in determining whether the conditions governing eligibility for such assistance are based on objectively justifiable considerations not dependent on nationality.[389] While AG Geelhoed in his Opinion delivered an answer corresponding to the actual inquiry of the referring court[390], the ECJ for its part chose to conduct the review on the national court's behalf.[391] The same is visible in *Morgan & Bucher*: in opposition of the proposition by the Finnish and Dutch governments that the national court should decide whether the restriction of freedom of movement created by German law that they had held to have a lawful objective was appropriate, AG Ruiz-Jarabo Colomer contended that "[t]he Court of Justice should not accept this suggestion and should disassociate itself from the

[387] Case C-75/11 *Commission v Austria*, para 60.
[388] See the Opinions of Advocate General Sharpston in Case C-73/08 *Bressol*, paras 110–114, as well as Joined Cases C-523/11 *Prinz* and C-585/11 *Seeberger*, para 53.
[389] Case C-209/03 *Bidar*, para 27.
[390] Opinion of Advocate General Geelhoed in Case C-209/03 *Bidar*, para 68.
[391] Case C-209/03 *Bidar*, paras 55−63.

analysis, since it has enough information to provide a complete solution, which, furthermore, avoids subsequent referrals."[392]

The Court has even provided the defendant governments with concrete examples of alternative policies which would not breach Union law. In *Giersch*, it suggested that the overly restrictive Luxembourgish residence condition which students who were children of frontier workers employed in Luxembourg were required to fulfil in order to be entitled to maintenance grants could be replaced e.g. with a requirement that the student should return to Luxembourg upon the completion of their studies, or that their parents should have been employed in Luxembourg for a certain minimum period of time.[393] Even though the ratio of these examples in the judgment is demonstrating that less stringent restrictions of free movement would suffice to produce the legitimate aim strived for by the Luxemburgish state, they seem a tad intrusive given that the policy field in question is one wherein the Member State should continue to be able to use its discretion freely.

Even where the national court has been entrusted with conducting the proportionality review, the Court has at times provided it with guidance in form of such a loaded, in-depth analysis of the matter that the national court would be required to possess a great amount of creativity in order not to reach a similar conclusion that the Court has alluded to in its ruling; this is particularly visible in *Bressol* wherein the Court, let alone Advocate General Sharpston, made it abundantly clear that the proportionality of the measures enacted by the Belgian legislator resulting in indirect discrimination of non-nationals in enrolment to medicinal education was questionable.[394]

To conclude, the justifications and proportionality reviews in education cases seem to follow the general trend detected above in Section 3.2: as a general rule, the Court is prepared to evaluate a wide array of justifications raised by the Member States for their restrictive education policies, even be they economic in nature. However, the proportionality review is the real tool of the ECJ to affect Member State policy-setting in a field of retained powers and to invite the Member States to try another solution than that produced by the purely national interests.

[392] Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-11/06 *Morgan* and C-12/06 *Bucher*, paras 111–112.
[393] Case C-20/12 *Giersch*, paras 79–80.
[394] See Case C-73/08 *Bressol,* paras 66–81, as well as Opinion of Advocate General Sharpston delivered in the same case.

5 Retained powers adjudication: conclusions

5.1 Reach of the argument from the scope of Union law

The education case law reviewed above in Chapter 4 corroborates the finding that the Court has, through its use of the retained powers formula, claimed a constitutional amendment in the Treaty framework, and the Member States have to a large degree adapted to this change insofar as the Court has got the chance to rule on questions within the retained powers of the Member States. In search of ascertaining that the freedom of movement of workers, and later Union citizens, bears substantive relevance the Court has required the Member States to effect changes in their education and social security policies, despite a clear limitation drawn by the drafters of the Treaty in form of the division of competences, without meeting any significant resistance from the part of the Member States that initially, however, seem to have drawn up the Union project with the intent of leaving the field of education outside the equation.

Yet, the Member States have kept bending the Court's ear with worry over their welfare schemes becoming undermined as a result of unlimited access of migrants to benefits, and the Court has certainly made concessions. The effect of the argument from the scope of Union law is thus not total; though the discretion of Member States is factually eroded, the choice of the Member States to exclude certain policy fields from harmonisation is not rendered completely without consequence.

Azoulai has described the retained powers as "the collective goods the State is supposed to protect so as to ensure the social cohesion of its own population in its territory".[395] Similarly, Boucon attributes the treatment of the fields of retained powers to the nature of those fields as pertaining either to national sovereignty (nationality, taxation) or the welfare state (social system, healthcare, education), concepts which both rely on the existence of geographical or membership boundaries.[396] She proposes this conceptual background as an explanation for the Court's willingness to tolerate national deviancy to a greater extent than in the classical negative integration cases pertaining to the four freedoms.

[395] L Azoulai 2011, p. 207.
[396] L Boucon 2014, p. 182.

Dougan contends that the choice made in Union law is that of conscious deconstruction of the geographical and membership, i.e. nationality, boundaries.[397] Snyder, on the other hand, maintains that such boundaries are not foreign to the Union either; in his view "EU boundaries are problematic, flexible, permeable, often situationally defined and frequently negotiable".[398] The latter view seems to better correspond with reality: as the Member States are allowed to certain extent to continue segregation for the benefit of their own nationals, the Union rather moulds than deconstructs existing boundaries. All in all, the solidarity link required for inclusion to a national welfare scheme is being remodelled by Union law: it may be economic contribution or a shared experience of links between the individual and the host Member State.[399] Supranational Union citizenship can thus be seen to 'tame' nationalism by opening doors to new members of society.[400] This inevitably also affects the Member States' budgetary discretion as regards its welfare regime.

Interestingly, what is acceptable to both Member States and the academy on one field of retained powers is not automatically that in another context. Namely, the recent discussion triggered by the crisis of the EMU has teased out opinions highly alarmed by the possible substantial effect of the Union competence to lay down budgetary discipline and balance rules on the Member State discretion in arranging their national budgetary and fiscal matters.[401] The conceptual setting is, however, identical to that in e.g. education adjudication before the Court, wherein the framing of national competence is more widely accepted in literature[402]: it is a question of whether general policy aims set by the Union mandate indirect affecting of the Member States' use of power.

[397] M Dougan 2009, p. 120
[398] F Snyder 2003, p. 67.
[399] M Dougan 2009, p. 121; K Lenaerts 2010, p. 1370.
[400] N Walker 2003, p. 47. Walker has identified the collective goods at stake in the fulfilment by a state of its welfare functions (i.e. social cohesion, material well-being and personal freedom) as the potential bridging factors in translating the constitutional model from state level to the supranational EU level. He has observed a twofold relationship in which these collective goods exist to the change towards supranational polity model: the limited capability of the state on one hand can actually be seen to further the course towards wider supranational integration because of the benefits gained through acting above Member State level, yet on the other hand the Union as a supranational actor may not be capable or it may lack the legitimacy to repair the shortcomings of the Member State, and as it curbs the Member State's regulatory ability it may end up worsening the decline of the Member State's capacity to fulfil its functions. See N Walker 2003, p. 46−49.
[401] See e.g. A Hinarejos 2012, p. 23–24 as well as K Lenaerts 2014, p. 766−767.
[402] See e.g. K Lenaerts 2011.

The example of the scholarly writings on the EMU, as well as e.g. the heavily emphasised assertion in Article 4(2) TEU that national security is to remain at the responsibility of the Member States (which, intriguingly, is not dissimilar from the attempted caveat in Article 165 TFEU regarding education), go to show that there does indeed exist support for a construction of the Union project in which Union law is not seen to possess total permeability. According such a reading the Member States may not only retain powers, but also a nucleus, or essence, of statehood, which is to remain free of unsolicited influence by the extension of the Member States that we call the European Union. In many fields of retained powers the Court has resisted the Member States' insertion for power. The real test of the argument from the scope of Union law would, however, be if the Court were to be given a possibility to rule on the legitimacy of the feared indirect affecting of national decision-making in the more sensitive areas of e.g. budgetary autonomy or national defence.

Based on the doctrine that the Court has steadily developed within its retained powers jurisprudence, I am prone to believe that as a premise, the Court would reaffirm the retained powers formula even in such sensitive domains as any other resolution would amount to illogical deviance from the construction of the Union constitutional framework concocted by the ECJ. The concerns regarding the autonomy of the Member States could, however, be weighed into the equation by means of recourse to Article 4(2) TEU in a balancing exercise as predicted by von Bogdandy and Schill[403]. An approach such as this would not necessarily correspond to the Member States' reading of the constitutional structure of the Union, but provided that the outcome of such judicial review would not breach untenably the sense of autonomy of a Member State, it would probably sit neatly as a part of the continuum of constitutional discourse on the nature of the European Union between the EU and its Member States.

5.2 Concluding remarks

The query made in this paper to the competences of the Member States raised various sub-questions; firstly, that of the locus of constituent power in the Union, secondly, that of the final weight of the Member States' residual powers given an erosion of their

[403] A von Bogdandy and S Schill 2011, p. 1441. According to the view of von Bogdandy and Schill, "where national identity is at stake, Article 4(2) TEU requires that a proportional balance be found between the uniform application of EU law, a fundamental constitutional principle of the EU, and the national identity of the Member State in question. Thus, Article 4(2) TEU does not accord automatic priority to the constitutional principle of the Member State protected by Article 4(2) TEU, nor does it require domestic constitutional law unconditionally to yield precedence to EU law."

discretion therewith, and thirdly that of the ability of the Treaties to depict the de facto constitutional scheme operating in the Union.

I have arrived at the conclusion already drawn by scholars prior to my study that the relation of the Union and the Member States as holders of constituent power most probably needs to remain as blurry as it presently is for the Union project to retain its force. As we admit that the Union indeed holds some amount of constituent power of its own, the origin of that power remains an enigma as the will of the Member States when drawing up the Treaties does not seem to have been to confer such self-evolutionary ability on the Communities and the later Union.

As for the Member States' retained powers, it can be contested whether or not the relation of mutual respect of each other's interests demanded by the Treaties and depicted by various scholars works for the equal benefit of the Union and the Member States. As noted by Maduro when describing the pluralist European constitutionalism, in such a framework "no legal order should be forced to abandon its own viewpoint", i.e. its reading of the source of its authority as a regulator.[404] It seems that in the fields of retained powers, due to a bias working against the Member States, Union values often take the upper hand as the political choices made by the Member States can be questioned in light of Union law by default and thus the exercise of competence by a Member State may be considerably circumscribed. The case study conducted in the field of education serves to validate these assumptions.

In response to the common assertion that the European Union lacks its own demos, supporters of European federalisation tend to point to an alleged exercise of constituent power by "European people(s) creating and legitimating a true European Constitution".[405] And yes, it is quite right to say that the European peoples have given their consent to their home Member States being part of the EU. However, as witnessed by the Member States' eagerness to accentuate the limits of competence of the Union, it is another question whether this political community truly knows to the fullest extent what it has consented to. Nationalists defending the sovereignty of individual Member States more often than not seem to target Union powers in their critique, even though they might in fact have a bigger worry: the scope of Union law. In short, the nature of

[404] M P Maduro 2003, p. 99, with reference to Richmond.
[405] ibid. p. 77.

Union law – especially its capability of pervading firewalls erected – combined with how its application and the 'rationing' of its effect are in the end a matter of political inclination rather than a strictly legal question, are not widely advertised to the great public either in the Articles of the Treaties or elsewhere.

I subscribe to a plea previously presented by Weatherill as regards the future of the Union amidst claims of encroachments upon Member State powers: what would be plausible is crafting a system "that is less easily misunderstood, and less easily misrepresented". [406] The Treaties do not sufficiently reflect what the current constitutional framework of the Union entails. For although a less-than-accurate representation of the Member States' powers as members of the Union shields the Union institutions from criticism by Eurosceptics, it also paves the way for unnecessary disappointment likely to affect the legitimacy enjoyed the European Union.

[406] S Weatherill 2009, p. 27.