The competences of the EU and the EC

Weatherill, Stephen
University of Oxford
Somerville College
OX26HD Oxford. U.K.

Aurkezpen honetan azalduko dugu nola EK soilki bere Itunak ematen dizkion ahalmenen arabera ari delako printzipioa, finean, guztiz desberdina den zerbait adierazten amaitu zen. Bereziki, baina ez bakarrik, Batzordeko botazioetan guztien adostasunaren praktikaren ondorio gisa, EKren aginpide-mugak testuinguru "konstituzionalean" baino areago "politikoan" definituak izaten amaitu ziren. "Gehiengo bereziko botazioak" Batzordera iristeak EKren aginpide-mugak garbiago finkatzeko kezka sortarazi du, azken finean, gutxiengoen benetako babesa lortzeko oinarri gisa. Aurkezpenean argudiatzen dugunez, asko egin da EKren sistemaren oreka berrezartzeko, "gehiengo bereziko botazioak" sartzeak ekarritako tentsioak ikusirik, eta EKren aginpideen "zerrenda finko (eta hertsiki mugatua)" moldatzerakoan eragindako presioa ez da nahiko litzatekeen soluzioa jadanik konpontzen ari den arazo baterako.

Giltza-Hitzak: EKren aginpideak. Subsidiaritatea. Batzordearen barneko botazioak. Gutxiengoen babesa.

En esta presentación explicaremos cómo el principio de que la CE opera únicamente sobre la base de las facultades que le son atribuidas al amparo de su Tratado acabó por significar algo bastante distinto en la práctica. Especialmente, pero no solamente, como resultado de la práctica de la unanimidad en las votaciones en el Consejo, los límites competenciales de la CE acabaron por definirse en un contexto "político" más que "constitucional". La llegada de las "votaciones por mayoría cualificada" al Consejo ha generado la inquietud de establecer con mayor claridad los límites competenciales de la CE, en suma, como base para lograr la protección efectiva de minorías. En la presentación argumentaremos que ya se ha hecho mucho para restablecer el equilibrio del sistema de la CE a la vista de las tensiones introducidas con la introducción de las "votaciones por mayoría cualificada ", y que la presión a la hora de elaborar una "lista firme (y estrictamente limitada)" de competencias de la CE no es una solución deseable para un problema que ya siendo solucionado.

Palabras Clave: Competencias de la CE. Subsidiaridad. Votaciones dentro del Consejo. Protección de las minorías.

Dans cet exposé nous expliquerons comment le principe indignant que la CE opère uniquement sur la base des facultés qui lui sont attribuées sous la protection de son Traité finit par signifier quelque chose d'assez différent dans la pratique. Les limites de compétences de la CE se définirent finalement dans un contexte "politique" plus que "constitutionnel" espécialement mais pas seulement comme résultat de la pratique de l'unanimité aux votations du Conseil. L'arrivée des "votations par majorité qualifiée" au Conseil a généré la préoccupation d'établir plus clairement les limites de compétences de la CE, en somme, comme base pour obtenir la protection effective de minorités. Dans la présentation, nous argumenterons qu'il a déjà beaucoup été fait pour rétablir l'équilibre du système de la CE en vue des tensions introduites par les "votations par majorité qualifiée", et que la pression au moment d'élaborer une "liste ferme (et strictement limitée)" des compétences de la CE n'est pas une solution désirable pour un problème qui est en train de se résoudre.

Mots Clés: Compétences de la CE. Subsidiarité. Votations dans le Conseil. Protection des minorités.

XV Congreso de Estudios Vascos: Euskal zientzia eta kultura, eta sare telematikoak = Ciencia y cultura vasca, y redes telemáticas = Science et culture basque, et réseaux télématiques = Basque science and culture, and telematic networks (15. 2001. Donostia). – Donostia : Eusko Ikaskuntza, 2002. - P 413-418. - ISBN: 84-8419-949-5.

Thank you very much for that introduction and thank you very much for the invitation to be here in Donostia.

Grainne de Burca's paper included a number of positive, optimistic comments about the European Union and I would like to follow that pattern, that is to say, most of what I'm going to try to say, is designed to promote the values of European integration against a background, which, in my view, assumes European integration has the capacity to strengthen state and regional power but do so within a collective context which ensures that regions and states work together and do not oppose each other economically, politically or even militarily.

And much of what I will say, much of all the work I do, is built on the assumption that the European Union has served Europe, or at least most of Western Europe, particularly well over the last 50 years when compared to the 200 years before 1945.

So, to that extent, I am suggesting a positive agenda and I have some anxieties about the defensive tone that we hear in a lot of the debate currently about the future of the European Union.

Now, what I'm particularly interested in, is the relationship between the competences of the European Union and of the member states and particularly, what I want to explain is the dynamic relationship that exists between the Community, the Union and its member states and the way in which the institutional context breeds change in the relationship between the states and the Union.

And I am particularly presenting a picture of dynamic change and institutional balance against the background of the proposals that exist for a hard list of Community competences that would separate out what the European Community and Union can do and should do from what, on the other hand, should be left to the member states, then to be distributed within those member-states to sub-state units or regional actors.

I am not convinced that this idea of a hard list of competences is workable or desirable. It seems to me that the idea of a hard list of competences goes against the whole historical idea of development of the European Community and it also seems to me that the idea of having a hard list of what the Community can do, on the one hand, of what the member states can do, on the other hand, suggests that there is, not a co-operative relationship, but rather an "either-or" problem. The hard list of competences suggests that something "belongs" to the member states or "belongs" to the Community, not that there can be a collaborative relationship involving both levels of governance.

And it seems to me that the secret of the success of the European Community, or more recently of the European Union, has been the way in which the units of governance at state level and at European level have worked together and in many ways have fused with each other, thereby to create a much more responsive and creative system of governance for Europe than would be envisaged by a system that says that there are States on the one hand and European institutions on the other and that there should be some clear-cut separation between them.

Now, there are five particular points which provide the structure for my talk, and the five points are, first of all, to summarise the European Community's attributed competence under its Treaty; the second part is to talk about how, in practice, the European Community has exercised its competence under the Treaty; the third part relates to the rise of qualified majority voting in the Council and the way in which that has generated changed approaches to defining the Community's competence; the fourth part looks in particular at the European Court of Justice, the way in which the European Court of Justice polices the limits of European Community competence, and then the fifth and final part is to reflect on this pressure for a hard list of competence division, a clear-cut division between what the Community shall do and what the member states will do and my conclusion will be that the hard list may not be workable and, in any event, it is not desirable.

So, the first part, briefly, the question of the Community's competence. This is constitutionally very straightforward. According to Article 5 of the Treaty, the European Community has only the competence conferred on it by its Treaty, this is the principle of enumerated powers, the principle of attributed competence, a number of slogans describe this, but the basic point is that the European Community and European Union are more like our orthodox understanding of an international organisation, in principle, than they are like our orthodox understanding of a State. They don't have sovereign powers, they only have the powers which are attributed to them by the Treaty. So that's constitutionally fundamental, that the European Community has been created by and for its member states and that the member states have the power to control how far the European Community shall reach in its competence.

So that's part one, and that sounds pretty straightforward and, as a matter of constitutional law or constitutional principle, it is very straightforward.

The second part of my presentation relates to the practice of attributed competence. And if we look at the historical development of the European Community over more than 40 years, we see that, in practice, the principle of attributed competence has come to be softened in its practical application. That is to say, the European Community, in particular, operates in wider fields than one might expect it to operate if one were simply to look at the text of the Treaty. So the practice exceeds the position in principle. That has been, most prominently, the result of unanimous voting in Council,

which has taken a very broad approach to what the European Community can do.

Up until 1987, which is when the Single European Act came into force, but up until 1987, decisions in Council were in practice taken by unanimous vote. Now, on the one hand, unanimous voting might be thought to protect the democratic status of all the States, no decision will be taken unless the governments of all the member states agree to it. ("States", I note in passing, are not the same as their governments!). That means that it will be difficult to secure support for radical proposals. Only one State has to disagree, and unanimity will not be assembled and the Community measure will not be adopted. So unanimity looks like a very restrictive voting procedure, and in certain circumstances, it is. Each State has a veto.

But, if there is unanimity, the practical tendency has been for the Council to act without worrying too much about whether the Treaty genuinely authorises that action. That is to say, a political reading of competence driven by unanimous preferences of the member states came in practice to override any constitutional concern for exactly where the limits of Community powers should lie. So practical politics replaced constitutional law, with regard to Council activity.

A very good example of that lies in the field of consumer protection and environmental protection. Now, is the European Community competent to legislate in the field of environmental protection? Is it competent to legislate in the field of consumer protection?

The answers to those questions are in the Treaty. That's very straightforward. It's the principle of attributed competence. We know what powers the Community has by reading the Treaty. And the answer to the questions is this: does the Community have the power to legislate in the field of environmental protection? No, not until 1987, when the Treaty was revised to include environmental protection as a Community competence. Does the Community have the power to legislate in the field of consumer protection? No, not until 1993, when the Treaty was amended by the Maastricht Treaty to confer competence in the consumer field on the Community.

But, in practice, a great deal of legislation in the field of environmental protection and consumer protection was adopted by the Council in the 1970s and in the 1980s and it was done because the Treaty confers a power on the Community to harmonise laws in order to create an integrated market. And the Council harmonised national environmental laws and it harmonised national consumer laws with the result that their were put in place Community environmental laws, Community consumer protection laws. Many of those laws were not, in any objective sense, directed at building markets, instead, they were directed at giving shape to consumer policy and environmental protection at the European level. That was not formally authorised by the Treaty, but the Council acting unanimously wished to proceed in those policy directions and given the existence of unanimity and the availability of the harmonisation attributed competence, the laws were made.

No state objected, at least no government of a state objected, because, by definition, if they objected, the law would never have been made because there would not have been unanimity in Council. So there was never any serious constitutional challenge to this very broad reading of the scope of Community competence. The European Court was very rarely involved in these sorts of issues, there was no serious constitutional challenge to this process. Insofar as the Court did deal with these issues, it tended to approve what the legislator was doing. So, famously, in 1985, for example the Court commented that environmental protection was one of the Community's essential objectives. Now, there was absolutely nothing in the Treaty that justified the claim that environmental protection was an objective, let alone an essential objective of the European Community, but the Court was simply reflecting legislative practice at the time.

So, Community competence was driven outwards, mainly by the preferences of the governments of the member states, acting in Council, and without any interference by the Court. Now, all that changed in 1987. 1987 is the crucial dividing moment between the early years of the Community and the Community we know today. In 1987, the Single European Act introduced qualified majority voting in the Council for legislation in a number of areas, most of all, those associated with market building. And in each of the subsequent periodic Treaty revisions, at Maastricht, Amsterdam and Nice, when it comes into force, the scope of qualified majority voting in the Council has been extended.

And, of course, the reason for accepting qualified majority voting was to get more done. Qualified majority voting ensures that one state, which in the past was frequently the UK, cannot hold up the process. So qualified majority voting is essential to drive forward Community legislative activity, which is especially important as the number of member states increases.

On the other hand, of course, the rise of qualified majority voting means that the states can be outvoted. States can be bound by legislation that they oppose. We assume that the states have accepted that this will happen because they think that they will be able to outvote other states more often and more profitably than they are outvoted themselves. But, nevertheless, after 1987, after the Single European Act the rule that Community action is rooted in the consensus of all the member states is broken. What's happened since 1987 is the rise of a number of techniques for controlling Community action, techniques that are more subtle than the pre-1987 control mechanism which was simply voting against a measure in Council.

Before 1987, voting against a measure in Council stopped it dead, because unanimity was the rule. After 1987, voting against the measure in Council only helps if you have a sufficient number of allies to prevent a qualified majority vote being created. So, after 1987 there's a risk in the European Community of majorities overriding minorities and we see diverse techniques for securing a degree of minority protection. This is where, today, we see the crucial tensions in the European Community and in the European Union. The tension between wanting to get more done, on the one hand, and on the other hand, protecting the interests, the democratically expressed preferences of all the states.

Now, the most prominent technique which reflects this anxiety about increasing Community power held by the majority is subsidiarity. The principle of subsidiarity is exactly a reflection of the need to think it more closely about what should be the role of the European Community given that its role cannot be simply controlled by a vote in Council. So, subsidiarity is designed as a tool of good governance or at least as a tool to dictate where lies the best level of governance. Subsidiarity, under the Treaty, Article 5, dictates that the Community shall act only where the Community adds value, in short.

Now, this means, in a more positive sense, that the Community shall act where it does add value. So, subsidiarity has been presented in some states at least as being a renationalisation principle. It is not that. Subsidiarity is about separating out where the Community should act and where matters should be left to the member states. And the assumption underlying subsidiarity is that there should be some principled approach to the allocation of competence and not just simply a rule left in the hands of a majority in Council. Subsidiarity, lawyers will say, does not do that job very well. Subsidiarity is not precise. It is vague. And it probably is not useful, at least, to a Court, in making decisions about what should be the appropriate level of governance. But the political idea of subsidiarity is right in line with the key question of what should be the function of the European Community and European Union vis-à-vis its member states.

There are, other more precise, more operationally useful devices for controlling the Community. One example of this is the limits that are placed on new competences conferred on the Community. So, for example, if we look at the Single European Act and if we looked at the Maastricht treaty, we will see at first sight that the European Community's competence has been extended. Culture, public health, consumer protection... these were all competences that were conferred on the European Community on Treaty revision under the Single European Act or under the Maastricht treaty. And on the face of it, that sounds like the Community winning and the member states losing. But, if you look more closely at the text of the provisions you will see that, in fact, the competence transferred to the Community is expressly limited. The competences in those fields of consumer protection, public health, culture, represent Community competences to support and supplement state action. And harmonisation of laws in some of those areas is excluded by the Treaty. So the member states are actually playing a careful game here, they are adding to the Community competence areas but simultaneously strictly defining the circumstances in which the Community may exercise that competence, thereby leaving plenty of power in the hands of the member states. And part of the story there is precisely minority protection. States are willing to confer powers on the Community, as long as they have some clear guarantee that there are limits that the Community will not cross in exercising that competence.

So, the Community is competent in the field of culture, but the Community cannot harmonise cultural rules, which is plainly, I think, a very good thing. The model of minimum harmonisation is one other device in this vein. Most of the new policy areas transferred to the Community envisage that the Community shall set rules but they shall be minimum rules, which means the member-states have room to introduce stricter rules. The consumer protection rules set by the Community establish minimum standards of consumer protection. They do not stop member states from going higher in order to protect consumers more generously.

So that is part three of my presentation. This very qualified balance between the increase in qualified majority voting and the controls placed on the Community's power to act largely, as I say, driven by an overall notion of minority protection.

Part four of my presentation relates particularly to the European Court of Justice and my submission is that the European Court of Justice is fully aware of this delicate tension, that the European Court of Justice is fully in tune with this notion of, in short, minority protection. And although the story of the European Court of Justice in the early years was of a very aggressive court, a court willing to be activist in expanding its jurisdiction and that of the Community generally, today, the Court is much more circumspect, the Court is aware that it is only one actor in the Community law-making process and that it, the Court, must show caution when invited to expand the scope of Community competence in a manner which may damage minorities.

For example, the European Court was invited, in 1994, to decide whether the European Community is competent to accede to the European Convention on Human Rights. And the European Court of Justice decided that the European Community is not competent to accede the European Convention on Human Rights, but rather that the Treaty would have to be amended for accession to the European Convention to be constitutionally possible.

One reading of that, of course, is that the European Court is protecting itself from subordination to the European Court of Human Rights. Well,

that's possible. I would be a little more positive and I would say that the European Court is actually showing deference to the member states as masters of the Treaty. The European Court, in that position, was, in my opinion, asserting that a treaty amendment was required in order to authorise accession to the European Convention and a treaty amendment does not rest with the court. So an invitation, in that opinion, to the Court to pursue an ambitious interpretation of the scope of Community powers was rejected by the Court. In fact, the Court, in my opinion, was drawing a line between interpretation of a treaty, which it can do, and amendment of the treaty, which it can not do and which it would not do in that case.

I mention in that vein also the Grant case. The Grant case involved discrimination against a woman on the basis of her sexual orientation. It was a case before British courts in which a lesbian claimed to have been discriminated against on the basis that she was homosexual. Now, the question for the European Court of Justice was whether that form of discrimination fell within existing Community law against sex discrimination. And it was a difficult point of interpretation. Did discrimination on grounds of sex cover discrimination on grounds of sexual orientation? In Grant, the European Court of Justice considered that the Community rules, as they stood, did not cover the case. An interesting point is that the European Court said that there was a provision in the Amsterdam Treaty that would confer legislative competence on the Council to act in the field of discrimination on grounds of sexual-orientation discrimination and that therefore, it, the Court, would not interpret existing law in an ambitious way so as to catch this form of discrimination. That is to say, the Court was saying that it is not our constitutional job to extend the law to catch this form of discrimination, rather, it is the responsibility of the Council to adopt legislation.

Again, the court is drawing a line to its own role and putting an emphasis on the political process as the producer of laws. It was particularly remarkable that the Court could take this view in Grant, because at that time Grant was decided, the Amsterdam Treaty, which created the relevant legislative power, was not even in force. It had been agreed, and the Court knew about it, but it was not in force. So the Court was being cautious, the court was being deferential to a legislative procedure that, at the time, was not even available. And this again tells me that the Court is anxious not to extend itself into areas of activist interpretation, where it might be seen to be treading on the toes of the legislature of the European Community.

One of the most striking examples of these new trends is the Court's decision in the "tobacco advertising" case, Case C-376/98. In October 2000, the Court annulled a directive on the advertising of tobacco products and this was the first time that the court had annulled a directive harmonising laws of this type. The background to the case was that the Community had, for a number of years, been pursuing a much more restrictive approach to the advertising of tobacco products. And a directive had been adopted by the Council in 1998 which, in effect, prohibited all forms of advertising of tobacco products with only very few exceptions.

Now, that sounds like a public health measure, you might think. But it was not possible to adopt such legislation as a public health measure because, although the Community has competence in the field of public health, as I have already said, that competence excludes any possibility of harmonising laws on public health. So the directive suppressing the advertising of tobacco products could not be adopted as a public health measure. It was adopted, in Council, as a harmonisation measure, it being argued that the suppression of advertising of tobacco products contributed to integrating markets, which is the very purpose of harmonisation under the Treaty.

Germany voted against the measure in Council, but it was adopted by qualified majority vote. Harmonisation measures can be adopted by qualified majority vote. Germany then sought the annulment of the directive before the European Court of Justice and Germany won. The European Court agreed with Germany's submission that this directive was invalid.

Now, that to me is a classic case of the European Court of Justice protecting minorities. In American terms that's a state's rights judgment. That's the European Court of Justice holding that the majority in Council had misread, had over-read, the scope of Community competence and the Court protects Germany, the minority, in a legal setting. Germany, the minority, had lost in the political setting, precisely because it had been outvoted. That sort of case would just never have arisen before 1987 because Germany would have voted against the measure in Council and it could not have been adopted because the regime then was unanimity in Council.

It is exactly the rise in qualified majority voting that makes these sorts of cases more likely and exactly these sorts of cases put the European Court in the constitutional firing line. Tobacco advertising as a decision shows that the Court is prepared to assert a constitutional limit to Community action and the Court is not prepared simply to allow a majority in Council to make a political choice about the limits of Community competence.

Now, the fifth and final part of my presentation, and I'll keep it very brief, relates to the pressure to have a hard list of competences. The argument is that there should be a clear list of what the Community can do and what the member states can do.

I doubt that is possible to achieve. It seems to me that the history of the European Community is built on the dynamic relationship between different institutions of the Community and between the institutions of the Community and the member states.

It is the interrelation of functions which has been characteristic to the growth of the European Community and to separate out what the Community can do on the one hand and what the member states can do on the other is to suppose that there is some kind of antagonistic relationship between them. But that is not the way things are at all. Nor is it the way things should be. So, the idea of a clear-cut separation of competence does not seem to me to reflect the collaborative nature of the European Community within which the European Community cannot survive without its member states and the member-states cannot survive without the European Community, or at least, the member states cannot satisfy the political and economic desires of its citizens without the framework of the European Community within which to co-operate.

My second objection to this idea of a clear cut list of competences is that it is addressing a problem that has already been tackled. That is to say, the main reason, as I see it, for having a hard list of Community competences is precisely to stop the European Community from being over-ambitious under a voting rule which is majority voting. But those sorts of problems have already been addressed. Subsidiarity, restrictive definitions of competence, minimum harmonisation, control by the European Court of Justice, all these characteristics that I have mentioned this morning seem to me to be exactly designed to stabilise the relationship between the Community and the member states, to take seriously the need to protect state competences against majority preferences expressed at Community level. That is to say, there is already a re-balancing going on in the political and judicial systems of the European Community, which does take seriously the need to protect state rights. And therefore, I think that this drive towards having a hard list of competences is tackling a problem that is already being addressed and it may well damage the re-balancing process that is already going on.

So, to conclude, when I hear Joschka Fischer talking about the need of constitutional finality in Europe, I get very nervous. Constitutional finality is, to me, very unappealing. If we are to have a constitutional finality, we have to decide on the correct vision for Europe's constitutional future, which implies, inevitably, we will be rejecting competing visions. Well, I don't think that is what we should do in Europe. We should, as far as possible, respect all visions. The current system, to me, seems to be a balancing process that does achieve that and therefore I would be rather keen to state the merits of the current system rather than to leap to change driven by a notion of constitutional finality.

Thank you.