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## Implied Powers Beyond Functional Integration? The Flexibility Clause in the Revised EU Treaties

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## Implied Powers Beyond Functional Integration? The Flexibility Clause in the Revised EU Treaties

### Cover Page Footnote

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**IMPLIED POWERS BEYOND FUNCTIONAL  
INTEGRATION? THE FLEXIBILITY CLAUSE IN THE  
REVISED EU TREATIES**

CARL LEBECK\*

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I gratefully acknowledge linguistic and stylistic suggestions from the editors, remaining mistakes are all mine

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## I. INTRODUCTION

One of the least discussed, but at least in principle, most important issues regarding the revision of European Union (EU) treaties has been the proposed revision of implied powers under the Treaty on the Functioning of the European Union (TFEU).<sup>1</sup> The purpose of this article is to give an account and present an analysis of the changes to the implied powers proposed in the latest round of the Intergovernmental Conference (IGC) of 2007.<sup>2</sup> Im-

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1. Consolidated version of the Treaty on the Functioning of the European Union, 2008 O.J. (C 115) 47 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047>:0199:EN:PDF [hereinafter TFEU]. Declarations annexed to the TFEU are available at Declaration Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, 2008 O.J. (C 115) 335, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0335:0359:EN:PDF>. See generally Council of the European Union, Brussels, Belgium, June 21-22, 2007, *Presidency Conclusions* CIG 11177/1/07 REV 1 (July 20, 2007), [hereinafter *Presidency Conclusions*] available at [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/94932.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf).

2. Substantive revisions concerning the implied powers have not taken place since the negotiations in October 2007, however, readers should note that the TFEU was formally adopted in December 2007 in the Lisbon Treaty. Conference of the Representatives of the

plied powers are of central importance to the constitutional structure of the EU since they provide flexibility of legislative (and in principle also of other) powers and also extend legislative powers of the European Community (EC) beyond what is explicitly mandated in the text of the treaties. Implied powers set the outer limits of legislative competencies of the EC which makes understanding them central to understanding the system of conferred powers within the EC. The revision in the roles of implied powers is also central to the understanding of the EU's constitutional architecture inter alia because it will extend the applicability of them to the EU as a whole (and abolish the difference between the EC and EU). The changes in the implied powers in the Treaty Establishing a Constitution for Europe (EU Constitutional Treaty),<sup>3</sup> proposed by the IGC in 2004, were radical compared to Article 308 of the Treaty Establishing the European Community (EC Treaty),<sup>4</sup> and

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Governments of the Member States, Brussels, Belgium, Dec. 3, 2007, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, (Dec. 13, 2007), [hereinafter *Lisbon Treaty*] available at <http://consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf>. The TFEU together with the revisions in EU Treaty is also known as the "Reform Treaty" or the *Lisbon Treaty*. Here the EU Treaty and the TFEU are used exclusively.

3. Treaty Establishing a Constitution for Europe, 2004 O.J. (C 310) [hereinafter EU Constitutional Treaty].

4. Treaty Establishing the European Community (Amsterdam consolidated version) 1997 O.J. (C 340) [hereinafter EC Treaty]. For a discussion of these developments, see Carl Lebeck, *Art. 308 EC-Treaty, From a Democratic to a Constitutional Deficit? Implied Powers, Accountability and the Structure of the European Community*, *Europarättslig Tidskrift* 365-09 (2007); FLORIAN SANDER, *REPRÄSENTATION UND KOMPETENZVERTEILUNG* (Dunker & Humblot, 2005); Rudolf Streinz, *Art. 308*, in *EUV/EWG KOMMENTAR* 2539-53 (Rudolf Streinz ed., 3d ed. 2003); Robert Schütze, *Organised Change Towards an "Ever Closer Union": Article 308 and the Limits to the Community's Legislative Competence*, 22 *YB. EURO. L.* 79 (2003); Robert Schütze, *Dynamic Integration – Article 308 EC and Legislation "in the Course of Operation of the Common Market": a Review Essay*, 23 *OX. J.L. ST.* 333 (2003a); VALERIE MICHAEL, *RECHERCHES SUR LES COMPÉTENCES DE LA COMMUNAUTÉ* 500-05 (L'Harmattan 2003); Matthias Rossi, *Art. 308 (ex-Art. 235)*, in *KOMMENTAR ZU EU-VERTRAG UND EG-VERTRAG* 2537-60 (Christian Calliess & Matthias Ruffert eds., Bücher Luchterhand 2002); Peter Orebeck, *The EU Competency Confusion: Limits, "Extension Mechanisms," Split Power, Subsidiarity, and "Institutional Clashes,"* 13 *J. TRANSNAT'L L. & POLY* 99 (2003); Marc Bungenberg, *Dynamische Integration, Art. 308 und die Forderung nach dem Kompetenzkatalog*, *Europarecht* 879 (2000); MARC BUNGENBERG, *ART. 235 EGV NACH MASTRICHT* (Baden-Baden 1999); Sigmar Stadelmaier, *Die "Implied Powers" der Europäischen Gemeinschaften*, 55 *AUSTRIAN J. PUB AND INT'L L.* 353, 354-55 (1997); ANITA WOLF-NIEDERMAIER, *DER EUROPÄISCHE GERICHTSHOF ZWISCHEN RECHT UND POLITIK* 200-05 (Baden-Baden 1997); Ferdinand 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*, 12 *MICH. J. INT'L L.* 471 (1991); J.H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403, 2443-53 (1991). There has been considerable doctrinal discussion when it comes to the extent of the role of Article 308 EC Treaty, for some authors proposing a more traditional restrained approach see P. Lachmann, *Some Danish Reflections on the Use of Article 235 of the Rome Treaty*, 18 *CML. REV.* 447 (1981); Ivo E. Schwartz, *Article 235 and Law-Making Powers in the European Community*, 27 *INT'L & COMP. L.Q.* 614 (1978); G. Marenco, *Les Conditions d'Application de l'Article 235 du Traité C.E.E.*, 13 *Revue Du Marché Commun.* 147, 147-57 (1970); Gert

the revisions proposed to the IGC 2007 have proposed further (but less radical) revisions on some issues. Implied powers generally allow public authorities flexibility to act on concerns that are related to their fields of activity, but which are not covered by the competencies allocated to them. The main reason implied powers are of such interest is because they confer powers to the European Community (EC) and the EU that are not clearly defined. In that respect, Article 308 EC Treaty is an exception to the prevalence of the defined (and hence delimited) powers of the EC/EU. Article 308 EC Treaty is a central part of the constitutional framework, since the EC/EU lacks inherent competencies, and the member states are the “masters of the treaties.” The structural issue of implied power is central to understanding some of the legitimacy problems facing the EC/EU. This Article discusses some of the aspects of the changes in the flexibility clause in relation to current Article 308 EC Treaty. The comparison concerns both the proposed changes adopted by the IGC 2004 in the EU Constitutional Treaty, and the changes proposed during the IGC 2007 incorporated into the TFEU.

Although there is considerable disagreement about the character of the EU, and to some extent, disagreement on the constitutional principles on which it should rely, there seems to be some agreement on the institutional principles of the EU that can be used to describe the constitutional practices of the EC/EU. These include conferred (as opposed to inherent) powers, fundamental rights, institutional balance, subsidiarity, and proportionality.<sup>5</sup> In such a system, implied powers are problematic since they weaken the constraining effects of conferred powers, and possibly the constraining effects of subsidiarity. The use of implied powers is often in contradiction with the protection of subsidiarity, as the use of implied powers leads to a greater degree of legal harmonization at the EU level. The protection of subsidiarity through procedural means in relation to the exercise of implied powers is a central part of the maintenance of some limits on the competencies of the EU.

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Nicolaysen, *Zur Theorie von den Implied Powers in den Europäischen Gemeinschaften*, *Europarecht* 129 (1966).

5. Armin von Bogdandy, *Europäischen Prinzipienlehre*, in *EUROPÄISCHES VERFASSUNGSRECHT: THEORETISCHE UND DOGMATISCHE GRUNDZÜGE* 149, 179-81, 191-94 (Armin von Bogdandy ed., 2003).

### A. Conferred Powers and Functional Integration

The EC/EU does not have any inherent powers; it only has powers delegated to it by the EC/EU member states.<sup>6</sup> The EC/EU cannot grant itself further powers. It lacks what has been called “*Kompetenz-Kompetenz*,” meaning that it lacks the power to change its own legal competency.<sup>7</sup> This view of the EC/EU has been consistent over time, and leads to the conclusion that those wielding the ultimate power over the EU are the member states in

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6. Under the EC/EU Treaties, the distinction between inherent and conferred powers has been explored by Alan Dashwood, *The Limits of European Community Powers*, 21 EUR. L. REV. 113, 115 (1996); Ingolf Pernice, *Kompetenzabgrenzung im Europäischen Verfassungsverbund*, 55 JURISTEN ZEITUNG 866 (2000); Franz C. Mayer, *Die drei Dimensionen der Europäischen Kompetenzdebatte*, 61 HEIDELBERG J. INT'L L. 577 (2001), available at [http://www.zaoerv.de/61\\_2001/vol61.cfm](http://www.zaoerv.de/61_2001/vol61.cfm); Armin von Bogdandy & Jürgen Bast, *Die vertikale Kompetenzordnung der Europäischen Union: Rechtsdogmatischer Bestand und verfassungspolitische Reformperspektiven*, 28 EUROPÄISCHE GRUNDRECHT ZEITSCHRIFT 441 (2001); Gráinne de Búrca & Bruno de Witte, *The Delimitation of Powers Between the EU and its Member States*, EUI RCAS Policy Paper CR 2001/03, available at <http://www.iue.it/RSCAS/e-texts/CR200103.pdf>.

7. However, when recognizing that the EC/EU cannot extend its own competencies, the ECJ has consistently held that the meaning of the competencies given to the EC/EU is to be determined by the ECJ itself. In that sense, one may argue that there is a judicial *Kompetenz-Kompetenz* in the EC/EU constitutional order. If that is true, the possibility of judicial *Kompetenz-Kompetenz* is distinctive from the possibility of inherent public powers. The reason for this is that in a constitutional system, where the primary mode of creating legal norms is through secondary legislation under a framework of treaties which cannot be legally changed by the lawmaking institutions in that constitutional system, it relegates the possibility of expansion of competencies to judicial practice. There are two possibilities for the ECJ to exercise judicial *Kompetenz-Kompetenz* in an expansive way. First, the ECJ can approve *ex post facto* expansive interpretations of legislative and executive powers of the political branches of the EU. The other possibility is for the ECJ to interpret fundamental freedoms (and in certain contexts fundamental rights) under the treaties in an expansive fashion. It seems clear that judicial *Kompetenz-Kompetenz* lacks the capacity of coordinated constitutional change, which is the core of inherent powers. The extent and effectiveness of judicial *Kompetenz-Kompetenz* is dependent upon the practices of the political branches. Thus, the role of the ECJ becomes a matter of stabilizing the legal framework already given by the member states. See Koen Lenaerts & Kathleen Gutman, “*Federal Common Law*” in *the European Union: A Comparative Perspective from the United States*, 54 AM. J. COMP. L. 1 (2006); FRANZ C. MAYER, *The European Constitution and the Courts*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (Armin von Bogdandy & Jürgen Bast eds., 2006); Gareth Davies, *The Division of Powers Between the European Court of Justice and National Courts*, Constitutionalism Web-Papers, ConWEB No. 3, Apr. 2004, available at <http://www.qub.ac.uk/schools/SchoolofPoliticsInternationalStudiesandPhilosophy/FileStore/ConWEBFiles/Fileupload,38338,en.pdf>. See generally J.H.H. WEILER, THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” (Cambridge Univ. Press 1999); Koen Lenaerts, *Some Thoughts About the Interaction Between Judges and Politicians*, 1992 U. CHI. LEGAL F. 93 (1992); Hjalte Rasmussen, *Towards a Normative Theory of Interpretation of Community Law*, 1992 U. CHI. LEGAL F. 135 (1992); Trevor C. Hartley, *Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community*, 34 AM. J. COMP. L. 229 (1986); Ami Barav, *The Judicial Power of the European Economic Community*, 53 S. CAL. L. REV. 461 (1980); Note, *The Court of Justice of the European Community: An Institutional Analysis*, 51 IOWA L. REV. 129 (1965-1966).

their capacities as “masters of the treaties.”<sup>8</sup> While that is a theoretical and largely uncontested position, upheld in the TFEU, the central issue is to what extent can the EU be seen as constrained by the principle of conferred powers?<sup>9</sup> For conferred powers to be a meaningful basis for as well as limitation on public powers, it is presupposed that they are limited in scope and that those limits are possible to determine. In the case of powers delegated to the EC the limits have been defined through the objectives that the powers are to serve and the competencies allocated to the EC to serve that objective. The functions of such norms are generally set out in terms of the objectives of the EC/EU.<sup>10</sup> The role of objectives to serve as a basis for a constitutionalization of the extent of policy making powers of the EU under the treaties is based on the premise that they are sufficiently clearly stated. The role of the objectives stated in the treaties has thus been to define those functions of public authorities that the member states have delegated to the EC/EU.

The legitimacy of functional integration is primarily based on chains of delegation rather than output. Functional integration is, at least in the understanding of the European Court of Justice (ECJ) and the constitutional orders (including the courts) of the member states, made legitimate by the delegation of powers to the EU by the member states, and that delegation has been acceptable within the member states’ respective constitutional orders due to its functional and limited character. In that regard, the use of implied powers is problematic. On one hand, implied powers may appear to be necessary in order to fulfil the functional goals but, to the extent the functional goals necessitate the use of more extensive powers than envisioned, it will require a consideration of non-functional, value-based choices. Functional integration is defined by the common institutions that are entrusted with powers of gov-

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8. Christian Calliess, *art. 5 (ex-art 3b)*, in *KOMMENTAR ZU EU-VERTRAG UND EG-VERTRAG* 381 (Christian Calliess & Matthias Ruffert eds., Luchterhand 2002).

9. That particular view on the nature of EC/EU and subsequently EU law has also been included in Article 5 EC Treaty, and with regard to particular institutions in Articles 7(1), 8, 9, 13, 189, 225a, 237, 240 of the EC Treaty, as well as in Articles 9(2), 10(2), 18(3), 32(1), Art. II-51(1), III-8(1), III-80, III-217 of Draft Constitutional Treaty for the European Union proposed by the EU Constitutional Convention, and subsequently in the defunct EU Constitutional Treaty agreed by the IGC 2004 Article I-3(5), I-6, I-11, I-19, I-111, I-118, III-315, III-373, III-375, III-404 EU Constitutional Treaty. The principle of conferred powers was also retained in the Treaty on the Functioning of the European Union in Articles, 3(6) 4(1), 5(2), and 9(2). It is furthermore emphasised in Declaration Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, , 2008 O.J. (C 115) 344-45, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0335:0359:EN:PDF>

10. Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights & Fundamental Freedoms, 1996 E.C.R. I-1759, I-1788.



ernment defined in terms of specific tasks, and not in terms of territorial control. Functional delegation to specialized agencies of government also exists in national constitutionalism, but the difference is that functional integration is based only on powers that are given to functionally-defined public bodies. Functional integration is in that sense based on an inherent paradox, namely the EU is supposed to be able to handle certain limited tasks of public policy-making more effectively than national institutions, whereas the objective of effectiveness often leads to a need to overstep the boundaries established for functional integration. As a result, functional integration has been retained in the phrasing of the treaties, while the functional integration has only been a weak constraint the scope of EU's policy-making powers. The limited character of functional integration is also what makes it acceptable in relation to national democracy and national constitutionalism, as the limited character of supranationalism makes it possible to retain the central aspects of democratic accountability within the nation state.<sup>11</sup> The dilemma is that functionalism, in its search for effectiveness, transcends its own boundaries, which causes the need for *political deliberation* over choices of policies and values to resurface. It thus undermines the possibility of containing such political discourse (and disagreement) within the national polity. That is a common ground for the view that the EC/EU requires some form of constitutional legitimacy independent from that of the delegation of the member states. Functionalism has been dependent upon a constitutional framework which allowed its powers to be effective, while at the same time, constraining those powers so as not to intrude on the domains where member states have not delegated any powers to the EU. The limited practical effect of functional constraints thus poses a problem of democratic legitimacy.

Functional integration lacks the kind of legitimacy that stems from continuous democratic processes, and rather relies on the fact that a sufficient degree of legitimacy can be attained by constitutionalizing the content of certain policy choices. Functional integration seeks to alleviate the democratic deficit by stabilizing and constitutionalizing policy competencies, and providing effective and efficient policy as a substitute for democratic participation and

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11. Sverker Gustavsson, *Preserve or Abolish the Democratic Deficit?*, in NATIONAL PARLIAMENTS AS CORNERSTONES OF EUROPEAN INTEGRATION 100, 117-21 (Eivind Smith ed., 1996); Christoph Gusy, *Demokratiedefizite postnationaler Gemeinschaften Unter Berücksichtigung der Europäischen Union*, in GLOBALISIERUNG UND DEMOKRATIE 131 (Hauke Brunkhorst ed., 2000).

accountability.<sup>12</sup> Conferred powers and the principle of functional integration support each other, but as is obvious from the recently proposed revisions of the treaties, conferred powers and functional integration are not logically dependent upon each other. Powers can be conferred without being harnessed to attain precisely defined objectives. The functionalist form of integration lives with an inherent paradox that lurks in the background of the decisions of the ECJ. The ECJ has successively transformed its case law concerning implied powers of the EC from a review of implied powers conferred in the EC Treaty to a review of objectives of the EC stated in the EC Treaty. The expansion, and in particular, the merger of EC objectives into the objectives of the EU, as in the proposed treaty revisions, leads to the conclusion that the objectives will be broader, and their connection to particular competencies will be far weaker. The probable result is that broader objectives will be interpreted in a more extensive way, meaning that the practical role of conferred powers as a constraint will become more limited. More generally, the role implied powers have come to play is problematic given the traditional assumptions of the legitimacy of EC law as relying on the principle of functionally limited powers. The functional constitutional approach assumes that public powers ought to be exercised in a more single-minded fashion than normal democratic political processes allow for. Processes of policy making in political assemblies that are directly elected require, to a far greater extent, openness to deliberation over political preferences and values.

### *B. Implied Powers in a System of Conferred Powers*

The role of implied powers is defined by the fact that the EC/EU does not have any inherent public powers.<sup>13</sup> The only powers it claims are the powers delegated to it by the member states. The basis for such delegation is that the powers are either explicitly mentioned in the treaties, or based on a general conferral of powers that are supposed to supplement the explicitly mentioned

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12. See, e.g., Ernst-Joachim Mestmäcker, *On the Legitimacy of European Law*, in *WIRTSCHAFT UND VERFASSUNG IN DER EUROPÄISCHEN UNION* 133 (1994/2003).

13. There is a certain terminological confusion when it comes to Article 308 EC Treaty. Lenaerts & Van Nuffel use the terms "implicit" and "implied" competencies of the EU when referring to actions based on a conjunction of several articles under the EC Treaties, and they refer to Article 308 EC Treaty as a matter of "supplementary competences." See KOEN LENAERTS & PIET VAN NUFFEL, *CONSTITUTIONAL LAW OF THE EUROPEAN UNION* 90-95 (Robert Bray ed., 2d ed. 2005). The most common way to describe powers under Article 308 EC Treaty is however "implied competencies," and this paper will adhere to that terminology.

powers in the process of attaining EC/EU objectives. The existence of “implied powers” in a system based on conferred powers leads to a situation where one has to distinguish between “explicitly conferred powers” and “implicitly conferred powers.” Alongside the principle of conferred powers is hence, as mentioned above, the principle of functional integration.

Implied powers seem to be the consequence of an attempt to increase the flexibility of a constitutional order of conferred powers where there is, in principle, little flexibility. The ways to constrain implied powers have been by procedure and judicial control, which has been focused on reviewing whether the measures that can be adopted under “explicitly conferred powers” and serve the purposes of the EC. As may be inferred from the term “implied,” such powers are subsidiary to the exercise of powers delegated “explicitly”, and because of the differences in scope and decision making, the maintenance of that distinction seems to stem from a constitutional perspective. In a system where the objectives become too wide to serve as a basis for meaningful judicial review, the effect seems to be that controlling the exercise of implied powers will become increasingly accomplished by procedural rather than substantive means.

### *C. Implied Powers and the Problem of Democratic Deficit in the EU*

The implied powers are related to another major problem in the constitutional discourse on the EU—the so-called “democratic deficit.”<sup>14</sup> The basis of the democratic deficit<sup>15</sup> is the character of the decision making by the Council of Ministers. Their decisions are entirely a matter of decisions by the national governments, act-

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14. Eric A. Stein, *International Integration and Democracy: No Love at First Sight?* 95 AM. J. INT'L L. 489, 519-24 (2001); Anne Peters, *European Democracy after the 2003 Convention*, 41 COMMON MKT. L. REV. 37, 41 (2004). See Andreas Føllesdal & Simon Hix, *Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik*, 44 J. COMMON MKT. STUDIES 533 (2006). There have been attempts to argue that there is no “democratic deficit,” due to the fact that the EC/EU form a structure of regulatory governance, which is governed through objectives over which application with little disagreement (and political disagreement over the objectives can be relegated to the process of treaty ratification). See Giandomenico Majone, *The European Community: an Independent Fourth Branch of Government?* (European Univ. Instit. Political & Soc. Sci. Working Paper No. 9, 1993); *The Rise of Regulatory State in Europe*, 17 W. EURO. POL. 78 (1994); see generally GIANDOMENICO MAJONE, *REGULATING EUROPE* (Jeremy Richardson ed., 1996); Giandomenico Majone, *Europe's 'Democratic Deficit': The Question of Standards*, 4 EUR. L.J. 5, 5-28 (1998); Andrew Moravcsik, *In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*, 40 J. COMMON MKT. STUDIES 603 (2002); see FRITZ SCHARFF, *GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC?* 21-23 (Oxford Univ. Press 2005).

15. Carol Harlow, *European Administrative Law and the Global Challenge*, in *THE EVOLUTION OF EU LAW* 266 (P. Craig & Gráinne de Búrca eds., 1999).

ing *in corporere*. As the national governments are elected in the respective member states according to constitutional and electoral law of each member states, by the citizens of each member state, there is no possibility of holding the Council, as a collective accountable for its decisions.

Implied powers set the outer limits of what functional integration can achieve within the given treaty structure. However, implied powers as they have been designed and interpreted have also created a "constitutional deficit". The constitutional deficit is an effect of the need for effectiveness, combined with of the institutional design aimed at retaining control of the member states over the outer limits of the EC competencies by giving that control to the executives of the member states. As mentioned above, implied powers can be seen as a way to cope with the inherent paradox of functional integration. That can also be seen in the manner in which the ECJ has sought to manage the application of implied powers: by extending the use of explicitly delegated powers as much as possible, while at the same time, accepting the continuous expansion of the EC competencies through implied powers. The total effect has been to expand the powers of the EC/EU with clear support by the national executives, but without clear support in the treaties. That has deepened the democratic deficit, while also creating a constitutional deficit, without addressing the issue on whether there is any need for a basis of legitimacy other than the consent of the member states to the EU. Likewise, the chosen model has also largely excluded effective accountability and democratic control of the Council.

#### *D. Subsidiarity as a Constraint on Implied Powers: From Substance to Procedure?*

There are inevitable conflicts between subsidiarity and needs for effective supranational coordination, an issue which has partly been resolved through the use of implied powers. The two are interrelated in the sense that they concern the protection of democratic legitimacy conceived as (ultimately) satisfied at a lower level of decision making versus the idea of legitimacy to a great extent dependent on effective governance also if effectiveness would lead to less effective accountability. Subsidiarity was conceived as that decisions should be made at the lowest level possible which seems to rely on a notion of participation and accountability as central criterion of legitimate public decision-making. The question is raised below as to whether that will change under the TFEU, since functional integration as the main source of legitimacy seems to

have been abandoned in the TFEU through the considerably broader empowerments that are harder to delimit than the competencies defined in the EC Treaty.

The use of implied powers under the EC Treaty has always been conditioned on a “necessity” requirement within the operation of the common market.<sup>16</sup> Since the introduction of the subsidiarity requirement, “necessity” is now a requirement for all actions by the EC. However, until now the subsidiarity requirement has only had an impact on a limited number of substantive issues, as a constraint it has been regarded as relatively weak. The introduction of procedural constraints to enforce subsidiarity in the EU Constitutional Treaty and the TFEU is a major change in the legal role of subsidiarity. The new constraints, in relation to the exercise of implied powers, concern both parliamentary control and a greater

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16. The principle of subsidiarity is set out in Article 5 EC Treaty, and in the Protocol on Subsidiarity and Proportionality which was added to the EC Treaty in the course of the Amsterdam Treaty. See DIE SUBSIDIARITÄT EUROPAS (Detlef Merten ed., 1993); Calliess, *supra* note 8, at 307; George A. Bermann, *Regulatory Federalisms: European Union and United States*, 263 RCADI 13 (1997); George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331 (1994); Gráinne de Búrca, *The Principle of Subsidiarity and the Court of Justice as an Institutional Actor*, 36 J. COMMON MKT. STUDIES 217, 218 (1998); see generally, Deborah Z. Cass, *The Word That Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community*, 29 COMMON MKT. L. REV. 1107 (1992); Rudolf Dolzer, *Subsidiarity: Toward a New Balance Among the European Community and the Member States?*, 42 ST. LOUIS U. L.J. 529 (1997-98); Denis J. Edwards, *Fearing Federalism's Failure: Subsidiarity in the European Union*, 44 AM. J. COMP. L. 537 (1996); Christian Kirchner, *The Principle of Subsidiarity in the Treaty on European Union: A Critique from a Perspective of Constitutional Economics*, 6 TUL. J. INT'L & COMP. L. 291 (1998); Koen Lenaerts & Patrick van Ypersele, *Le Principe de Subsidiarite et son contexte: etude de l'article 3B du Traité CE*, CAHIERS DE DROIT EUROPÉEN 3 (1994); Paul D. Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 FORDHAM INT'L L.J. 616 (1994-1995); Gerald L. Neuman, *Subsidiarity, Harmonization, and their Values: Convergence and Divergence in Europe and the United States*, 2 COLUM. J. EUR. L. 573, 574-76 (1996); Pierre Pescatore, *Mit der Subsidiarität Leben, Gedanken zu einer drohenden Balkanisierung der Europäischen Gemeinschaft*, in FESTSCHRIFT FÜR ULRICH EVERLING 1071 (1995); Jörn Pipkorn, *Subsidiaritätsprinzip im Vertrag über die Europäische Union – rechtliche Bedeutung und Gerichtliche Überprüfbarkeit*, 22 EUZW 697 (1992); Mathias Rohe, *Binnenmarkt oder Interessenverband? Zum Verhältnis Binnenmarktziel und Subsidiaritätsprinzip nach dem Maastricht-Vertrag*, RABELS ZEITSCHRIFT 1 (1997); Florian Sander, *Subsidiarity Infringements Before the European Court of Justice: Futile Interference with Politics or Substantial Step Towards EU Federalism?*, 12 COLUM. J. EUR. L. 517 (2005-2006); Theodor Schilling, *A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle*, 14 Y.B. EUR. L. 203, 234 (1994); Rupert Scholz, *Das Subsidiaritätsprinzip im europäischen Gemeinschaftsrecht, - ein Tragfähiger Maßstab zur Kompetenzabgrenzung*, in FÜR RECHT UND STAAT: ZUM 60 GEBURTSTAG 441 (Klaus Letzgas et al. eds., 1994); Edward Swaine, *Subsidiarity and Self-Interest: Federalism at the European Court of Justice*, 41 HARV. INT'L. L. J. 1 (2000); Christian Timmermans, *Subsidiarity and Transparency*, 22 FORDHAM INT'L. L. J. S106 (1998-1999); A.G. Toth, *The Principle of Subsidiarity in the Maastricht Treaty*, 29 COMMON MKT. L. REV. 1079 (1992); Joel P. Trachtman, *L'État C'est Nous: Sovereignty, Economic Integration and Subsidiarity*, 33 HARV. INT'L. L. J. 459 (1992); W. Gary Vause, *The Subsidiarity Principle in European Union Law – American Federalism Compared*, 27 CASE W. RES. J. INT'L. L. 61 (1995).

role for national parliaments through control of compliance with the principle of subsidiarity. Subsidiarity and implied powers have not been explicitly connected to each other under the EC Treaty,<sup>17</sup> and the introduction of a control is a major novelty common to the various proposed revisions to the treaties.<sup>18</sup>

Subsidiarity and proportionality are both central principles when it comes to assessing the appropriate role of implied powers. The reason for that is that the use of implied powers is to be assessed on whether the powers are necessary to achieve the objectives of the common market (as under the EC Treaty) or the objectives of the EU (as under the EU Constitutional Treaty and under the proposed Treaty on the Functioning of European Union). Subsidiarity and proportionality have a strong structural similarity in the sense that they respectively require that decisions should be taken at the lowest feasible political level, and that public measures should be minimally intrusive (i.e. there is, both in the case of subsidiarity and proportionality, a two stage test of necessity and appropriateness of EC measures).<sup>19</sup> In that regard, subsidiarity and proportionality are two factors that have to be built into the test of necessity as a necessary requirement for the exercise of implied powers.<sup>20</sup>

That was recognized specifically in the EU Constitutional Treaty and in the TFEU which is now in the (yet uncertain) process of ratification. The common basis for subsidiarity and implied powers has thus been the principle of functional integration. As mentioned above, functional integration is defined by the fact that

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17. However, subsidiarity and the use of implied powers both rely on a test of necessity, and the exercise of implied powers always has to pass the test of necessity under subsidiarity. There is thus a structural similarity when it comes to the relations between subsidiarity and implied powers, but effectively, implied powers depend on having passed the subsidiarity test. That does not, however, contradict the fact that the ECJ sometimes has used subsidiarity as the appropriate test to question whether a measure under Article 308 EC Treaty has been legal.

18. Anna Vergés Bausili, *Rethinking the Methods of Dividing and Exercising Powers in the EU: Reforming Subsidiarity and National Parliaments* (Jean Monnet Working Paper No. 9/02), available at <http://www.jeanmonnetprogram.org/papers/02/020901.pdf>; N.W. Barber, *Subsidiarity in the Draft Constitution*, 11 EURO. PUB. L. 196 (2005); N.W. Barber, *The Limited Modesty of Subsidiarity*, 11 EURO. L. J. 308 (2005); Ian Cooper, *The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU*, 44 J. COMMON MKT. STUDIES 281, 281-82 (2006).

19. Gert Nicolaysen, *Notwendige Rechtssetzung Auch Ein Beitrag Zum Thema Subsidiarität*, in GEDÄCHTNISCHRIFT FÜR EBERHARD GRABITZ 469, 474-75 (Albrecht Randelzhofer et al. eds., 1995).

20. Ute Mager, *Die Prozeduralisierung des Subsidiaritätsprinzips im Verfassungsentwurf des Europäischen Konvents – Verbesserter Schutz vor Kompetenzverlagerung auf die Gemeinschaftsebene*, 3 Zeitschrift für Europarechtliche Studien 471 (2003); Christian Koenig & R.A. Lorz, *Stärkung der Subsidiaritätsprinzips*, 58 JURISTEN ZEITUNG 167-73 (2003).

the powers delegated to a supranational organisation are limited and aimed at objectives which are, if not clearly delimited, at least delimitable. The abandonment of traditional forms of functional integration thus also has extensive implications for subsidiarity and proportionality. Functional integration leads to the control of subsidiarity and proportionality becoming proceduralized rather than substantive. Thus the vast expansion of objectives of the EU, compared to the EC Treaty, leads to a common change constraining implied powers and protecting subsidiarity, where the focus changes from objectives to procedures.

### *E. Implied Powers Under the EC Treaty*

As mentioned above, the EC/EU relies on the principle of conferred powers,<sup>21</sup> meaning that the EC/EU does not have any inherent powers of its own, but only has those powers that have been delegated to it by the member states.<sup>22</sup> In that respect, after the adoption of a new treaty, the EC/EU has powers only insofar as the states that are parties to the treaty have consented to, and the limits of the powers of the EU are set by the powers conferred to it in the treaty.<sup>23</sup> That also, as discussed above, sets the conditions of the use of implied powers of the EC.

## II. THE BASIS FOR IMPLIED POWERS—ARTICLE 308 EC TREATY

Among those conferred powers is also a clause of so called “implied powers,”<sup>24</sup> that confers the right on the Council, after consultations with the European Parliament to decide on measures necessary “for the realization of the common market.” The first way in which the implied powers clause was formulated was in Article 235 Treaty Establishing the European Community (Rome Treaty)<sup>25</sup> subsequently renumbered as Article 308 EC Treaty<sup>26</sup> states:

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21. LENAERTS & VAN NUFFEL, *supra* note 12, at 86-89; STEPHEN WEATHERILL, LAW AND INTEGRATION IN THE EUROPEAN UNION 38 (Peter Cane et al. eds., 1995).

22. EC Treaty, *supra* note 4, at art. 5.

23. Lebeck, *supra* note 4, 365-09 (2007); Schütze, *supra* note 4, at 79, 82-86; Schütze *supra* note 4, at 333; Rossi, *supra* note 4, at 2537-60; Stadelmaier, *supra* note 4, at 353; Tschofen, *supra* note 4, at 471; Weiler, *supra* note 4 at 2443-53; Lachmann, *supra* note 4, at 447, 451-55; Marengo, *supra* note 4, at 147-57; Nicolaysen, *supra* note 4, at 129, 131-36.

24. EC Treaty, *supra* note 4, at art. 308.

25. Treaty Establishing the European Community, 1992 O.J. (C 191) [hereinafter revised version of the Rome Treaty].

26. *Id.*

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.<sup>27</sup>

The implied powers in the constitutional structure of the EC (until now only form of implied powers) makes four formal requirements: (1) a measure should be aimed at attaining a community objective; (2) it should be *necessary*, and (3) connected to the *operation of the common market*, (a factor that the ECJ has chosen to interpret as anything provided for within the EC Treaty); and (4) it shall *not provided for the necessary powers* in the EC Treaty. The objectives of the EC are set out in Article 2 EC Treaty and consist of general goals of EC policies that are specified in Articles 3 and 4. However, Article 308 EC Treaty refers to actions "in the operation of the common market," which seems to mean that the area where implied powers can be applied is restricted to that part of the EC. The distinction between the common market and the other objectives of the community points to a limited understanding of the common market. The ECJ has in its case law under Article 308 EC Treaty never accepted any such limited understanding, instead the objectives of the community have been understood in a "global" sense, regarding the objectives as a whole, and sometimes combined with the objectives of the EU as set out under the EU-treaty when the EC-treaty provides for the EC to be used as a vehicle for implementation of EU-policies. The basis for interpreting the conferred powers are also related to the general constraints on implementation of objectives that are set out in Article 5 EC Treaty,<sup>28</sup> which enshrines the principle of conferred powers, and sets out the principle that in order to realize the purposes of the community, the community may not go beyond what is set out in the treaties, and the community may not take any action that is not necessary to realize the objectives.

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27. *Id.*

28. Calliess, *supra* note 8, at 307-09.



### A. *The Legal Forms of Measures Under Article 308 EC Treaty*

An important aspect of Article 308 EC Treaty is that it does not speak of *legislation* as such. The word used instead is “measures” which seems, in principle, to be unlimited.<sup>29</sup> The use of Article 308 EC Treaty has mostly been limited to the adoption of legislative measures, albeit of wildly varying generality. That means that the implied powers under the EC Treaty are legislative as well as executive, which means that the national governments acting as a collective in the Council of Ministers merges executive and legislative powers at the EC level as well as at the national level.

### B. *The Procedure of Decision Making*

In relation to the decision making procedure, it is clear that the traditional approach has been limited and focused on the powers of the national executives acting *in corporere* within the Council. That approach can be characterized as “executive federalism,” a constitutional structure consisting of states rather than a people as constituent parts, and where the constituent parts are represented at the federal or supranational level by representatives of their respective (usually indirectly elected) executives rather than through directly elected legislatures.<sup>30</sup> In a system of executive federalism, where the constituent parts are the member states and the member states regulate their own processes of political decision making, it is impossible to hold the “federal” level accountable. The only possible form of accountability is indirect through the national governments. The parliamentary control allowed within the traditional structure of implied powers in EC law has been limited to the European Parliament, and that control has been limited to rights of consultation that have been interpreted in

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29. The word “measure” must be understood in a broader sense than “legislative acts,” and it also seems to imply that the use of implied powers under Article 308 EC Treaty have been applicable to the exercise of public powers by the Council of Ministers. That means legal acts, which cannot in any normal sense be understood as legislative acts, have also fallen under Article 308 EC Treaty. There is, as will be mentioned below, no real difference in that respect between the Proposed Treaty on the Functioning of the European Union and the current EC Treaty, and in certain respects, this means that the Council of Ministers will be able to create legislative (i.e. general) and non-general legal norms.

30. PHILIPP DANN, *PARLAMENTE IM EXEKUTIVFÖDERALISMUS* (Armin von Bagdandy & Ruediger Wolfrum eds., 2003); *see also* Deirdre Curtin, *The Executive(s) of the European Union, in 30 YEARS OF EUROPEAN LEGAL STUDIES AT THE COLLEGE OF EUROPE 83* (Paul Demaret et al. eds., 2005); Stefan Griller, *EU – ein staatsrechtliches Monstrum?, in EUROPAWISSENSCHAFTEN 201* (Gunnar Folke Schuppert et al. eds., 2005).

a restrictive fashion.<sup>31</sup> The process of consultation does not include any procedure to hold the Council of Ministers to account for their views or to provide any rationale for its decisions. The process does not even include a requirement to await the opinion of the European Parliament. As a result, the role of the European Parliament has been limited in that it has not had, as is the case in the co-decision procedure, a power to delay decision making and *create* a supermajority requirement in relation to the decision making of the Council of Ministers.

Another aspect is the importance of the EC executive branch, the European Commission, as it has exclusive powers of proposal, and hence a strong power of agenda setting. In that respect, legislation on the basis of Article 308 EC Treaty is not different from other types of legislation. Thus, the European Commission is the "gatekeeper" over legislation when the legislation is adopted on the basis of Article 308 EC Treaty. Whereas, implied powers are often used in an *ad hoc* manner, the agenda setting powers of the European Commission suggests that there is a strong and continuous institutional interest<sup>32</sup> of the Commission in expanding the reach of EC law. The only check on the exercise of power under Article 308 EC Treaty, in the present form, is the ECJ and the Court of First Instance (CFI). The only possible control is judicial, and although that might be effective, it also means that control will be limited when it comes to issues of policy. The consequence is relatively wide discretion, particularly in areas where judicial institutions traditionally tend to be deferential to the political branches.

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31. Case C-417/93, *Parliament v. Council*, 1995 E.C.R. I-1185, I-1197-98, I-1213-15. The first attempt to formalize the duties of consultation was with Case 138/79, *Roquette Frères v. Council*, 1980 E.C.R. 3333.

32. The theoretical approach related to institutional interests has been a central current in U.S. constitutional theory. Expressed with considerable simplification, the assumption of the theories based on institutional interests is that each branch of government seeks to maximize its power and influence. That idea has sometimes relied on a general theory of behaviour of political decision making which assumes influence-maximization. The view of institutional interests has been challenged on the basis that political decision makers need not want to maximize their own influence and power, e.g. in situations where political decision makers, for ideological reasons, want to delimit their own powers. In addition to that, one could also add that efficiency and effectiveness of the exercise of powers, may in some contexts, be enhanced through the delegation or separation of powers. Second, the interest in binding one's adversaries may, under certain institutional constraints, lead to an acceptance of more generalized forms of constitutional constraints. However, it should also be said that if decision makers have a general preference to enforce their policies, it seems likely over time that they will be interested in enhancing the powers of the institutions they represent. In the case of federal or quasi-federal systems, where there is no party-system, the institutional aspects seem even more important. Daryl Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006); Richard A. Epstein, *Why Parties and Powers Both Matter: A Separationist Response to Levinson and Pildes*, 119 HARV. L. REV. F. 210 (2006) available at <http://www.harvardlawreview.org/forum/issues/119/june06/epstein.shtml>.

The ECJ has developed case law which sought to uphold the primacy of explicitly delegated powers<sup>33</sup> and sought to delimit the use of Article 308 EC Treaty. These developments were partly a result of the need to maintain institutional balance within the EC/EU, since other legal bases for decision making give greater roles to the European Parliament (and in the case of IGCs, for national parliaments that are permitted, to accept or reject amendments to the treaties). The ECJ has restricted the discretionary power of the Council to choose a legal basis for its decision, to a minimum.<sup>34</sup> Furthermore the ECJ has interpreted the scope of the ordinary legal bases expansively in order to make them cover as much ground as possible, which has simultaneously restricted the role of implied powers in areas where the authority of the EC/EU is uncontested.<sup>35</sup> However, the ECJ has accepted a wide scope of implied powers in fields where the legal basis for actions by the EC/EU is less obvious. The structure of implied powers in EC law has certain institutional features. It created a very strong role of the national executives, and because of the unique characteristics of the EC/EU political system (lack of political parties, lack of a permanent opposition, lack of transparency regarding the deliberations of the Council of Ministers), the least common denominator of the Council presumably were the interests of the national executives.<sup>36</sup> The absence of political accountability and the continuous change in the composition of the federal legislature (following the varying electoral periods in the member states) preclude the emergence of political parties and a system with a ruling majority and a minority in opposition. The absence of permanent lines of political conflict instead leads to the least common denominator of decision making, national and institutional interests common to all executives of the member states. These traits are common to all forms of decision making in institutions that are characterized by executive federalism, such as the Council of Ministers. To a certain extent, the will of the Council might be tempered by parliamentary influences at the federal level, and in the co-decision procedure of the EC that is the case where the European Parliament works as a

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33. See Case 8/73, *Hauptzollamt Bremen v. Massey Ferguson*, 1973 E.C.R. I-897, 907; Case 45/86, *Comm'n v. Council*, 1987 E.C.R. 1493, 1520.

34. See Case C-268/94, *Portuguese Republic v. Council*, 1996 E.C.R. I-6177, I-6216-I-6217, I-6186-I-6187.

35. See Case C-350/92 *Spain v. Council*, 1995 E.C.R. I-1985, I-2012-15; see e.g., Case C-271/94, *Parliament v. Council*, 1996 E.C.R. I-1689, I-1710-11; Case C-377/98, *Netherlands v. Parliament & Council*, 2002 E.C.R. I-7079; Case C-436/03, *Parliament v. Council*, 2006 E.C.R. I-3733; Case C-217/04, *U.K. v. Parliament & Council*, 2006 E.C.R. I-3771.

36. Lebeck, *supra* note 4, at 400-09.

countervailing power to the Council of Ministers, but which is not the case when it comes to implied powers.

*C. The Scope of Implied Powers: From Policies to the Objectives of the European Community*

The scope of the implied powers of the EC is primarily defined through the objectives of the European Community. Those objectives are set out in Article 2 EC Treaty and specified in Articles 3 and 4 EC Treaty. The substantive limits of the implied powers are based, first on the implications of the text, and then to include what cannot be read out from the text, and finally to be understood in light of the treaty objectives as a whole. This has been interpreted to mean that the objectives within the EC Treaty have applied in specific contexts where a legislative authorization to the EC has been made in order to realize some measures of the EU.

The specification of objectives is done in two steps within the EC Treaty, generally, in Article 2 EC Treaty, and more specifically, in Articles 3 and 4 EC Treaty. It is important to note that when the articles specifying objectives refer to each other, the general objectives are defined with reference to more specific objectives. A textualist approach to the statement of Article 2 EC Treaty seems to be that the EC objectives are tripartite, in common market, the Economic and Monetary Union (EMU), and in a number of other objectives. This linguistic understanding of EC objectives seems to point to a limited approach to the objectives of the EC. The text seems to imply *e contrario* that implied powers are not applicable in the field of the EMU, since the monetary union as such is distinguished from the common market in Article 2 EC Treaty. The objective of establishing a common market is defined through the policy measures enumerated in Articles 3 and 4 EC Treaty. The objectives in Articles 3 and 4 EC Treaty are set out with a high level of specificity, and they are to be applied in conjunction with more specific competencies of policies set out in the treaties. That is relevant when it comes to analyzing the possible meanings of implied powers when it comes to realising the objectives. The objectives, in conjunction with the principle of conferred powers, also raise the question of whether the EC/EU has a general power to regulate the internal market, a claim which ECJ rejected given the high degree of specificity of competencies.<sup>37</sup>

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37. Alan Dashwood, *The Relationship Between the Member States and the European Union/European Community*, 41 COMMON MKT. L. REV. 355, 357-62 (2004); Derrick Wyatt, *Community Competence to Regulate the Internal Market* (Univ. of Oxford Faculty of Law

In that regard, the role of implied powers becomes even more important.<sup>38</sup> The ECJ adopted an approach where the objectives set out in Article 2 EC Treaty, as specified by Articles 3 and 4, which also means that there is no possibility under such explicitly delegated competencies alone, to further other objectives.<sup>39</sup> From the outset, the basis of competencies spelled out in Article 3 EC Treaty was seen as specifying the meaning of explicit competencies, which could be interpreted in a more extensive fashion through Article 308 EC Treaty.<sup>40</sup> The objectives are mainly economic, and the specific policies and activities referred to in Articles 3 and 4 EC Treaty also set limits to the competencies of the EU. However, the idea that the competencies have been spelled out only through Article 3 EC Treaty has been abandoned since goals under Article 4 have also been included, and since the use of goals specified have been assumed to be the basis for the use of Article 308 EC Treaty to realise implied goals rather than implied powers. Although the interpretation has been expansive it has not been unlimited. That is because the case law has been inconsistent as to whether the competencies conferred in conjunction with Article 308 EC Treaty confer a general power to regulate the common market, or if it only confers specific powers applicable in certain fields. The present approach seems to be that the EC (given the view set out in Article 5 EC Treaty on the conferred and limited nature of the powers of EC) does not have any general power to regulate the internal market even under Article 308 EC Treaty. That is a view which provides for certain limits when it comes to interpreting implied competencies. This is true not only when it comes to interpreting explicitly stated competencies in conjunction with each other, but also to some extent to when it comes to the application of Article 308 EC Treaty.

Whereas the ECJ has held explicitly limited competencies to be specific and not general, they may (as long as they are used, to some extent, for their express purpose) regulate issues not related to economic policies. The scope of Article 308 EC Treaty has been most contested in the field of external policy and Common Foreign and Security Policy (CFSP), where the issue on the scope of EC powers in conjunction with Article 308 EC Treaty was claimed to reflect all possible purposes of the EC.. It was an approach ac-

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Legal Studies Research Paper Series, Paper No. 9/2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=997863](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=997863).

38. See Case C-376/98, *Germany v. Parliament*, 2000 E.C.R. I-8419 ¶¶ 83, 84; Case C-74/99 *The Queen v. Sec'y of State for Health ex parte Imperial Tobacco Ltd.*, 2000 E.C.R. I-8599.

39. Dashwood, *supra* note 37, at 358.

40. Lachmann, *supra* note 4, at 449-53.

cepted by the ECJ in Opinion 2/94, but the opinion also clearly limited that holistic interpretation to the objectives of the EC (as opposed to objectives of the EC). The authorizations of the EC have been understood broadly and it is not an exaggeration to claim that there has been a successive weakening of the distinction that legislative authorizations in the EC Treaty to use EC law to implement measures of the second pillar of the EU, the CFSP, have led to such measures receiving limited judicial scrutiny.<sup>41</sup> However, the expansionist stance has not precluded the ECJ from at some occasions, (most importantly in Advisory Opinion 2/94<sup>42</sup> on the competency of the EC), to acceding to the European Convention of Human Rights set a limit to the use of Article 308 EC Treaty, at least in cases where no purposes of the EC could be used to justify the decision. In relation to EC's accession to the European Convention on Human Rights, the ECJ rejected that claim to competency under Article 308 EC Treaty on the basis that the protection of fundamental rights was not a *purpose* of the EC.<sup>43</sup> Although the implied competency of the EU has been expansively interpreted, it has been exclusively tailored to measures regulated in the EC Treaty. Article 308 EC Treaty has been used to implement measures under the CFSP only in cases where there have been explicit provisions for use of EC law for such purposes within the EC Treaty. The ECJ/CFI held that the objectives of the EC Treaty, understood as a whole, should set the outer limits for the competencies of the EC, rather than more narrow textual interpretations. Several other features of the current case law are also notable, and given the most recent developments, will be carried on into the revised EU Treaty. Since the early seventies, the ECJ has held that there can never be a legislative choice between exercising implied powers and exercising ordinary legislative procedures, if the use of the latter is provided for in the EC Treaty. The ECJ has consistently limited the applicability of implied powers and flexibility clauses by interpreting ordinary explicitly conferred powers<sup>44</sup> in a broad manner, but also allowed for quite broad interpretations of implied powers when explicitly conferred powers have been ex-

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41. Case T-315/01, *Kadi v. Council & Comm'n*, 2005 E.C.R. II-3649.

42. Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights & Fundamental Freedoms*, 1996 E.C.R. I-1759, I-1788-89.

43. However, one of the paradoxes of that view is that human rights are seen primarily as an area for positive governmental action, rather than just side-constraints on the activities of the government. The European Charter on Human Rights and the recently adopted Treaty on the Functioning of the European Union also reflects that view, where an explicit incorporation of the protection of human rights, as an aim of public policy, has been accepted (as well as a competency to accede to the ECHR).

44. See EC Treaty, *supra* note 4, at art. 5.

hausted. The court's approach avoids textual interpretations in favour of purpose-based interpretations, and also avoids limited interpretations of particular purposes in favour of a more general understanding of the purposes stated in the EC Treaty as a whole.<sup>45</sup> It has led to a view where the purposes and objectives that can be deduced from the text and structure of the EC Treaty are central in ascertaining the competencies of the EC.<sup>46</sup>

However, more recently, the ECJ/CFI has also relied on the objectives of the EU as a whole to interpret articles (such as Article 60 EC Treaty), that explicitly authorize legislative measures under the EC Treaty to realise objectives under the intergovernmental pillars (e.g. in relation to the CFSP).<sup>47</sup> The CFI has so far interpreted the reach of the CFSP and the measures that the CFSP may justify in a quite expansive way, and it has not recognized any clearly demarcated distinctions between areas of foreign and domestic policy. The constraint (which is not without importance), as applied, has raised a concern that there has to be some link to CFSP and other policy areas of the EU on the basis of legislation. However, interpreting the CFSP widely has also led to a wide applicability of such powers when applied in conjunction with Article 308 EC Treaty.<sup>48</sup> The applicability of the CFSP has not formally led to the view that there is an all encompassing purpose of providing public security, but rather pointed to the notion that the area of CFSP cannot be territorially limited, (i.e. that measures directed to physical or moral persons within the EU also can be a matter of foreign policy).<sup>49</sup> Obviously, implied powers are not logically inconsistent with a system of conferred powers, however they tend to weaken the practical effects and the effectiveness of the con-

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45. Case 38/69, *Comm'n v. Italy*, 1970 E.C.R. 47.

46. Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights & Fundamental Freedoms*, 1996 E.C.R. I-1759, I-1788.

47. Case T-315/01, *Kadi v. Council & Comm'n*, 2005 E.C.R. II-3649; Case T-306/01, *Yusuf v. Council & Comm'n*, 2005 E.C.R. II-3533.

48. It seems important to note that subsequent to the decisions of *Kadi* and *Al-Yusuf*, subsequent judgements of the CFI as well as the ECJ imposing procedural and substantive constraints on the exercise of legislative powers on the basis of Articles 60, 301 and 308 EC Treaty have been imposed, but that they have not explicitly turned down wide interpretation of which kind of legislative acts that may be justified under the said conjunction of articles of the EC Treaty with regard to the CFSP. See Case T-49/04, *Faraj Hassan v. Council & Comm'n*, 2006 E.C.R. II-52; Case T-253/02, *Ayadi Hassan v. Council & Comm'n*, 2006 E.C.R. II-2139; Case T-315/01, *Kadi v. Council & Comm'n*, 2005 E.C.R. II-3649; Case T-306/01, *Yusuf v. Council and Comm'n*, 2005 E.C.R. II-3533. See also Ulrich Haltern, *Gemeinschaftsgrundrechte und Antiterrormaßnahmen der UNO*, 62 JURISTEN ZEITUNG 537-47 (2007).

49. Case T-315/01, *Kadi v. Council & Comm'n*, 2005 E.C.R. II-3649; Case T-306/01, *Yusuf v. Council & Comm'n*; 2005 E.C.R. II-3533.

straints imposed by a principle of conferred powers, particularly when interpreted in an expansive way.<sup>50</sup>

*D. Distinguishing Different Legal Grounds—From Flexibility to Formalism and Back Again*

When it comes to the choice of legal basis in legislation under the EC Treaty, it is clear that the choice must have objective, rather than subjective grounds.<sup>51</sup> The requirement of objective grounds is a minimal restriction to maintain the institutional balance between the EC institutions and between the EC and the member states, since different legal bases also allow for different forms of decision making. However, the doctrine of such objective grounds was not the first approach taken by the ECJ when it comes to use of implied powers. In the first cases concerning the use of implied powers, the ECJ held that the choice of legal basis was at the discretion of the Council of Ministers.<sup>52</sup> The constitutional effects of that initial flexibility were limited since it was at a time when most decisions were anyway adopted by consensus. From that perspective, it can be said that the initial flexibility concerning legal basis predates the supranational phase of EC law. The primacy of “explicitly delegated powers,” which was pronounced in *Massey Ferguson v. Hauptzollamt*<sup>53</sup> was an adaptation over time to what is necessary in a constitutionalized system, where there is a successive tendency of differentiation between various forms of legislation. The development of case law concerning the need for objective grounds was a way to make constitutional constraints defining the system of EC law effective. However, the successive forms of differentiation also created the incen-

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50. Lebeck, *supra* note 4, at 407-09.

51. Case 45/86, *Comm'n v. Council*, 1987 E.C.R. 1498, 1520; Case C-84/94, *U.K. v. Council*, 1996 E.C.R. I-5755. In the latter case concerning the Sunday Trading directive, United Kingdom contended that the appropriate legal basis would have been the then Article 235 Rome Treaty, a position which was rejected by the ECJ on the ground of subsidiarity. *Rome Treaty*, *supra* note 25. In general it seems as if the ECJ did not argue that reasons of subsidiarity per se would be a reason for a particular choice of legal basis on the basis of Council practice. On the contrary, it seems as if the ECJ both wanted to uphold a more formal approach in restricting the legislative discretion of the Council in choices of legal bases. In particular in the pre-*Francovich* era, that also had an important effect in relation to the member states, when it comes to the role of direct and indirect effect. *See also*, Case C-300/89, *Comm'n v. Council*, 1991 E.C.R. I-2867; Case C-268/94, *Portugal v. Council*, 1996 E.C.R. I-6216, I-6217; Case C-209/07, *Comm'n v. Council*, 1999 E.C.R. I-8067, I-8089.

52. *Joined Cases C-73 & 74/63, Internationale Crediet - en Handelsvereniging Rotterdam v. Minister van Landbouw en Visserij*, 1964 E.C.R. 1 (English Spec. Ed.).

53. Case 8/73, *Hauptzollamt Bremerhaven v. Massey Ferguson*, 1973 E.C.R. 897, 907.



tive of the political branches to avoid the effects of that kind of differentiation. It is not surprising that the use of Article 308 EC Treaty expanded drastically during the seventies,<sup>54</sup> as did the conflicts on the use of Article 308 EC Treaty as opposed to other legal grounds.<sup>55</sup>

However, the primacy of the explicitly delegated powers has also led them to be interpreted in a more extensive way. This means that the primacy of "ordinary" forms of legislation has been protected, whereas the protection of the member states associated with the use of Article 308 EC Treaty has been limited. Simultaneously, Article 308 EC Treaty has been interpreted in a way which seems to have expanded the outer limits of the EC competencies through the use of Article 308 EC Treaty. Thus the tendencies of formalism, when it comes to the legal basis of the use of competencies, have never been an obstacle for generally expansive interpretations of EC law. This leads to the last point in this discussion of the regulation of such competencies under the EC Treaty.

#### *E. Implied Powers Under the EC Treaty—The Joint Problems of Constitutional and Democratic Deficits*

As discussed above, the understandings of legitimacy of the EC/EU have focused either on delegation, or outcome-based legitimacy. In the former, the legitimacy is based on a chain of delegation, whereas in the latter it is based on the practical problem-solving capacities of a political order. From the perspective of outcome-based legitimacy<sup>56</sup> one may argue that role of Article 308 EC Treaty is to increase flexibility and thus also the capacity for action and problem solving of EC.<sup>57</sup> That approach to implied powers, relying on the idea of "planned crisis management" was central in early justification of the role of implied powers in EC law.<sup>58</sup> The underlying assumption is that outcomes will be better if powers of political decision-making are relatively unconstrained. That seems not to be a self-evidently correct assumption, and thus it seems as

54. Lachmann, *supra* note 4, at 449-53. The legislation of the EC during the seventies experienced a drastic shift towards the use of Article 308 EC Treaty (then Article 235 EC Treaty) as a way to forge political compromises in the Council of Ministers. Some governments of the member states expressed their concern on that shift since they saw it as a way to undermine the process of ordinary legislation and hence also constitutional constraints of the EU.

55. See also Case 56/88, U.K. v. Council, 1989 E.C.R. 1615-16.

56. SCHARPF, *supra* note 13, at 26-28.

57. Wyatt, *supra* note 37, at 3-5.

58. GIUDOTTO GRAF HENKEL VON DONNERSMARCK, PLANIMMANENTE KRISENSTEUERUNG IN DER EUROPÄISCHEN WIRTSCHAFTSGEMEINSCHAFT (Alfred Metzner Verlag 1971).

if there is a certain risk associated with the design of Article 308 EC Treaty, since it means that constitutional constraints of the EC as well as the member states are inevitably weakened. From a proceduralist perspective on democracy, the institute of implied powers has often been criticised for contributing to the problems of the democratic deficit of the EC/EU. To a certain extent, one may argue that the creation of a clause of implied powers which provides flexibility can be seen as a way to strengthen the outcome-based legitimacy of the EU. However, that may of course happen at the expense of procedural legitimacy, as well as at the expense of stability of constitutional structures, both in the EC/EU itself, and indirectly in the legal orders of the member states. As I have sought to sketch out above, the problem associated with Article 308 EC Treaty is only partly a matter of democratic deficit, but is also a matter of “constitutional deficit.”<sup>59</sup> This means that implied powers provide an excessive degree of legislative discretion to the Council, making constitutional constraints relatively ineffective and democratic accountability very difficult. The problem with the present form of implied powers is mainly that the constraining effect of conferred powers has been watered down, whereas at the same time, there has been little or no attempt to alleviate the democratic deficit. This problem led to a dramatic expansion of the joint legislative powers of the national executives in the EU.

The structure of decision making under Article 308 EC Treaty combines a strong executive-federal form and comparably weak judicial control concerning the application of Article 308 EC Treaty as far as Article 308 EC Treaty does not intrude on the “explicitly” conferred competencies. The weakness of judicial control seems to a certain extent to be possible to explain from the institutional structure of decision making under Article 308 EC Treaty, which gives ample opportunities for exercise of judicial *Kompetenz-Kompetenz* which is more extensive than most forms of decision making under the EC Treaty. The institutional interests of national executives in expanding EC powers under Article 308 EC Treaty (as opposed to expansion under other legal bases of legislation provided for in the EC Treaty) has hence been controlled only to a limited extent. The structure of decision making seems also to weaken the argument in favour of the implied powers clause based on outcome-legitimacy, since it provides a strong bias in favour of

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59. The notion of “constitutional deficit” has also been associated with the incremental and unplanned constitutional development of EC law through judicial precedents. See Tanja Hitzel-Cassagnes, *Der EuGH im Spannungsfeld von Konstitutionalisierung und Demokratisierung*, in *POLITIK UND RECHT* 377-95 (Michael Becker & Ruth Zimmerling eds., 2006).

expanding powers of national executives, not just in cases where the power is necessary, but also in cases where there is only in the institutional interest of the national executives to do so. Hence, although the capacity for action is increased, there is no possibility under Article 308 EC Treaty to distinguish between advancement of the institutional interests of national executives, and crisis management. The structure of decision making under Article 308 EC Treaty weakens the possibilities for political accountability within the EC, presupposing that effective of control of legislative powers under Article 308 EC Treaty have to come from the ECJ. The price of greater political capacity for action at the EC level is thus that constitutional control in the member states is undermined and increased judicialisation at the EC/EU-level. The absence of parliamentary control at both the national and supranational level is an incentive for the national executives to use implied powers as a way to evade national as well as European parliamentary control. Article 308 EC Treaty thus increases discretion of the Council as the EC legislature while diminishing political control of its powers.<sup>60</sup> The limited parliamentary control is an incentive to extend the use of implied powers, and that is also a driving force for the constitutional deficit. The constitutional deficit also vividly illustrates the limits when it comes to judicial control in relation to legislative powers which are not subjected to democratic accountability.<sup>61</sup> The extent of judicial control of legislative powers is always limited, not just because of democratic legitimacy, but more generally for functional reasons. The democratic deficit of functional integration remains difficult to “solve” judicially, once a very general delegation of power to a particular institution has been made.

The problem is that implied power undercuts the sustainment of the principle of conferred powers and the possibility of effectively delimiting the powers of EU. The structure of incentives of the Council facilitates expansion of EC powers, at the expense of the national parliaments as well as the European parliament. In that regard the attempts of “parliamentarizing” the exercise of implied legislative powers in the TFEU is an important step towards maintaining both effectiveness of institutional balance and accountability under EC/EU law. Despite that, it is not a self-evident that an increased role for the European Parliament will automati-

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60. Tschofen, *supra* note 4, at 493-94.

61. Hartmut Aden, *National, europäische und international Verrechtlichung in wechselseitiger Abhängigkeit – Mehrebenenrecht und Machtverschiebung zur Exekutive*, in *POLITIK UND RECHT* 357 (Michael Becker & Ruth Zimmerling eds., 2006).

cally result in a greater degree of balance between the member states and the EC/EU. Contrary to what some authors<sup>62</sup> have claimed, democratic principles need not imply a greater degree of constitutionalization within the framework of the EU.

### III. IMPLIED POWERS IN THE DRAFT CONSTITUTIONAL TREATY AND THE EU CONSTITUTIONAL TREATY—RADICAL REFORMS THAT DID NOT HAPPEN-THEN

The first proposed revision of implied powers came with the Draft Constitution proposed by the EU Constitutional Convention in 2003. Comparing the Draft EU Constitution that was produced by the EU Constitutional Convention and the EU Constitutional Treaty, one is bound to notice a number of changes. However the changes were very limited concerning the subject of implied powers. Because of that, the proposals of the EU Constitutional Convention and by the 2004 IGC in the EU Constitutional Treaty that were rejected through referenda in the Netherlands and France in 2005 are treated together in one section. In the versions of the Draft Constitutional Treaty and the EU Constitutional Treaty agreed upon in October 2004 by various heads of state, the clause of implied power read as follows:

#### Art I-18 Constitutional Treaty of the European Union (IGC 2004)

1. If action by the Union should prove necessary, within the framework of the policies defined in Part III, to attain one of the objectives set out in the Constitution, and the Constitution has not provided the necessary powers, the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.

2. Using the procedure for monitoring the subsidiarity principle referred to in Article I-11(3), the European 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 regula-

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62. See, e.g., Tschöfen, *supra* note 4, at 494-96.

tions in cases where the Constitution excludes such harmonisation.<sup>63</sup>

Article I-18 of the proposed text of the IGC 2004 (the EU Constitutional Treaty) was considerably different from Article 308 EC Treaty. It changed the subject matter of implied powers by referring to them in Part III of the EU Constitution, which dramatically increased the subject matter covered by the implied powers. Implied powers were proposed to be possible to use not only for special purposes, but in relation to the objectives of the EU as a whole. The objectives concerned the EU as a whole, not, as under the EC Treaty only the EC. Compared to the implied powers set out in Article 308 EC Treaty, the powers related to the general objectives of the EU would have been far broader. The other radical change in implied powers was the greater degree of parliamentary control at the European level, which also means that the Council of Ministers' use of implied powers, would be subject to political control, a feature retained from the EU Constitutional Convention in the EU Constitutional Treaty as well as the TFEU.

#### *A. The Scope of Implied Powers under the EU Constitutional Treaty*

Under the EU Constitutional Treaty, both the scope of the fields of policy where implied powers could be used and the scope objectives that implied powers could be used to attain were expanded. The IGC 2004 proposed to abolish the split between objectives of EC and EU that were central to the ECJ in Opinion 2/94. However, unlike the objectives of the EC, EU objectives were seen as relevant only in special, if widely interpreted, circumstances. The most dramatic expansion of the scope of implied powers under the EU Constitutional Treaty was the merger of EC and EU objectives.

##### *1. The Objectives of the EU in the EU Constitutional Treaty*

Implied powers under the EC Treaty are defined in light of the objectives of the EC. A major change of objectives would have had extensive repercussions when it comes to the role of implied powers. The objectives of the EU, as set out in the EU Constitutional Treaty were as follows:

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63. EU Constitutional Treaty, *supra* note 3, at art. I-18.

## Article I-3 of the EU Constitutional Treaty

The Union's objectives:

1. The Union's aim is to promote peace, its values and the well-being of its peoples.

2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted.

3. The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

It shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

5. The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Constitution.<sup>64</sup>

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64. *Id.* at art. I-3.

Compared to the objectives in the EC Treaty, these objectives are wider in scope and much less precise. It should also be noted that in Articles 2 and 3 EC Treaty, the objectives of the community refer to policies aimed at realizing the common market not the kind of "global" objectives that were proposed in the EU Constitutional Treaty. The EC may at least theoretically have objectives and policies that are separate from the policies aimed at realizing the common market, and such objectives and policies would not be a possible basis for measures under Article 308 EC Treaty. The structure of the objectives in the EU Constitutional Treaty was radically different from the structure of objectives of the EC Treaty and the EU Treaty. The recitals of objectives in the EU Constitutional Treaty resembled the statement of objectives of the EU Treaty. However, the central difference is that the current EU Treaty does not include any clause on implied powers, which is a structural limitation. The fact that the EU Constitutional Treaty included implied powers and made them applicable also to traditionally intergovernmental areas of policy illustrates the extent of supranationalization that would have occurred through the EU Constitutional Treaty.

It is notable that in the flexibility clause of the EU Constitutional Treaty it was stated that "one of the objectives" set out in the EU Constitutional Treaty would have been sufficient as a justification for action on the part of the EU. Given the extremely wide scope of the objectives, as well as the correspondingly wide scope of policies, the implied powers under the EU Constitutional Treaty would have constituted a dramatic expansion of the outer limits of EU competencies compared to competencies of the EC and the EU under their respective treaties. The objectives were defined in ways that would have made them virtually impossible to delimit. The aim to promote peace and prosperity among the peoples of the Union by definition would have covered, every possible area of policy making in relation to a modern, secular public authority. In a similar fashion, the objectives regarding freedom, security, justice, the power to create a common market with "undistorted competition," the powers of social policy, the aims of economic development, and social and territorial cohesion would likewise, have been so extensive as to be practically unlimited. One of the most important aspects of the objectives in the EU Constitutional Treaty concerned the CFSP, traditionally the second pillar of the European Union. Under this objective, the EU would have had almost unlimited foreign policy power enabling the pursuit of the policy objectives outside the EU. These foreign policy powers would have given almost unlimited power to the Council of Ministers, and would

have made judicial constraints irrelevant with regard to the EU's foreign policy powers. The objectives in the EU Constitutional Treaty were defined without specific reference to policy areas. The extent of implied powers was instead undefined, except in the sense that they could only have been used to extend policies delegated to the EU under Part III of the EU Constitutional Treaty.

## *2. The Framework of Policies in Part III of the EU Constitutional Treaty*

The assessment of the role of implied powers is not complete without a discussion about the scope of powers. The first major limitation regarding the use of implied powers in the EU Constitutional Treaty would have been that they were confined to Part III of the EU Constitutional Treaty. The EU Charter of Human Rights could not have been used as a basis for implied powers, the *objectives* enshrined in the EU Constitutional Treaty were limited to policy areas already set out within the EU Constitutional Treaty. Those included, *inter alia*, the internal market (encompassing free movement of individuals, goods, capital, and services), economic policies, the coordination of economic policies, and justice and home affairs as well as external policies and the common foreign and security policy. In those respects, it was clear that the combination of different competencies and objectives could have been a basis for extensive use of implied powers.

The structural restriction of Part III, defined the possible use of implied powers. Implied powers could only extend powers of policies that were already given under Part III of the EU Constitutional Treaty. However, the powers set out in Part III of the EU Constitutional Treaty concerned, more or less, all powers of a legislative or executive character that would have been given to the EU under the EU Constitutional Treaty. The major difference between the EC and the EU Treaties and the EU Constitutional Treaty was that all powers under Part III of the EU Constitutional Treaty were incorporated into a supranational framework, whereas earlier, a considerable part of those powers had previously been exclusively intergovernmental powers. The text of the flexibility clause provided that implied powers were broader than the explicitly stated powers, but the exercise of implied powers would still have had remain within the "framework of policies" set out in Part III of the EU Constitutional Treaty.

With regard to the exercise of implied powers, there was also a certain difference, between the EC Treaty and the proposed EU Constitutional Treaty namely that for the exercise of many powers,



the EU Constitutional Treaty provided for specific forms of legal action (either through so-called European laws, or in framework laws). The formalization of the legislative powers limits the use of implied powers. In relation to the use of Article 308 EC Treaty, and the role of specific legislative measures, the approach of the ECJ has that such measures should be used as extensively as possible, and that the use of implied powers that are not clearly outside the scope of an explicitly granted power of policy should be minimized. Although the EU Constitutional Treaty never came into force, there is no reason to believe that the practice of the ECJ would have changed dramatically on that point. Thus, the greater specificity of the exercise of powers under Part III of the EU Constitutional Treaty delimited some aspects of the use of implied powers.

However, there were fields stated in special articles where harmonization (i.e. supranational legislation) would have been expressly precluded,<sup>65</sup> and thus the flexibility clause is not applicable to those fields. The fields in which harmonization would have been expressly precluded were quite limited, considering the wide scope of EU Constitutional Treaty. The policy areas where harmonisation would have been precluded, included measures to avert “discrimination based on sex, racial or ethnic origin, religion or belief, disability, [and] age or sexual orientation.”<sup>66</sup> Measures on improving working environments, working conditions, social security, workers, information and consultation of workers, defending workers’ and employers’ interests and co-determination [at the labour market] , equality between genders regarding employment opportunities, combating social exclusion, and modernisation of social security programs,<sup>67</sup> policies of integration third country nationals,<sup>68</sup> crime prevention policy,<sup>69</sup> policy for industrial competitiveness,<sup>70</sup> and policies to enhance civil protection against natural or manmade disasters<sup>71</sup> would also have been included in the fields where harmonisation were precluded. In such cases, coordination was acceptable, but not through supranational means, which would have enabled the use of implied powers.

With regard to the broad powers accorded to the EU under the EU Constitutional Treaty, and the general possibility of an expan-

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65. *Id.* at art. I-18(3).

66. *Id.* at art. III-124.

67. *Id.* at art. III-210(1)(a)-(c), (e)-(f), (i), (k).

68. *Id.* at art. III-267(1).

69. *Id.* at art. III-272.

70. *Id.* at art. III-279(1).

71. *Id.* at art. III-284.

sive interpretation of those powers (in light of the extensive objectives of the EU Constitutional Treaty) one may question whether the functionalist understanding of integration would have been tenable if the EU Constitutional Treaty. The EU is still based on the principle of conferred powers insofar as that the EU does not have any inherent powers. However, given the breadth of legislative powers accorded to the EU, the practical effect of the principle of conferred powers as a constraint would have been limited under the EU Constitutional Treaty. In light of the combined effect of the powers conferred to the EU, and the objectives they are aimed at achieving, the overall effect would not have been easily distinguishable from ordinary inherent powers. Thus, the functional approach seems to have less explanatory power than before, in relation to the EU. The legitimacy appears to be based on delegation and that the EU is able to adopt policies which are seen as substantively acceptable to the citizens and the role of European Parliament as a constraint on that power seems to reflect a change towards a situation with less clearly delimited powers and politically controlled.

*B. The Procedures of Decision Making: Sharing of Powers between the Council and the Parliament*

The second, and more radical, aspect of the proposed change was that the unanimity requirement within the Council of Ministers would have been retained but was supplemented with a rule requiring simple majority approval in the European Parliament, whereas the requirement that the European Commission should propose legislation was retained.<sup>72</sup> Most of the changes to the decision making procedure for implied powers proposed in the EU Constitutional Treaty are proposed to be retained in the TFEU. With regard to implied powers, parliamentary control would have increased dramatically, and changed from being practically non-existent, to being equal to that of the Council of Ministers. The increased parliamentary involvement would have contributed to a greater degree of deliberative openness during the process of decision making. This deliberative openness could have changed the structure of incentives of political action of the institutions since one of the legislative branches will have more of their concerns publicized during the legislative process. The result is that the ac-

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72. For a background of them, see RUDOLF STREINZ ET AL., DIE NEUE VERFASSUNG FÜR EUROPA 74 (2005); Klaus Büniger et al., *Die Zuständigkeiten der Union*, in DIE EUROPÄISCHE VERFASSUNG 107-09, (Marcus Höreth et al. eds., 2005).

countability of the EU, through the European Parliament, is enhanced as the European Parliament is susceptible to a considerably greater degree of accountability than the Council of Ministers. However, the European Parliament, unlike the Council of Ministers, has a party system and although national parties join parliamentary parties, the possibilities for some degree of accountability are considerable, on the other hand that would not have increased the possibility to revise decisions adopted under the flexibility clause that was proposed in the EU Constitutional Treaty.

The Parliament is institutionally biased, to a greater extent than the members of the Council, toward the expansive interpretations of competencies of the EU since that is Parliament's only available avenue to influence policy-making. However, in relation to the institutional constraints, it seems that all things being equal, the hurdles to use of implied powers would have not lessened under the EU Constitutional Treaty. It also appears that the potential for inter-institutional conflicts over bases of actions between the European Parliament and the Council of Ministers would have diminished in the sense that the European Parliament has been made a part of the decision making in the context of implied powers. Whereas, the Parliament's participation in the decision making can be said to increase transparency and accountability, it would not *per se* have changed the pro-integration dynamics surrounding the use of implied powers as compared to the earlier treaties adopted. However, the absence of an effective division between opposition and government, a division which is part and parcel of parliamentary systems, would have remained within the Council of Ministers. The European Parliament in this respect is generally a veto player and thus, will at most have a constraining effect on the use of implied powers, although it can be supposed to have a quite strongly pro-integrationist default position. However, it is clear that the institutional bias of implied powers affecting the decision making process under the EC Treaty (favouring the institutional interests of the national executives) are, if not remedied completely, at least more limited under the new treaty.

*1. Flexibility and the Proceduralisation of Subsidiarity: National Parliaments' Power to Delay*

The principle of subsidiarity has been one of the major developments in EC law. Under the EC Treaty, there was no special relation between control of subsidiarity and the use of implied powers, but that successively changed in the Draft Constitutional Treaty and the EU Constitutional Treaty. A background of the le-

gal status of the principle of subsidiarity will be discussed first, and then the effects of the proposed changes in the EU Constitutional Treaty to the exercise of implied powers will be discussed.

*a) The Background of Subsidiarity – From Edinburgh to Amsterdam*

The principle of subsidiarity was first introduced in conjunction with the creation of the Treaty on the European Union (the so called Maastricht Treaty which entered into force in 1993). The principle has subsequently been incorporated into the EC Treaty and the EU Treaty. The principle was further developed in the revisions on the EC Treaty and EU Treaty agreed to in a Protocol 1997 (the so called Amsterdam treaty) That protocol was not revised in the treaty revisions of 2001 (the so called Nice Treaty). The first attempt to solidify the content of subsidiarity was decided at the Edinburg Summit in 1992, where various heads of state decided to allow the Council of Ministers to make an inter-institutional agreement (which is a form of sub-constitutional norms) with the European Parliament and the European Commission in order to further the effective application of the principle of subsidiarity to all institutions.<sup>73</sup> The introduction of the principle of subsidiarity in EC/EU Law occurred through the EC Treaty as a part of the revisions adopted at the summit in Maastricht in 1992 (then Article 3b, now Article 5 EC Treaty), and it is clear that the provisions in the treaty are the core of subsidiarity. However, the binding Protocol on subsidiarity, which was attached to the EC Treaty after the 1997 summit in Amsterdam, worked as a clarification to Article 5 EC Treaty, and the Protocol repeatedly states that it does not aim to modify the application of the provisions of treaties, but only to fill lacunas relating to the provisions of subsidiarity.<sup>74</sup> This was the background of the procedural protection of subsidiarity until 1997. There was a mix between a general norm of “hard” law enshrined in the treaty, and “soft” norms trying to ensure compliance with the principle. The Protocol on Subsidiarity and Proportionality annexed to the EC Treaty is a binding rule aimed to institutionalize the inter-institutional agreement from 1993.

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73. European Council in Edinburgh, Edinburgh, U.K., Dec. 11-12, 1992, *Conclusions of the Presidency*, ¶paragraph 5, available at [http://www.europarl.europa.eu/summits/edinburgh/a0\\_en.pdf](http://www.europarl.europa.eu/summits/edinburgh/a0_en.pdf).

74. KLAUS PETER NANZ & REINHARD SILBERRG, *DER VERTRAG VON AMSTERDAM 96-98*, 104-08 (Kurt Schelster & Werner Hoyer eds., 1997).

The judicial application of the subsidiarity clause in the EC Treaty has not been non-existent, but it has remained limited, and it is questionable whether it has been an effective constraint on EC law. The role of judicial review in a federal system is to uphold the vertical separation or balance of powers, and to maintain stability in vertical power relations. The role of subsidiarity as a basis for judicial review to maintain federal balance between the EU and the member states has been limited.

The difficulty with subsidiarity as a principle of law is that it theoretically provides extremely broad judicial discretion which is difficult to square with most notions of the scope of legitimate judicial powers. Some authors have argued<sup>75</sup> that the role of subsidiarity must be to provide incentives for federal restraint and for the maintenance of lower levels of government, through political rather than judicial means. It is not unfair to say that, in general, the political incentives to do so have been limited on the part of the EC/EU judicial and political institutions. In the case of the political "branches" of the EC/EU, their roles are dependent on subsidiarity remaining relatively limited. One of the major problems of delimiting competencies between supranational-federal and national-state authorities is that major conflicts will emerge, not when it comes to authorities that are clearly divided in areas where the authority is shared.<sup>76</sup> In that sense, the functional approach of subsidiarity is an answer to that problem, albeit one which resolves problems of vertical division of powers but which implies problems of horizontal division of powers, as it presupposes judges to make decisions on choices of institutions to implement policies.

The conflict between the need for effectiveness and harmonization and the need for maintaining a balance between different layers of government was not solved through the norm of subsidiarity, and hence the more detailed prescriptions in the Protocol was a way to enforce some kind of minimal procedural requirement of considerations of subsidiarity. Sander points out that the possibil-

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75. See SANDER, *supra* note 4, at 532-47.

76. Ernest A. Young, *Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism*, 77 N.Y.U. L. REV. 1612 (2002). A problem, when it comes to protecting member state autonomy from intrusions of supranational/federal authority through federal means, is to get political and judicial control to reinforce federalism. An additional dilemma is the general conflict between effectiveness, understood as the greater approximation of policies (the principle of *effet utile* interpreted by the ECJ), which tends to diminish the role of constitutional constraints agreed upon by the member states. Further, the structural rules of the EU set a general framework for political as well as legal policy-making that seems far more effective than various forms of constraints, imposed as substantive rules, on EC competencies by the member states.

ity to use subsidiarity as an effective constraint has been very limited, and as other authors have pointed out it is questionable whether judicial enforcement of the principle of subsidiarity can be upheld, and that it can thus also be argued that subsidiarity is a very problematic way to constitutionalize the balance of functions between the member states of the EC/EU and the EC/EU itself. It therefore seems that a stable form of functional division of powers is very difficult to achieve through judicial rather than political control.

In order to make the application of subsidiarity more effective and more formalized, the Protocol on Subsidiarity and Proportionality was attached to the EC Treaty in 1997.<sup>77</sup> The principle of subsidiarity, as defined in the EC Treaty, is a constraint which for obvious reasons is only applicable to shared competencies. The creation of the Protocol on Subsidiarity and Proportionality made the more detailed provisions to a part of the EC Treaty, but it seems also as if the introduction of the Protocol per se was a way to formalize and proceduralize the protection of subsidiarity, and also to integrate into the work of the political branches.<sup>78</sup> However, at the same time, it seems as if the effects were greatly limited, since the role of national parliaments was left outside the Protocol, and the duty of consultation was limited to an obligation to "consult widely." The Protocol on Subsidiarity and Proportionality in its present form provides for protection of proportionality and subsidiarity through institutions that cannot be expected to take a strong interest (i.e., in EU-institutions themselves) in subsidiarity.

The substantive rules enshrined in the Protocol created certain guidelines for how subsidiarity should be safeguarded in the legislative process. It is stated that the application of subsidiarity neither affects the *acquis communautaires*,<sup>79</sup> the general principles of EC law,<sup>80</sup> nor the institutional balance between the EC/EU institutions.<sup>81</sup> Subsidiarity is also to be exercised with respect for the objectives of the EU.<sup>82</sup> Furthermore, the Protocol states that subsidiarity is a dynamic concept and hence it can expand and contract as a constraint on EC decision making over time. The Protocol does not seek to impose any substantive coherence over time on the ba-

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77. Protocol on the Application of the Principles of Subsidiarity and Proportionality, 1997 O.J. (C 310) 207.

78. *Id.* at art. 1.

79. *Id.* at art. 2.

80. *Id.*

81. *Id.*

82. *Id.*

sis of requirement of subsidiarity. The tendencies towards formalization of subsidiarity existed at a quite early stage, but the effectiveness of protection due to insufficient institutional support was a central reason for why the development towards a more extensive role of subsidiarity was so slow. The present model (under the EC-treaty) leads to the conclusion that the intended role for subsidiarity was limited and that the various attempts to concretise subsidiarity happened through proceduralisation which reflects the problematic character of subsidiarity as a substantive and judicially enforceable norm.

*b) Subsidiarity in the EU Constitutional Treaty*

In the proposal of the IGC 2004, the Protocol on Subsidiarity and Proportionality was revised, and explicitly referred to within the text of the Treaty, giving it a higher legal status. However, in relation to subsidiarity, it seems also to be clear that these changes are not *per se* related to implied powers. The reference to subsidiarity and Article I-11(3) will be discussed below. It should be noted that following the formulations of the subsidiarity clause in the EU Constitutional Treaty compared to the formulations of the EC Treaty, subsidiarity would not have been radically strengthened. However, it was given a special relation to the role of implied powers, and the procedural side would have been given a greater express role in the EU Constitutional Treaty.

Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments shall ensure compliance with that principle in accordance with the procedure set out in that Protocol.<sup>83</sup>

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83. EU Constitutional Treaty, *supra* note 3, at art. I-11(3).

The restrictions on the flexibility clause with regard to subsidiarity were proposed to be relatively stringent, also constraining the role of implied powers.<sup>84</sup> Subsidiarity has always been a general constraint in the sense that implied powers may only be used when that is necessary in order to achieve some of the goals of the EC/EU. In relation to Article I-11(3) the measures covered by the flexibility clause belong to the non-exclusive competencies of the EU. The principle of subsidiarity had not previously been as strongly formulated in the treaties.

The duty of the Commission to make consultations in the EU Constitutional Treaty set out along the lines of "comply or explain,"<sup>85</sup> which would have given it a certain freedom. The only reason for an exception to the requirement of justification would be the urgency of a measure adopted, which limits the possibilities for the use of it, particularly with regard to the introduced requirement of parliamentary participation through the European Parliament. The creation of such a requirement is more radical than the preceding requirement in the Protocol on Subsidiarity and Proportionality set out in the EC Treaty (after 1997), and it was comparable to the wording under the Protocol annexed to the EC Treaty.<sup>86</sup> In the past, requirements of consultation and providing reasons were often been interpreted quite narrowly, and in that sense, it remains to be seen what the practical outcome of the requirements of justifications.<sup>87</sup> Article 5 EC Treaty suggests a relatively heavy burden of justification with regard to subsidiarity on the part of the European institutions, since it includes qualitative as well as (if possible) quantitative requirements of justifications. The burden of justification with regard to proportionality is not very detailed and it seems limited. The control of subsidiarity through national parliaments is only supposed to concern procedural as opposed to substantive issues. It has been questioned whether that is a viable distinction, since it is hard to divide substantive issues from procedural issues. The reason for is of course that considerations of subsidiarity concern the role of institutional

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84. Bunger et al., *supra* note 72, at 109-15; STREINZ et al., *supra* note 72, at 51-53.

85. Protocol on the Application of the Principles of Subsidiarity and Proportionality, 2004 O.J. (C 310) 207, (following IGC 2004) arts. 5-6 [hereinafter 2004 Protocol].

86. It should also be noted that the Amsterdam Treaty did not, when it came to the declarations of subsidiarity, include any reference to it in the text of the Treaty, something which considerably lessened its weight, whereas the immediate reference to it within the text of the Treaty as such, in principle at least should place it on the same level as the rest of the Article in question.

87. Margherita Poto, *The Principle of Proportionality in Comparative Perspective*, 8 GERMAN L.J. 835 ff. (2007).

With regard to the practice of providing reasons under Article 308 EC Treaty, see Case 151/77, Peiser v. Hauptzollamt, 1979 E.C.R. 1469, 1485-86.



roles, but the underlying basis of decisions is still related to choices of policy.<sup>88</sup> In a system of conferred powers and functional goals, it can be said that it is theoretically possible (although probably not practically feasible) to make such a distinction. With goals as wide as the ones that were proposed in the EU Constitutional Treaty, and incorporated into the TFEU, it seems simply impossible. Likewise, the envisaged distinction between subsidiarity and proportionality seems problematic in the context of EU law. The limits of subsidiarity as well as proportionality review by national parliaments are dependent a high degree of agreement on the scope and character of functionally defined powers, but these powers are proposed in a constitutional system where functional integration has largely been abandoned.

The protection of the role of national parliaments with regard to the flexibility clause seems to entail exclusively control of subsidiarity, not of proportionality. This in turn seems to lead to the conclusion that the only control of the latter will be judicial rather than political. The Protocol on Subsidiarity and Proportionality creates a procedural requirement that give national parliaments the right to see legislative acts in advance, and they are given six weeks to consult and give opinions with regard to subsidiarity.<sup>89</sup> That is the so called "early warning system" the Protocol on Subsidiarity and Proportionality created an, which provides a basis for actions of the national parliaments something which suggests that there is a possibility for national parliaments to act collectively in order to defend their institutional interests.<sup>90</sup> Though that is true, the effects of successful actions by national parliaments will remain very limited. The national parliaments have not been given veto powers. They were only given power to impose a more stringent justification requirement on the European Commission, but there is no way to enforce that requirement in the face of a defiant Commission.<sup>91</sup> A side effect of the procedure of protection of subsidiarity is that it increases the transparency of the deliberations,

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88. Bausili, *supra* note 18, at 7-9.

89. 2004 Protocol, *supra* note 85, at art. 6.

90. In terms of its structure, the role of the Protocol can be compared to other constitutional guarantees aimed at giving different groups greater time to mobilize in the face of potential legislative changes, but the powers of delay are very limited and have little practical effect.

91. One should also note that the European Commission and the National Parliaments are entirely independent of each other, and the structure of incentives of the European Commission will be much more attuned to the Council and the Parliament with powers to appoint, approve, and in the case of Parliament, ultimately censure the European Commission.

albeit in a limited manner.<sup>92</sup> Article 7 of the Protocol on Subsidiarity and Proportionality states that if a sufficient number of national parliaments find that a proposed legislative act does not comply with the principle of subsidiarity (proportionality is not mentioned) the national parliaments can then call for the legislative proposal to be reviewed again.<sup>93</sup> The current system requires twenty-seven votes out of fifty-four votes (each National Parliament having two votes)<sup>94</sup> in relation to measures not included by the Justice and Home Affairs, and twenty votes in relation to legislative proposals with regard to Justice and Home Affairs in order for such a proposal to be reviewed.<sup>95</sup> The strange effect is that the hurdles are higher for national parliaments to have influence on Justice and Home Affairs which concern the very core of government powers, than in other fields. However, there is little or no guidance offered when it comes to what such a review would entail.<sup>96</sup>

## 2. *Conclusions on the Procedure of Decision Making*

The changes in the decision making procedure would have created a veto power outside the Council of Ministers, and to a power to delay legislation under Article I-18 EU Constitutional Treaty. In that sense, transparency and accountability would undoubtedly have increased, and will do if the proposed changes retained in the TFEU are ratified. The changes in procedure of decision making create limited, but still an increase in, accountability through the greater role of the European Parliament, and a greater role of transparency through the further requirements for review, circulation of the proposal by the Commission and participation of national parliaments. Among the forms of decision making envisaged in the treaties, the use of implied powers is considerably more

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92. 2004 Protocol, *supra* note 85, at arts. 3, 7. One should also note that the duty of consultation is applicable to all bodies exercising legislative functions, including the Council of Ministers, the European Commission, and the European Parliament. The duty of consultation also applies in cases where others propose legislative acts, including the ECB, the ECJ, and even groups of member states.

93. *Id.* at art. 7.

94. *Id.* at art. 7, 2d recital.

95. *Id.* One may also note that the Protocol thus includes a sub-majority rule where a minority of the National Parliaments can trigger a review of legislative proposals in the field of Justice and Home Affairs. The function of such a rule can also to some extent be to counterbalance the increased influence of the bigger countries in the decision making of the EU.

96. Anna Vergés Bausili, *Beyond the Early Warning System: The Reform of EU Governance and the National Parliaments*, in A CONSTITUTION FOR EUROPE: THE IGC, THE RATIFICATION PROCESS AND BEYOND 211-22 (Ingolf Pernice & Jiri Zemánek eds., 2005).

transparent in the EU Constitutional Treaty and the TFEU compared to the EC Treaty. The introduction of an element to protect subsidiarity was a radical step that increased the roles of national parliaments (i.e., not just the European Parliament), and it can be seen as a way, however weak to create more political accountability.

The greater role of national parliaments, although set out in a weak form where national parliamentary influence would still face considerable hurdles and where the final powers of decision making would still lie with the European institutions, would create a far greater form of transparency, as compared to the current limited transparency *before* the adoption of a measure under Article 308 EC Treaty. A second important aspect of transparency is that other institutional interests will be represented in the process of adopting measures under the flexibility clause. Thus, transparency is increased considerably, and more institutions are represented, but it does not change the fact that these constraints can be considered “soft” rather than “hard”. The only hard constraint imposed is that the European Parliament is given veto power, instead of the very limited “right of consultation” which exists under the EC Treaty. The expansion of veto powers appears to be the only (limited) new restriction on implied powers.

### *C. Judicial Control*

The role of the ECJ as a guardian of the treaties and arbiter of conflicts between different competencies will increase, given the character of the constitutional framework. Comparing the EC Treaty and the proposed EU Constitutional Treaty, the latter included a clause on the use of EC/EU powers which explicitly spoke about the basis of EU powers as conferred, not inherent competency. The radical character of the change to implied powers in the EU Constitutional Treaty can be classified in two ways. First, it included an express statement about the nature of the powers of the EU as one conferred by the member states, rather than being inherent. Second, it included a vast expansion of the subject matter of EU law, through the creation of a unified legal order with two treaties, but no differentiation between the treaties with regard to the objectives of the EU, and generalized applicability of the flexibility clause. The continued judicialisation of the control of implied powers vis-a-vis other grounds of powers would probably, despite the increased political constraints to have enhanced the role of the ECJ.

*D. The Implied Powers of the Constitutional Treaty: Expanding Powers and Increasing Accountability*

The EU Constitutional Treaty was never adopted, but the model of implied powers that it set out, is still of importance as it was the basis for the TFEU as proposed by the IGC 2007. The regime of implied powers proposed in the EU Constitutional Treaty was considerably different from the regime of implied powers in the EC Treaty. The central and most obvious difference is that the EU Constitutional Treaty included powers that under the EC/EU-treaties belong to the second pillar of the EU, the CFSP, and the third pillar of the EU, Police and Judicial Cooperation in Criminal Matters. These powers could be the basis for action under Article I-18 of the EU Constitutional Treaty.

The imposition of political control outside the Council of Ministers, through the roles of the European Parliament and the national parliaments, creates limits on the exercise of implied powers. Although the European Parliament is a co-legislator, the parliamentary control of the exercise of the powers under the flexibility clause was far more limited than under the co-decision procedure. Under the latter procedure, a joint "conciliation" committee of the Council of Ministers, the European Parliament, and the European Commission deliberate over given legislative proposals, and the members of the parliament can take an active role in the deliberations. Compared to those other forms of decision making, the parliamentary control under Article I-18 EU Constitutional Treaty would have been limited, although it leads to the idea that parliamentarians will have to take stands on legislations and justify them to the public.<sup>97</sup>

The model of implied powers under Article 308 EC Treaty creates a bias in favour of the institutional interests of national executives acting through the Council. Under the EU Constitutional Treaty, implied powers are exercised jointly by the Council of Ministers and the European Parliament. While that would have created a modicum of parliamentary accountability, the European

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97. The more general point is that parliamentary deliberation has several roles; one to modify and improve legislative practices by forcing parliamentarians to make sustained public justifications for their positions on legislative proposals (which should be distinguished from legislative deliberation) and secondly that it is obvious that controls based on publicity presuppose that the public can, in some way, act to influence the decision making. In that regard, the public exercises its control over Parliamentary decision making at the voting booth. One may speak of greater accountability in relation to the flexibility clause in the EU Constitutional Treaty as well as in the TFEU but it is a reactive form of control since the European Parliament cannot act to influence the content of a proposal in any institutionalized way under the scheme of the Treaty.

Parliament, the European Council, and EU institutions would still have had a strong institutional interest in an expansive interpretation of implied powers and ultimately of powers of the EU. The increased role of national parliaments under the Protocol on Subsidiarity and Proportionality means that EU Constitutional Treaty would have delimited the tendency towards both executive federalism but not towards other forms of federalism. That is because effective control by national parliaments presupposes forms of collective action which are difficult to achieve. The main difference seems to be that the EU Constitutional Treaty included a much broader scope of powers, while still appealing to the policies contained in Part III of the EU Constitutional Treaty.

#### IV. IMPLIED POWERS IN THE PROPOSED TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION—REFORMS APPEARING LESS RADICAL?

The TFEU relies on and extends the proposal developed by the European Council in Berlin on June 22-23, 2007. The changes made at the June 2007 summit concerning implied powers were limited compared to the EU Constitutional Treaty. The proposal, developed in the aftermath of the summit of June 2007 and signed at a December 2007 summit in Lisbon, was identical to the EU Constitutional Treaty regarding the revision of the decision making procedures, but it sought to delimit the fields of policy where the decision procedure of implied powers should be applicable. The attempts to delimit the effects of implied powers Article 352 TFEU<sup>98</sup> are based on a mix of textual changes and common declarations to be annexed to the Treaty. As the procedure of decision making was identical to the case in the EU Constitutional Treaty, there is little need to reiterate the effects of the proposed changes of decision making procedure in any detail.

##### *A. The New Implied Powers—Article 352 TFEU*

Below is the proposed text of Article 352 (then Article 308) from August 2007:

1. If action by the Union should prove necessary, within the framework of the policies defined by the Trea-

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98. In the TFEU, Article 308 EC Treaty is converted (and revised) to Article 352. TFEU, *supra* note 1. In the text I use Article 352 consistently, as that is the numbering used in the consolidated versions of the TFEU and EU Treaty, and which can be expected to be of greatest use for the readers.

ties, to attain one of the objectives set out by 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.

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.<sup>99</sup>

Article 352(4) of the proposed revision of October 2007 reads:

4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and shall respect the limits set out in Article 25, second paragraph, of the Treaty on European Union.<sup>100</sup>

The new Article 352 TFEU (consisting of the combined proposals from August and October 2007, cited above) is largely similar,<sup>101</sup> but on certain important points also distinguishable from the flexibility clause of the EU Constitutional Treaty. In particular, the scope of application may become more limited through the declarations added to the Treaty June 2007, although the practical effects of those declarations still remain to be seen. Compared to the EU Constitutional Treaty the major change is the restriction

99. Conference of the Representatives of the Governments of the Member States, Brussels, Belgium, July 23, 2007, *Draft TFEU Amending the Treaty on European Union and the Treaty Establishing the European Community*, ¶ 291 (amended Aug. 3, 2007), available at

<http://europapoort.eerstekamer.nl/9345000/1/j9vvgy6i0ydh7th/vgbwr4k8ocw2/f=/vhmpgxeg0px5.pdf>. See also, Peter-Christian Müller-Graff, *Die Zukunft des europäischen Verfassungstopos und Primärrechts nach der deutschen Ratspräsidentschaft*, INTEGRATION 223 (2007); Timo Goosmann, *Die "Berliner Erklärung" – Dokument europäischer Identität oder pragmatischer Zwischenschritt zum Reformvertrag?*, INTEGRATION 251 (2007). For the final version of the TFEU, see TFEU, *supra* note 1.

100 Conference of the Representatives of the Governments of the Member States, Brussels, Belgium, Oct. 18, 2007, *Draft Treaty Amending the Treaty on European Union and the Treaty Establishing the European Community*, (Oct. 5, 2007), available at <http://www.consilium.europa.eu/uedocs/cmsUpload/cg00001re01en.pdf>.

101. The TFEU contains this provision almost exactly, stating, "4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and shall respect the limits set out in Article 25b, second paragraph, of the Treaty on European Union." TFEU, *supra* note 1, at art. 352(4).

with regard the scope of implied powers concern the role of use of such powers to CFSP.

*B. Changes in the Scope Through Textual Revisions*

The generally formulated limitation of the scope of implied powers was set out in the flexibility clause of the EU Constitutional Treaty; namely that they were only to be applicable to powers under part III of the EU Constitutional Treaty is *not* included in the TFEU. That leads to the conclusion that all fields of policy, except in cases where harmonization has been expressly precluded in the Treaty, can be subject to legislation under the new flexibility clause. However, there are two substantive limitations, the express exclusion of harmonization set out in connection to Articles providing for policy making powers and in Article 352(4) TFEU, where the objectives of the CFSP cannot be attained through the use of the flexibility clause. The first version of Article 352(4) TFEU only referred to matters of CFSP, whereas in the second revised version of the TFEU, the reference concerning CFSP concerns an article of the EU Treaty whose purpose is to delimit the supranational side of EU law concerning CFSP. It is clear that the reference to Article 25 EU (in the proposed revised version of the EU Treaty) is a reference to a quite general article, which does not in and of itself significantly clarify the scope of the CFSP. The difference is one of the Treaty's design in that the constraint on the use of implied powers is dependent on a cross-reference to another article, and the way it refers to CFSP. It is an attempt to retain some meaningful constitutional constraints on foreign policy powers of the EU.

This restricts the scope of implied powers compared to the EC Treaty since the CFI has presently held that objectives of foreign policy may be considered as a basis for the use of implied powers under Article 308 EC Treaty in cases where there is a textual basis in the EC Treaty to implement measures of the European Union, on that point, there is no difference between the old and new treaties. It seems, thus, as if the TFEU may control that more effectively. However, if one only considers the text of Article 352 TFEU, the effects compared to the EU Constitutional Treaty would be small when it comes to delimit implied powers.

Like the EU Constitutional Treaty, there is also a second restriction on the scope of implied powers through the insertion of rejections of the possibility for harmonization in treaty articles where the member states want to avoid the possibility of direct supranationalization. The most general constraint is that harmonization cannot be enforced through the EC Treaties, and hence not

through implied powers, when it comes to coordinating and supplementing actions.<sup>102</sup>

As was the case in the EU Constitutional Treaty, harmonization is also precluded in the TFEU concerning policies of: discrimination on the basis of gender, ethnicity and race, religion, disabilities and on the basis of sexual orientation<sup>103</sup>, integration of immigrants from third countries,<sup>104</sup> crime prevention,<sup>105</sup> employment policies<sup>106</sup>, educational cooperation<sup>107</sup>, cultural policies<sup>108</sup>, European space policy,<sup>109</sup> measures aimed at limiting the health effects of use of alcohol and tobacco,<sup>110</sup> industrial policy,<sup>111</sup> tourism sector,<sup>112</sup> civil protection against natural and man-made disasters,<sup>113</sup> but unlike the EU Constitutional Treaty, also measures concerning administrative capacity building to enforce EU law.<sup>114</sup>

In comparison with the restrictions on harmonization in the EU Constitutional Treaty, changes in the TFEU are limited. However, member states have more clearly emphasized that the enforcement of EU law shall remain a national issue, and that each member state has the freedom to design institutions in that field, whereas the national governments accept that harmonization of measures concerning the common market may take place. Likewise, the member states safeguard their power over immigration policies, crime prevention, and certain fields of social and industrial policy and the management of civil emergencies, all of which belong to the core of governmental powers. In the text of Article 352 TFEU, the scope of application was limited to subject matters (CFSP) and cases where harmonization had been expressly precluded in the relevant parts of the TFEU. That is clearly a greater limitation than what was contemplated in the first EU Constitutional Treaty.

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102. *Id.* at art. 2(5).

103. *Id.* at art. 19.

104. *Id.* at art. 79.

105. *Id.* at art. 84.

106. *Id.* at art. 149.

107. *Id.* at art. 165.

108. *Id.* at art. 167.

109. *Id.* at art. 173(3).

110. *Id.* at art. 147.

111. *Id.* at art. 153(2)a.

112. *Id.* at art. 195(2).

113. *Id.* at art. 196(2).

114. *Id.* at art. 197(2).



### *C. Restricting the Scope of Implied Powers Through Soft Law?*

The IGC mandate of the summit in June 2007 included two declarations for a proposal aimed at limiting the scope of Article 352 TFEU. However, that proposal was also relegated to annexed *declarations* on the scope of the articles, which raises questions about its status in relation to the body of the Treaty. The scope of the application of when it comes, not to particular policies, but to objectives was entirely relegated to common declarations. The sections concerning the most radical restrictions regarding the scope of implied powers, (i.e., the declarations restricting which objectives that may justify the use of implied powers), are only found in a political declaration.

The parties to the treaties have made a number of joint, as well as unilateral declarations to all the current treaties, and the proposed TFEU is no exception. The role of unilateral declarations is obviously very limited whereas the role of joint declarations is more ambiguous. Such declarations have an ambiguous role because they have not been regarded as legally binding within EC/EU law. The ECJ has never considered them to be a part of EC law, but it seems likely that in some contexts, declarations have affected legislative practices.<sup>115</sup>

#### *1. The Status of Declarations Annexed to EU Treaties*

In the EU, declarations annexed to the treaties are seen as having a political, rather than a legal role. That has also been the case in the ECJ with respect to judicial interpretations of joint declarations relating to the treaties; as such declarations have never been treated as a source of law. Hence, the declarations are neither a part of the text of the treaties themselves, nor seen as Protocols annexed to the treaties. They seem to provide at best political constraints whose effects are difficult to predict, and it is questionable whether they will actually work to constrain the use of implied powers.

From the perspective of public international law, following Article 31 of the Vienna Convention of the Law of Treaties, the declarations are regarded as an aid to treaty interpretation.<sup>116</sup> It should

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115. See Knud Erik Jørgensen, *The Social Construction of the Acquis Communautaire: A Cornerstone of the European Edifice*, 3 EIoP 5 (1999), available at <http://eiop.or.at/eiop/texte/1999-005.htm> (last visited July 10, 2008).

116. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 634-40 (Oxford Univ. Press 5th ed. 1998); Jean-Marc Sorel, *Article 31 – Convention de 1969*, in *LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITES*, vol. II, 1289 (Oliver Corten & Pierre Klein

be noted that while declarations signed by all contracting parties to a treaty under Article 31 Vienna Convention of the Law of Treaties, and accepted by all parties are regarded as binding, the case law in ECJ hitherto has been very limited in that regard.<sup>117</sup> Anthony Aust argues that the use of such declarations can have a practical role in making treaties more readable by excluding certain definitions or interpretations, but also can have a political role in the sense that they make it possible for parties to relegate compromises to joint declarations and therefore exclude them from the main text of the treaty.<sup>118</sup> From Aust's position, it follows that although declarations may be created for practical and editorial reasons there is no reason not to regard the norms as binding. Malcolm Shaw takes a different approach focusing on whether there was any intention of the parties to be bound.<sup>119</sup> The reason for that seems to be to institutionalize a certain degree of uncertainty and thus to create a possibility of compromises. That depends on the interpretation of treaties, which will at least to some extent, be influenced by such joint declarations. In the case of the EU, one may question given the absence of any case law providing for interpretations of declarations whether they are anything else than political constraints.

## 2. *The Text of the Declarations*

The texts of the two declarations respectively refer to the scope of objectives, and make general statements on the role of implied powers as a part of a system of conferred powers.

### Declaration on Article 352 TFEU

The Conference declares that the reference in Article 352(1) of the Treaty on the Functioning of the European Union to objectives of the Union refers to the objectives

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eds., 2006); Yves Bouthellier, *Article 31 - Convention de 1969*, in LES CONVENTIONS DE VIENNE SUR LE DROIT DES TRAITES, vol. II, 1339 (Oliver Corten & Pierre Klein eds., 2006).

117. When it comes to the role of so-called declarations annexed to European treaties, the legal doctrine is very limited, however, it seems to point to the view that the declarations are, from the perspective of international law, obligatory, and certain parts of them are also treated as binding. However, it should be said that whereas certain declarations have been treated as binding when it comes to constitutional practices of the political branches, especially by the Council of Ministers, it should also be added that their *judicial* status is much more uncertain. It also seems as if constraints where the member states want to make them unconditionally binding, are also made in the form of Protocols. A.G. Tôth, *The Legal Status of Declarations Annexed to the Single European Act*, 23 COMMON MKT. L. REV. 803, 811 (1986).

118. ANTHONY AUST, MODERN TREATY-LAW AND PRACTICE 190-91 (Cambridge Univ. Press 2000).

119. MALCOLM N. SHAW, INTERNATIONAL LAW 634-36 (Cambridge Univ. Press 4th ed. 1997).

as set out in Article 3(2) and (3) of the Treaty on European Union and to the objectives of Article 3(5) of the said Treaty with respect to external action under Part Five of the Treaty on the Functioning of the European Union. It is therefore excluded that an action based on Article 352 of the Treaty on the Functioning of the European Union would only pursue objectives set out in Article 3(1) of the Treaty on European Union. In this connection, the Conference notes that in accordance with Article 31(1) of the Treaty on European Union, legislative acts may not be adopted in the area of the Common Foreign and Security Policy.

The statements in declaration on Article 352 TFEU, include a limit to which objectives of the EU that implied powers may be used to further, namely the objectives of Articles 2(2) and 2(3) EU Treaty. The declarations repeated what was already stated in hard law in Article 352(4) TFEU excluding the objectives related to the CFSP from the scope of implied powers. That is further emphasised by declarations where the objectives for which the new implied powers article may be used, will not *exclusively* include Article 2(2) in the EU Treaty which only refers to that the EU shall promote peace and prosperity, which apparently was thought to be a too widely defined goal. That is (for sure) a considerable expansion of powers, including the common market and the area of freedom, justice and security, but it seeks to exclude, albeit through soft law, policies of the EMU from the scope of Article 352 TFEU, thus the role of implied powers may be seen as more ambiguous than what only the text of Article 352 TFEU suggests. In a similar way, the declaration reiterates the prohibition of legislative acts in the area of CFSP adds on to those constraints.

The Conference underlines that, in accordance with the settled case law of the Court of Justice of the European Union, Article 352 of the Treaty on the Functioning of the 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, Article 352 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.<sup>120</sup>

The interest in avoiding a possibility of backdoor amendments is expressed far clearer than previously, but it should be added that although this is a part of the instructions for the next IGC, it will only be a part of the *travaux préparatoires* of the new treaty, which will limit their role, at least when it comes to the role of judicial interpretations of the new treaty. The conclusions regarding the role of implied powers in the new treaty are not entirely clear. The EC Treaty, being transformed into the TFEU, points in the direction that the implied powers, compared to the current treaty, will be more extensive, and that they most importantly also will cover the Justice and Home Affairs part, which formerly was a part of the intergovernmental pillars (although the rules of decision making will still leave the individual member states more influential there than in many other areas). Even though recitals in the second declaration concerning implied powers were added to the TFEU, it should also be noted that the ECJ is already affirming those principles, and in that respect, it is questionable whether that will change the role of implied powers.

#### *D. The New Implied Powers—Legal Delegation, Political Constraints?*

That constitutional documents are sometimes ambiguously drafted is nothing new. In fact, ambiguity and the possibility of interpretation seem to be central facets in creation of constitutional norms.<sup>121</sup> To a certain extent, the use of ambiguities in the design of constitutional documents is a way to overcome what would otherwise be irresolvable political conflicts.<sup>122</sup> Traditionally, linguistic ambiguities have been used in constitutional texts, but in the case of the EC/EU treaties, ambiguities were created in the hierarchical norms, including inter-institutional agreements, po-

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120. *Id.*

121. The role of uncertainty has been emphasised particularly in rationalist theories of constitutional design which argue that the effectiveness of constitutional norms is determined by their general acceptability, and as such also dependent on that they are understood as reasonably impartial. The impartiality, this line of argumentation then arise from that such norms may not be obviously favoring a particular interest, i.e. that there has to be a "veil of uncertainty." That obviously is related to the *ex ante* justification of constitutional norms. See RUSSEL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY* 28-31 (Oxford Univ. Press 1999).

122. CASS R. SUNSTEIN, *DESIGNING DEMOCRACY – WHAT CONSTITUTIONS DO* 49-61 (Oxford Univ. Press 2001).

litical declarations, and informal agreements between the member states (such as the Luxembourg compromise), instead of the more traditional linguistic ambiguities typically found in constitutions. However, such ambiguous instruments have a considerable limitation over time since they are neither formalized, nor independently enforced, which clearly sets them apart from the constitutional texts of the treaties.

The TFEU continues the approach where the core of EU competencies are set out in “hard” law and are highly institutionalized, while many of the limitations are set out in terms of “soft” law (e.g. political declarations) that are non-binding and susceptible to change through practices. The constraints on the exercise of implied powers through the annexed declarations are, from a legal perspective, very weak. The political declarations aimed at limiting the application, but not the applicability of the clause of flexibility appear designed less to create constitutional constraints, but more to facilitate harmonization of law. In this respect, the tendencies toward executive federalism remain, although the Council of Ministers is subjected to a greater burden of reason giving with respect to the use of implied powers. However, it is a form of control which is political, and which does not aim at creating constitutional stability in relation between the member states and the EU, and which provides for less parliamentary influence compared to parliamentary veto powers.

#### V. CONCLUSIONS: IMPLIED POWERS BEYOND FUNCTIONAL INTEGRATION?

As mentioned above, implied powers in a constitutional system, such as that of the EU, is problematic since implied powers may undermine the effectiveness of the constitutional limits to delegation of powers to the EC/EU. The attempts to revise the flexibility clause in Article 308 EC Treaty, led in the case of the EU Constitutional Treaty, to a radical expansion of its scope along with greater parliamentary control (primarily at the European level, but also at national level). In Article 352 TFEU, the reforms of the decision making process for implied powers proposed in Article I-18 EU Constitutional Treaty remained but the scope of application of the implied powers were limited. Given the character of the procedure of decision making, a strong pro-integrationist bias in how the powers under the flexibility clause will remain. This undermines the possibility of maintaining the constraints on the exercise of implied powers that had made it fit with the functional understanding of the principle of conferred powers. The most important

expansion of scope under the TFEU was the possibility of harmonization, through the flexibility clause, in the field of Justice and Home Affairs. The TFEU, compared to the never realised EU Constitutional Treaty, expanded the scope of implied powers with the exception of the CFSP, and that powers under the flexibility clause cannot be used to exercise powers of coordination. However, the changes of the scope in the TFEU (compared to the EU Constitutional Treaty) expanded the fields where harmonization would be possible, in particular with regard to social policies. At the same time though, it also added two non-binding declarations of the member states on the scope of implied powers intended by the parties. In those declarations the member states declared which objectives may be the basis for decisions under the clause of implied powers. However, the non-binding character of those declarations and the absence of references to such declarations in the judicial practice of the ECJ, suggest that their role will be limited. The traditional approach of functional integration has been that supranational powers have been given to the EC/EU in functionally defined areas, whereas the rest have been retained by the member states. The model of the new clause of implied powers is rather that the EU has powers to use implied powers with supranational effect in all fields except where the member states have explicitly limited the power of the EU. In that regard, implied powers under TFEU are beyond the traditional approach of functional integration.

#### *A. Defining Implied Powers—Ambiguity by Design*

The expansion of the scope of implied powers and the relative weakness of institutional constraints leads to the conclusion that the outer limits of EU powers will expand under the TFEU. The limitations to the scope of the applicability of the flexibility clause are “soft,” and given the history of judicial interpretation of joint declarations, they cannot be expected to be effective at least in judicial practice. Despite the absence of judicial protection of joint declarations annexed to treaties, the joint declarations seem to have had a certain political effectiveness at least in some cases, which may be a reason to think there still is a certain ambiguity in the design of implied powers. The only exceptions to the soft regulation are the CFSP and the coordination of complementary actions, which are excluded from the scope of the flexibility clause in the text of the treaty.

It is important that such declarations are often made, but that they have not been regarded as sources of law. Although they may

be subsidiary sources for interpretation of a treaty, they have not been and currently are not, regarded as “hard” law. The role of the joint declarations as “soft” instruments is, at best, unclear. The “soft” norms have sought to delimit the role of the flexibility clause, whereas the “hard” law of the treaty has expanded it. Thus, the continued use of implied powers will be largely political, due to the increased involvement of parliamentary institutions, and the norms aimed at constraining the use of implied powers are dependent upon political opinions in order to be enforced. In these respects, implied powers have expanded and the political control of their application has increased. The more specific restrictions on their scope have weakened, and the political incentives to constrain the use of implied powers remain, at best, limited. The constraining effect of the principle of conferral of powers has been weakened. The weakness of the principle is not new, but by further limiting its role as a practical constraint, it appears inevitable that the absence of constitutional constraints and lack of institutional balance will not be remedied. The lines drawn in the revised treaties concerning control of the use of implied powers are most likely, drawn in the sand.

*B. Procedures of Decision Making: Retaining the  
Pro-Integration Bias*

The increased participation of the European Parliament limits the development toward executive federalism in that the Council of Ministers. The introduction of another body with veto power lessens the democratic deficit, but it does not establish any robust political constraints on the exercise of implied powers. The increased participation of the European Parliament creates an incentive for greater expansive use of the *explicitly* conferred powers, since the differences and the institutional incentives of the Council of Ministers to use Article 308 EC Treaty as a way to avoid parliamentary influence at the EU level, will disappear.

The most problematic aspects of the democratic deficit and lack of accountability will be limited, but that does not diminish the problems of the constitutional deficit associated with the exercise of implied powers. Due to the dramatically increased scope of implied powers (compared to the EC Treaty), the constitutional deficit has expanded rather than contracted. The retained pro-integration bias in the institutional process means that although certain precise constraints have been imposed on the exercise of the implied powers, it is incumbent upon the ECJ to uphold those constraints. The result is still a high degree of judicialisation, at

least regarding the outer limits of the EU's competencies.<sup>123</sup> The increased role for national parliaments, regarding subsidiarity, seems only to change the role of national parliaments from non-existent to very weak. The barriers to the use of implied powers appear to remain unchanged in any substantial way. While the democratic deficit will be alleviated, it appears that the biased decision making process and the weak substantive controls over the exercise of implied powers will prevent elimination of the constitutional deficit.

*C. Final Remarks— Implied Powers Beyond Functional Integration?*

The traditional dilemma regarding the exercise of implied powers under Article 308 EC Treaty was the problem in delimiting the role of implied powers. The model chosen in the revised treaties creates a general power of legislation through the clause of implied powers, but specifying certain fields of exception that cannot be subject to harmonization and where Article 352 TFEU cannot be used (most importantly in the field of CFSP) The possibility of harmonization is the general rule, and the impossibility of harmonization is the exception. Together with the vastly expanded objectives, it leads to that the traditional understanding of the EU as based on functional delegation need to be reconsidered. A more reasonable approach seems to be that the EU is competent to act, except where it is explicitly ruled out.

While the democratic deficit is reduced, it is not abolished: the only parliamentary power that exists is veto power of the European Parliament and a power to delay, for a short period of time, the national parliaments. In that regard, the functional model of integration has been watered down through the very broad goals of the EU, and the principle of limited delegation has been undercut through the use of supranational legislation under implied powers. The democratic deficit has been partially remedied when it comes to influence by directly elected decision-makers but it remains in important respects when it comes to the possibility of *ex post facto* accountability, the powers of agenda setting, and transparency within the Council of Ministers. However, the constitutional deficit

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123. One should note that, given the case law of the ECJ, the constraint in relation to the objectives of the CFSP seems feasible. It seems far more questionable if the declarations from the next IGC, agreed upon at the summit, will be particularly effective since there will not be any references to the declarations in the final text and since preparatory works, in general, have a low status as sources for treaty interpretation. In that sense, the declarations seem to provide much less of a constraint than the revisions in the actual flexibility clause.



from the flexibility clause and the pro-integration bias remains, in a way that does not stabilize the division of powers between the member states and the EU for the future.

*Appendix A: Fields of Policy Where Harmonization is Precluded**EU Constitutional Treaty*

- Gender Discrimination
- Racial/Ethnic Discrimination
- Religious Discrimination
- Discrimination Against the Disabled
- Discrimination on the Basis of Sexual Orientation
- Age Discrimination
- Working Conditions
- Social Security for Employees
- Consultation with Workers
- Information to Workers
- Co-determination of Employers/Employees
- Gender Equality in the Labour Market
- Integration of Third-Country Nationals
- Management of Civil Disasters
- Policies to Increase Competitiveness of Industries
- Crime Prevention

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- Gender Discrimination
- Racial/Ethnic Discrimination
- Religious Discrimination
- Discrimination Against the Disabled
- Discrimination on the Basis of Sexual Orientation
- Age Discrimination
- Integration of Third-Country Nationals
- Management of Civil Disasters
- Policies to Increase Competitiveness of Industries
- Crime Prevention
- European Space Policy
- Tourism Sector
- Administrative Capacity-Building of to Enforce EU Law