Cooperative federalism constitutionalised: the emergence of complementary competences in the EC legal order

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Journal Article

European Law Review

E.L. Rev. 2006, 31(2), 167-184

Subject
European Union

Other related subjects
Constitutional law; Environment; Health

Keywords
Constitutional law; EC law; Environmental policy; Federalism; Legislative competence; Public health

Cases cited

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***E.L. Rev. 167** Beyond the core areas of European integration, the federal division of legislative powers between the European Community and the Member States has long been characterised by a co-operative federalism: national legislators will typically be entitled to complement the common Community standard. Since the Single European Act, this philosophy of co-operative federalism has increasingly been "constitutionalised": ever more legislative competences constitutionally limit the power of the Community legislator to intervene in a particular policy field. The article traces the emergence of these complementary competences. It then examines the Community's environmental and public health policies in an attempt to analyse the constitutional regime governing these complementary competences. The article concludes that many central constitutional choices are still to be made by the European Court of Justice, in particular, whether there are hard or soft constitutional limits around the Community's complementary competences.*

Introduction: co-operative federalism outside the "core" of the internal market

While the division of legislative powers between a federation and its entities is a central task of every federal constitution, a typology of competences is *not* essential to the federal distribution of legislative power.[1] Where a competence typology exists, different types of competences constitutionally pitch the degree of legislative responsibility of each level in relation to the other. The respective differences are thus of a relational kind. Each competence category represents a calibrated quantum of legislative power: where a legislator enjoys an exclusive competence, no legislative power will remain at the other governmental level. Where, on the other hand, the power is shared, the relationship between the two legislators will be subject to a number of constitutional principles that co-ordinate the harmonious co-existence of two sources of autonomous legislative power. In some situations, finally, a competence may only entitle the federal legislator to a limited degree of legislative intervention so as to protect the predominant legislative function of the sub-federal public authority.

***E.L. Rev. 168** The federal principle stands for *duplex regimen* and the idea of some "unity in diversity". For modern states, the two most influential constellations of the federal principle emerged under the names of "dual federalism" and "co-operative federalism". Each model was coined to reflect a particular constitutional arrangement in the division of legislative powers.[2] Co-operative federalism has been shorthand for various phenomena. Its essence may be summarised as follows: "As the words indicate, the national and state governments work together in the same areas, sharing functions and therefore power."[3] Co-operative federalism works under the premise that "the National Government and the States are mutually complementary parts of a *single* governmental mechanism all of whose powers are intended to realize the current purposes of government according to their applicability to the problem at hand".[4]

Outside the core areas of European integration, the predominant federalist philosophy of the European Community has always been that of legislative co-operation.[5] For those "flanking policies", Community legislation would not, ipso facto, exclude stricter national measures that harmoniously supplemented the Community standard. Minimum harmonisation would set a mandatory floor and permit upward legislative differentiation. National measures that conformed to Community legislation (and the Treaty) would not be pre-empted. However, recourse to minimum harmonisation for legislation adopted under Arts 95 and 308 EC had been a *legislative* choice. Political feasibility and legislative discretion determined the intention of the Community legislator to pre-empt a field or to allow for supplementary national legislation. Co-operative federalism was a *legislative* technique.

Since the Single European Act ("SEA"), the phenomenon of co-operative federalism has increasingly been "constitutionalised". Newly introduced legislative competences have set *constitutional* limits to the legislative powers of the Community legislator in two ways.[6] For a number of policy fields, the Treaty mandated the Community legislator to set minimum requirements only. The method of constitutionally fixing minimum harmonisation emerged for the

first time with the SEA in relation to environmental and social policy.[7] Subsequent amendments have extended this technique to the area of **E.L. Rev. 169* consumer protection,[8] the protection of public health,[9] and to visa and asylum matters.[10] The constitutional relationship between the Community and the national legislator is relatively straightforward: the Treaty guarantees the ability of the national legislator to adopt higher standards. The legislative co-operation is a result of the structure of the legal base as such. This particularity sets them apart from "normal" shared competences, for these competences pre-structure the relationship between the Community and the national legislator at the constitutional level.

A second variant of constitutionally enshrined co-operative federalism appears with the Maastricht Treaty. Instead of referring to "minimum" standards, the Treaty characterises the function of the Community legislator as "complementing" or "supplementing" national action. The contours of this type of legislative competence are still largely unexplored, especially as some of these competences introduce the concept of "incentive measures" that may exclude all harmonisation within the field.[11] (This sub-type would not constitute a *legislative* competence at all,[12] if the reference to "harmonisation" is taken to mean generally binding Community intervention.)[13] Europe's federalism has come to describe *both* variants as "complementary competences", especially since a number of "minimum harmonisation" competences expressly refer to making a contribution or supplementing national action. Today, the following complementary competences can be found in the EC's constitutional order:

(a) Community action to combat discrimination: Art.13(2) allows the Council to adopt Community "incentive measures, excluding any harmonization of the laws and regulations of the Member States", to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in this particular competence.

(b) Visa, asylum, and immigration: here, the Council was called upon to establish, until May 1, 2004, "minimum standards" for asylum seekers and refugees.[14] The Community was equally entitled to adopt measures on immigration, which "shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements".[15]

(c) Employment policy: the Community "shall contribute to a high level of employment by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action. In doing so, the competences of the Member States shall be respected".[16] For this purpose, the Community shall adopt "incentive measures designed to encourage cooperation **E.L. Rev. 170* between Member States and to support their action in the field of employment". Those measures shall not include harmonisation of the laws and regulations of the Member States.[17]

(d) Social policy: the Community "shall support and complement the activities of the Member States" in certain fields by adopting measures "designed to encourage cooperation between Member States" as well as "minimum requirements". Community legislation will thereby in no way "prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty". [18]

(e) Education and vocational training: the Community is entitled to "contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity". To that effect, the Council "shall adopt incentive measures, excluding any harmonization of the laws and regulations of the Member States". The same applies, mutatis mutandis, to vocational training. [19]

(f) Culture: the Community's cultural involvement "shall be aimed at encouraging cooperation between Member States and, if necessary, support and supplementing their action" through "incentive measures, excluding any harmonization of the laws and regulations of the Member States". [20]

(g) Public health: Community action shall complement national policies through legislative measures in certain fields (para.4a, b) as well as "incentive measures designed to protect and improve human health, excluding any harmonization of the laws and regulations of the Member States". [21]

(h) Consumer protection: the Community shall "contribute to protecting the health, safety and economic interests of consumers" through measures which "support, supplement, and monitor the policy pursued by the Member States", whereby Member States would not lose their legislative power to maintain or introduce more stringent measures. [22]

(i) Trans-European Networks: to build trans-European networks, the Community shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures. [23]

(j) Industrial policy: here, the Community shall "contribute" to enhancing the competitiveness of the European industry by means of "specific measures in support of action taken in the Member States". [24]

***E.L. Rev. 171** (k) Research and technological development: the Community shall also complement the activities of the Member States with regard to research and technological development. The Community and the Member States shall thereby co-ordinate their research and

technological development activities so as to ensure that national policies and Community policy are mutually consistent. [25]

(l) Environment: the Treaty simply states that the Community is permitted to contribute to a policy on the environment, while not preventing Member States from maintaining or introducing more stringent protective measures. [26]

(m) Development co-operation: the Community policy in the sphere of development co-operation "shall be complementary to the policies pursued by the Member States". [27]

(n) Economic, financial and technical co-operation with third countries: Community measures "shall be complementary to those carried out by the Member States and consistent with the development policy of the Community". [28]

The existence of complementary competences in a federal legal order represents, in itself, a constitutional choice in favour of co-operative federalism. The characteristic nature of complementary legislative competences appears to lie in their constitutionally limited "pre-emptive" capacity. The central question for this special type of legislative competence has consequently been how much legislative space the Community legislator must leave to the national level. What is the frame of reference by which the "complementary" nature of the Community action will be evaluated? Do complementary competences prevent the Community legislator from ever laying down exhaustive standards with regard to a particular legislative *measure* ? Alternatively, will the Community legislator be allowed to totally harmonise certain matters, while it can never totally exclude the national legislator from all action within the scope of the legislative *competence* ?

We shall begin to answer these questions through an overview of their constitutional structure in relation to environmental policy. A second section will analyse the Community's emerging public health policy in order to distil some of the constitutional principles that govern this relatively young competence. The Community's public health competence indeed exhibits (nearly) all the novel constitutional strategies for limiting the legislative powers of the Community. The primary focus in this article is the constitutionalised structure of the legislative function under complementary competences--the division of *powers* as ordained by the European constitution as such. [29]

***E.L. Rev. 172** Environmental policy and co-operative federalism: soft or hard constitutional limits?

There was no mention of a Community environmental policy in 1958. The original Treaty of Rome was an economic treaty that had none the less committed itself to "promote throughout the Community a harmonious development of economic activities", a "balanced expansion" and "an accelerated raising of the standard of living". [30] At that time, the environment was not regarded as a

Community policy. However, national environmental policies could impede the proper functioning of the internal market and potentially create obstacles to trade and distortions of competition. [31]

The birth of a Community environmental policy occurred in 1972 with the Paris Summit. [32] That political impulse was transformed into the first environmental action programme, which admitted that:

"a harmonious development of economic activities and a continuous and balanced expansion cannot now be imagined in the absence of an effective campaign to combat pollution and nuisances or of an improvement in the quality of life and the protection of the environment". [33]

In the absence of a clear legislative mandate on environmental matters, the Community legislator would base its environmental legislation on Arts 94 and 308 EC or, sometimes, both: environmental legislation had to be necessary in the course of the operation of the common market. [34] In the period leading up to the SEA, some 200 environmentally-related measures were thus adopted that would create "the foundation for the formation ***E.L. Rev. 173*** of a very specific Community environmental policy". [35] Most of these environmental acts were designed as "minimum harmonisation". [36]

Formal constitutional foundations for a Community environmental policy were to be laid in the SEA. Thence, the EC Treaty provided a specific legislative competence for environmental policy. [37] Interestingly, the subsidiarity principle emerges for the first time for the sharing out of the legislative function in environmental matters. [38] The Maastricht Treaty reinforced the constitutional status of environmental policy by amending Arts 2 and 3 EC, which commit the Community to "a high level of protection and improvement of the quality of the environment". [39] In the present constitutional arrangement, environmental policy finds its place in Title XIX comprising Arts 174-176 EC.

The constitutional regime on environmental policy is in many respects paradigmatic for the Community's complementary competences. First, the conceptual contours of this legislative competence are much more precise than in older policy areas. Secondly, the Community's role is characterised as a "contribution"--thus acknowledging the continued legitimacy of national legislation in the field. [40] In the environmental sphere, the federal structure of the legislative function is specified in Art.176 EC: Community environmental legislation "shall not prevent any Member State from maintaining or ***E.L. Rev. 174*** introducing more stringent protective measures". Community legislation only lays down minimum mandatory standards and permits national "opt-ups". [41] Minimum does not, however, mean minimal; on the contrary, the Community has committed itself to a "high level of protection". [42] The constitutional commitment has been interpreted *not* to require the guaranteeing of a high level of protection in every single

legislative piece, but as a general political orientation for the development of the Community's environmental policy. [43]

This leads us into the very conceptual heart of complementary legislative competences: does the same "general approach" also apply to the constitutional limitation to only adopt "minimum standards"? Or, alternatively, does Art.176 EC prevent the Community legislator from ever adopting environmental measures that "exhaustively harmonise" all matters within their scope and thus "occupy the field"? Are all measures adopted under Art.175 EC thus minimum harmonisation measures; or, does Art.176 only "generally" require the Community legislator to leave some abstractly defined legislative space to the national legislators? [44]

Surprisingly, after nearly two decades of constitutional experience, the issue has not been definitely resolved. Two views are possible. According to a soft constitutional view, Art.176 EC will not constitutionally prevent the Community legislator from adopting legislative measures that totally harmonise all matters within their scope. The SEA, so the argument runs, only codified a legislative practice in which minimum harmonisation was the predominant--not the exclusive--method of harmonisation. Article 176 EC was inserted into the Treaty,

"without thereby implicitly making total harmonization impossible…This view implies that the inclusion of Art.176 in the Treaty was not really intended to have legal consequences. According to this interpretation Art.176 merely expresses the principle that *in general* decision-making under Art.175 takes the form of minimum harmonisation, but does not limit the Council's power, by way of "self-binding', of ***E.L. Rev. 175*** setting total harmonisation standards. In other words it is up to the Council to decide to what extent Member States are allowed to adopt more stringent standards than those set in the Directive." [45]

While there may thus be a strong presumption against field pre-emption--codified in Art.176 EC--the Community legislator faces no *constitutional limitation* upon exhaustively harmonising an environmental issue through a measure adopted under Art.175 EC. Consequently,

"when a Member State, based on Art.176 of the Treaty, wants to take more protective measures, its legislative discretion is reduced in proportion to the concretisation which Community secondary law has given to the balance between environmental and economic interests in a specific situation". [46]

According to a second view, Art.176 EC refers to *every single* Community legislative measure adopted under Art.175 EC. The Community legislator will never be able to occupy a field. Each Community measure must leave a degree of legislative space to the national legislators. There are heavy legal arguments in favour of this hard constitutional position. First, the very wording of Art.176 points in that direction: the frame of reference for the higher national standard is not the Community environmental policy in abstracto, but is defined by specific Community *measure(s)*. Secondly, from a teleological perspective, the aim of achieving a high level of

protection within the Community would be better served by allowing Member States to go beyond the political compromise represented in the Community legislation. [47] Thirdly, it seems dubious, if not wrong, to reduce the SEA to having simple codified previous legislative practice. [48] Lastly, according to recent legislative practice, environmental Directives are not likely to contain a "minimum harmonisation clause". (It is, furthermore, not unknown for such clauses to be removed from European environmental legislation in the course of a subsequent amendment. [49]) It could therefore be argued that today's legislative practice recognises Art.176 EC as a direct constitutional limit for every environmental Community measure.

The "complementary" quality of the Community's activities would--in line with the hard constitutional nature of Art.176--be required and enforced for every single piece of legislation. Instead of an abstract evaluation of the "residual powers" left to the national level (measured, presumably, against the totality of existing Community environmental legislation), the frame of reference would be set by the scope of the specific ***E.L. Rev. 176*** piece(s) of legislation. [50] Requiring the Community legislator to leave legislative space *within the scope of the concrete Community measure,* would provide a more concrete constitutional safeguard that may well better protect the Member States' legislative autonomy. Following this second view, the Community's complementary competences *à la* Art.176 EC would come close to the constitutional regime developed under German federalism with regard to framework competences. [51]

What about constitutional guidelines from the European Court of Justice? The question about the nature of Community legislation adopted under Art.175 EC and Art.176 EC had never been raised before *Dusseldorp,* [52] and it would, for that reason alone, "have been desirable to interpret in some detail the purpose, meaning and relevance of Article 176 in the system of the Treaty". [53] In this case, Dutch legislation had made the export of waste for recovery subject to an additional condition that was not mentioned in the relevant Community environmental legislation. In a preliminary reference, the European Court was expressly asked whether Art.176 of the Treaty could provide a basis for the legitimacy of the stricter national rules. The Court avoided the question of the constitutional relationship between Community legislation and Art.176 by focusing on the free movement aspect of the case. Indeed, if the national rules were found to violate the Treaty, then the complex discussion of the division of legislative power for environmental matters was unnecessary. [54] Analysing the obstacles to export trade created by the stricter national environmental rules, the Court found that Art.176 would not allow national legislators to extend the application of those stricter rules:

"when it is clear that they create a barrier to exports which is not justified either by an imperative measure relating to protection of the environment or by one of derogations provided for by [Art.30] of the Treaty". [55]

A later decision was, however, a little more forthcoming. In *Fornasar,* [56] the Court had to interpret the exhaustiveness of Community legislation on hazardous waste, in particular Directive 91/689. [57] Article 1(4) of the Directive provided:

"For the purpose of this Directive "hazardous waste' means:

E.L. Rev. 177 -- wastes featuring on a list to be drawn up in accordance with the procedure laid down in Article 18 of Directive 75/442/EC on the basis of Annexes I and II to this Directive, not later than six months before the date of implementation of this Directive. These wastes must have one or more of the properties listed in Annex III. The list shall take into account the origin and composition of the waste and, where necessary, limit values of concentration. This list shall be periodically reviewed and if necessary revised by the same procedure,

-- any other waste which is considered by a Member State to display any of the properties listed in Annex III. Such cases shall be notified to the Commission and reviewed in accordance with the procedure laid down in Article 18 of Directive 75/442/EC with a view to adaptation of the list."

A Council Decision had established a list of hazardous waste pursuant to Art.1(4) of Directive 91/689. [58] In national proceedings, the issue arose whether the list thus drawn up was exhaustive or not. The Commission maintained that the list could not be automatically supplemented for waste falling within the scope of the annexes of the Community legislation. [59] The German and Austrian Governments, on the other hand, argued that the list could not be exhaustive because the second indent of Art.1(4) indicated that other waste may also be classified as hazardous by the states. [60] While the Court pointed to the need for a precise and uniform definition of hazardous waste, [61] it did not find the Community list to be exhaustive. The passage of interest here read as follows:

"In that connection, it must be observed that the Community rules do not seek to effect complete harmonization in the area of the environment. Even though [Art.174] of the Treaty refers to certain Community objectives to be attained, both [Art.176] of the EC Treaty (…) and Directive 91/689 allow the Member States to introduce more stringent protective measures. Under [Art.174] of the Treaty, Community policy on the environment is to aim at a high level of protection, taking into account the diversity of situations in the various regions of the Community. (…)

It follows from the foregoing that, pursuant to Article 1(4) of Directive 91/689, the list provided for by that directive entitles the Member States to classify any other waste which a Member State considers to display one of the properties listed in Annex III to that directive as hazardous. Thus, such waste is considered hazardous only in the territory of the Member States which have adopted such a classification. In that event, the Member States are bound to notify such cases to the Commission for review in accordance with the procedure laid down in Article 18 of Directive 75/442, with a view to adaptation of the list of hazardous waste. Accordingly, on the basis of experience, the Commission is called upon to examine the extent to which it is appropriate to supplement the general list of hazardous waste applicable to all Member States of the Community

by adding to it waste considered hazardous by one **E.L. Rev. 178* or more Member States pursuant to the second indent of Article 1(4) of Directive 91/689." [62]

This first part of the ruling signals the Court's support for the second doctrinal position outlined above. Indeed, the general tenor of the opening statement appears to endorse a hard constitutional frame around Art.175 EC: "Community rules do not seek to effect complete harmonization in the area of the environment". Isolated from the specific legislative measure on the judicial table, Art.176 EC would seem to always entitle national legislators to complement the common Community standard. Had the Court stopped here, no doubts as to the soft or hard constitutional nature of Art.176 EC would have remained. The Court, however, continued and the second part of the ruling represented a specific analysis of the legislative regime established for hazardous waste under the Directive. The second indent of Art.1(4) expressly entitled Member States to supplement the Community list. It could consequently be construed as a "minimum harmonisation clause". A narrow reading of the ruling could therefore characterise the complementary quality of the Community intervention as a *legislative* choice of the specific Community measure. The comforting ambivalence of *Fornasar* shows that the Court has still to make up its collective mind on whether to choose a "soft" or a "hard" constitutional meaning of Art.176 EC. In light of the weighty arguments in favour of the "hard" constitutional complementary nature of the provision, it is hoped that the Court will eventually take the decisive step towards a fully constitutionalised co-operative federalism in the environmental field.

Let us finally investigate the possible scope of Art.176. Will Art.176 EC only entitle national legislators to adopt stricter national standards in relation to Community legislation under Art.175 EC, or will Art.176 EC--either as soft anti-pre-emption presumption or hard constitutional limit--also apply to European legislation adopted under another legislative competence? Does a national environmental measure covered by Art.176 EC have to conform to all other secondary law adopted by the Community? These questions have been hotly debated in German academic circles under the banner of "the principle of optimal environmental protection". [63] According to this hypothesised general legal principle, Member States would always be entitled to adopt more stringent national environmental laws regardless of the legislative competence underlying the Community measure--be it Arts 37, 71, 93, 95 or 133 of the Treaty.

This view has arguably gained ground with the Amsterdam Treaty and the transposition of the environmental *Querschnittsklausel* (cross-section clause) into the first part of the Treaty dealing with the fundamental principles of the Community legal order. Article 6 EC states:

"Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development."

**E.L. Rev. 179* However, does this *Community* commitment to incorporating environmental sensibilities into the operation of other Community policies also imply Art.176 EC's general application to all Community legislation? Some serious doubts are in order. Article 6 EC is

addressed to the Community legislator. Literal and systematic interpretations of Art.176, moreover, suggest that its scope of application is to be confined to Community measures adopted under Art.175 only. Finally, the horizontal application of Art.176 would--at least for environmental legislation--render the specific "opt-out" regime established under Art.95(4)-(9) superfluous. [64] The debate is still open with the Court not having yet decided the issue. [65]

Public health: novel constitutional techniques for complementary competences

The official recognition of a Community policy regarding "public health" occurred only with the second, and not with the first Treaty amendment. The Maastricht Treaty granted a competence for health to the Community. This competence grant had been a compromise between those Member States that did not wish to endow the federal level with an express mandate and those who wanted to "centralise" health issues even further. [66] The introduction of the new competence was certainly no clear victory for a comprehensive European health policy. On the contrary, the competence was a prime illustration of the inter-governmental corset increasingly placed around Community competences: the sharp textual edges of the new provision constituted a tight constitutional frame designed to contain Community action that might otherwise have been based on Art.95 EC. The Amsterdam Treaty loosened the corset a little--after the BSE and CJD crisis had ***E.L. Rev. 180*** demonstrated the European dimension of certain health threats even to the more sceptical defenders of state responsibility in this field. Today, we find the Community's competence for public health codified in a single Article that by itself forms Title XIII of the Treaty. Article 152 EC is the prototype of the new complementary competences and assembles (almost) all the novel constitutional techniques. It reads:

"Public Health--Article 152

1. A high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities.

Community action, which shall complement national policies, shall be directed towards improving public health, preventing human illness and diseases, and obviating sources of danger to human health. Such action shall cover the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention, as well as health information and education.

The Community shall complement the Member States' action in reducing drugs-related health damage, including information and prevention.

2. The Community shall encourage cooperation between the Member States in the areas referred to in this Article and, if necessary, lend support to their action. Member States shall, in liaison with the Commission, coordinate among themselves their policies and programmes in the areas referred to in paragraph 1. The Commission may, in close contact with the Member States, take any useful initiative to promote such coordination.

3. The Community and the Member States shall foster cooperation with third countries and the competent international organizations in the sphere of public health.

4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee and the Committee of the Regions, shall contribute to the achievement of the objectives referred to in this article through adopting:

(a) measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives; these measures shall not prevent any Member State from maintaining or introducing more stringent protective measures;

(b) by way of derogation from Article 37, measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health;

(c) incentive measures designed to protect and improve human health, excluding any harmonization of the laws and regulations of the Member States.

<DPAC2>The Council, acting by a qualified majority on a proposal from the Commission, may also adopt recommendations for the purposes set out in this article.</DPAC2>
5. Community action in the field of public health shall fully respect the responsibilities of the Member States for the organization and delivery of health services and medical care. In particular, measures referred to in paragraph 4(a) shall not affect national provisions on the donation or medical use of organs and blood."

What are the constitutional characteristics of these new "complementary competences"? First of all, their length: Art.152 numbers 390 words. Quantity is not everything, but it counts for something. Compared to the humble 50 words that make up Art.94 and the 57 words that built Art.308 EC, the careful wording shows that the amenders of the EC ***E.L. Rev. 181*** Treaty did not want to grant an abstractly phrased competence that would work as a formidable teleological platform for further centralisation. More words, more precision. This linguistic strategy is as old as the desire to codify itself. [67]

Let us turn to the substance of the competence. Paragraph 1 defines the specific objectives of the Community's public health policy and specifies that Community action shall *complement* national policies in the pursuit of these aims. A special part of the Community's efforts should thereby be channelled into encouraging co-operation among the Member States (para.2) as well as co-operation with third countries (para.3).

The legal base for Community action is embedded in para.4 which distinguishes three situations: regarding organs and substances of human origin, blood and blood derivatives, the Community may only lay down minimum standards. (Here, we thus find the type of "minimum harmonisation" competence that was discussed above as the first constitutional expression of the philosophy of

co-operative federalism.) Article 152(4)(b) expressly creates a specific legal base for measures in the veterinary and phytosanitary fields that were previously adopted within the Constitutional Agricultural Policy ("CAP"). Measures "which have as their direct objective the protection of public health" can now be based on Art.152 EC to the pleasure of the European Parliament and the peoples of Europe.[68] The sub-paragraph does not extend the legislative competence to the Community. In addition to these specific fields, para.4(c) finally grants a "general" public health competence to the Community. However, this competence is limited to the adoption of "incentive measures" "excluding any harmonization of the laws and regulations of the Member States". Whatever the concept of "incentive measure" is supposed to mean, one has to assume that it was designed as a constitutional limitation to those "normal measures" that can be adopted under para.4(a) and (b). Literally, the concept suggests the desire to have the Community primarily encourage the co-ordination of national policies.

But what exactly is the prohibition of "harmonisation" supposed to mean? Two views can be put forward. According to the first, the exclusion of harmonisation means that Community legislation must not modify *existing* national public health legislation. However, considering the wide definition given to the concept of "harmonisation" by the Court of Justice in *Spain v Council,* any legislative intervention on the part of the Community will unfold a de facto harmonising effect within the national legal orders.[69] From this strict reading, the exclusion of harmonisation under para.4(c) would consequently deny all pre-emptive effect to Community legislation.[70] A second less restrictive view argues that the Community's legislative powers are only trimmed so as to prevent the de jure harmonisation of national legislation.[71] *Both* views appear problematic ***E.L. Rev. 182*** from a co-operative federalist perspective. Let us imagine a new public health threat that affects Europe. Let us also imagine that national legislators are still quicker to adopt measures than the Community legislator. Will the Community therefore ever be able to adopt Community-wide standards for the problem? Will Community action be confined to co-ordinating national policies without setting common Community-wide standards? If so, it would be difficult to speak of a truly independent Community *policy* as the Community legislator simply cannot make its own policy choices for a European public health policy. The Community would have no *competence* to legislate. The principle of subsidiary would not even come into play--even for those situations where it is clear that common European rules would be more effective! For the moment, it seems that the national "pre-emption" of Community action will only be lifted, where the diverse national laws create genuine obstacles to intra-Community trade and/or distortions of competition. The Community would then be entitled to have recourse to Art.95 EC.[72] The current constitutional regime may thus again introduce the need for a benign degree of "cynical reasoning"[73] on the part of the Community legislator to justify politically desired Community "health measures" by means of the economic vocabulary of the internal market.

Finally, we find another characteristic mark of the novel type of competence in para.5. Here, the Treaty constitutionally recognises the "responsibility" of the Member States for the organisation and delivery of health services and medical care. Moreover, measures adopted under para.4a shall "not affect" national provisions on the donation or medical use of organs and blood. Either

formulation sounds like an "express saving clause" at the constitutional level and would, if the Court decides to go down this road, mean that the Community policy cannot "pre-empt" any national legislation within the areas enumerated. These constitutional exemptions--some have called them "negative competences"--must nonetheless not be confused with a constitutional recognition of exclusive national legislative powers. Unlike the operation of a *Querschnittsklausel,* these provisions will not have any effect beyond the scope of Art.152 EC.Where harmonisation under Art.95 EC or Community intervention in the course of the Common Market under Art.308 EC is necessary, the Community legislator can well enter into these pseudoexclusive fields. [74]

E.L. Rev. 183 In conclusion, the federal division of the legislative function in the field of public health demonstrates the constitution's intent to leave responsibility for these matters primarily to the national legislator. It goes, perhaps, too far to describe the Member States as the "*Herren der Gesundheitspolitik*". [75] However, the invention of novel constitutional techniques--such as "incentive measures" and the exclusion of harmonisation--has been designed to constitutionally limit the competence of the Community to act in the field of public health and to preserve the legislative predominance of the national legislators. Complementary competences have therefore been associated with the principle of subsidiarity. However, it is important to underline that this "constitutionalised" expression of subsidiarity undermines to some extent the flexible federalism that is part and parcel of that very same constitutional principle. A fully co-operative federalist solution would have granted a legislative competence in the area of public health to the Community so as to allow Community action:

"in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community". [76]

The exclusion of harmonisation in some complementary competences may, however, limit the very competence of the Community to act. [77] Complementary competences of this kind breathe, but do thus not "*fully* breathe the air of "subsidiarity"'. [78] In the absence of clear constitutional contours around the subsidiarity principle, the Community legal order would thus have chosen the more radical path for some of its complementary competences: the exclusion of all harmonisation of national legislation.

Conclusion: the still uncertain constitutional regime for complementary competences

In ever more policy areas, the phenomenon of co-operative federalism has been "constitutionalised" in the Community legal order. Today, 14 legislative competences can be described as "complementary competences". The Community legislator is thereby either confined to establishing minimum standards and/or restricted to complementing ***E.L. Rev. 184*** the national legislator. Legislative co-operation is not the result of a legislative policy choice but is a *constitutional* choice. The Treaty guarantees the ability of the national legislator to legislate in concert with the Community legislator. The pre-emptive effect of Community legislation is

constitutionally limited. This should theoretically mean that Member States are *always* entitled to adopt higher national standards on top of a Community measure (provided, of course, these national measures conform to primary and secondary Community law).

The constitutional regime governing complementary competences has not yet been fully spelled out by the European Court of Justice. We saw in the context of the Community's environmental policy that the Court has so far eschewed the question whether complementary competences will constitutionally prevent the Community legislator from ever adopting legislative measures that totally harmonise all matters within their scope. The "hard" constitutional solution appears preferable when compared to the "soft" constitutional option of only allowing the national level some abstract degree of legislative autonomy. The more concrete, the more operational--this wisdom certainly applies for constitutional safeguards. If the European Court of Justice affirms the hard constitutional frame around "minimum harmonisation" competences, the latter would approach the idea of "framework competences" known in German constitutional thought. Unfortunately, we must equally wait for solidified constitutional principles in relation to the second type of complementary competence as embodied in the Community's public health policy. There simply is not yet any authoritative judicial commentary on what an "incentive measure" is, or what the exclusion of harmonisation is supposed to mean.

In conclusion, the exact degree of legislative space guaranteed to the national legislator under the EC's complementary competence is still unclear. However, the very existence of complementary competences in a federal legal order represents, in and of itself, a constitutional choice in favour of co-operative federalism.

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Footnotes

1 While competence typologies have been fundamental to German federalism, they do not represent a characteristic element of US American federalism.

2 For an extensive discussion of the two federal models, see: R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of the Legislative Function in the European Union* (EUI Thesis, 2005), esp. Chs 2 and 3.

3 M.D. Reagan, *The New Federalism* (Oxford University Press, 1972), p.21.

4 E.S. Corwin, "The Passing of Dual Federalism" [1950] 36 *Virginia Law Review* 1 at p.19.

5 Total harmonisation could sometimes occur even in flanking policies, such as environmental legislation. See, e.g. Directive 70/156 on rules on exhaust

emissions and noise, [1970] O.J. Spec. Ed. 96, or Directive 84/631 on the trans-frontier shipment of hazardous waste, [1984] O.J. L326/31. According to one environmental law specialist,"[t]otal harmonization is found above all in those fields of environmental policy where there is a definite relationship with the free movement of goods. In particular, the Council makes use of total harmonization in legislation to harmonize product standards, as it is the only way to ensure the free movement of the goods in question. This means that total harmonization is encountered particularly frequently in environmental measures based on Article 95 EC." J.H. Jans, *European Environmental Law* (Europa Law Publishing, 2000), p.108.

6 The two methods are not mutually exclusive and might be combined within a single legislative competence; see, e.g. the Community power for public health under Art.152 EC. For a more complex classification of complementary competences, see: V. Michel, *Recherches sur les compétences de la Communauté européenne* (L'Harmattan, 2003).

7 See (d) p.170 below.

8 See (h) p.170 below.

9 See (g) p.170 below.

10 See (b) above.

11 See, e.g. Art.152(4)(c), below fn.68.

12 For the concept of legislative power in the EC legal order, see: R. Schütze, "The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division Powers" (2006) 25 *Yearbook of European Law* (forthcoming).

13 The exclusion of harmonisation can be found in (a), (c), (e), (f) and (g) below.

14 Art.63(1), (2) EC.

15 Art.63(3), (4) EC--both paragraphs make no reference to "stricter" national measures and might therefore constitutionally guarantee upward and downward flexibility for national legislators.

16 Art.127 EC.

17 Art.129 EC.

18 Art.137(1), (2) and (4) EC.

19 Arts 149 and 150 EC also limits Community policy to measures that "support and supplement the action of Member Stares, while fully respecting the responsibility of the Member States for the content and organization of vocational training", "excluding any harmonization of the laws and regulation of the Member States" (Art.150(1), (4) EC).

20 Art.151(2), (5) EC.

21 Art.152(1), (4) EC.

22 Art.153(1), 3(b), (5) EC.

23 Art.154 EC.

24 Art.157 EC.

25 Arts 164, 165 EC.

26 Arts 175, 176 EC.

27 Art.177 EC.

28 Art.181a EC.

29 It is still worth mentioning that the general trend towards co-operative federalism for environmental legislation has increased in recent years. While minimum harmonisation has always been one of the principal legislative methods, L. Krämer has pointed to the growing number of horizontal Directives in the environmental area. These horizontal Directives do not concern a specific sector of the environment and would leave considerable differentiation at national, regional and local level (*cf.* L. Krämer, "Differentiation in EU Environmental Policy" [2000] 9 *European Environmental Law Review* 133 at p.136). The trend has also been noted by Davies:"The trend away from the early style of environmental legislation (which often set highly detailed rules such as specific emission limit values) to the adoption of measures establishing only frameworks for action can be said to be reflective of this requirement [proportionality]. Framework measures typically set narrowly defined objectives but provide Member States with as much flexibility as possible in the implementation taking into account regional and local conditions." P.G.G. Davies, *European Union Environmental Law* (Ashgate, 2004), p.23.

30 Art.2 EEC.

31 Art.30 EC recognised this possibility for it permitted restrictions on imports and exports to be justified on the ground of "the protection of health and life of humans, animals and plants". Between 1958 and 1972, only a small number of Community measures fell into the "environmental field". Illustrations of early Community environmental measures are: Directive 70/157 on the permissible sound levels and exhaust systems in motor vehicles, [1970] O.J. Spec. Ed. 111; and Directive 72/306, [1972] O.J. Spec. Ed. 889, regulating the emission of pollutants from vehicles with diesel engines.

32 The Declaration of the Heads of States and Government stated:"Economic expansion, which is not an end in itself, must as a priority help to attenuate the disparities in living conditions. (…) In the European spirit special attention will be paid to non-material values and wealth and to protection of the environmental so that progress shall serve mankind." [1972] 10 E.C. Bull. 15-16.

33 Declaration of the Council of the European Communities, and of the representatives of the Governments of the Member States meeting in the Council of November 22, 1973 on the Programme of action of the European Communities on the environment, [1973] O.J. C112/1-2.

34 For a discussion of the birth of environmental policy out of the lap of Arts 94 and 308 EC, see: J.A. Usher, "The Gradual Widening of European Community Policy on the Basis of Articles 100 and 235 of the EEC Treaty" in: J. Schwarze and H.G. Schermers (eds.), *Structure and Dimension of European Community Policy* (Nomos, 1988), pp.32-33.The magic and necessary economic link between Community environmental policy and the economic functioning of the common market could, at times, render the legislative discourse fairly absurd as, for example, when the

Community legislator explained the need for the Directive on wild birds--based on Art.308 EC--in terms of the economic functioning of the common market:

35 D.H. Scheuing, "Umweltschutz auf der Grundlage der Einheitlichen Europäischen Akte" (1989) 24 *Europarecht* 152 at p.157. More modest statistics attribute about 100 legislative measures to the period between 1973 and 1988--still "no mean feat" given the lack of an express legal basis (*cf.* S.P. Johnson and G. Corcelle, *The Environmental Policy of the European Communities, Communities* (Kluwer Law International, 1995), p.5).

36 See, e.g. Art.7(2) of Directive 76/160 (quality of bathing water), [1976] O.J. L31/1; Art.6 of Directive 75/440 (quality of surface water), [1975] O.J. L194/26; or Art.10 of Directive 76/464 (pollution caused by dangerous substances discharged into the aquatic environment), [1976] O.J. L129/23. In the words of L. Krämer:"Community policy makers were aware from the very beginnings of environmental policy that the Community space between the south of Italy and the north of Scotland, between the Alps and the plains in northern Germany/Denmark, is very diversified, that environmental pressures differ and that the degree of awareness of environmental degradation varies considerably from one region to the other, provoking different answers to the environmental challenges. (…) Environmental directives were drafted as minimum directives, which allowed Member States to maintain or introduce more protective environmental measures at national level." See Krämer, cited above fn.29.

37 Title VII of the EEC Treaty comprised three Articles: Arts 130r, 130s, and 130t.

38 Ex-Art.130r(4) provided:"The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States."

39 Art.2 EC.

40 Art.174(1) EC.

41 This is the difference to the opt-out mechanism in Art.95(4)-(9) EC, which allows for a *derogation* from Community legislation.

42 Art.174(2) EC. Similar commitments to a "high" level of protection are found in the following complementary competences: Art.61(2)(e) (measures in the field of police and judicial co-operation); Art.95(3) EC (harmonisation measures concerning health, safety, environmental protection and consumer protection); Art.127(1) EC (high level of employment); Art.152 (high level of human health); Art.153 (high level of consumer protection); and, finally, Art.163 (research and technological development activities of high quality). In Case C-341/95, *Gianni Bettati v Safety Hi-Tech Srl* [1998] E.C.R. I-4355, the Court clarified that, in the environmental policy of the Community, a high level of protection "does not necessarily have to be the highest that is technically possible" at [47].

43 This point has been made by L. Krämer who argued that "*sich das Ziel "hohes Schutzniveau' in Artikel 175 auf die gemeinschaftliche Umweltpolitik insgesamt, nicht auf eine einzelne Regelung oder gar eine einzelne Vorschrift bezieht. Deswegen steht dieses Ziel dem Absenken des heltenden Schutzniviveaus im Einzelfall auch*

nicht entgegen" (L. Krämer, *Artikel 174,* rn.18, in: H. von der Groeben & J. Schwarze (eds.), *Kommentar zum Vertrag über die Europäische Union* (Nomos, 2003).

44 It goes without saying that these higher national standards must not create unjustified obstacles to intra-Community trade or disproportionately distort competition within the internal market. This condition follows from Art.176 directly, which subjects more stringent national measures to conformity with the Treaty. This issue will not be dealt with here. For a general discussion of the constitutional tensions involved in the minimum harmonisation method, see: M. Dougan, "Minimum Harmonization and the Internal Market" (2000) 37 *Common Market Law Review* 853, as well as S. Weatherill, "Pre-emption, Harmonisation and the Distribution of Competence to Regulate the Internal Market" in: C. Barnard and J. Scott, *The Law of the Single European Market: Unpacking the Premises* (Hart, 2002), p.41.

45 J.H. Jans, *European Environmental Law* (Europa Law Publishing, 2000), p.118 (emphasis in original).

46 L. Krämer, *EC Environmental Law* (Sweet & Maxwell, 2003), p.121.

47 G. Winter, "Die Sperrwirkung von Gemeinschaftssekundärrecht für einzelstaatliche Regelungen des Binnenmarkts mit besonderer Berücksichtigung von Art.130 t EGV" (1998) 51 *Die öffentliche Verwaltung* 377 at p.380.

48 "*Entgegen erstem Anschein hat die Einheitliche Europäische Akte für die Umweltpolitik der Gemeinschaft doch einige wichtige Neuerungen gebracht.*" D.H. Scheuing, cited above fn.35, at p.192.

49 "This is because the principle that Community protective measures lay down a minimum standard which can be enhanced by the Member States has now been incorporated into Article 176 of the Treaty." (J.H. Jans, cited above fn.45, p.114, quoting Directive 97/11, [1997] O.J. L73/5, amending Directive 85/337 on the assessment of the effect of certain public and private projects on the environment, [1985] O.J. L175/40, that deleted the minimum harmonisation clause in Art.13 of the latter Directive).

50 The constitutional limitation should only take effect *after* the introduction of Art.176 EC; contra E. Epiney who argues that Art.176 should also apply to Community measures adopted before the EEA and that would now fall within the scope of Art.175 *cf.* Epiney, *Umweltrecht in der EU* (Heymanns, 1997), p.126.

51 For a discussion of the German constitutional concept of "framework law", see: R. Schütze, cited above fn.2, at pp.61-66.

52 Case C-203/96, *Chemische Afvalstoffen Dusseldorp BV v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer* [1998] E.C.R. I-4075.

53 L. Krämer, *Casebook on EU Environmental Law* (Hart Publishing, 2002), p.28.

54 This elegant, albeit somewhat evasive, solution had been suggested by A.G. Jacobs: "In my view, however, none of the issues which might arise under [Art.176] need to be resolved in the present case. [Article 176] provides that the measures permissible by virtue of that article must in any event be compatible with the other provisions of the Treaty. For the reasons given below, I consider that the contested rule is contrary to [Art.29] of the Treaty." Opinion of A.G. Jacobs, Case C-203/96, *Chemische*

Afvalstoffen Dusseldorp BV v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer [1998] E.C.R. I-4075, at point 74).

55 *ibid.,* at point 50.

56 Case C-318/98, *Criminal proceedings against Giancarlo Fornasar, Andrea Strizzolo, Giancarlo Toso, Lucio Mucchino, Enzo Peressutti and Sante Chiarcosso* [2000] E.C.R. I-4785.

57 Council Directive 91/689 on hazardous waste, [1991] O.J. L377/20.

58 Council Decision 94/904 establishing a list of hazardous waste pursuant to Art.1(4) of Directive 91/689, [1994] O.J. L356/14.

59 Case C-318/98, cited above fn.56, at [35].

60 *ibid.,* at [36].

61 *ibid.,* at [43].

62 *ibid.,* at [47]-[49].

63 "*Grundsatz des bestmöglichen Umweltschutzes*". The principle was "discovered" by M. Zuleeg in a path breaking article in 1987 *cf.* M. Zuleeg, "Vorbehaltene Kompetenzen der Mitgliedstaaten der Europäischen Gemeinschaft auf dem Gebiete des Umweltschutzes" (1987) 6 *Neue Zeitschrift für Verwaltungsrecht* 280. Since then the principle has conquered German academia to such an extent that it is almost universally accepted. See the monograph on the principle: W. Kahl, *Umweltprinzip und Gemeinschaftsrecht: Eine Untersuchung zur Rechtsidee des "bestmöglichen Umweltschutzes" im EWG-Vertrag* (C.F. Müller, 1993).

64 L. Krämer, *EC Environmental Law,* cited above fn.46, p.132. Krämer argues that both Art.176 and Art.95(4)-(9) EC are exceptions from the general principles of the Community legal order and, therefore, have to be interpreted restrictively:"As none of the Treaty provisions on which an environmental action can be based contain provisions similar to those of Arts 176 and 95, the conclusion must be that these provisions are exceptions to the general rule that Community measures cannot be derogated from by Member Sates, unless Community law expressly so provides. Their application to measures which had been adopted by virtue of Arts 37, 71, 93 or 133 of the EC Treaty is therefore not possible; all the more so since it would not be clear whether Arts. 176 or 95 should apply in a specific case."

65 The closest the Court got to this issue was in the judicial constellation in Case C-232/97, *Nederhoff & Zn. v Dijkgraaf en hoogheemraden van het Hoogheemraadschap Rijnland* [1999] E.C.R. I-6385. There a national water protection measure went beyond the Community environmental legislation embodied in Directive 76/464, [1976] O.J. L129/23, of which Art.10 expressly authorised Member States to take more stringent measures than those provided for in the Directive. However, the stricter national environmental standard also collided with Directive 76/769 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations, [1976] O.J. L262/201, as amended by European Parliament and Council Directive 94/60, [1994] O.J. L365/1. How would the Court conceptualise the relation between the higher national *environmental*

standard and the Community *harmonisation* measures? The Court obviously recognised the tension:"That raises the question whether Directive 76/769, as amended, which merely introduces restrictions on the marketing and use of wood treated with creosote, precludes a national water protection measure which has the effect of prohibiting or permitting only in exceptional cases the use of that substance for treating wood to be introduced into surface water. Even if the effects of a national measure such as that at issue in the main proceedings may be regarded as an obstacle to the free movement of products containing creosote, as regulated by Directive 76/769, it is sufficient to note that, in accordance with Article 1 thereof, that directive applies without prejudice to the application of other relevant Community provisions." *Nederhoff, ibid.,* at [63]-[64]). The express savings clause found in Art.1(1) of Directive 76/769 thus "saved" the Court from entering a difficult pre-emption analysis.

66 T.K. Hervey and J.V. McHale, *Health Law and the European Union* (Cambridge University Press, 2004), p.74.

67 The *Allgemeine Landrecht für die preu%EFischen Staaten* (Prussian General Law 1794) counted more than 19,000 paragraphs so as to regulate every single imaginable situation so as to limit judicial activism.

68 Art.37(2) EC only entitles the European Parliament to be consulted for measures adopted under the CAP. Among the "agricultural" health measures adopted under Art.152 EC, see: Regulation 999/2001, [2001] O.J. L147/1; and Regulation 1829/2003, [2003] O.J. L268/1.

69 Case C-350/92, *Spain v Council* [1995] E.C.R. I-1985. In that judgment, the Court found the adoption of a Regulation not beyond the scope of Art.95 because it aimed "to prevent the heterogeneous development of national laws leading to further disparities" in the internal market (at [35]).

70 See A. Bardenhewer-Rating and F. Niggermeier, "Artikel 152", rn.20 arguing that the pre-Amsterdam version of Art.152 EC was not a legislative competence at all, in: von der Groeben and J. Schwarze, *Kommentar zum Vertrag über die EU* (Nomos, 2003).

71 For K. Lenaerts, "incentive measures can be adopted in the form of Regulations, Directives, Decisions or atypical legal acts and are thus normal legislative acts of the Community[.]" "[T]he fact that a Community incentive measure may have the indirect effect of harmonizing (…) does not necessarily mean that it conflicts with the prohibition on harmonization" (K. Lenaerts, *Subsidiarity and Community competence in the field of education* (1994-1995) 1 *Columbia Journal of European Law* 1 at pp.13 and 15).

72 In Case C-376/98, *Federal Republic of Germany v European Parliament and Council of the European Union (Tobacco Advertising)* [2000] E.C.R. I-8419, the Court clarified that Art.95 EC could not be used for a legislative measure whose principal aim was the protection of public health. Article 95 EC must not be used to circumvent the express exclusion of harmonisation found in Art.152(4)(c) EC. A "health" measure adopted under Art.95 EC must therefore "genuinely have as its object the improvement of the conditions for the establishment and functioning of

the internal market". A "mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition" would not be sufficient (at [79], [84]).

73 D.H. Scheuing, cited above fn.35, at p.162.

74 Contra, H. Hablitzel, "Harmonisierungsverbot und Subsidiaritätsprinzip im europäischen Bildungsrecht" (2002) 55 *Die öffentliche Verwaltung* 407 at p.409: "*Es kann nicht oft genug wiederholt werden, da%EF diese Harmonisierungsverbote ein Novum inder Entwicklung des Gemeinschaftsrechts darstellen. Den neu eingeführten Harmonisierungsverboten kommt eine überragende, exzeptionelle Stellung im gesamten Gemeinschaftsrecht zu, die die sonstige vertragsrechtliche Systematik durchbricht. Denn erstmals wurde im EGV eine Negativabgrenzung einer Kompetenznorm vorgenommen, ein umfassendes Verbot der Rechtsangleichung statuiert. Man kann geradezu von einer kompetenzerhaltenden Norm für die Mitgliedstaaten (...) sprechen, welche die sonst geforderte Rechtsangleichung (vgl. Art. 3 Buchst. h und Art. 94 ff. EGV) ausschlie%EFt* [.]" The author goes even farther by claiming that the introduction of "exclusion clauses" constitutes a constitutional rupture with the acquis communautaire for that competence.

75 J.C. Wichard, "Artikel 152" rn.8, in: C. Calliess and M. Ruffert (eds), *Kommentar des Vertrages über die Europäische Union und des Vertrages zur Gründung der Europäischen Gemeinschaft: EUV/EGV* (Luchterhand, 2002).

76 Art.5(2) EC.

77 These are those complementary competences listed under (a), (c), (e), (f) and (g). See above fnn.14-21.

78 For a slightly different view, see K. Lenaerts who claims in the context of the Community's complementary competence in the field of education and vocational training, that:"Articles 126 and 127 thus fully breathe the air of "subsidiarity'. Subsidiarity has plainly been taken into account in the very definition of the Community's competence within these fields. Because the drafters took special pains to incorporate the principles of subsidiarity and proportionality *into the definition of Community power,* these two principles may not require separate application in order to shield the Member States from too zealous an exercise by the Community of its constitutionally limited powers." *Cf.* K. Lenaerts, cited above fn.71, at p.28 (emphasis added).

