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"How to Tame the Elusive: Lessons from the Revision of the EU Flexibility Clause"

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1 Introduction

Implied powers clause, residual power, open-ended power, competence reservoir, *Kompetenz-Kompetenz*, flexibility clause: the mechanism established in what has now become Article 352 of the Treaty on the Functioning of the European Union (TFEU) has many names (formerly known as Article 235 and 308).[1] Despite the multitude of labels used, the basic purpose of the mechanism is clear: to provide the European Union (EU) with the option of extending its legislative powers beyond those that have been explicitly specified in the founding Treaties.

The possibility for international organizations to expand their competence beyond the express wording of the constituent instrument was defined by the International Court of Justice (ICJ) as a principle of law over 60 years ago. The principle of implied powers as known in federal legal systems was thereby imported to the international sphere.[2] While literature on EU law displays many ways of defining the mechanism provided for by Article 352, that article in essence codifies the implied powers principle (or doctrine) as know in international law.[3]

The most apparent difference between the implied powers doctrine as relied upon by the ICJ and the flexibility clause is that the latter is expressly written down. This means that whereas the legislator of the EU in utilizing the flexibility clause refers to an explicit

[1] Treaty on the Functioning of the European Union (Lisbon consolidated version) (30 April 2008), OJ C 115/47 (9 May 2008). In the following the term flexibility clause will be used. I wish to thank the anonymous reviewers for their comments on the article.

[2] Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion, 11 April 1949), ICJ Reports 1949, at 183. However, also see Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Final Protocol, Article IV), (Advisory Opinion, 28 August 1928), PCIJ Publications 1928, Series B, no. 16.

[3] Very explicit on this are e.g. Joseph Weiler, The Constitution of Europe: "Do the New Clothes have an Emperor?" and other Essays on European Integration, 1999, Cambridge University Press, Joakim Nergelius, The Constitutional Dilemma of the European Union, Europa Law Publishing, 2009, at 52-53, and Carl Lebeck, "Implied Powers Beyond Functional Integration? The Flexibility Clause in the Revised EU Treaties", in 17 Journal of Transnational Law and Policy 2008, 303-358. A lexical definition reconciles "principle" and "doctrine" in that "doctrine" is defined as a principle that is widely adhered to. See Bryan A. Garner (ed.), *Black´s Law Dictionary*, Thomson/West, 2004 (8th ed.).

article of the TFEU, other organizations (with no such clauses) refer to a principle of international law. This express occurrence of the clause in the TFEU is often regarded as a unique feature, distinguishing the EU from (other) international organizations. Such a claim is not, however, completely correct. There are many examples of provisions that empower organizations or organs of organizations to take additional, incidental, or ancillary measures (to express powers) in order to reach the objective of the organization.[4] The one difference is that these provisions neither have the specificity, nor the long history of active use as does Article 352 TFEU.

The flexibility clause has been part of EU law ever since the Treaty of Rome, and although the clause is not the only mechanism for expanding competence, it has been called the "true locus" of expansion of EU law.[5] As the very purpose of the flexibility clause is to provide for the exercise of legal powers where none is to be found in the EU Treaties, the clause defines the ultimate reach of EU competence. For this reason discussions on the proper use of clause also serve as a mirror image of differences concerning the desired degree of European integration. Furthermore, since the clause defines the outer reach of EU competence, this also means that in a critique of the reach of EU legislative activities the flexibility clause is likely to be one of the mechanisms that are targeted. In a concrete disagreement a picture of the article as a necessary tool for effective integration on the one hand, and as a threat to member sovereignty on the other hand hereby come to stand against each other. This concern was picked-up for example by the German Bundesverfassungsgericht in its judgment on the Treaty of Lisbon.[6]

During the history of European integration the flexibility clause has been perceived differently at different moments. Use of the clause has both been praised for making European integration more effective, and accused for transcending the limits of EC/EU legislative competence. The aim of the present article is to outline the function and development of the flexibility clause in light of the changes to the article that are introduced by the Treaty of Lisbon. For the first time in the history of the EC/EU the flexibility clause has been substantively rewritten. It is therefore timely to reflect upon

[4] For one example of such a provision, see The World Health Organization (WHO) constitution which provides that: "In order to achieve its objective, the functions of the Organization shall be: … generally to take all necessary action to attain the objective of the Organization.", Constitution of the World Health Organization (22 July 1946), 14 *United Nations Treaty Series* 185, Article 2(v). Judge Weeramantry, dissenter to the majority in the *Legality of the Use* opinion of the ICJ, relied on this article in claiming that the WHO does possess an implied power to deal with issues of peace and security. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion, 8 July 1996), ICJ Reports 1996, at 133.

[5] For the characterization, see Weiler (1999), op.cit. at 52. Schütze states that legislative acts based upon the flexibility clause have on average been adopted at a pace of 27 acts per year since its inception, and 17 per year since 2000. Since 2000 the clause has been repeatedly used as a legal base for the establishment of agencies, in granting financial assistance to non-member states, and in connection to enlargement. See Schütze (2003) op.cit., at 82, and at 110 note 140. For a graphic illustration of different kinds of acts adopted on the basis of the flexibility clause see Marc Bungenberg, *Art. 235 EGV nach Maastricht: Die Auswirkungen der Einheitlichen Europäischen Akte und des Vertrages über die Europäische Union auf die Handlungsbefugnis des Art. 235 EGV (Art. 308 EGV n.F.)*, 1999, Nomos, at 100.

[6] German Constitutional Court, Judgment of 30 June 2009, 2 BvE 2/08. Also see the Czech Constitutional Court, Judgment of 26th November 2008, Pl. US. 19/08.

this change and especially how the consolidation addresses the unease that attaches to the very idea of non-express powers. Since this unease is something that attaches to implied powers reasoning in international organization more generally, some notes will also be made towards the end on whether the EU model could be of more general guidance for dealing with ambiguities that attach to any attempt at defining the exact reach of powers of organizations.

2 On the Logic of the Flexibility Clause

Apart from the procedure of formal amendment, there are two main mechanisms for developing the powers of the EU: the so called parallelism mechanism and the flexibility clause.[7] Although the effect of exercising either is the expansion of competence, whereas parallel powers arise from internal powers, the flexibility clause relates to the objectives of the Union at large. A parallel power exists in an area in which the Union is already permitted to act. The new power enables more effective (external) action in a field where the Union already has competence to act.[8] The power implied is not new, but merely an extension, which can be utilized in order to reach the objective for which the original (internal) express power was conferred. Parallelism hereby pertains more to the *effet utile* principle in the sense that the parallel power seeks to avoid a situation where the (internal) express power would become ineffective and useless.[9]

The flexibility clause on its part builds on the absence of a power altogether and the implied power is exercised so as to fulfill a Union objective. In short, parallelism entails deriving external powers from internal competence while the flexibility clause serves primarily to create internal competence. In the words of Advocate-General Tizzano:

> … just as, in the absence of internal powers, the Council may, subject to the conditions and in accordance with the procedure specified in Article 235 [Article 352], create such powers if they are 'necessary' for the attainment of an objective of the Community, so may the Community, if an agreement is 'necessary' to attain one of its objectives, affirm its own competence … to conclude that agreement, deriving it by implication from the corresponding internal competence, even if the latter has not yet been exercised. And if the corresponding internal competence is also lacking, the same result can be

[7] The classical example in ECJ case law of parallel powers is the *ERTA* case. Case C-22/70, *Commission of the European Communities v Council of the European Communities*, [1971] European Court Reports 263, paras 16 and 17.
[8] Weiler (1999), op.cit. at 52.
[9] See Trevor Hartley, *Constitutional Problems of the European Union*, 1999, Hart Publishing, at 156-157, and Robert Schütze, "Parallel External Powers in the European Community: From 'Cubist' Perspectives Towards 'Naturalist' Constitutional Principles?", in 23 *Yearbook of European Law* 2004, pp. 225-274, at 230-231.

> achieved … by resorting directly to Article 235 [Article 352] at the time of concluding the agreement.[10]

It should be noted that some authors deny a characterization of the flexibility clause as an express embodiment of the implied powers doctrine and instead regard them as distinct mechanisms. The implied powers doctrine is in such a view seen as a limited mechanism which constructs the powers of organizations restrictively. Hence the claim is that to liken the flexibility clause with the implied powers doctrine would be an overly restrictive characterization of the function of the clause. Instead, what distinguishes the flexibility clause from the implied powers doctrine, the argument goes is that the clause should be regarded as a legal base in its own right.[11] However in making such a separation the implied powers doctrine is often defined in an overly narrow way. This is particularly apparent when the implied powers doctrine is for example described as a tool for the effective exercise of pre-existing powers only, or as limited to the creation of "indispensable" powers.[12] Such a narrow construction of the doctrine does not correspond to its use in international law.[13]

In its practice the ICJ has for example claimed in the *Reparation for Injuries* case that the UN possesses a power to bring claims (in respect of damage caused to the victim) on the basis that: "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication, as being essential to the performance of its duties".[14] In a more general manner the ICJ has even claimed in the *Certain Expenses* case that: "... when the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not ultra vires the Organization".[15]

These constructions can be compared with the first paragraph of the flexibility clause which now reads:

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[10] Joined Opinion of Mr. Advocate General Tizzano (31 January 2002), Cases C-466/98, 467/98, 468/98, 471/98, 472/98, 475/98, 476/98, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, Kingdom of Denmark, Kingdom of Sweden, Kingdom of Belgium, Grand Duchy of Luxemburg, Republic of Austria, and Federal Republic of Germany*, European Court Reports [2002], I-9427, para. 48.

[11] Schütze (2003) op.cit. at 103 talks about the "reduction" of the clause to an "instrument for the canalization of implied powers".

[12] This seems to be the approach e.g. of Paul Craig and Gráinne de Búrca, EU Law: Texts, Cases, and Materials, 2007 (4th ed.), Oxford University Press, at 90-94. Also see Robert Schütze, "Organized Change towards an "Ever Closer Union": Article 308 and the Limits to the Community´s Legislative Competence", in 22 *Yearbook of European Law* 2003, 79-115, at 85 and note 31.

[13] See Viljam Engström, Understanding Powers of International Organizations: A Study of the Doctrines of Attributed Powers, Implied Powers and Constitutionalism – with a Special Focus on the Human Rights Committee, 2009, Åbo Akademi University Press, especially Part II, chapter 1.

[14] *Reparation for Injuries*, ICJ Reports 1949, op.cit. at 182-183.

[15] *Certain Expenses of the United Nations* (Article 17, paragraph 2 of the Charter) (Advisory Opinion, 20 July 1962), ICJ Reports 1962, at 168.

> If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures….[16]

If compared to the reasoning by the ICJ in the *Reparation for Injuries* case, the flexibility clause essentially seems to display the same construction: if there is a lack of powers in an area where action is perceived necessary (or appropriate) in order to reach an aim or purpose of the organization, then such a power can be implied. However, if compared to the logic of the *Certain Expenses* case, the wording of the ICJ stands out as even wider than the flexibility clause in that the necessity test for non-express powers is altogether absent. While the *Certain Expenses* formulation is admittedly extreme, perhaps even transcending the implied powers-logic altogether, these quotes at any rate demonstrate that while the implied powers doctrine as known in international law can also be used in a more narrow sense (in order to imply a power for the performance of existing powers), it seems clear that the doctrine is not restricted to such a construction.[17]

The very source of this conceptual confusion stems from the fact that the implied powers doctrine (and the flexibility clause) by its very nature defies any abstract definition. As such, it imports an ambiguity into the reach of the competence of an actor. A common presumption of institutional law is that there inheres in the necessity concept some guidance regarding its contents in that the concept is geared towards increasing the effectiveness of organizations. Since all organizations are geared towards the fulfillment of their purposes there might be some merit to such a presumption.[18] Yet, although constituent instruments rarely resist a functional reading, this does not bring about an automacy to this effect. The US Supreme Court, in characterizing the necessity reasoning at the heart of the so-called "necessary and proper clause" of the US Constitution already in the *McCulloch v The State of Maryland et al.* case (1819) recognized the absence of any fixed definition.

> To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. … The word 'necessary' is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison …[19]

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[16] Treaty on the Functioning of the European Union, op.cit., Article 352.

[17] For more limited constructions see *Jurisdiction of the European Commission of the Danube between Galatz and Braila* (Advisory Opinion, 8 December 1927), PCIJ Publications 1927, Series B, no. 14, and *Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Final Protocol, Article IV)* (Advisory Opinion, 28 August 1928), PCIJ Publications 1928, Series B, no. 16.

[18] Michael Singer, "Jurisdictional Immunity of International Organizations: Human Rights and Functional Necessity Concerns", in 36 *Virginia Journal of International Law* 1995, 53-165, at 105.

[19] *McCulloch v The State of Maryland et al.*, 1819, 17 US (4 Wheat.) 316, at 414.

The idea of the functional necessity of non-express powers at the heart of the flexibility clause works as an expansive force. Yet, what distinguishes organizations from states is that organizations do not have a *carte blanche* for acting. As the ICJ has expressed it: whereas states are in principle free to perform any act they choose, organizations are restricted by their purposes and functions.[20] This holds true also for the EU. Most clearly the idea is expressed through the principle of conferred powers.[21] The limited nature of organizations is also present in the flexibility clause in that the powers arrived at shall be "appropriate", hereby invoking their proportionality. This means that the measure taken must be suitable for attaining an objective of the EC and remain within the proportions of that objective.[22] The ambiguity of implied powers reasoning enters as there is no abstract way to determine which side to emphasize; the restrictive or the expansive. This is not only a question of how far the flexibility clause expands competence, but also whether it expands competences to begin with. Necessity reasoning hereby stands out as an "anomalous motivation" and as a concept through which all actors can seek (and have sought) to justify their conduct.[23]

Against this background it comes as no surprise that the flexibility clause has been characterized both as an exceptional device requiring restrictive interpretation and as a tool for unlimited expansion of competence (or, *Kompetenz-Kompetenz*).[24] Both characterizations are correct, since the clause can perform both roles. Like any organization the EU meets concurring claims that it does too much on the one hand, and that it does not do enough on the other hand. The different characterizations of the flexibility clause are expressions of different visions of the EU. In fact, the twists and turns in the use of the flexibility clause through the history of the EU constitute a good example of how implied powers reasoning lends itself to different constructions.

3 A Flexible History

[20] In *Reparation for Injuries* the ICJ concluded that: "… [The United Nations] is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less is it the same thing as saying that it is a ´super-State´, whatever that expression might mean. … Whereas a state possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice.", *Reparation for Injuries*, ICJ Reports 1949, op.cit. at 179-180.

[21] See Treaty on European Union (Lisbon consolidated version) (30 April 2008), OJ C 115/47 (9 May 2008), Article 5(1).

[22] On whether subsidiarity is part of this test, see Schütze (2003), op.cit. at 90-91.

[23] "For every instance of necessity being used as a ground to extend the freedom of action of international actors, there are occasions where it is used to restrain behavior", David J. Bederman, *The Spirit of International Law*, 2002, University of Georgia Press, at 126. The International Monetary Fund has considered maintaining institutional effectiveness in dealing with its primary objectives (macro-economic stabilization and short-term financing) as a reason for not deriving an implied power to deal with human rights issues, see Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund, and International Human Rights Law*, Hart Publishing, 2003, at 170-171.

[24] See Schütze (2003), op.cit. esp. at 103 and 109-110 with further references.

Although the history of the flexibility clause has been told several times, a brief account can be useful as an illustration of how the more general shifts in the pace of European integration have been reflected in the use of the clause.[25] By the time when the Treaty of Rome entered into force (1958), the implied powers doctrine had already been firmly established in the case law of the ICJ. What was then Article 235 of the Treaty establishing the European Economic Community (EEC) provided that:

> If any action by the Community appears necessary to achieve, in the functioning of the Common Market, one of the aims of the Community in cases where this Treaty has not provided for the requisite powers of action, the Council, acting by means of a unanimous vote on a proposal of the Commission and after the Assembly has been consulted, shall enact the appropriate provisions.[26]

Articles 235 and 236 of the EEC Treaty staked out the means by which the Economic Community could be adapted to changing circumstances. While Article 236 established a mechanism for revision of the EEC Treaty by member states in the form of a conference, Article 235 was designed as a tool which the Community could invoke whenever it felt a need to do so. In the Treaty establishing the European Coal and Steel Community the two mechanisms had even been merged into a single article (Article 95).[27]

As to its structure, decision-making through the flexibility clause built on a proposition by the Commission and a consequent decision by the Council, after consulting what was then known as the European Parliamentary Assembly. The legislative program of this foundational phase did not however call for frequent use of the flexibility clause. Instead the explicit powers were perceived as more or less sufficient for establishing the basic structures of the Community. After the initial establishment of the Community even a decline in the political will of member states to promote expansion of Community powers has been identified. This is reflected in the rather restrictive formulations on the occasional cases where the clause was invoked.[28] Although the ICJ had as early as 1962 in the *Certain Expenses* case constructed the powers of the UN very widely, indicating that if only a power could be related to the purposes of an organization (whether strictly

[25] See e.g. Bungenberg, op.cit. For extensive references to other literature, see Schütze (2003), op.cit. at 82.
[26] Treaty establishing the European Economic Community, 25 March 1957, 298 *UNTS* 11, Article 235.
[27] Treaty establishing the European Coal and Steel Community, 18 April 1951, 261 *UNTS* 140, Article 95: "In all cases not expressly provided for in the present Treaty in which a decision or a recommendation of the High Authority appears necessary to fulfill, in the operation of the common market for coal and steel and in accordance with the provisions of Article 5 above, one of the purposes of the Community as defined in Articles 2, 3 and 4, such decision or recommendation may be taken subject to the unanimous concurrence of the Council and after consultation with the Consultative Committee. … If, …, unforeseen difficulties which are brought out by experience in the means of application of the present Treaty, or a profound change in the economic or technical conditions which affects the common coal and steel market directly, should make necessary an adaptation of the rules concerning the exercise by the High Authority of the powers which are conferred upon it, appropriate modifications may be made …. These modifications will be proposed jointly by the High Authority and the Council acting by a five-sixths majority. They shall then be submitted to the opinion of the Court. … They will enter into force if they are approved by the Assembly acting by a majority of three-quarters of the members present and voting comprising two-thirds of the total membership.".
[28] Weiler (1999), op.cit. at 53.

speaking necessary or not) it would also be legal, Community members had not yet faced a need for adopting a liberal interpretation of the clause.[29]

All of this was to change as a reinterpretation of the flexibility clause was agreed upon at the Paris summit of 1972. At that summit members decided to make full use of the clause and utilize it as an integrationist tool.[30] The EEC membership had been expanded (with Denmark, Ireland, and the United Kingdom), which was seen as an opportunity to provide the Community a fresh start. A reinforcement of Community institutions was needed, and the flexibility clause was to be a key in this revival.[31] The EEC had some years earlier reached the so-called Luxembourg compromise, which (in response to French objections to the introduction of majority voting) stipulated that a country which believed that its national interests would be adversely affected by a Council decision could not be overruled by a majority. This gave members in effect a right of veto and a powerful tool for influencing Council decision-making. No disadvantage hereby followed from utilizing the flexibility clause (which required unanimity), in comparison with other treaty provisions. EC institutions did not dislike the revival either.[32] After all, the fact that for example the European Parliament was to be consulted was as strong a role that the Parliament could have in those early days of integration.

As a result, from 1973 until the Single European Act (SEA), there was a quantitative rise in recourse to, as well as a qualitative change in the understanding of the scope of the clause. The period is marked for example by the establishment of new institutions and the pursuit of an environmental policy through the use of the clause.[33] The ECJ was also to confirm this changing interpretation. In *Massey Ferguson* (1973) a Council regulation (based on Article 235) was contested with the argument that the flexibility clause could only apply in the absence of a specific provision. The Court however found that the "necessity test" of the clause was satisfied and that this sufficed for its use. The existence of alternative legal bases did not prevent this.[34] As a result Community institutions henceforth began utilizing the flexibility clause without even considering other legal bases. Weiler claims that the *de facto* usage of the clause up until the SEA in 1986, opened up practically any realm of state activity to the Community.[35]

The SEA was the first treaty revision in thirty years and was designed to adapt the Communities to better achieve the internal market. This adaptation of the Community treaties meant for example that new policy titles and a number of express legal competences were added. Most notably, as the membership in the Community had

[29] See *Certain Expenses*, ICJ Reports 1962, op.cit. at 168. Also see White, Nigel D., *The Law of International Organizations*, 1996, Manchester University Press, at 131-132.
[30] See Declaration of the Paris Summit (19-20 October 1972), in EC Bulletin 10-1972.
[31] See Declaration of the Paris Summit (19-20 October 1972), in EC Bulletin 10-1972, para. 15.
[32] Weiler (1999), op.cit. at 59.
[33] As to environmental law, see André Nollkaemper, "The European Community and International Environmental Co-operation – Legal Aspects of External Community Powers", in 2 *Legal Issues of European Integration* 1987, 59-88.
[34] Case 8/73 *Hauptzollamt Bremerhaven v Massey-Ferguson GmbH* [1973] European Court Reports 897, para. 4.
[35] Weiler (1999), op.cit. at 55 note 120, and 60.

doubled by the mid 1980s, achievement of consensus had become too cumbersome. Hence, use of qualified majority voting was extended. As a consequence of this move also the role of the Commission became emphasized both in setting the Community agenda and in acting as a power broker in the legislative process.[36] At the same time the legislative powers of the Parliament remained consultative only. This move is an important signpost in European integration, often perceived as the origin for the problems of democratic legitimacy.

A shift in the reasoning of the ECJ can also be identified. Schütze argues that a change in the use of the flexibility clause can be detected especially when used as a joint legal basis in cases where reliance on the clause would exclude the possibility of majority voting. In such cases the flexibility clause increasingly began to be treated as a subsidiary mechanism.[37] The very mechanism which was to make the EC more effective now displayed a different side. In the general move to majority voting, the flexibility clause now all of a sudden appeared as a rather cumbersome mechanism (due to its unanimity requirement). However, the general trend also after the SEA was a steady increase in the use of the clause. This can be explained by the other side of unanimous decision-making: the flexibility clause was now one of the (decreasing) legal bases which granted all members a right of veto.

The Treaty establishing the European Community was signed in February 1992, and constitutes in many ways an additional dividing line in the history of the flexibility clause. Now all of a sudden there is a clear decline in the use of the clause. This change can be witnessed both quantitatively as well as qualitatively, while the language of the clause itself remained largely unaltered.[38] Article 235 now read:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.[39]

Although the modifications to the clause are minor, the Maastricht Treaty revision at large introduced new competences to the Community and increased the range of policy areas governed by qualified majority voting. However, it also introduced the idea of conferred powers and the principle of subsidiarity, both indicating that there are limits to Community competences.[40] In the so-called *ECHR* opinion in 1996 concerning the competence of the Community to accede to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), the ECJ reinforced the idea of limits. In its reasoning on whether the Community has the

[36] Weiler (1999), op.cit. at 65.
[37] Schütze (2003), op.cit. at 100-101, building mainly on Case 45/86 *Commission v Council* [1987] European Court Reports 1493.
[38] See Bungenberg, op.cit. at 70-100.
[39] Treaty establishing the European Community (Maastricht consolidated version) (7 February 1992), in force 1 November 1993, OJ C 224/1 (31 August 1992), Article 235.
[40] Treaty establishing the European Community, op.cit. Article 3b.

competence to accede to the Convention the ECJ argued that Community powers do have limits, and that these derive from their conferred character.[41] Hence the ECJ denied accession of the Community to the European Convention on Human Rights, since this would entail:

> … [A] substantial change in the present Community system for the protection of Human Rights, in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.[42]

In the Treaty of Amsterdam (1997) the most visible change was the renumbering of the clause which now became Article 308. However, the application of the Article was undergoing a steady change. Schütze speculates whether the *ECHR* opinion was a first indication of a new judicial rigor in the ECJ approach to the limits to Community competence.[43] As an indication of the stricter approach to the flexibility clause the question of Article 308 and for example whether the adoption of a catalogue of competences would be necessary in order to restrict application of the clause arose in the negotiation process of the Treaty of Amsterdam. Also the role of the European Parliament was discussed.[44] No changes were however made to the wording of the clause itself.

On a more general level there has indeed ever since the late 1990s been many indications of a more "hostile constitutional landscape" towards European integration.[45] The ECJ in the so-called *Tobacco Advertising* case (2000) reinforced the role of the principle of conferred powers as a limit on Community competences.[46] Recourse to the flexibility clause seems to have dropped ever since the turn of the millennium.[47] As a tool for creating agencies, for example, a trend has been noted in increasingly refraining from using the flexibility clause in favor of other provisions.[48] Incidentally a similar shift in reasoning can also be witnessed in international law, especially in the denial by the ICJ of

[41] Opinion 2/94, op.cit. paras 29-30.
[42] Opinion 2/94, op.cit. paras 34-35.
[43] Schütze (2003), op.cit. at 95.
[44] Bungenberg, op.cit. at 255-269.
[45] See Joseph Weiler, "Epilogue: The European Courts of Justice: Beyond 'Beyond Doctrine' or the Legitimacy Crisis of European Constitutionalism", in Anne-Marie Slaughter, Alec Stone Sweet and Joseph Weiler (eds), *The European Court and National Courts – Doctrine and Jurisprudence*, 1998 (reprinted 2000), Hart Publishing, 365-391, at 366 *et seq.*
[46] Case C-376/98, *Federal Republic of Germany v European Parliament and Council of European Union*, [2000] European Court Reports I-8419, para. 83. "To construe that article [Article 95] as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording if the provisions … but would also be incompatible with the principle embodied in Article 3b of the EC Treaty (now Article 5 EC) that the powers of the Community are limited to those specifically conferred on it."
[47] Schütze claims that the drop has been to around 17 acts per year, Schütze (2003), op.cit. at 110, note 140.
[48] See e.g. Sami Andoura and Peter Timmerman, "Governance of the EU: The Reform Debate on European Agencies Reignited", EPIN Working Paper, no. 19, 2008, at 7-8.

implied powers of the World Health Organization in the *Legality of the Use by a State of Nuclear Weapons* case.[49]

None of this however means that the competences of the EU at large would be in decline. Later case-law of the ECJ has in fact put the approach in the *Tobacco Advertising* case into doubt.[50] This may also help explain why, despite the indication of a long decline in utilizing the flexibility clause, worries about misuse of the clause have nevertheless grown ever stronger. These concerns culminated in the Laeken Declaration which explicitly raised the question whether the clause would need to be reviewed in order to avoid a creeping expansion of Community powers.[51] In the consequent discussions during the work of the European Convention (charged with the task of drafting a Constitutional Treaty for Europe) a number of approaches through which to meet this challenge were presented. The discussion from the time of drafting the Treaty of Amsterdam was picked-up on whether teleological interpretations of competence could be restricted through a high degree of enumeration and detail. In this respect a catalog of powers was suggested as a way of reducing ambiguity.[52] A proposal was even made that the constitutionalization of the legal system would require outright abolishment of evolutionary powers.

Suggestions to abolish the flexibility clause as well as to subject its use to an opinion of the ECJ were eventually turned down by Working Group V of the European Convention.[53] In fact, the Working Group was quite clear on upholding the functional character of the clause. While emphasizing that the clause "must never give the impression that the Union defines its own competence", the Working Group also recognized the importance of maintaining a capacity for the Union to develop dynamically.[54] This echoes a familiar dichotomy of international organizations. On the one hand the exercise of powers establishes organizations as autonomous actors (and even as legal persons). On the other hand those powers, whether express or implied, must always be embedded in the membership of the organization.[55]

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[49] *Legality of the Use by a State of NuclearWeapons* (Advisory Opinion, 8 July 1996), ICJ Reports 1996.

[50] Derrick Wyatt, "Community Competence to Regulate the Internal Market", University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No 9/2007. Even the *ECHR* Opinion is a somewhat ambiguous example of a more restrictive approach to competences. See Päivi Leino-Sandberg, *Particularity as Universality: The Politics of Human Rights in the European Union*, The Erik Castrén Institute Research Reports 15/2005, at 192-196 in particular.

[51] See Laeken Declaration on the Future of the European Union (15 December 2001), Annex I to *Presidency Conclusions of the Laeken European Council* (14-15 December 2001), SN 300/1/01 REV 1.

[52] See the Discussion Paper on Delimitation of Competence between the European Union and the Member States – Existing System, Problems and Avenues to be Explored, CONV 47/02 (15 May 2002), esp. para. 4(b).

[53] See The European Convention, Final Report of Working Group V, CONV 375/1/02 (4 November 2002). Also see de Búrca, Gráinne and de Witte, Bruno, "The Delimitation of Powers Between the EU and its Member States", in Anthony Arnull and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union*, 2002, Oxford University Press, 201-222, at 213 et seq.

[54] The European Convention, Final Report of Working Group V, op.cit. at 14.

[55] The two aspects of international organizations were identified by Virally in his classic search for a theory of international organizations as state sovereignty on the one hand (members of organizations being predominantly states), and the concept of "function" on the other. M. Virally, "La notion de fonction dans la théorie de l´organisation internationale", in S. Bastid *et al.*, *Mélanges offerts á Charles Rousseau – La*

4 Article 352 of the Treaty of Lisbon

While the most radical suggestions for addressing the ambiguities that the flexibility clause imports into the definition of EU powers were not realized, many of the concerns expressed during the work of the European Convention did eventually find their way into the Treaty of Lisbon. To begin with, the Treaty of Lisbon has now renumbered the flexibility clause. Present Article 352 reads:

> 1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.
>
> 2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments´ attention to proposals based on this Article.
>
> 3. Measures based on this Article shall not entail harmonisation of Member States´ laws or regulations in cases where the Treaties exclude such harmonisation.
>
> 4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.[56]

For the first time in the history of European integration the flexibility clause is substantively rewritten. A first change to take hold of is that the reference to the common market of the old clause (Article 308) is deleted. Whereas earlier the clause spoke of action that is necessary "in the course of the operation of the common market", now this necessity for action must arise "within the framework of the policies defined in the

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communauté internationale, 1974, Pedone, 277-300. The thoughts of Virally are reproduced in Henry G. Schermers and Niels M. Blokker, *International Institutional Law: Unity within Diversity*, 2003 (4th ed.), Martinus Nijhoff Publishers, at 10 *et seq*. On powers and autonomy, see Viljam Engström, "Powers of Organizations and the Many Faces of Autonomy", in Richard Collins and Nigel White (eds), *International Organizations and the Idea of Autonomy*, outcoming in 2010, Routledge. The relationship has even been described as one of competing sovereignties. Miguel Poiares Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action", in Neil Walker (ed.), *Sovereignty in Transition*, 2003, Hart Publishing, 501-537, at 505 and de Búrca, Gráinne, "Sovereignty and the Supremacy Doctrine of the European Court of Justice", in Neil Walker (ed.), *Sovereignty in Transition*, 2003, Hart Publishing, 449-460, at 451-455.

[56] Treaty on the Functioning of the European Union, op.cit., Article 352.

Treaties". If taken literally, this would seem to narrow the purpose for which action can be taken as new policy areas can no longer be added to the sphere of the Community through the use of the flexibility clause.[57]

However, there may also be a more pragmatic reading of this change of vocabulary. As the "Community" notion gets substituted for "Union", the flexibility clause can consequently no longer refer to the common market solely. After all, the EU of today also pursues other policies. In the days of the EEC the notion "common market" covered all aspects of the Community´s tasks. Provisions dealing for example with social policy were oriented to addressing problems related to the removal of protectionist measures. Gradually the socio-economic objectives of the EU have grown more varied. The reference to "policies defined in the Treaties" accommodates this change.[58] Although the reference to the "common market" has resisted many revisions of the treaties, the eradication of the so-called pillar system now made it necessary also to adjust the flexibility clause so as to reflect its widened sphere of applicability.

One change that is more clearly designed to limit the scope of application of the clause is the express exclusion of some areas from its ambit. Up until the work of the European Convention, the clear divide between the EC and EU Treaties restricted the applicability of the flexibility clause to the former only. The draft Constitutional Treaty in eradicating the pillar system included both second and third pillar activities within the scope of the flexibility clause. The Treaty of Lisbon does not go quite as far and explicitly excludes matters concerning common foreign and security policy.[59] In addition the flexibility clause cannot be used to harmonize laws where this has been explicitly excluded.[60] What was formerly known as the area of justice and home affairs (nowadays mainly falling under the heading of freedom, security and justice) now falls within the sphere of applicability of the clause. This means that compared to the pre-Convention situation the applicability of the flexibility clause is in fact widened.

Apart from these changes there are also amendments of a more procedural nature. First of all the redefined clause emphasizes a link to subsidiarity, or more precisely, ties the clause to the mechanism for ensuring compliance with the subsidiarity principle which is established in the Protocol on the application of the principles of subsidiarity and proportionality of the Treaty of Lisbon (also known as the "early warning" system). This introduces an obligation for the Commission to inform national parliaments whenever the

[57] This is the conclusion e.g. of Schütze (2003), op.cit. at 114.

[58] Alan Dashwood, "Article 308 as the Outer Limit of Expressly Conferred Community Competence", in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law*, 2009, Hart Publishing, 35-44, at 36-37. For this reason e.g. Griller calls this an insignificant adjustment. Stefan Griller, "Is this a Constitution?", in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?*, 2008, 21-56, at 44, SpringerWienNewYork.

[59] In addition, the reference to Article 40 (2) TEU means that if the Union utilizes the flexibility clause within its categories and areas of competence (as defined in Articles 3 to 6 of the Treaty on the Functioning of the European Union), this shall not affect the procedures and the extent of the powers of Union institutions within the area of common foreign and security policy.

[60] The TFEU contains many such exclusions, see e.g. Article 79(4) on immigration policy, Article 84 on crime prevention, and Article 153(2)(a) on social policy.

clause is utilized. An *ex ante* procedure of control was also among the recommendations of Working Group V of the European Convention which emphasized the role of the ECJ in delivering an opinion on the application of the clause (upon the request of a member state or the Commission).[61] The Treaty of Lisbon did not however pick up that proposal. In fact, from a constitutional perspective its approach is rather the opposite. Instead of introducing a judicial mechanism of control, the Treaty of Lisbon emphasizes a political procedure by linking the flexibility clause to the early warning system, with the effect that national parliaments can enact a review of draft legislative acts.[62]

Last but certainly not least, the role of the European Parliament is enhanced by "upgrading" the former process of consulting the Parliament into the assent procedure. This means that instead of merely being asked for its opinion on proposed legislation (which was the procedure up until the Treaty of Lisbon), Parliament has now a right of veto. If the European Parliament rejects a legislative proposal the Council cannot overrule that rejection. However, the European Parliament will not be able to make amendments to legislative proposals.

In a Declaration on Article 352 of the Treaty on the Functioning of the European Union the reasoning of the ECJ in the *ECHR* Opinion is repeated:

> Article 352 of the Treaty on the Functioning of the European Union, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole and, in particular, by those that define the tasks and the activities of the Union. In any event, this Article cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose.[63]

While this inclusion is undoubtedly an expression of a desire to avoid a creeping increase of Community competence, its practical effect is uncertain. Firstly, declarations annexed to EC Treaties are not legally binding.[64] A second problem follows from determining when dynamic interpretation transitions into amendment. In distinguishing between the two mechanisms with respect to the scope of changes that can be realized through them,

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[61] The European Convention, Final Report of Working Group V, op.cit., at 16.

[62] The procedure gives national parliaments eight weeks to send an opinion on the incompatibility of an act with the principle of subsidiarity. If the opinion on a draft legislative act represents one third of national parliaments, the act must be reviewed. If the opinion represents a simple majority of national parliaments, and the reviewed act is still maintained, the matter is submitted to the Union legislator. See Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, Treaty on the Functioning of the European Union, op.cit., especially articles 4-7. As to the status of the Protocol, Article 51 of the TEU provides that protocols and annexes are an integral part of the Treaties.

[63] See Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon (13 December 2007), No. 42: Declaration on Article 352 of the Treaty on the Functioning of the European Union, Annexed to the Treaty on the Functioning of the European Union.

[64] See e.g. Linda Senden, *Soft Law in European Community Law*, 2004, Hart Publishing e.g. at 38, and Trevor Hartley, *The Foundations of European Community Law,* 2007, Oxford University Press, at 87.

the underlying idea is that the process of formal amendment serves as an upper limit upon the use of the flexibility clause.[65] That claim however only begs the question of when such a widening of the scope of Union powers (which requires the use of formal amendment) is at hand.[66]

5 Searching for Limits to Flexibility

What is one to make of these changes to the flexibility clause? On the one hand the Treaty of Lisbon at large can be seen to strengthen the emphasis on the limited nature of EU competence.[67] In the context of the flexibility clause indications of such a move are the express exclusion of particular areas from its sphere as well as the strong emphasis of the Declaration on Article 352 on the principle of conferred powers. On the other hand, although the ECJ has introduced the requirement of an "inextricable link" as a treshold for parallel (external) powers (hereby marking a changing approach to parallell powers), the Treaty of Lisbon makes no efforts to redefine the necessity-test at the heart of the flexibility clause.[68] Instead, if the widened scope of the clause to also cover matters of justice and home affairs is capitalized upon, it would seem that the sphere of applicability as a tool for enhancing integration is in fact widened.

The need to identify the legal contents or at least some absolute limits to implied powers reasoning is a remarkably persistent but also fully understandable idea. A central feature of any (democratic) system of governance is, after all, the imposition of limits on the exercise of public power. Out of all international institutions the EU is the paradigm example of exercise of public power beyond the level of nation states. Hence, to underline that the EU does not define its own competence serves to assure member states that the powers of the EU are not limitless. The one problem is that attempts at pinpointing such limits often only add to the ambiguity.

As already noted, in this search for limits to implied powers reasoning, faith is commonly put in a high degree of enumeration of the constituent instrument.[69] Enumerating the mechanism for formal amendment, the principle of conferred powers, and the explicit

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[65] See e.g. Franziska Tschofen, "Article 235 of the Treaty Establishing the European Economic Community: Potential Conflicts between the Dynamics of Lawmaking in the Community and National Constitutional Principles", in 12 *Michigan Journal of International Law* 1991, 471-509, at 484-485.

[66] This circularity has also been pointed out by Schütze (2003), op.cit. at 91-95 and 112.

[67] See John Erik Fossum and Agustín José Menéndez, "Still adrift in the Rubicon? The Constitutional Treaty Assessed", in Erik Oddvar Eriksen, John Erik Fossum, Mattias Kumm and Agustín José Menéndez (eds), *The European Constitution: The Rubicon Crossed?*, 2005, ARENA, 97-144, at 128-129.

[68] See Opinion 1/94, *Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property - Article 228(6) of the EC Treaty*, [1994] European Court Reports I-5267, para. 86, and Case C-467/98, *Commission of the European Communities v Kingdom of Denmark*, [2002] European Court Reports I-9519, para 61.

[69] In literature on international institutional law, see e.g. Chittharanjan F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2005 (2nd ed.), Cambridge University Press, at 98, and Tetsuo Sato, *Evolving Constitutions of International Organizations*, 1996, Kluwer Law International, at 261. On the EU, see e.g. the Discussion Paper on Delimitation of Competence between the European Union and the Member States, op.cit. esp. para. 4(b), and earlier Tschofen (1991), op.cit. at 478.

exclusion of areas from the applicability of the flexibility clause are indications of the same desire. However, while this way of interlinking the flexibility clause with other elements of the EU Treaties affect the conceptual construction of the clause, these linkages do not necessarily serve as a guarantee against dynamic interpretations.

By way of an example, while it makes good sense to identify a general principle of safeguarding the core features of organizations when exercising implied powers (meaning that the use of implied powers must for example respect the object and purpose, express wording, and division of competence of the constituent instrument) the decision of when a contradiction between the object and purpose or the express wording of an organization and the implied power is at hand cannot be settled in the abstract. The reason is that an assumption that express provisions restrict the use of implied powers will in the subsequent practice of the organization only be meaningful as part of a general assessment of the limiting impact of those express provisions. As the tasks of organs will evolve during the life of the organization, so too will the limiting impact of the constituent instrument be subject to change. In other words, every liberal use of the flexibility clause will also interpret the limiting elements of the Treaties liberally.[70] Hence, a functional interpretation of powers will not only arrive at an additional power, but will also stretch that functionality to the limiting impact of the constituent instrument. This means that although more detailed drafting *can* provide for more detailed counterarguments for the dissenter, it can not however exclude liberal use of the clause.[71] This is of some concern in assessing the revised flexibility clause.

Bearing this nature of reasoning on powers of organizations in mind affects the idea of invoking domestic jurisdiction concerns (as for example expressed through the subsidiarity clause) and the principle of conferred powers as limits on liberal interpretations of powers.[72] Domestic jurisdiction clauses cannot remove the ambiguity and solve the question of what an organization is legally entitled to do in the abstract, since domestic jurisdiction clauses are compatible with living in "hermetic isolation" from other states, as well as with surrendering decision-making to a supranational organization.[73] The Permanent Court of International Justice took hold of this already in

[70] See Sacha Prechal, "Institutional Balance: A Fragile Principle with Uncertain Contents", in Ton Heukels, Niels Blokker, and Marcel Brus (eds), *The European Union after Amsterdam: A Legal Analysis*, 1998, Kluwer Law International, 273-295, e.g. at 276. Also Schütze (2003), op.cit. at 108-109 seems to be aware of this.

[71] For this reason it is also futile to exhaustively try to enumerate the powers of an organization. See Joseph Weiler, "Conclusions", in *Europe 2004: Le Grand Debat*, conference in Brussels (15 and 16 October 2001), 2002 (available at http://europa.eu.int/comm/governance/). The more principled point is made by Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 2005 (Reissue with a new Epilogue), Cambridge University Press, at 336-337.

[72] See Estella who demonstrates the political character of the use of the subsidiarity principle in respect of regulation of waste-management and noise pollution, Antonio Estella, *The EU Principle of Subsidiarity and its Critique*, 2002, Oxford University Press, at 108-111. As to the principle of conferral, see e.g. Gráinne de Búrca, "Limiting EU Powers", in 1 *European Constitutional Law Review* 2005, 92-98, at 94

[73] See Koskenniemi (2005), op.cit. at 240 *et seq*. Estella characterizes the subsidiarity principle as a "catch-all formula of good government and common sense", Estella (2002), op.cit. at 96. In the heydays of internationalism an absence of challenges to the exercise of powers of organizations (on the basis of safeguarding domestic jurisdiction) actually led to characterizations of domestic jurisdiction clauses as of

the *Nationality Decrees* opinion (1923) in identifying domestic jurisdiction issues as "essentially relative".[74] This means that although the flexibility clause is now tied to the early warning system for ensuring compliance with the subsidiarity principle, liberal interpretations of the flexibility clause are not excluded by this fact alone. If anything, it could be expected that this rather adds another layer to a discussion on the proper reach of powers. This follows from that a precondition for balancing the concerns of subsidiarity and institutional effectiveness, a discussion about the proper conception of subsidiarity will arise.

As to the principle of conferred powers, the claim of the Declaration on Article 352 is that this principle limits the EU to the general framework created by the provisions of the EU treaties as a whole and to the defined tasks and activities of the Union.[75] This suggests that the system of enumerated powers of the EU treaties cannot be contradicted. Nor can the EU expand its scope of authority vis-à-vis members since those members have already conferred upon the organization the means at the disposal of the organization as well as defined its tasks and activities.[76] However, this conception of the principle of conferred powers is not entirely satisfactory. Instead, that principle is better understood as a search for member consent. If members agree on the use of a power (whether express or implied), then such a power can be characterized as conferred upon the organization. This was the logic at the heart of the reasoning of the ICJ in the *Legality of Use* case:

> The powers conferred on international organizations are normally the subject of an express statement in their constituent instruments. Nevertheless, the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers … known as "implied" powers".[77]

It is a principle of law that every organization can utilize implied powers. In this sense those implied powers upon which there is agreement can be characterized as conferred. This is even more apparent in the case of EU law, given the express embodiment of the flexibility clause into the TFEU. It comes as no surprise therefore that a similar line of though can be found in the *ECHR* Opinion of the ECJ when characterizing the flexibility clause as: "… being an integral part of an institutional system based on the principle of conferred powers ….".[78] Since the flexibility clause is part of the powers conferred upon the Community, also the powers arrived at through the use of that mechanism should consequently be characterized as conferred. As a consequence the principle of conferred powers loses its function as a limit to implied powers. Instead that principle becomes a

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symbolic interest only. For an example, see Schermers and Blokker (2003), op.cit. at 161-162. Similarily in EC law the absence of precedents on the use of subsidiarity as a challenge to legislation lead some authors to consider such challenges impossible. For an example, see John Usher, *EC Institutions and Legislation*, 1998, Longman, at 99-100.

[74] *Nationality Decrees issued in Tunis and Morocco (French zone)* (Advisory Opinion, 7 February 1923), PCIJ Publications 1923, Series B, no. 4, at 24.

[75] See Declaration on Article 352 of the Treaty on the Functioning of the European Union, op.cit.

[76] See Tschofen (1991), op.cit. at 484, and overview in Schütze (2003), op.cit. at 107-108.

[77] *Legality of the Use*, ICJ Reports 1996, op.cit. para. 25.

[78] Opinion 2/94, op.cit. para. 30.

vocabulary through which to express the acceptance of (or opposition to) use of the flexibility clause.[79]

Given the discussion so far, the only absolute limit upon the use of the flexibility clause would then seem to be the explicit exclusion of common foreign and security policy (as well as those policy areas where the treaties exclude harmonization) from the scope of the clause. But even in this case some uncertainties present themselves, due to the elusiveness of the definition of common foreign and security policy. Up until the Treaty of Lisbon the issue of definition commonly arose as a question of whether particular action falls within the objectives of the Community or the Union. The reasoning of the ECJ for example in the *Kadi and Al Barakaat* case has been criticized for allowing engagement in foreign policy issues through forging a link to the internal market. As a consequence the reasoning has been seen to undermine the principle that the clause cannot be used to pursue common foreign and security policy objectives.[80] The point made above thereby reenters: it is only when there is a pre-existing shared conception of how to interpret the EU treaties that the delimitation can clarify the scope of non-express powers. This is not to deny that explicit exclusion of subject areas will serve to guard against a creeping expansion of EU powers (in those areas), but to emphasize that novel interpretations of EU treaties can always erode that limiting impact.

It is therefore not surprising that some legislators in ratifying the Treaty of Lisbon made no attempt at a general assessment of the clause. For example the government proposal to the Finnish parliament for the ratification of the Treaty of Lisbon only makes a sweeping statement that the main effect of the amended clause will be that the conditions and procedure for its use will change.[81] This may in fact be the only general assessment possible. As the flexibility clause will escape fixed characterization even after the Lisbon revision, any "true nature" of the clause cannot be identified. The perpetual question of implied powers reasoning hereby re-enters: how can the idea of non-express powers and the corresponding possibility of functional development be maintained, while accommodating the fear that the clause will be used to erode member sovereignty? This leads interest to the modifications of the procedural preconditions of the clause.

6 The Flexibility Clause in a Constitutionalizing Union

[79] So also Stephen Weatherill, "Competence and Legitimacy", in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law*, 2009, Hart Publishing, 17-34, at 19.

[80] See e.g. P. Takis Tridimas, "Terrorism and the ECJ: Empowerment and democracy in the EC Legal Order", Queen Mary University of London, School of Law, Legal Studies Research Paper No. 12/2009, at 6-7, and Angus Johnston, "Frozen in time? The ECJ Finally Rules on the Kadi Appeal", in 68 *Cambridge Law Journal* 2009, at 1-4. It should however be noted that the ECJ itself set as its point of departure that the flexibility clause is not applicable in the area of common foreign and security policy. See Kadi and Al Barakaat International Foundation v Council and Commission, Joined cases C-402/05 P and C-415/05 P (3 September 2008), paras 198-201.

[81] Hallituksen esitys Eduskunnalle Euroopan unionista tehdyn sopimuksen ja Euroopan yhteisön perustamissopimuksen muuttamisesta tehdyn Lissabonin sopimuksen hyväksymisestä ja laiksi sen lainsäädännön alaan kuuluvien määräysten voimaansaattamisesta, HE 23/2008, at 266-267.

Decisions on the use of the flexibility clause have required, and will continue to require, a unanimous decision by the Council. This means that every use of the clause has the support of EU members. However liberally the clause is constructed, member states have given their consent (or have at least refrained from expressing their objection) to that construction. At the same time the unanimity requirement has not managed to reassure critics. Although there is at the face of it nothing "creeping" in a unanimous decision by member states of an organization, the clause is nevertheless targeted for enabling an undue expansion of powers. It seems then that unanimity among state representatives in the Council does not suffice to render decision-making under the clause (or the clause itself) legitimate.

The establishment and maintenance of a system of political rule has in the context of the state meant focusing on the individual as the basic unit of society and on creating a political domain for collective decision-making. A link needs to be established between governmental institutions and societies. As Allott puts it, any exercise of public power is delegated by the society to be exercised in the public interest.[82] In modern constitutionalism this idea of the constituent power is commonly expressed through an emphasis on democratic governance.[83]

The discussion on the flaws in the democratic legitimacy of the EU has become something of an evergreen although the issue has been a central theme of every major revision of the founding treaties. In fact, as to the flexibility clause, the so-called Vedel report already in 1972 emphasized the role of the European Parliament (which is the same year that the clause was revived as a mechanism for integration). The report, which was concerned with ways of increasing the powers of the European Parliament, suggested among other things that the adoption of acts under the flexibility clause was to be made dependent on approval of the Parliament. The logic was that since an expansion of Community powers leads to national parliaments losing legal and de facto powers, the role of the European Parliament as the voice of "social forces" should be emphasized.[84] Almost 40 years later, the Treaty of Lisbon now takes this development to its logical conclusion as the role of the European Parliament is enhanced.

[82] Phillip Allott, "Intergovernmental Societies and the Idea of Constitutionalism", in Jean-Marc Coicaud and Veijo Heiskanen (eds), *The Legitimacy of International Organizations*, 2001, United Nations University Press, 69-103, at 91-92.

[83] Neil Walker, "Taking Constitutionalism Beyond the State", in 56 *Political Studies* 2008, 519-543, at 528-531.

[84] In a first stage the report suggested that Parliament should be given a power of co-decision, see Report of the Working Party examining the problem of the enlargement of the powers of the European Parliament: Report Vedel, *Bulletin of the European Economic Community*, April 1972, no. 4, pp. 7-85. Also see Tschofen (1991), op.cit. at 506-507. Also the ECJ has appreciated the flexibility clause for engaging the European Parliament, see cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission, OJ C 285/2 (8 November 2008), paras 230 and 235.

The development of the role of the European Parliament under the flexibility clause is part of a more generally improved role of the Parliament under the Treaty of Lisbon.[85] Emphasizing the role of the European Parliament in decision-making under the flexibility clause certainly adds a mechanism of political control, and with that, opens up the question of the outer limits of Community law for broader political deliberation. However, along with the improved influence in the legislative process also the ability (or inability) of the European Parliament to have a legitimating effect becomes highlighted. The question arises whether improvements in the role of the European Parliament in the legislative process manages to get to the heart of the problem. While there are many aspects to the legitimacy critique (some emphasizing costs or efficiency concerns, others focusing on technocracy and lack of popular participation), the most devastating concern for the European Parliament is the absence of a common identity.[86] In the face of this absence, a strengthening of the role of the Parliament not only does not solve the legitimacy problem, but may in fact aggravate it. This is the end result if the construction and interpretation by the European Parliament of the needs and values of European citizens turn out superficial.[87] Adding to this the fact that the substantive scope of application of the flexibility clause will be broadened (as former third pillar matters will be included), the net effect could at worst be an aggravation of the legitimacy problems of the EU.

Against this background the involvement of national parliaments seems a useful move to make. If social legitimation of decisions at the EU level cannot be achieved, then legitimation needs to be sought at the national level.[88] This becomes particularly imminent in the context of the flexibility clause. The more liberal an interpretation of the legal order is, the more it will appear to "stretch" the constituent instrument, and the more necessary it will become to firmly ground this interpretation in national constitutional debate. In this respect the logic is very similar to treating formal amendment as the "upper limit" to the flexibility clause (and implied powers reasoning more generally). If there is an identified need for developing the powers of the EU in a particular policy area, but the matter is too contentious to be realized at the EU level (through an act of interpretation), then the only way to proceed is to bring the deliberation to the level of national legislatures.

The focus on national parliaments in the revised flexibility clause is also part of a more general emphasis on the role of national parliaments as active participants in the EU

[85] On these improvements, see Koen Lenaerts and Nathan Cambien, "The Democratic Legitimacy of the EU after the Treaty of Lisbon", in Jan Wouters *et al, European Constitutionalism beyond Lisbon*, 2009 Intersentia, 185-207, at 187-188.

[86] For a general discussion see Erik O. Eriksen, The Unfinished Democratization of Europe, 2009, Oxford University Press, at 57-58. Also see e.g. Wincott, Daniel, "Democracy and Constitutionalism in the European Community", in Zenon Bankowski and Andrew Scott (eds), *The European Union and its Order: The Legal Theory of European Integration*, 1999, Blackwell Publishing, 113-130, at 116 *et seq.*

[87] An emphasis on popular legitimacy, Grimm claims, may serve to remove the EU "farther from its base than ever", Grimm (1995), at 298-299. Also see e.g. Weiler (1999), op.cit. at 81-86, and Weatherill (2009), op.cit. at 25-26.

[88] On the topic, see e.g. Philipp Kiiver, The National Parliaments in the European Union: A Critical View on EU Constitution-building, 2006, Kluwer Law International, at 171 et seq.

decision-making process. As such it adds to the flexibility clause an additional element of political deliberation and control.[89] Procedurally, then, it would seem that serious attempts are made in the redrafted flexibility clause to meet concerns over the democratic legitimacy of EU decision-making. Given the extent to which the procedure is modified, the revision itself becomes an expression for the search for the value-base of the EU. The fact that this search is conducted on two levels, through the European Parliament, but also through national parliaments could also be seen as an admittance of the difficulties with finding a legitimating input through the European Parliament. In all, the turn to national parliaments has been characterized as the creation of a multi-level parliamentary field, where democratic representation is a result of interplay of multiple processes.[90] It may however be that national parliaments are not only brought in to add legitimacy to EU decision-making as such, but also as a way of rescuing the legitimacy of the European Parliament itself.[91] When seen from this perspective, it is in fact the strengthened role of the European Parliament which necessitates the involvement of national parliaments (in order to avoid a deterrence of legitimacy problems in using the flexibility clause)

Apart from the more principled concerns, the more practical impact of involving national parliaments is somewhat uncertain. The question may be asked whether the involvement of national parliaments will have any added value, since this right seems merely to embody the right of national parliaments to send complaints to the initiator of EU legislation that they possessed already before the Treaty of Lisbon, with the exception that under the flexibility clause the involvements of national parliaments is only mentioned in the context of subsidiarity-issues. Further, any single member can not enact a review of the legislative act. In order for true deliberation between the EU and its members to occur (in the form of review), 1/3 of the votes distributed to the national parliaments is needed, and a simple majority in order for the matter to be submitted to the European Parliament (if the legislative proposal is not reviewed). Notably, in either case, such a critical mass would make approval in the Council seem unlikely anyway (as the flexibility clause still requires unanimity).[92]

Bringing national parliaments into the discussion on the reach of EU powers also narrows the difference between the mechanism for formal amendment and the flexibility clause. This may have some unintended side-effects. The involvement of national parliaments

[89] Any direct legal input of national parliaments is however still rather weak. See Philipp Kiiver, "European Treaty Reform and the National Parliaments: Towards a New Assessment of Parliamentary-Friendly Treaty Provisions, in Jan Wouters *et al*, *European Constitutionalism beyond Lisbon*, 2009 Intersentia, 131-146, at 131-132, and Walter van Gerven, "Wanted: More Democratic Legitimacy for the European Union – Some Suppositions, Propositions, Tests and Observations in Light of the Fate of the European Convention", in Jan Wouters *et al*, *European Constitutionalism beyond Lisbon*, 2009, Intersentia, 147-183, at 171.

[90] Erik Crum and John E. Fossum, "The Multilevel Parliamentary Field: a framework for theorizing democracy in the EU, in 1 *European Political Science Review* 2009, 249-271, at 259 et seq.

[91] This seems to be the suggestion of Eriksen 2009, op.cit. at 224.

[92] This builds on Kiiver (2009), op.cit. at 141-143, who calls the involvement of national parliaments "mostly symbolic", the main effect coming from stimulating the use of powers already existing, and promoting institutional learning. Also see George A. Bermann, "The Lisbon Treaty: The Irish 'No'. National Parliaments and Subsidiarity: An Outsider´s View", 4 *European Constitutional Law Review* 2008, 453-459, claiming that in order to be effective the procedure should have been developed further especially in respect of timing.

may affect the perception of the EU as an autonomous supranational actor. After all, the exercise of powers (and particularly implied powers) is one of the hallmarks of the autonomy of organizations.[93] Competence creep is part of the process in which the necessary autonomy is bestowed upon the EU to enable it to function successfully in finding solutions to common problems. Quite in contrast to this, the redrafted flexibility clause now seems to give up some of this autonomy in favor of member states. A connected concern is that *ex ante* control also affects the nature of the clause. While the aim of the flexibility clause is to allow for swift adaptation of the powers of the EU, some of that functionality will inevitably be lost in an added dimension of national parliamentary debate. If this means that the EU no longer can deliver effectively in response to expectations, such a loss of functionality may in itself become a legitimacy concern for the EU.[94]

6 Concluding Remarks

In the dichotomy between dynamic development and maintained legitimacy all organizations need to find an individual balance. A reassessment of this balance was also the explicit goal of the process that started with the Laeken declaration and ended with the Treaty of Lisbon. The fact that the outcome of the revision of the flexibility clause sends mixed signals should come as no surprise. It rather suggests that the nature of the clause remains intact. The express exclusion of policy areas from the ambit of the clause and the enumeration of formal amendment and the principle of conferred powers as limits upon its use send the signal that the clause has its limits. Yet, the basic mechanism remains intact, only the odd reference to the common market being updated to reflect the present-day design of the EU. Considering that also former third pillar issues are now included within the sphere of the clause, the range of policy areas in which the clause can be applied is in fact broadened. The dual role of the clause hereby seems to have been amplified instead of clarified (which was the goal of the Laeken declaration).

The most interesting changes that have been introduced by the Treaty of Lisbon are therefore of a procedural nature. These changes fall firmly within the general constitutional development of the EU in recent years in that focus is on avenues for political input. Unanimous decision-making in the Council accompanied by judicial supervision by the ECJ no longer suffices for ensuring legitimacy in the eyes of EU citizens. Hopes are that the strengthened role of the European Parliament and the involvement of national parliaments will come to the rescue. From the desire of 1972 to start utilizing the clause as an effective tool for European integration, emphasis has hereby shifted to anchoring decision-making more closely in constitutional deliberation. Although unanimity in a Council of 27 members (and more) will be more difficult to

[93] The goal-oriented character and the possession of powers were among the arguments emphasized in first advancing the idea of organizations as distinct legal entities in the early 1900s. See David J. Bederman, "The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel", in 36 *Virginia Journal of International Law* 1996, 275-377, at 336-343.

[94] See Weatherill (2009), op.cit. at 26-27 and at 32-33. Also see Tschofen (1991), op.cit. at 506.

achieve than ever before, in principle there is nothing to stop the EU from developing as dynamically as ever. What the procedural changes do aim at is that however the flexibility clause is used in the future, this use will be firmly based in the values and views of citizens.

The new flexibility clause marks a new phase in the history of dynamic development not only of the EU, but potentially also of other organizations. Although implied powers reasoning has always been accused for being political and ambiguous, the revised flexibility clause now also offers a procedure for political contestation to go with that political character. Seen from the perspective of international law, the "odd" occurrence of an express embodiment of the implied powers idea in EU law now all of a sudden displays its real potential, as it allows for bringing members "back in" into a discourse on the proper reach of powers. Whether this also means that legitimacy issues concerning the outer reach of the powers of the EU will be remedied in practice is a question that remains to be seen. It may well be, as some skeptics would have it, that legitimacy deficits in international organizations can eventually only be met through decreasing the demand for legitimacy (through scaling down ambitions of policy-makers).[95] Although some unique steps have been taken in respect of the flexibility clause, then again the demand for legitimacy is unique as well.

[95] Such a claim is e.g. made by Ulrich Haltern, "Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination", in 9 *European Law Journal* 2003, 14-44, at 41.