THE COMPETENCE 'CON' AND THE MIRAGE OF REPATRIATING POWERS

ABSTRACT: Any meaningful repatriation of powers while inside the EU is a mirage. The EU has long regarded its own law as supreme, jealously protecting its powers and stealthily extending them in the name of European integration.

At the same time, words have been used to imply decentralisation. It is now claimed that it is possible to take powers back to national level based on the Treaty of Lisbon. In reality, the whip hand stays firmly with the EU, as the goal of European integration limits and directs the exercise of power.

This article examines the key concepts of competence, subsidiarity and the *acquis communautaire*.

THE COMMITMENT TO 'EVER CLOSER UNION'

On 23.1.13, David Cameron gave a speech on Britain's future in the EU.[1] He stated that power must be able to flow back to Member States, not just away from them, claiming that "this was promised by European Leaders at Laeken a decade ago".

The Laeken Declaration on the Future of the EU (15.12. 01) has erroneously been quoted as proof that EU leaders were open to returning powers to national level.[2] It actually asked at what level was **competence** exercised in the most efficient way, and how was the principle of **subsidiarity** to be applied?

It specifically raised the prospect of "reorganisation of competence" while **respecting the *acquis communautaire***.

These three concepts are critical to the complex EU legal jigsaw puzzle, and will be examined in more depth. Cameron also appeared to question the goal of "**ever closer union**" – read: political integration.

It is a condition of EU membership that countries accept the judgement of the European Court of Justice. It ruled that Member States had to accept the ***acquis communautaire*** ('the occupied field'). This means that they commit to both the entire body of EU law, such as Treaty obligations, its own rulings, such as Case Law; and the EU's **goals**.

The Court has also decided that EU membership obligations produce a **permanent** limitation of national sovereign rights. The EU's own website also makes it clear that "*The main goal of the EU is the progressive integration of Member States' economic and political systems*".

To even discuss the return of lost powers (except through leaving the EU) would seem to be illegal under EU law, as it would go against both the goals of the EU and the letter of the law (the *acquis*).

DOES ARTICLE 48, ON TREATY CHANGE, PROVIDE A GET-OUT?

Some people have questioned whether a Treaty change could reduce the boundaries of 'the occupied field' on the grounds that **Article 48** of the Treaty of Lisbon (concerning treaty changes) might now seem to allow powers to be taken back. After all, it talks of 'increasing or reducing' the competences of the EU.

There are two important issues. The first is the role of the EU institutions that would make Treaty changes, particularly the heads of national governments, the European Council.

The Court has effectively ruled that the European Council not a law unto itself, and that the institutions of the Union must act on the basis of the Treaty creating an **ever closer union**. It had also previously confirmed that EU institutions were bound by EU goals. The Treaty of Lisbon would require an EU institution to support the political objectives of the EU, legal continuity and consistency.[3]

The Court has ruled that EU legal principles are as applicable to institutions as Member States.

The word **"competence"** (aka 'competency') is key – and its definition is conveniently vague; the EU website definition hinting it spans 'powers and responsibilities':

Competencies:
This is Eurojargon for 'powers and responsibilities'. It is often used in political discussions about what powers and responsibilities should be given to EU institutions and what should be left to national, regional and local authorities.[4]

COMPETENC(I)ES SUPPORT ONLY LIMITED CONCEPT OF SOVEREIGNTY

Loïc Azoulai, Professor of EU Law in Florence, recently reviewed ECJ judgments on "competence" in the European Journal of Legal Studies.[5]

He notes that for Member States, the language of "competence" is used (reviewing its origins in French, the working language of the Court, and stressing that competence' is not **'power'**) but the language of '**rule**' is used for the **EU**.

*"This is not just wordplay... **in any power unilaterally exercised by a Member State**, there is not just a capacity to act but also **a capacity to be affected by EU law**."*

He notes that under EU law, "*the problem becomes one of **limiting the exercise of competences belonging entirely and legitimately to the Member States**. The new formula means that in any power unilaterally exercised by a Member State, there is not just a capacity to act but also a capacity to be affected by EU law.*"

Conversely, he finds that the scope of application of **EU law extends beyond the subject areas over which the EU has been given jurisdiction**. By dissociating the *existence* of state powers from the *exercise* of such powers, the Court legitimises the application of EU law in any domain that is not a priori within the Union's scope of intervention. Should any sector not feature on the list of exclusive or shared powers attributed to the Union under the Treaty, it does not follow that the application of EU law shall be excluded from that sector.

He notes an openly-admitted motive for EU intervention – the **pursuit of European integration**.
"*The 'effectiveness of the Treaty' would be greatly diminished and its 'purpose' would be seriously compromised if the Community were not allowed to act **beyond** the narrow sphere of the exclusive competences attributed to it. In other words, if [Member] States could freely use their powers… one could fear a fragmentation of the integration project.*"

The Court occasionally refers to 'exclusive' State powers as 'retained powers' or 'areas of reserved competence'. There are a few powers which could be truly seen **exclusively of the State's competence**.[6]

A list is given (e.g. conditions for granting nationality, system of attribution of surnames), also specific spheres in which the EU has received competence but only limited powers to act – the road to harmonisation of national laws being totally or partly prohibited (education, public health, social protection, social rights), and a domain in which the EU has exercised the powers of harmonisation that it possesses only in a piecemeal fashion (direct taxation).

However the exercise of this competence is subject to the 'limits' laid down by EU law, and Azoulai warns that *'There simply is **no nucleus of sovereignty** that the Member States can invoke, as such, against the Community [read: 'EU']'.*

EXCLUSIVE NATIONAL COMPETENCE NOT WHAT IT SEEMS

In 1969, France argued that a decision had been taken in monetary policy where the **Member States were exclusively competent**. However, while paying lip service to this, the Court ruled that there were general obligations for states to coordinate their economic policies and to treat their policies on foreign exchange as a matter of *'common concern'*. Being the expression of a fundamental requirement of '*solidarity*' within the Community, these spiritual obligations took precedence. Membership of the [EU] Community holds that governments undertake to **cooperate in a spirit of loyalty and solidarity,** even in policies that come within the scope of their retained powers**.**

The Court sees Treaty obligations for 'responsibilization'. **National authorities are vested with thinking if not acting 'European' to the full extent of the State's capacity**. (cf. the Directive on cross-border health care).

Azoulai also determines another justification for EU intervention, an EU belief **in the protection of individual situations within the European space**. By acting only for a part of the EU's citizens, national governments potentially endanger the 'common interest of the Member States and of their citizens'.

CASE LAW FAVOURS INTEGRATION RATHER THAN SOVEREIGNTY

Binding EU Case Law would concur with Azoulai:[7]

"*The Court has, however, stated on numerous occasions, as settled case-law, that there are certain areas in which, even though they fall in principle within the exclusive [law-making] power of the Member States, Community law sets limits to that power*."

"the Court went on to qualify the circumstances under which this national competence must be exercised."

"*It is therefore expressly foreseen that Community measures might be adopted on issues... even though they currently fall within national competence.*"

and confirm that "*the acquis communautaire..... undoubtedly encompasses all the competences conferred upon the Community.*".

A University of Cagliari law presentation reviewed some "competences" that were supposedly reserved for Member States and warns that: [8]

"Member States **must coordinate their policies** in liaison with the Commission...

The EU role **should not be underestimated**...

[The] EU found significant ways to **force Member States...**".

So, if Member States' "competences" do not provide true unfettered sovereign powers, and the EU can intervene readily in those areas, citing other obligations, is it almost academic whether such "competences" are labelled as for Member States or the EU? Or whether each number of nominal labels is increased or decreased – especially if the EU can act irrespective of any assigned "competence"?

"Capacity to act" has been shown to be clearly in the **context of the Treaty**, which is to produce action towards attaining the EU's objectives, further **political and economic integration**.[9] The Laeken Declaration got the essential nature of "competence" right when it turned the focus to **tasks,** asking as to which could be better left to Member States.

This is consistent with the Eurojargon definition (see above) and seems to overlap strongly with the established EU doctrine of **subsidiarity** (see Appendix), where the EU will make the running if it considers itself better placed than Member States to drive further integration.[10]

The Treaty of Lisbon has a Declaration about the EU 'ceasing to exercise competence'.[11] There is no change of legal precedent as Declarations have no legal force. Member States would still be fettered by the full range of EU obligations, even if they were handed the initiative under **subsidiarity**.

The EU could also theoretically decide to cease to exercise some powers in favour of a global governance institution like a climate change body, but it would **not** empower Member States to act in breach of any wide-ranging EU obligations, however created.

DEROGATION NOT A MEANS TO RESTORE SOVEREIGNTY

Some commentators ask if Member States could be given a '**derogation**' (special permission) not to take part in an area of European integration. The European Commission rules that derogations are exceptional and limited – an obvious case would be a temporary derogation when new Member States require some time to fully implement EU legal obligations.[12]

Azoulai notes:
*"Provisions on freedom of movement are 'non-specific' in scope and it is settled case-law that the strict possibility to **derogate** from them does not amount 'to reserve certain matters to the exclusive jurisdiction of the Member States'. The Court has rejected the idea that State derogations enshrine 'reservations of sovereignty'. In addition, it is established precedent that the exercise of the Member States' 'exclusive' competence in the area of criminal law is subject to the 'limits' laid down by Community law.".*

Main references:
1 http://www.number10.gov.uk/news/david-cameron-eu-speech/ as written
2 Reproduced in The Treaty of Lisbon in Perspective, British Management Data Foundation, 2008
3 European Court of Justice Cases 440/05, 11/00, 15/00, 160/03; Treaty of Lisbon TEU, Title III, Article 13.
4 http://europa.eu/abc/eurojargon/index_en.htm
5 Loïc Azoulai, Professor of EU Law, European University Institute (Florence).
The 'Retained Powers' Formula in the Case Law of the European Court of Justice: EU Law as Total Law?, European Journal of Legal Studies, Autumn/Winter 2011, https://core.ac.uk/download/pdf/45680377.pdf (original link: www.ejls.eu/9/116UK.htm). Case 30/59 quote abridged for brevity.
6 These correspond to what Treaty of Lisbon TEU Article 4(2) calls the 'essential State functions'
7 Quotes (Case 186/01, para 56; Case 1/05, para 27; Case 83/98, para 83; *acquis* (Case 91/05).
8 Presentation is 'EU Competences and Subsidiarity',
http://giurisprudenza.unica.it/dlf/home/portali/unigiurisprudenza/UserFiles/File/Utenti/g.coinu/EU%20Competences%20and%20Subsidiarity.pdf. See also Treaty of Lisbon Articles (TFEU 2-5 e.g.).
9 Treaty of Lisbon TEU Article 1
10 Treaty of Lisbon Protocol 2 on Subsidiarity
11 Treaty of Lisbon Declaration 18
12 Repatriating EU powers to Member States**,** House of Commons Library Standard Note: SN/IA/6153.
See Case 410/04 for philosophy.

See also New Alliance website for key legal decisions and quotes.

APPENDIX – REFERENCE MATERIAL ON SUBSIDIARITY

The Euro-Know website provides some useful history in its definition:

Subsidiarity
The term subsidiarity conveys the impression of a principle that decisions should always be taken at the national level, 'close to the citizen', unless for compelling reasons they have to be taken at the EU level. As such it was relied upon by the British government to reconcile the electorate to the federalising implications of the 1992 Maastricht Treaty. There were, however, two flaws: subsidiarity is too vague a principle to be relied upon in law; and its meaning is not necessarily what it purports to be, for the term begs the question who determines - and on what criteria - the level at which a decision should be made.

The 'principe de subsidiarité' first surfaced in a Commission paper submitted to a report on institutional reform in 1975, a time when Community confidence was at a low ebb. Starting from the point that the European project 'is not to give birth to a centralising superstate', the Commission proposed that the Union should be 'given responsibility only for those matters which the member states are no longer capable of dealing with efficiently'. This sounded reassuring, but the Commission qualified its proposal by adding that the potential application of the principle was 'of course' restricted, since 'the Union must be given extensive enough competence for its cohesion to be ensured'.

As the momentum of integration grew, the concept of subsidiarity was diluted. Without using the actual word, the 1986 Single European Act sanctioned Community action (in this case, on the environment) to the extent that its objectives 'can be attained better at the Community level'. The Maastricht Treaty stipulated that the subsidiarity principle did not apply at all to areas within the Community's 'exclusive competence': and in other areas the EU could take action whenever its purposes could not be 'sufficiently' achieved at national level. The presumption, implicit in the Commission's 1975 paper, that responsibility lay with the member states unless delegated of necessity to the Union had now effectively been reversed. Henceforth, responsibility lay with the Union unless it considered the issue in question parochial enough to be entrusted to lower authority. Commission president Jacques Delors made his own position clear when he suggested animal welfare as a suitable subject for the member states - to him, subsidiarity was no more than a sop to British public opinion.

British negotiators were well aware that subsidiarity ... equalled federation, and were content that it be so, provided the sceptics back home did not hear about it. Dr Jürgen Oesterholt, German ambassador to Britain, June 1996

The Danish referendum's rejection of the Maastricht Treaty in 1992 led to a protestation by the European Council that subsidiarity was a genuine principle and 'excessive centralisation' was not Europe's intention. But the acid test would be the attitude of the Court of Justice. In 1996 (in a case on employment conditions) the advocate-general opined that it would be 'illusory' to expect member states to achieve harmonisation better than the Community - an interpretation that ruled out the application of subsidiarity across a broad range of policies, including the single market. With its history of integrationism, based on the Treaty of Rome's doctrine of 'ever closer union', it was in any event certain that the Court of Justice, failing a strong political steer in the opposite direction, would interpret any ambiguity in favour of supranationalism.

A protocol to the 1997 Treaty of Amsterdam codified the guiding principles of subsidiarity. Again, there was lip service to national decision-making, but the central message was uncompromisingly supranational. The acquis communautaire and the 'institutional balance' (the respective responsibilities of the member states and the EU's institutions) were to be 'maintained in full'; the supremacy of Community law was to be sacrosanct; the Community's powers were not to be 'called into question'. The phrasing was revealing. This was a repudiation of the British and Danish vision of subsidiarity. A concept that had once been portrayed as proof that the high water mark of federalism had been reached was now reduced to guidelines as to the most user-friendly form of Community action - 'other things being equal, Directives should be preferred to Regulations and Framework Directives to detailed measures'. For integrationists, it was victory. For their opponents, especially for wishful thinking politicians who had convinced themselves (or the voters) that subsidiarity would swing the balance of decision-making back towards the nation state, it was the end of a delusion.

(Ref: www.euro-know.org/europages/dictionary/c.html)

Before becoming Commons Speaker, John Bercow MP wrote in a Bruges Group paper “Subsidiarity and the Illusion of Democratic Control”:

“*In a Written Parliamentary Answer, Keith Vaz told my colleague, Peter Lilley, "**subsidiarity is not about the repatriation of powers** to Member States. Rather, it is about ensuring that where the Treaty already allows for action at both EU and Member State level, the most appropriate level is chosen each time action is required.*"

Hansard Official Report, 9 January 2001, vol. 360, col. 508w

"*In areas which do not fall within its exclusive competence, the Community shall take action, in accordance of the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.*"

Article 3b of the *Treaty Establishing the EC (*Maastricht Treaty)

Article ref: www.newalliance.org.uk/competence.htm. This article is produced as a discussion paper – it is not legal advice in any form, and readers are reminded that the law is not an exact science and is subject to interpretation. It may be freely quoted for non-commercial purposes so long as acknowledgement is given.
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