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Title: The 'Retained Powers' Formula in the Case Law of the European Court of Justice: EU Law as Total Law?

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Abstract:

The case-law of the European Court of Justice is full of standard formulas. This article analyses one such formula, the so-called 'formula on retained powers' according to which the scope of application of EU law extends to subject areas over which Member States are supposed to have retained powers. It attempts to trace it back through the line of ECJ decisions, to analyse the specific components and arguments encapsulated in it, and to identify its justifications and effects. It is argued that the recurrence of this judicial formula amounts to the emergence of a new doctrine in EU law called the 'total law doctrine' based on both the recognition of the essential own capacities of the Member States within the integrated European space and on the requirement to include certain under-protected interests and situations in the manner national authorities usually use to think and to act.

ESSAY**THE ‘RETAINED POWERS’ FORMULA IN THE CASE LAW OF THE
EUROPEAN COURT OF JUSTICE: EU LAW AS TOTAL LAW?**

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1. Introduction

It is almost an adage. The expression has become commonplace in EU law. When confronted with a controversial issue of applicability, the Court usually refers to a single formula – or to a slight alteration of it –, set out thus:

Whilst it is not in dispute that EU law does not detract from the powers of the Member States [recognized in particular in the areas of direct taxation, social protection, education, attribution of nationality, civil status of persons], the fact remains that, when exercising those powers, the Member States must comply with EU law.¹

Such State powers are occasionally labelled ‘retained powers’ by the Court or, less frequently, ‘areas of reserved competence’.² For this reason, I call this expression the ‘formula on retained powers’. Notice, however, that in the French language, the working language of the Court, the formula is asserted in terms of ‘*compétence/competence*’ rather than in terms of ‘*pouvoirs/powers*’.³

Literally this formula means 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 legitimizes the application of EU law in any domain that is not a priori within the Union’s scope of intervention.⁴ 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.⁵ As a result, the applicability of EU law particularly of specific provisions

¹ See e.g. Case C-73/08, *Bressol* [2010] § 28. And see the list of cases mentioned in notes 49 and 50.

² See e.g. Case C-279/93 *Schumacker* [1995] § 21 and Case C-281/06, *Jundt* [2007] § 85.

³ In the *Schumacker* case, the central passage reads: ‘*Il convient de constater que si, en l’état actuel du droit communautaire, la matière des impôts directs ne relève pas en tant que telle du domaine de la compétence de la Communauté, il n’en reste pas moins que les États membres doivent exercer leurs compétences retenues dans le respect du droit communautaire*’. In the *Bressol* case, it reads ‘*il convient de rappeler que si le droit de l’Union ne porte pas atteinte à la compétence des États membres en ce qui concerne l’organisation de leurs systèmes éducatifs et de la formation professionnelle – en vertu des articles 165, paragraphe 1, et 166, paragraphe 1, TFUE –, il demeure toutefois que, dans l’exercice de cette compétence, ces États doivent respecter le droit de l’Union et, notamment, les dispositions relatives à la liberté de circuler et de séjourner sur le territoire des États membres*’.

⁴ Except perhaps in relation to Article 346 TFEU (essential interests of state security). In relation to Art. 345 (the system of property ownership), see Case C-302/97, *Konle* [1999] § 38.

⁵ The list of exclusive and shared competences conferred upon the Union is in articles 3 and 4 TFEU.

enshrined in primary law (freedoms of movement and general principles of EU law) appears to be indifferent to the constitutional attribution of powers.⁶ The scope of EU law may reach far beyond the limits of the legislative powers bestowed on EU institutions. It is a phenomenon that K. Lenaerts has identified and coined ‘*the framing of national laws by EU law*’.⁷ As a translation from the French expression ‘*encadrement des droits nationaux*’, it is used in the combined senses of ‘limiting’, ‘containing’, ‘ring-fencing’.⁸

The surprising thing is that while the effects of such case-law upset some specialists of the branches of national law that are so affected (especially tax law, private international law and social protection law specialists), its source is rarely examined. It may be that the formula says nothing that the generalists of EU law do not already know: EU law, in some of its provisions, has a practically unlimited field of application. This is the result of a well-established case law particularly in the area of the freedom of movement. Provisions on freedom of movement are ‘non-specific’ in scope⁹ 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*’.¹⁰ 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.¹¹ Accordingly, it has been long and rightly stated that ‘*There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community*’.¹²

⁶ See S. Weatherill, ‘Competence and Legitimacy’ in C. Barnard & O. Odudu (eds), *The Outer Limits of European Union Law* (Hart Publishing, Oxford, 2009).

⁷ K. Lenaerts, ‘Federalism and the Rule of Law: Perspectives from the European Court of Justice’ (2010) 33 *Fordham International Law Journal* 1338.

⁸ See K. Lenaerts, ‘L’encadrement par le droit de l’Union européenne des compétences des Etats membres’ in *Mélanges en l’honneur du Professeur Jean Paul Jacqué* (Paris, Dalloz, 2010).

⁹ See, the opinion of A.G. Kokott in *Tas-Hagen and Tas* (Case C-192/05 [2006]), § 34. See also K. Lenaerts, ‘Les répercussions des compétences de la Communauté européenne sur les compétences externes des Etats membres et la question de la préemption’, in P. Demaret (ed), *Relations extérieures de la Communauté européenne et marché intérieur: aspects juridiques et fonctionnels* (Story Scientia, Brussels, 1987).

¹⁰ See e.g. Case 72/83 *Campus Oil* [1984] § 32.

¹¹ Case 203/80, *Casati* [1981] § 22; Case C-387/93, *Banchero* [1995] § 58. For discussion, see V. Michel, *Recherches sur les compétences de la Communauté* (L’Harmattan, Paris, 2003).

¹² K. Lenaerts, ‘Constitutionalism and the many faces of federalism’ (1990) 38 *American Journal of Comparative Law* 205, 220.

In view of this, one may wonder whether the retained powers formula, incorporated in the Court's case law in the mid 1990s, is not essentially rhetorical in its scope. But let us not conclude too hastily. For, if not its content, the context in which the formula is currently expressed is new. The overabundance of provisions limiting the Union's competences in the treaties is one of the most obvious marks left by the Lisbon Treaty. The new Treaties assert that 'the Union shall act *only* within the limits of the competences conferred upon it by the Member States',¹³ that 'competences *not conferred* upon the Union in the Treaties remain with the Member States',¹⁴ that proposals for the amendment of the Treaties 'may serve either to increase or to *reduce* the competences conferred on the Union',¹⁵ or that '[t]he Charter *does not extend* the field of application of Union law *beyond* the power of the Union'¹⁶. All of this come down to putting out one and the same message: *the bounds of the scope of EU law are strict; they should correspond strictly to the competences attributed to the EU*. True, from a purely formal point of view, only Article 51(2) of the Charter specifically relates the scope of application of EU law to Union powers. However, it is submitted that Member States when drafting the treaties do not think in terms of scope of application. They think in terms of 'allocation of competences', and by repeatedly limiting the competences allocated to the Union and underlying these limits they intend to limit the interference of EU law with the areas of 'retained powers', that is areas which do not pertain to shared or exclusive Union's competences. Notice that even the 'internal market' consisting of the provisions on free movement is referred to as a field of competence in Article 4 of the Treaty on the Functioning of the European Union. As a field of shared competence, it too is supposed to have inherent limits.

The Court's formula reads like a denial of the message enacted by the Member States as 'Masters of the treaties'. Far from containing the scope of EU law, it serves as a vehicle for the *totalization* of the process of integration. It seems that there are no longer any reserved domains that are not subject to the 'reservation' that, in exercising their powers, Member States must abide by EU law.¹⁷ This article will first trace back the roots of the formula in the past case-law (II). It will then attempt to analyse the argument encapsulated in it (III). This will be done by comparing the argument to another more traditional one

¹³ Art. 5 (2) TEU.

¹⁴ Art. 4 (1) TEU.

¹⁵ Art. 48 (2) TEU.

¹⁶ Art. 51 (2) Charter of Fundamental Rights of the European Union.

¹⁷ This reservation was formulated notably in *Micheletti* (Case C-369/90, § 10) on state power with respect to nationality and reiterated in Case C-135/08, *Rottmann* [2010] § 47.

at work in the case-law of the Court. Finally I will try to discuss the distinctiveness of this argument by investigating its possible justifications and implications (IV).

2. From ‘Partial’ to ‘Total Integration’

It has taken some time before the Court worked out the formula on retained powers. From the *Steenkolenmijnen* case of 1961 to the *Schumacker* case of 1995, there has been a clear yet twisted progression: the formula first developed and then petered out into scattered references before re-emerging as a general rule of adjudication. Under this formula, the Court now classifies anything that does not naturally fall within the EU’s area of intervention. Notice that in the same period there has been a shift away from an EC law tending towards the complete unification of national markets in certain ‘decisive but limited’ sectors, towards a more flexible system of EU law but that extends to those sectors supposedly ‘reserved’ for Member States.

2.1 Partial Integration and Exclusive Authority

The *Steenkolenmijnen* decision is one of the earliest decisions issued by the Court under the European Coal and Steel Community treaty. An association of Dutch undertakings had asked the Court to recognize that Germany had violated the ECSC Treaty by paying a bonus for mineworkers out of public funds.¹⁸ This bonus caused an outflow of labour to Germany from neighbouring Dutch companies, which saw it as a manifest infringement of the conditions for fair and undistorted competition in the common market for coal and steel. Under article 4 of the ECSC Treaty, payment of any state aid or subsidy to companies to the detriment of competition is prohibited. To enforce this prohibition, the Community’s institutions have been granted an exclusive power of sanction:

in the Community field, namely in respect of everything that pertains to the pursuit of the common objectives within the common market, the institutions of the Community have been endowed with exclusive authority.¹⁹

¹⁸ Case 30/59, *De Gezamenlijke Steenkolenmijnen in Limburg v. High Authority of the European Coal and Steel Community* [1961].

¹⁹ The Court again emphasizes ‘the exclusive character of the Community’s jurisdiction within the Community’ further on (ECR, p. 22).

However, this authority is only relative. In *‘those sectors of the economy of the Member States which do not come within the province of the Community’*, the Member States continue to exercise *‘residual powers’*.²⁰ This is true of *‘their social policy’* and *‘over a wide area of their fiscal policy’*. This is the result of *‘the partial nature of the integration effected by the Treaty’*. Partial integration raises a specific problem, the problem of boundaries: for while there are two separate domains, the two exclusive authorities governing them are exercised within a single territory and with respect to the same addressees. It may be consequently that, in exercising their retained powers over taxation, Member States affect the conditions of competition protected by the Community in the coal and steel industries.

To this problem, the Court came up with a nuanced response. For one part, it ruled that

the jurisdiction of the Community [may] impinge on national sovereignty in cases where, because of the power retained by the Member States, this is necessary to prevent the effectiveness of the Treaty from being considerably weakened and its purpose from being seriously compromised.

The Community should be able to act to effectively pursue the purpose of constructing a common market laid down by the Member States in the Treaty.²¹ However, only limited prerogatives are conferred thereby. The Court refused to extend to these domains the sanction power the Community enjoys within its *‘own domain’*. The Treaty only grants the High Authority in such instances *‘a limited power of recommendation’*, for *‘remedying’* infringements of competition, to try to *‘correct or mitigate’* their effects. This may be insufficient to remove these infringements of competition which *‘conflict with the general purpose of the Treaty’*; but that is *‘the inevitable and legitimate outcome of the partial integration which the Treaty seeks to attain’*. This is what the Treaty seeks. From the outset, the Court experienced European integration in terms of an insuperable contradiction. How could one account both for the specialization of spheres, the Community sphere and the national sphere, and for the assumption of an open-ended and unspecific general purpose such as the *‘existence of the common market’*? Two options were implicitly rejected by the Court: the idea of strict parallel competences and the principle of the absolute superiority of

²⁰ Note that the French original version reads *‘pouvoirs retenus’* (retained powers) translated *ex post* in English *‘residual powers’*.

²¹ Notice how close this line of argument is to the one the Court uses in *AETR* to justify recognition of implicit competences in the Community (Case 22/70 [1971]). For an analysis of the argument of implicit competences, see G. Tusseau, *Les normes d’habilitation* (Dalloz, Paris, 2006).

Community competence. There remained the hypothesis of ‘the necessary impingement of the Community competence’.

The Court extended this approach to the domains covered by the European Economic Community treaty in the *Commission v. French Republic* judgment of 10 December 1969.²² France was accused of maintaining a rate of preferential rediscount for French exporters. The French government argued that this decision had been taken in a sphere (the monetary sphere) in which the Member States were exclusively competent. The Court readily granted this: for sure such policy was a form of ‘*exercise of their reserved powers*’. States had jurisdiction to issue, manage, and defend their currencies.²³ And yet, in this same sphere, there are general rules compelling states to coordinate their economic policies and to treat their policies on foreign exchange as a matter of ‘*common concern*’ (§14). Being the expression of a fundamental requirement of ‘*solidarity*’ within the Community, these rules apply beyond the sphere of restrictive powers attributed to Community institutions. That suffices to conclude that ‘*the exercise of reserved powers cannot therefore permit the unilateral adoption of measures prohibited by the Treaty*’. While European integration is partial insofar as the attributions of Community institutions are limited, it does wholly commit the State. The Court suggests the idea of certain ‘total obligations’. Membership of the Community implies that governments undertake to cooperate in a spirit of loyalty and solidarity, even in policies that come within the scope of their retained powers. Now, that means in particular complying with the EEC obligation not to grant aid without first being so authorized by the Commission. Notice that in this case the exclusive powers of the Community are entirely protected and not ‘lightened’ as in the ECSC case. Moreover, in the EC/EU law on state aid, the Court has nowadays relinquished all references to retained powers. In such cases, it simply states that ‘*rules relating to tax are not excluded from the scope of Article 87 EC*’.²⁴ Even so, the theory of the two spheres has not vanished. It reemerges, although in another form, in the domain of the freedom of movement.

²² Joined Cases 6 and 11/69 *Commission v. France* [1969]

²³ The exclusive competence of States in the monetary sphere was recognized by the Court in a series of subsequent judgments: Case 95/81 *Commission v. Italy* [1982]; Case 57/86 *Greece v. Commission* [1988], Case 127/87 *Commission v. Greece* [1988].

²⁴ Case C-182/03, *Belgium and Forum 187 ASBL v. Commission* [2006] § 81.

2.2 Total integration and the Capacity to be Affected

The *Casagrande* decision issued in 1974 is not a proper extension of this first approach, but it constitutes an interesting step towards totalization, mirroring the formula finally reached.²⁵ This case concerned the refusal to award an educational grant for the child of an Italian worker who was resident in Germany. Article 12 of the EC Regulation on the free movement of workers within the Community provides that, in order to promote their integration, the children of migrant workers' families shall be admitted to educational courses under the same conditions as the nationals of the host state. Now, the German authorities argued that access was one thing, aid another; the latter being part of the general education policy and within the exclusive power of Member States. To this argument, the Court retorted:

Although educational and training policy is not as such included in the spheres which the treaty has entrusted to the Community institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training; Chapters 1 and 2 of Title III of Part Two of the Treaty in particular contain several provisions the application of which could affect this policy.²⁶

In this paragraph, the specific provision it is referred to is the rule of non-discrimination between nationals and migrant worker family members. Non-discrimination is raised to both an objective of the Community and a basis for the exercise of Community competence which is to apply as broadly as possible. This justifies the extension of the rule of non-discrimination to a matter (measures intended to facilitate educational attendance) considered as closely related to the one covered by the EC regulation.

Casagrande is remarkable in that it outlines a distinction that currently governs the reasoning of the ECJ: the distinction between the *exercise* of competence and the *existence* of competence. In their existence, competences may occupy separate spheres; but in their exercise, they come together, and the application of EU law may 'affect' any national policy (§6). The reference to 'affecting' mirrors the 'impingement of competence' stated in the *Steenkolenmijnen* case.

²⁵ Case 9/74, *Casagrande* [1974].

²⁶ For a similar formulation, see Case 65/81, *Reina* [1982], § 15 (demographic policy); Case 152/82, *Forcheri* [1983], § 17 (educational and training policy).

However, this formulation is still a long way from the consolidated formula to which the Court currently adheres. This formula was cast for the first time in 1995 in the *Schumacker* case in reference to direct taxation: *‘Although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law’*.²⁷ Compared with *Casagrande*, this expression works as a chiasma. First, where the Court referred in 1974 to ‘the competence of Community institutions’, it now refers to the ‘powers retained by the Member States’. Second, the problem is not captured in terms of ‘powers transferred to the Community’ but in terms of powers exercised by the Member States. Thirdly, the Court doesn’t wonder about the ‘effect of the Treaty on national policy’ but rather about the ‘effect’ certain national measures may have on the sphere governed by the Treaty provisions.²⁸ The outcome of this transformation is that the language of ‘competence’ is henceforth associated with the Member States, while the language of the ‘rule’ is associated with the Union. This is not just wordplay. The focus has changed. Instead of focusing on the extension of 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.

In reality, this formulation was elaborated a little earlier in a 1991 judgment, *Commission v. United Kingdom*.²⁹ In this judgment, the Court refers to a line of cases dating back to the 1969 judgment.³⁰ Relying on earlier formulations, it introduces the expression that *‘powers retained by the Member States must be exercised consistently with Community law’*. To this it adds the distinction between the ‘existence and exercise’ of competence. The full sequence reads:

as Community law stands at present, it is for the Member States to determine, in accordance with the general rules of international law, the conditions which must be fulfilled in order for a vessel to be registered in their registers and granted the right to fly their flag, but, in exercising that power, the Member State must comply with the rules of Community law.

²⁷ Case C-279/93, *Schumacker* [1995], § 21.

²⁸ See Case C-120/95, *Decker* [1998], § 24.

²⁹ Case C-246/89, *Commission v. United Kingdom* [1991].

³⁰ The Court cites judgments re-iterating the solution and formulation of the 1969 decisions, all in the monetary sphere (see note 23).

It is not unimportant that this sequence was introduced in answer to an argument by the defendant government that the matter at hand (granting of nationality to ships) comes within ‘the competence of each State under public international law’. The flag flown on the high seas is one of the rare spheres in which international law lays down a principle of exclusivity for the state.³¹ The power to determine the conditions for attributing nationality to ships flying its flag is a power that belongs to a state and to one state alone. The Court’s interpretation consists in deriving from this principle of exclusivity with respect to other states a rule as to the distribution of powers between the Member State and the EU. As a result, ‘exclusive competence’ is interpreted as meaning that the Member State is legitimately in a position to act wherever the EU fails to do so.³² The Court responds to the concern of the government to oppose any interference from foreign or supranational organs in his ‘reserved’ sphere. But, in including this competence in the framework of a division of powers between the Member State and the EU, the Court is in the position to recall the Member States the obligations they take on under the Treaty. The exclusivity recognized by international law is echoed by the obligations derived from Community law, which the Court takes it upon itself to protect.

3. The Argument from Totalization

The retained powers formula was stabilized from the mid 1990s and possibly ready to extend the empire of EU law to wholly new sectors. And that would probably have been the case, had another more straightforward argument not been developed by the Court. The argument from Constitutionalization has long barred the way to the argument from Totalization.

3.1 The ‘Constitutionalization’ of EU Law as a Compelling Argument

In a short paper entitled ‘Fédéralisme et intégration’ published in 1973, P. Pescatore pointed out that the argument that had arisen from the *Steenkolenmijnen* decision was already outdated.³³ The *Van Gend en Loos* and *Costa v. Enel* judgments contributing to the ‘constitutionalization of the

³¹ See J. Combacau, ‘Conclusions générales’, in *SFDI, Les compétences de l’Etat en droit international*, (Pedone, Paris, 2006) 315.

³² On the origin and the different meanings of ‘exclusive competence’ in public international law, see J. Basdevant, ‘Règles générales du droit de la paix’, *Recueil des cours de l’Académie de droit international* (1936), t. 58, IV, (Sijthoff, Leiden, 1968), not. Chap. VII.

³³ ‘Fédéralisme et intégration: Remarques liminaires’ (1973), reprod. in *Etudes de droit communautaire européen 1962-2007* (Bruylant, Bruxelles, 2008) 450.

Community legal order' had supposedly made this very 'first approach' obsolete. In recognizing that, by virtue of the Community Treaties, the Member States limited 'their sovereign rights' and created rights directly for individuals, the Court unleashed new potential. It conferred on individuals the capacity to go to the national courts to force states to comply with their obligations under the Treaty. Arguably, the mechanism of assertion of individual rights has superseded questions relating to the delimitation of competences. EC/EU rights are functionally broad in scope and not sector-specific. Their application is supposedly triggered by any cross-border situation that relates to the establishment of the common/internal market. Therefore, the expansion of the scope of EU law can easily find a justification in the principle of effectiveness of these rights and of their protection. Moreover, state justifications for derogation from EU 'constitutional' law based on the protection of core national competences are banned by the Court. In short, invocation of EU subjective rights is largely indifferent to the delineation of competences between the EU and its Member States.

A good illustration of this is a judgment which was delivered in the same year as Schumacker but is much better known. The *Bosman* case pertains to relations between Community law and professional sport.³⁴ One of the issues it raises is whether this sector can escape the hold of the treaty rules on the free movement of workers. The Court acknowledges the fact that sport is a special domain that cannot be confused with 'commercial activities' normally subject to the EC Treaty. Accordingly, it points out the '*considerable social importance of sporting activities and in particular football in the Community*' (§106).³⁵ However, this specificity cannot, in its view, count as a restriction of the application of the Treaty: '*Having regard to the objectives of the Community, sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty*'.³⁶ To determine whether an activity falls within the ambit of the Treaty, it is not therefore any specific character it may have that matters; it suffices to establish a relationship between the activity and the accomplishment of the objectives of the EC Treaty, in particular the objective of establishing the common market.³⁷ The reason for including this activity in

³⁴ ECJ, 15 December 1995, *Bosman*, Case C-415/93.

³⁵ See also the analogy with the field of culture suggested by the German government (§ 71).

³⁶ Case 36/74, *Walrave* [1974] § 4.

³⁷ Compare the characterization of an economic activity used by the Court in competition law. It has been consistently held that '*any activity consisting in offering goods and services on a given market is an economic activity*' (Joined Cases C-180/98 to C-184/98, *Pavlov and Others* [2000]). See L. Idot, 'Concurrence et libre circulation. Regards sur les derniers développements' (2005) 3 *Revue des affaires européennes* 391-409.

the sphere of EU law is that the organization of this activity ('the exercise of sports') may call into question one of the essential objectives of the Community. Therefore it may imperil one of the fundamental individual rights conferred by the Treaty, that of leaving one's home country to pursue an economic activity in any other Member State. The applicability of Community law is assessed by the effects of sports measures on the establishment of the common market. But notice it is also by these effects that its application is generally assessed and a restriction to trade constituted. It follows, in the reasoning about applicability, that the judgment on the restriction to trade has already begun. It is therefore only at the stage of justification of a possible derogation that the particular features of state regulated activity shall be recognized.

The technique consists therefore in submitting a sphere that does not fall within the purview of the EU to the fundamental provisions of the Treaty by relying on the teleology included in the Treaty. All the national regulations that are liable to impinge on the objectives of economic integration will then come within the scope of application of EU 'constitutional' law (in particular the freedoms of movement). This technique has been used especially in areas in which considerations of social cohesion or public morality might seem to prevail over strictly market aspects. This has been true in the sphere of gambling, characterized by the Court as a field of economic activities but of a 'peculiar nature'.³⁸ This has led to an *expansionism* of EU law whose conditions of applicability are substantially broadened, tied sometimes to a form of *pluralism*, insofar as the specific activities may give rise to a special more relaxed regime of justification.³⁹

Relying on this case-law, one might think that national powers have been 'abolished'.⁴⁰ The problem of the allocation of powers seems to have been removed: freedoms of movement are liable to apply to any sphere so long as the political project which those freedoms serve – the establishment of the internal market – might be affected. How then could one explain the return of the retained powers formula in certain judgments at this same period of the history of case law? What does the formula bring that could not be settled by the invocation of EU rights? Perhaps nothing more than an answer to arguments

³⁸ Case C-275/92, *Schindler* [1994]. On services for emitting and transmitting televised messages, see also Case 52/79, *Debaue* [1980] § 12.

³⁹ On gambling, see the highly conciliatory judgment, Case C-275/92, *Schindler* [1994]. After a line of more restrictive cases, the Court again loosened its analysis of restriction to trade in Case C-42/07, *Liga Portuguesa de Futebol* [2009].

⁴⁰ Such is indeed the conclusion of Denys Simon, *Le système juridique communautaire*, 3rd ed. (PUF, Paris, 2001) § 89.

that were not produced in the *Bosman* case because of the non-state character of the measures at issue in that case. The *Duphar* decision clearly points in that direction. Invited to rule on the provision of medicinal drugs to patients under a national social security system, the Court acknowledged for the first time that ‘Community law does not detract from the powers of Member States to organize their social security systems’.⁴¹ It added, however, that the regulation, being liable to ‘affect’ the marketing of medicinal preparations, remained subject to the rules on the free movement of goods. At most, it was appropriate to take account of the ‘special nature’ of the activity. The solution in *Duphar* is akin to that in *Bosman*.⁴² As resumed by Advocate General Fennelly in a later case, the application of national social security systems must respect ‘the exercise of the rights conferred by Community law’.⁴³ Observance of the retained powers of Member States is limited to ‘the inherently uncommercial act of solidarity’ that underpins such systems; but when EU objectives are affected, compliance with the provisions of the Treaty is mandatory.⁴⁴

According to this argument, any state regulation that is an obstacle to the pursuit of the objectives of economic integration is included within the sphere of EU law. Within this sphere, the provisions of EU law implementing the Treaty objectives ‘take precedence over any national rule which might conflict with them’.⁴⁵ At first glance, the *Schumacker* formula does not lead to a different outcome. The Member State that retains powers is simply acknowledged in these powers but still bound to comply with the rules of the Treaty. The express recognition of ‘retained powers’ to Member States does not seem to change anything in the structural relationships between EU law and Member States.

⁴¹ Case 238/82, *Duphar* [1984] § 16.

⁴² The only difference is that, instead of involving the specific character of the activity in question at the justification stage, the Court makes a point of it in characterizing the restriction: ‘in view of the special nature, in that respect, of the trade in pharmaceutical products, namely the fact that social security institutions are substituted for consumers as regards the responsibility for the payment of medical expenses, legislation of the type in question cannot in itself be regarded as constituting a restriction on the freedom to import guaranteed by article 20 of the Treaty if certain conditions are satisfied’ (§ 20). A similar solution is reached in *Debauxe* (Case 52/79 [1980] § 16) on TV services. These solutions are akin to the technique that was soon to be developed by the Court in *Keck and Mithouard* (Joined Cases C-267/91 and C-268/91, *Keck and Mithouard* [1993]).

⁴³ Opinion of AG Fennelly in *Sodemare* (Case C-70/95 [1997]), § 28.

⁴⁴ See also, on the organization of armed forces, Case C-285/98, *Kreil* [2000] § 15.

⁴⁵ Case 118/75, *Watson and Belmann* [1976] § 16.

3.2 The Development of the Argument from Totalization

The opinion of Advocate General Tesouro in the *Kholl* and *Decker* cases points in a slightly different direction.⁴⁶ These are the first cases concerning the reimbursement of health care received by a Member State national in another Member State. Following the interpretation of Advocate General Fennelly in *Sodemare*, he considers that the case law of the Court with respect to retained powers ‘*by no means implies that the social security sector constitutes an island beyond the reach of Community law*’. However, he also suggests there is a need to take into account the duty to respect the State’s organizational capacities in the sphere of its ‘reserved powers’. According to the Advocate General, two kinds of requirements are involved in these cases: on the one hand ‘*the survival of social security schemes*’, which determines social cohesion in all European states, and on the other the ‘*fundamental principle*’ of prohibition of any discrimination on the grounds of nationality, the *raison d’être* of European integration. This is the core of the Argument from Totalization. It lies in a form of ‘*dramatization*’.⁴⁷ Whenever a regulatory system pertaining to an ‘area of reserved competence’ is challenged before the Court, the question arises: How to safeguard the ‘essential functions’ of Member States without undermining the ‘core’ of EU integration? This indefinite oscillatory motion will repeat in the case law.⁴⁸ The political and social context of distrust towards further integration and federalization of Europe may have played a role in the emergence of such a change in formulations.

One question remains however: What is to be considered as ‘retained powers’? As developed in the case-law, this notion is multipurpose. It covers different situations. By this, the Court designates both and indifferently powers which are truly exclusively of the State’s competence (conditions for granting nationality, system of attribution of surnames),⁴⁹ spheres in which the EU has received competence but only limited powers to act – the road to harmonization

⁴⁶ Opinion of AG Tesouro in *Decker* (Case C-120/95 [1998]) and *Kohll* (Case C-158/96 [1998]).

⁴⁷ I borrow this term from D. Ritteng, ‘Les Etats membres face aux entraves’ in L. Azoulai (ed), *L’entrave dans le droit du marché intérieur* (Bruylant, Bruxelles, 2011).

⁴⁸ The Court’s reasoning in *Rottmann* is an excellent example of this. The Court swings incessantly between the legitimacy of state action in the withdrawal of nationality and the need to allow for the fundamental status of the person in question as an EU citizen. This is resolved by the creation of a double test of proportionality imposed in decision making, one with respect to national law; the other with respect to EU law (Case C-135/08, *Rottmann* [2010] § 55).

⁴⁹ Case C-135/08, *Rottmann* [2010]; Case C-148/02, *Garcia Avello* [2003]; ECJ, Case C-353/06, *Grunkin Paul* [2008]; Case C-208/09, *Sayn-Wittgenstein* [2010]; Case C-391/09, *Runevič-Vardyn* [2011].

of national laws being totally or partly prohibited (education, public health, social protection, social rights),⁵⁰ and a domain in which the EU has exercised the powers of harmonization that it possesses only in a piecemeal fashion (direct taxation).⁵¹ No specific legal criterion accounts for such diversity. What brings these subject matters together is rather a certain idea of what the State can and should do in Europe. The Court comes close here to what in the Treaty is called without being defined the ‘essential State functions’⁵². These are the function of protecting of individuals by granting nationality, attributing surnames, granting social rights; but also the function of integrating the members of the society and ensuring social cohesion via education, health, social protection and redistribution. The so-called ‘retained powers’ are the collective goods the State is supposed to protect so as to ensure the social cohesion of its own population in its territory. That justifies that, in all these spheres, the State is vested with a unilateral power to act, excluding the intrusion of EU organs. Arguably, by recognizing retained powers, the Court recognizes that Member States have a primordial (rather than exclusive) power in the organization of a subject area that is considered to be essential to social integration. States are no longer reduced to powers potentially destructive for the establishment of the common market; they are recognized as autonomous

⁵⁰ On education: Case C-76/05, *Schwarz and Gootjes-Schwarz* [2007]; Case C-11/06, *Morgan* [2007]; Case C-73/08, *Bressol and others* [2010].

The sphere of health is unusual in that, for some specific aspects (safety art. 4(2) TFEU), it involves shared competence between the EU and the Member States, the EU legislator being authorized to act uniformly and restrictively, while, for other aspects, any harmonization is excluded (art. 168 TFEU): see Case C-372/04, *Watts* [2006].

The same is true of social security where certain ‘non essential aspects’ relating to the free movement of people may be the subject of joint action (art. 48 TFEU and, currently, art. 21 TFEU). On social security: Case C-158/96, *Kohll* [1998]; on welfare benefits: Case C-192/05, *Tas-Hagen* [2006]; Case C-499/06, *Nerkowska* [2008].

On social rights of workers: Case C-438/05, *Viking Line* [2007]; Case C-341/05, *Laval un Partneri* [2007].

⁵¹ The legal basis of rare texts adopted on direct taxation lies essentially in art. 115 TFEU, which provides for a unanimous vote of the Council ‘in accordance with a special legislative procedure’ (Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States; Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments; Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States). In this sphere, the judgment formulating the principle of framing, followed in a long line of cases, is: Case C-279/93, *Schumacker* [1995].

⁵² Art. 4 (2) TEU.

political actors fulfilling their duties as guarantor of the cohesion of the European populations.⁵³

It remains to be seen whether that implies a difference of approach in the obligations incumbent upon the State. Traditionally, in EC/EU law, a state power exercised in economic or commercial matters, while the EU fails to act in a uniform manner, is suspect by nature. Not only because, exercised locally on the scale of the EU, it brings about compartmentalization; but also because it is exercised in conjunction with the other Member States regulating the same subject area in their territory and therefore brings about fragmentation. To prevent this competition from creating a double regulatory burden for the movement of goods and services within the EU, the Court relied on the Treaty to delineate powers among Member States. That is the sense of the *Cassis de Dijon* case law.⁵⁴ By relying on the presumed equivalence of the applicable competing national regulations, a single State (generally, the State of origin of the good or service) is made responsible for determining whether the movement of the good or service is lawful. Can this technique be transposed to cases when the Court recognizes the Member State have a so-called ‘retained power’? If such were the case, one would have to accept that, say, in the sensitive sphere of family law, the principle of the country of origin is to apply to cases of marriage between people of the same sex or to surrogate mothers, subject only to imperative considerations of public policy.⁵⁵ That was not the path followed until then. In spheres of ‘retained powers’, as in all socially sensitive areas, the Court seems inclined to exclude any presumption that

⁵³ This may explain the Court’s reluctance to extend this formula to the existence of ‘private powers’. In *Viking Line*, it is indeed private powers that are at issue but, to answer the argument that EU law does not apply to the sphere of action of those powers (the exercise of social rights), the Court reiterates its formula and its reference to the State, by declaring that ‘even if, in the areas which fall outside the scope of the Community’s competence, the Member States are still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question, the fact remains that, when exercising that competence, the Member States must nevertheless comply with Community law’ (Case C-438/05, § 40).

⁵⁴ Case 120/78, *Rewe-Zentral* (*Cassis de Dijon*) [1979]. See N. Bernard, ‘La libre circulation des marchandises, des personnes et des services dans le traité CE sous l’angle de la compétence’ (1998) Cahiers de droit européen 11.

⁵⁵ See on this point the analysis by K. Lenaerts, ‘Federalism and the Rule of Law: Perspectives from the European Court of Justice’ (2010) 33 Fordham International Law Journal 1338, 1355 ff.

national regulations are equivalent.⁵⁶ This accounts in particular for the *Grunkin Paul* judgment on the recognition of surnames.⁵⁷

In fact, the Argument from Totalization is a twofold argument. One side is the applicability of EU law to areas of retained powers. The other side of the coin is the recognition of the own essential duties of Member States. Strikingly, the language of competences is not limited to the stage of applicability of EU law. Soon after the emergence of the formula on ‘retained powers’, the Court started recognizing state justifications based on Member States’ competences. The recognition of the State’s ‘*sovereign powers*’ in social protection and public health has been reflected in the fact that the maintenance of ‘*treatment capacity or medical competence on national territory*’ may justify a derogation from the application of the Treaty.⁵⁸ Similarly, the retained power in matters of taxation has been mirrored in the recognition of the necessary ‘*preservation of the allocation of the power to impose taxes between Member States*’.⁵⁹ Furthermore, in the retained power of the Member State over the regulation of civil status and surnames, the Court has seen a form of defence of Member States’ ‘*national identities*’.⁶⁰ Visibly, in all of these cases, the position of the State is no longer reduced to a position of defence of particular interests; it is re-established in its essential functions.⁶¹ In fact, to understand the sense of the transformation that has occurred regarding the system governing the relationships between the Member States and EU law, one must reverse the terms of the official formula.⁶² The Court includes in its case-law another, implicit, formula, which stands as follows: *If the areas of competence reserved to the Member States are subject to the fundamental principles of EU law, the fact remains that, in applying those principles,*

⁵⁶ By way of illustration see the judgment on gambling: Case C-42/07, *Liga Portuguesa de Futebol* [2009] § 69.

⁵⁷ Case C-353/06, *Grunkin Paul* [2008]. What Germany is criticized for in this case is not its refusal to apply an *equivalent* law, the Danish system of attribution of surnames; it is Germany’s objecting to the possibility of recognizing a concrete situation that does not correspond to the interests defended by its own law. See for a similar analysis in the field of tax law M. Fallon, ‘La jurisprudence européenne en matière de double imposition résultant de l’exercice parallèle des compétences fiscales: originalité et anomalies’ in V. Deckers e.a. (dir.), *Les dialogues de la fiscalité - Anno 2010* (Bruxelles, Larcier, 2010) 301.

⁵⁸ Case C-372/04, *Watts* [2006] § 105.

⁵⁹ Case C-446/03, *Marks & Spencer* [2005] § 45.

⁶⁰ Case C-208/09, *Sayn-Wittgenstein* [2010] § 92; Case C-391/09, *Runevič-Vardyn* [2011] § 86.

⁶¹ See D. Rittleng, ‘Les Etats membres face aux entraves’ in L. Azoulai (ed.), *L’entrave dans le droit du marché intérieur* (Bruxelles, Bruylant, 2011).

⁶² This has been suggested by Alexandre Maitrot de la Motte in ‘L’entrave fiscale’ L. Azoulai (ed.), *L’entrave dans le droit du marché intérieur* (Bruxelles, Bruylant, forthcoming 2011).

the Court must respect and have due regard to the freedom of each Member States in exercising its powers.

What does it mean in actual practice? It is perhaps in the *Watts* case that the Court is clearest about the obligation imposed on Member States in domains of ‘retained powers’.⁶³ When questioned about the compatibility of its case law with the ‘exclusive’ responsibility which the Treaty attributes to Member States for the organization of health services, that the Court explicitly acknowledges, the Court answers that its case-law is not to be construed as

imposing on the Member States an obligation to reimburse the cost of hospital treatment in other Member States without reference to any budgetary consideration but, on the contrary, are based on the need to balance the objective of the free movement of patients against overriding national objectives relating to management of the available hospital capacity, control of health expenditure and financial balance of social security systems.

The search for a right balance may lead States to ‘*make adjustments to their national systems of social security. It does not follow that this undermines their sovereign powers in the field*’. In other words, the structure of the national system must be reprogrammed so as to allow for the protection and the development of individual transnational situations within the EU. That would be the true story behind all of this new rhetoric on retained powers: to ‘make adjustments’, ‘to have regard to all the circumstances of each specific case’.⁶⁴ In other words, to develop solutions based on equity – or call it *transnational equity* to make sense of the protection of interests lacking representation under purely national regulatory systems.

One may wonder, however, whether this distinction between the free choice of a system of regulation, which is to be safeguarded, and the implementation of that system in specific instances, which has to be adjusted and equitable, is a serious and sustainable one.⁶⁵ That would mean in practice that the national authority, without changing the national system, must be ready at any time to correct the application of the rule in the light of the ‘personal circumstances’

⁶³ Case C-372/04, *Watts* [2006].

⁶⁴ Case C-157/99, *Geraets-Smits et Peerbrooms* [2001] § 104.

⁶⁵ For the distinction, see Opinion of AG Sharpston in *Grunkin Paul* (Case C-353/06 [2008]), § 49. See also § 34 of the judgement; Case C-73/08, *Bressol and others* [2010] § 29. For a tough critique of this distinction, see G. Davies, ‘The Price of Letting Courts Value Solidarity: The Judicial Role in Liberalizing Welfare’ in M. Ross & Y. Borgmann-Prebil (eds), *Promoting Solidarity in the European Union* (OUP, Oxford 2010).

characterizing the case of the EU citizen in question.⁶⁶ That may seem very little. But, in reality, this apparently minor requirement is overarching. Even outside the scope of attributions of the Union, Member States are exposed to the encroachment of EU law that they cannot withstand other than by adapting their law.

4. The Distinctiveness of the Total Law Doctrine

The development of the Argument from Totalization of EU law is not only grounded on a strategy of expansion. It is based on a specific vision of the position and the posture of the State as member of the European Union. It amounts to the emergence of a real doctrine. However, the question remains as to how to justify such ‘jurisdiction of the Community to impinge on national sovereignty’ as the Court put it in its early case of 1961. To make these justifications clear will help us to pinpoint the possible implications of this case-law.

4.1 Justifications

To justify such an impingement, the Court first resorted to the ideas of necessity and purpose. 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 that were attributed to it.⁶⁷ In other words, if States could freely use their powers in the sphere of their retained powers, one could fear a fragmentation of the integration project, both materially and geographically. For want of any uniformity and universality in the application of rules on the freedom of circulation, the very project of establishing a single European market would be endangered:

The internal market would not have the comprehensive aim of providing an area without internal frontiers (Article 14(2) EC), but would be merely fragmentary as it would be limited to individual products and activities governed by specific rules of Community law.⁶⁸

⁶⁶ See for example Case C-372/04, *Watts* [2006]; Case C-499/06; *Nerkowska* [2008].

⁶⁷ Case 30/59, *De Gezamenlijke Steenkolenmijnen in Limburg v. High Authority* [1961] ECR p. 46.

⁶⁸ Opinion of Advocate General Kokott in *Tas-Hagen and Tas* (Case C-192/05 [2006]), § 35.

In this justification, the only question is one of the effectiveness of the integration project. The meaning of the project is unstated. A purely instrumental justification would not be of much worth if it did not pursue further.

In *Commission v. France* 1969, as seen, the Court did indeed go further. It founded the impingement on ‘*the common concern of Member States*’, ‘*[t]he solidarity, which is at the basis of these obligations as of the whole of the community system*’. The solidarity requirement reveals the existence of a commitment in favour of the creation of a Community that goes beyond the collection of States that make it up. The idea is that the Union has its own structure, separate from a simple collection of States. Being based on a ‘*transfer of sovereign rights*’ it is akin to a political authority and implies for its members extended obligations of cooperation and solidarity.⁶⁹ Thereby, the encroachment of fundamental EU law is structurally justified. Notice that a similar structural argument is to be found in the case law of the US Supreme Court.⁷⁰ To justify the application and superiority of federal law, the Court refers to the ‘coherent whole’ that the federation constitutes.⁷¹ The power specific to each Member State is not denied. However, that power exists only with respect to a ‘global system’ in which it is bound up.⁷² In the same vein, P. Pescatore stated that if the national authorities and first among them the constitutional courts must yield to the force of Community law, although they are supposed to preserve the powers reserved to the State, it is because ‘*each only controls a fragment of the total territory of the Community*’.⁷³ Acting only for a part of the EU’s citizens, national sovereigns potentially endanger the common interest of the Member States and of their citizens. Hence the necessity to yield to the power exercised by the Union. Union power is the realization of an ‘*idée d’oeuvre commune*’ that is supposedly

⁶⁹ The first systematic description of this structure is in P. Pescatore, *The Law of Integration. Emergence of a new phenomenon in international relations, based on the experience of the European Communities* (Sijthoof, Leiden, 1974).

⁷⁰ In the famous case of *McCulloch v. Maryland* 17 U.S. 316 (1819), Justice Marshall writes in relation to the conflict of jurisdiction between the federal state and the federated state: ‘The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole – between the laws of a Government declared to be supreme, and those of a Government which, when in opposition to those laws, is not supreme’.

⁷¹ O. Beaud, *Théorie de la Fédération* (PUF, Paris, 2007) 191-2.

⁷² See in that connection K. Boskovits, *Le juge communautaire et l’articulation des compétences normatives entre la Communauté européenne et ses Etats membres*, (Sakkoulas/Bruylant, Athens/Brussels, 1999) 218.

⁷³ P. Pescatore, ‘La protection des droits ordinaires du ‘Citoyen Européen’’ (2006), reprod. in *Etudes de droit communautaire européen 1962-2007* (Bruylant, Bruxelles, 2008) 935.

manifest in the Treaties.⁷⁴ This way the power retained by each State and its participation in a greater common whole can both be asserted together.

The third justification is the most elaborate. It is ethical in nature. It consists in contemplating the integration process not only as a project for economic unity or as a form of political solidarity but as an *ethos*: that is the occupation of a space – the European space, and the protection of individual situations within that space. The encroachment of EU law into areas of retained powers is justified by the need to impose the consideration of isolated interests in the Union, interests of those who circulate within the Union, who come from or are established in other Member States. Those interests that are naturally under-represented in the legislation of Member States constitute the ‘European’ situations *par excellence*.⁷⁵ In that context, the provisions on freedom of movement and non-discrimination operate as rules of conduct imposed on Member States. EU law forces the State authorities to rethink the way they act. The following passage in the *Rottmann* decision illustrates this point perfectly: ‘the fact that a matter falls within the competence of the Member States does not alter the fact that, *in situations covered by European Union law*, the national rules concerned must have due regard to the latter’.⁷⁶ Such situations are characterized through connecting factors elaborated on a factual basis. Connection to fundamental EU law generally relies on an element of transnationality in the situation at issue, but sometimes it extends more broadly to forms of plurinationality⁷⁷ and ‘Europeanity’.⁷⁸ Such connection triggers a restructuration. The Court asks the State to reorganize its normative programmes so as to avoid the exclusion of ‘European’ situations and interests from the modes of apprehension of national law. Moreover, to compel the State to take account of these interests, the Court has developed an obligation to cooperate with the authorities of other Member States⁷⁹ and an obligation to

⁷⁴ P. Pescatore (n 69) 41.

⁷⁵ This has been thematized by C. Joerges & J. Neyer, ‘Deliberative Supranationalism’ Revisited’, EUI Working Paper Law, 2006/20. See also C. Joerges, ‘Sur la légitimité d’européaniser le droit privé. Plaidoyer pour une approche procédurale’ (2004) *Revue Internationale de Droit Economique* 133.

⁷⁶ Case C-135/08, *Rottmann* [2010] § 41. Emphasis added

⁷⁷ Case C-148/02, *Garcia Avello* [2003].

⁷⁸ In some case, connection may occur regardless of any form of extraneity because the very status of EU citizen is called into question: Case C-135/08, *Rottmann* [2010], Case C-135/08; Case C-34/09, *Ruiz Zambrano* [2011].

⁷⁹ See, for example, Case C-279/93, *Schumacker* [1995] § 45.

take into consideration all the items of the situation involved.⁸⁰ These guarantees are designed to ensure the decision-making process at national level is more reflexive.

4.2 Implications

There seems to be nothing original in these three justifications. They may be used to justify authority of EU law in many other instances, irrespective of the nature of state powers. Should it be concluded that it is simply a rhetorical formula? To finally answer this question, let us consider the basic categories forged by legal scholarship in conceptualizing European law. The development of the EC/EU legal order is traditionally ordered around two fundamental themes. The first is the ‘refashioning of sovereignties’, that Pierre Pescatore first highlighted in his book on ‘The law of integration’. It consists in ‘a redistribution of functions’, that is, in developing the competence and normative powers of the Union, which exercises them autonomously, uniformly and bindingly. At the same time, Member States are to be prevented from infringing the action undertaken by the Union’s organs. To this effect, the Court has developed what is termed a ‘doctrine of pre-emption’.⁸¹ The second theme was brought out by Joseph Weiler. It is called ‘constitutionalization of EU law’ because it consists in deriving from the provisions of the Treaty general and substantive obligations, ‘constitutional rules’ that Member States are bound to abide by in all spheres in which they exercise their powers.⁸² This development is complementary to the first one. It generates subjective rights that can be invoked in national courts even in cases where the Union is unable to act through the powers attributed to it. Those are the two aspects, one structural, the other normative, of European legal integration. Both were shaped by the Court’s case law in the first fifty years of integration.

The doctrine on retained powers roughly recalls the doctrine of pre-emption first forged by the US Supreme Court. Among the various forms this judicial doctrine took on, one has been called ‘obstacle preemption’ or ‘conflict

⁸⁰ See, for example, Case C-372/04, *Watts* [2006] § 116.

⁸¹ On preemption in EU law see recently R. Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law* (Oxford University Press, Oxford, 2009); and see K. Boskovits, *Le juge communautaire et l’articulation des compétences normatives entre la Communauté européenne et ses États membres* (Sakkoulas/Bruylant, Athens/Brussels, 1999) 287 ff.

⁸² On the constitutionalization of EU law, see J.H.H. Weiler, *The Constitution of Europe. ‘Do the New Clothes Have an Emperor?’ And Other Essays on European Integration* (Cambridge University Press, Cambridge, 1999), 19 ff.

preemption’.⁸³ This consists in considering that the legislation of a federated state will be pre-empted and consequently set aside should it be an obstacle to the full and complete achievement of the goals and objectives of the Congress legislation.⁸⁴ As a result, the spheres of competence traditionally reserved to federated States, like health or safety, may be subjected to the authority of the federal state.⁸⁵ This doctrine has made it possible to circumvent the obstacle of the Tenth Amendment of the Constitution whereby ‘[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people’. At this point, the analogy with EU law is striking. However, there is a fundamental point on which the doctrines of the two Courts diverge: the US doctrine of pre-emption applies exclusively to federal acts. It is the intention or the purpose of the US Congress that is to be implemented. It aims at protecting the exercise of a federal legislative competence. By contrast, the Court’s doctrine on retained powers concerns the application of EU primary law, namely the provisions on the freedom of movement related to internal market and EU citizenship. Its purpose is not to protect the legislative powers exercised by the Union. The Court relies on Treaty provisions precisely because it does not want to replace the powers of the Member States by those of the Union. EU Total law is not a matter of pre-empting the sphere occupied by national regulations but of adapting the way in which they are applied.

The doctrine on retained powers is perhaps better compared to the old doctrine of limits developed by the Court in criminal matters. In both cases, the aim is to create EU obligations so as to limit the exercise of national powers. The Court has since long recognized that

criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible’ and not the Union.⁸⁶ And yet, ‘it is clear from a consistent line of cases decided by the Court, that Community law also sets certain

⁸³ For a full analysis of the doctrine of preemption, L. Tribe, *American Constitutional Law* (Vol I, Foundation Press, New York, 2000) 1200 ff.

⁸⁴ *If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted... where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress’* (US Supreme Court, *Silkwood v. Kerr-McGee Corp.* 464 US (1984). See *Pacific Gas & Electric co. v. State Energy Resources Conservation a Development Comm’n* 461 US 190 (1983).

⁸⁵ On civil and social matters, see for example US Supreme Court, *Sandra Jean Dale Boggs, Petitioner v. Thomas F. Boggs, Harry M. Boggs and David B. Boggs*, n° 96-79 (1997).

⁸⁶ Most recently, Case C-6/11 PPU, *El Dridi* [2011] § 53.

*limits in that area as regards the control measures which it permits the Member States to maintain.*⁸⁷

It follows that criminal law may be ‘*affected*’.⁸⁸ Notice however that this concerns mainly criminal sanctions as obstacles to free movement. Measures affected are measures of supervision or sanction that are adjunctive to legislations of economic or commercial nature. In fact, the criminal character of the regulation so affected matters less than its instrumental character.⁸⁹ It is first the policy instrument that is affected here. The doctrine on retained powers is much broader in scope. Beyond the State as regulator/sanction-taker, it is the deepest structures of the welfare state and of the nation state – taxation, social protection, conditions of persons – that are affected.

It may seem more judicious, then, to compare the doctrine with the ‘absorption doctrine’ described by Joseph Weiler in his outstanding study of the constitutionalization of EU law.⁹⁰ The Court has extended the reach of EU law to spheres of national law that lie outside the EU’s area of competence. The finest example of this is perhaps *Casagrande*. In this judgment, as has been seen, the Court extends the rule of non-discrimination enshrined in EC regulation to a subject matter not covered by that regulation. Recent case law provides fresh examples of such extension. However, instead of referring to ‘Community competences’, the Court prefers to refer to the general principles of EU law.⁹¹ The argument then consists in seeing in a legislative provision the ‘materialization’ of a higher and more general principle, which then leads to the applicability of the said provision beyond the scope provided for by the legislation. Thereby EU law is applied to situations that lie outside the purview of the European legislator.⁹² Consider by way of illustration the *Impact* judgment on the application of the framework agreement on fixed-term employment. The Court referred to the distinction existence/exercise of competence to state:

⁸⁷ Case 203/80, *Casati* [1981] § 27; Case C-387/93, *Banchero* [1995] § 58. See also Case C-348/96, *Calfa* [1999] § 17; Case C-338/04, *Placanica* [2007] § 68.

⁸⁸ Case C-226/97, *Lemmens* [1998] § 19.

⁸⁹ Compare on customs matters, Case C-546/09, *Aurubis Bulgaria* [2011] § 41.

⁹⁰ The term ‘absorption’ is used by J. Weiler in his commentary on *Casagrande*, (n 82) 47.

⁹¹ See, for example, Case C-307/05, *Del Cerro Alonso* [2007]; Case C-555/07, *Küçükdeveci* [2010].

⁹² See the criticism of this practice in Editorial Comments, ‘The scope of application of the general principles of Union law: An ever expanding Union?’ (2010) *CML Rev.* 1589.

while it is true [...] that the establishment of the level of the various constituent parts of the pay of a work falls outside the competence of the Community legislature and is unquestionably still a matter for the competent bodies in the various Member States, those bodies must nevertheless exercise their competence consistently with Community law [...] in the areas in which the Community does not have competence.⁹³

As a result, the non-discrimination clause inserted in the framework agreement shall have to be extended to the state policy relating to pay.

In view of this development, it may be tempting to reduce the totalization doctrine to the traditional absorption doctrine. However, this temptation should be resisted. Totalization is not absorption. In cases like *Casagrande* and *Impact*, the legislative competence of the Union is extended to sensitive national areas.⁹⁴ Under the application of the doctrine on retained powers, on the contrary, the Court protects ‘reserved areas’ regulated by Member States. Instead of suggesting an extension of Union competence, it acknowledges that full integration has not been and cannot be completed. There are areas which remain outside the Union jurisdiction. In these domains, the Court imparts to specific Treaty provisions a function of ‘responsibilization’ of national authorities. National authorities are vested with thinking if not acting ‘European’ to the full extent of the State’s capacity.⁹⁵ In so doing, the Court relies mainly on the provisions on free movement. They are general and flexible enough to allow for refashioning national decision-making processes.⁹⁶ The obligations imposed on Member States are essentially reflexive in nature. They consist in requiring the States to use their power in a ‘reasonable’ way, in consideration of the singular case to which it applies and within the wider transnational framework in which it is exercised. The aim is to ask States to

⁹³ Case C-268/06, *Impact* [2008] § 129.

⁹⁴ On this recent development of case law, see K. Lenaerts and J.A. Gutiérrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’ (2010) CMLR 1629; S. Prechal, ‘Competence Creep and General Principles of Law’ (2010) 3 (1) Review of European Administrative Law 5.

⁹⁵ In analysing this case law, K. Lenaerts similarly invokes the obligation on States to ‘think federal’ (‘Federalism and the rule of law: Perspectives from the European Court of Justice’ (2010) 33 Fordham International Law Journal 1340).

⁹⁶ In *Rottmann*, AG Poiares Maduro considers however that ‘it would [...] be wrong to assume that [...] only certain Community rules – essentially the general principles of law and the fundamental rights – are capable of being invoked against the exercise of State competence in this sphere. In theory, any rule of the Community legal order may be invoked if the conditions for the acquisition and loss of nationality laid down by a Member State are incompatible with it’ (§ 28 of opinion). So analysed, however, the doctrine becomes a mere expression of the doctrine of primacy of EU law.

adapt their systems and procedures so as to open them up to the interests protected by the EU. What is required is a reorganization of the internal forum rather than a colonization of the State by EU rules and powers.

This may be true in theory but does it apply in practice? The dividing line may be hard to draw indeed. B. de Witte has recently convincingly argued that there has since long existed a competence for the EU ‘to pursue a large number of non-market aims by means of internal market legislation’.⁹⁷ This competence is subject to limits, in particular to ‘the requirement that the measure must also adequately contribute to improve the conditions for the establishment and functioning of the internal market’. However, in actual practice, these limits proved to be relatively easy to satisfy.⁹⁸ Now, the doctrine of totalization apparently stands as an ideal ground for developing further the ‘EU competence to protect’. The adoption of the directive on cross-border health care is an excellent example that this judicial doctrine can be readily exploited by EU institutions to justify new forms of legislative intervention.⁹⁹

5. Integration Through Law and Equity

This article aimed at analysing a recurrent formula present in the case-law of the European Court of Justice. Many of the same facets of the relevant jurisprudence have already been explored in various strands of literature. These focus on EU citizenship and its impact on fields such as health, education and social security or on the ‘constitutional asymmetry’ which results from having weak EU legislative powers and strong primary Treaty provisions and the effect of this situation on the balance between economic and social rights under EU law are relevant in that connection. However, none of those studies have addressed specifically the common source of all these developments, namely the ‘odd’ formula on retained powers. Such formula may come as a surprise when contemplating the long evolution of EC/EU law. Under the ‘constitutionalization trend’ forged by the Court, EU law was deemed to encompass any situation relating to the establishment of the internal market, irrespective of the subject matter involved. Why then introduce this reference to the ‘retained powers’ of the Member States in the mid of the 1990s’ and,

⁹⁷ B. de Witte, ‘A Competence to Protect: The Pursuit of Non-Market Aims through Internal Market Legislation’ in P. Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press, 2011).

⁹⁸ See e.g. Case C-58/08, *Vodafone* [2010].

⁹⁹ Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients’ rights in cross-border healthcare, OJ 2011 L 88, p. 45.

since then, constantly resort to it while it may appear as an obstacle to the full application of EU law?

It has been argued that the formula has been used by the Court as a twofold argument. First as a way of recognizing the essential own capacities of the Member States within the integrated European space. Second as a matter of including certain under-protected interests and situations in the manner the national authorities usually use to think and to act. However, this refashioning of state authorities' reactions and behaviours should not be done arbitrarily. Otherwise, it would run the risk of being felt as over-intrusive. Much remains to be worked out as regards the specification of the concrete situations worthy of protection based on EU law. Closer scrutiny of this doctrine and of its implementation would be fruitful not only to de-fuse criticism elicited by the EU's supposed 'creeping competence' but also, more positively, to reconstruct the meaning of the process of integration through law and through equity.