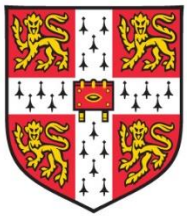

UNIVERSITY OF CAMBRIDGE

THE CONSTITUTIONAL COURT OF A MORE MATURE LEGAL ORDER: CONSTITUTIONAL REVIEW BY THE COURT OF JUSTICE OF THE EUROPEAN UNION

DARREN HARVEY

DARWIN COLLEGE

3RD JULY 2019

"THIS DISSERTATION IS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY"

'This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text. It is not substantially the same as any that I have submitted, or, is being concurrently submitted for a degree or diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my thesis has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee'.

Darren Harvey, Darwin College

Short Summary of PhD Thesis

The Constitutional Court of More Mature Legal Order: Constitutional Review by the Court of Justice of the European Union

This thesis examines the changing role of the Court of Justice of the European Union (CJEU) from the perspective of its task of conducting constitutional review of EU legislation. It addresses a gap in the existing literature by providing a systematic analysis of how the methodology and intensity of constitutional review has changed over time.

By focusing upon federalism and fundamental rights cases, it argues that a series of significant shifts may be detected in the jurisprudence of the Court since the coming into force of the Lisbon Treaty. In marked contrast with earlier periods in its history, the Court now subjects EU legislation to high-intensity review in cases of serious interference with the EU's core constitutional principles. The Court has also adopted an increasingly "process-oriented" approach to constitutional review in recent years. This involves heightened scrutiny of the legislative process and evidence base upon which contested EU legislation was enacted. The result has been a gradual infiltration of procedural review into constitutional adjudication.

These developments in the methodology and intensity of constitutional review form the basis for evaluating the changing role of the CJEU over time. It is contended that the case law reveals much about the contemporary, post-Lisbon role of the Court and, crucially, how this differs from previous periods in the history of European integration.

Whereas the Court has long been criticised for failing to subject EU legislation to meaningful judicial scrutiny, there is growing evidence that the Court now takes its responsibility for constitutional review more seriously. Furthermore, recent judgments demonstrate the Court to be an institutional actor that is responsive to the wider legal and political context in which it now operates.

These developments give rise to a reconsideration of exiting accounts which depict the CJEU as an "activist" or unwaveringly "pro-integrationist" institution. When viewed from the largely unexplored perspective of the evolution of constitutional review, it is concluded that the Court now engages in a finely calibrated, variable intensity approach to such review. In so doing, the Court has finally assumed the role of a veritable Constitutional Court whose primary role is one of upholding the checks and balances within a more mature EU legal order.

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Studying for a PhD in law at the University of Cambridge has changed my life. I have been incredibly fortunate to have been able to spend the best part of four years listening, learning reading and writing alongside some of the most intelligent and interesting people in the world. The experiences gained from academic life in Cambridge have provided me with a multitude of opportunities that simply would not have otherwise been available to me. Beyond all else, Cambridge has taught me how to think. Saul Bellow might well be right when he says that in the end you can't save your soul and life by thought alone. But, he adds, if you think, the least of the consolation prizes is the world.

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The Constitutional Court of a More Mature Legal Order: Constitutional Review by the Court of Justice of the European Union

Chapter 1

Constitutional Review and the Changing Role of the Court of Justice of the European Union

1.) Introduction

The purpose of this thesis is to examine the changing role of the Court of Justice of the European Union (CJEU) when reviewing the legality of measures of European Union (EU) law.[1] It contends that, as a court of general jurisdiction,[2] certain of the CJEU's tasks have gradually come to resemble the practice of constitutional review of legislation as (broadly) understood in many nation states.[3] Additionally, the present analysis argues that the Court's approach to reviewing the constitutionality of EU legislation has changed over the course of the history of the European integration project.

In marked contrast with its earlier jurisprudence, the Court has recently come to subject EU legislation to "high-intensity" review. In cases of serious interference with fundamental rights or core constitutional principles of the EU legal order, the Court engages in strict scrutiny of the legislature's discretionary policy choices.[4] Beyond these rare examples of

[1] The CJEU 'shall ensure that in the interpretation and application of the Treaties the law is observed', Article 19(1) Consolidated Version of the Treaty on European Union (TEU) [2016] OJ C 202. In carrying out this task, the Court is required to provide preliminary rulings on the interpretation and validity of EU legal acts and directly review the legality of such acts, Article 263(1) and Article 267(1) Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C 202.

[2] As a 'nonspecialized court of general jurisdiction' the CJEU 'handles many different kinds of matters spread over a wide range of specialized areas' M Rosenfeld, 'Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court' (2006) 4 International Journal of Constitutional Law 618, 618.

[3] See generally Mark Tushnet, 'Judicial Review of Legislation' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press 2005).

[4] *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and others,* ECLI:EU:C:2014:238 paras 47-48; *Case C-601/15 PPU, J N v Staatssecretaris voor Veiligheid en Justitie,* ECLI:EU:C:2016:84.

serious interference, the Court increasingly adopts a "process-oriented" approach to constitutional review.[5] In so doing, the CJEU emphasises that the political process on the European level is primarily responsible for ensuring that the constitutional rights and principles enshrined in the EU Treaties are respected. Rather than second-guessing the merits of the EU legislature's policy choices, process-oriented review is utilised to determine whether the EU institutions have considered all relevant facts and circumstances when legislating.[6] This is achieved by scrutinising the legislative process and evidence base upon which contested EU legislation was enacted, resulting in "the gradual infiltration of procedural review into constitutional adjudication."[7]

These developments in the methodology and intensity of constitutional review of EU legislation then form the basis for evaluating the contemporary role of the CJEU within the post-Lisbon Treaty European Union.[8] As shall be demonstrated below, the existing literature on the Court has not yet fully considered how the practice of constitutional review of EU legislation has shifted over time.

In seeking to provide a novel perspective on the changing role of the CJEU (and its contribution to the European integration project more generally), it is contended that the Lisbon Treaty reforms have had a profound impact upon the Court's approach to constitutional review.

With regards to constitutional constraints upon EU legislative power, considerable changes have been made to the monitoring and enforcement of those principles that seek to uphold the EU's "federal order of competences."[9] Furthermore, the Charter of Fundamental Rights (CFR) now shares the same legal status as the EU Treaties, thus empowering the CJEU to

[5] K Lenaerts, 'The European Court of Justice and Process-Oriented Review' (2012) 31 Yearbook of European Law 3.
[6] Jacob Öberg, 'The Rise of the Procedural Paradigm: Judicial Review of EU Legislation in Vertical Competence Disputes' (2017) 13 European Constitutional Law Review 248.
[7] Ittai Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6 Legisprudence 271, 271.
[8] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306, p. 1–271.
[9] See in particular the principles of Conferral, Subsidiarity and Proportionality enshrined in Article 5 TEU; Armin Von Bogdandy and Jürgen Bast, 'The Federal Order of Competences' in Armin Von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2009).

conduct fundamental rights review on the basis of a constitutionally-entrenched Bill of Rights.[10]

The entry into force of the Lisbon Treaty has also fundamentally altered the concept of legislation in the EU.[11] Today, for the first time in the history of the European integration project, a procedural or parliamentary definition of EU legislative power is provided by the EU Treaties.[12] EU legislation is now formally defined as legislative acts adopted in accordance with specific legislative procedures.[13] Ordinarily, this involves the joint adoption of Commission proposals by the European Parliament and Council; with the latter two institutions representing the European citizenry and the Member States respectively.[14]

Finally, Protocol No.2 annexed to the Lisbon Treaty - coupled with a series of "Better Regulation" initiatives - have placed the EU legislature under an increased number of procedural obligations in recent years.[15] This increased degree of "proceduralisation" means that the EU institutions must now consult widely, actively consider alternative policy options and support their decisions with robust reasoning at all stages of the legislative process.[16]

It is contended that the abovementioned shifts in the methodology and intensity of constitutional review fit within this wider context of recent constitutional and legislative reforms. By engaging in high intensity review of serious infringements of fundamental rights, the Court's jurisprudence is consistent with the elevation of the Charter to the apex of the EU's constitutional order.[17] Similarly, by scrutinising the legislative process and evidence base of EU legislation when determining its constitutionality, the emergence of

[10] Article 6(1) TEU.
[11] Jürgen Bast, 'New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law' (2012) 49 Common Market Law Review 885.
[12] Robert Schütze, *European Constitutional Law* (Cambridge University Press 2012) 152.
[13] Article 289(3) TFEU.
[14] Article 10(1) TEU and Article 289(1) TFEU.
[15] Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2008] OJ C 115, p. 206–209.; Inter-institutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, [2016] OJ L 123, p. 1–14.
[16] Patricia Popelier, 'Preliminary Comments on the Role of Courts as Regulatory Watchdogs' (2012) 6 Legisprudence 257, 257.
[17] Damian Chalmers, 'Judicial Authority and the Constitutional Treaty' (2005) 3 International Journal of Constitutional Law 448, 459.

process-oriented review may be seen as a direct response to the increased proceduralisation of law-making.[18]

It is submitted that these changes in the practice of constitutional review of EU legislation demonstrate a Court that is responsive to the wider legal and political context in which it now operates. Whereas the Court has long been criticised for failing to subject EU legislation to meaningful judicial scrutiny, recent case law establishes that it now takes its responsibility for constitutional review more seriously.[19] The post-Lisbon Treaty jurisprudence displays a finely calibrated, variable intensity approach to constitutional review.

These contemporary developments also require one to reconsider those accounts which portray the CJEU as behaving in an "activist" or unwaveringly "pro-integrationist" fashion. In putting forward an alternative perspective on the modern role of the Court, it is contended that the CJEU now operates as a veritable Constitutional Court whose primary task is that of upholding the "checks and balances" of a "more mature" EU legal order.[20]

In laying the foundations for these arguments, the remainder of Chapter 1 sets out the key changes which led to the emergence of a distinct practice of constitutional review of EU legislation. This is followed by an elaboration of the claim that the post-Lisbon Treaty jurisprudence of the Court contains a series of shifts in the methodology and intensity of constitutional review. The final section of this introductory chapter situates these findings within the wider literature on the role of the CJEU and its contribution to the European integration process.

2.) The Rise of Constitutional Review of Legislation in the European Union

Understood generally as the power of courts to strike down or dis-apply legislation that is incompatible with provisions of a hierarchically superior Constitution, the practice of

[18] Alberto Alemanno, 'The Emergence of the Evidence-Based Judicial Reflex: A Response to Bar-Siman-Tov's Semiprocedural Review' (2013) 1 The Theory and Practice of Legislation 327.
[19] For criticisms see Gabriél A Moens and John Trone, 'The Principle Of Subsidiarity in EU Judicial And Legislative Practice: Panacea Or Placebo?' (2015) 41 Journal of Legislation 65; Jason Coppel and Aidan O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 Common Market Law Review 669.
[20] Koen Lenaerts, 'How the ECJ Thinks: A Study on Judicial Legitimacy' (2013) 36 Fordham International Law Journal 1302, 1309.

constitutional review is now a feature of the majority of national legal systems around the world.[21] Despite innumerable differences in structure, composition, powers and procedures, it is generally accepted that courts empowered with the task of conducting constitutional review of legislation typically engage in two key tasks.[22]

The first is to resolve boundary disputes between branches or levels of government in legal systems that constitutionally divide power. This is often referred to as structural constitutional review. In legal orders that distribute power along federal lines, this involves "the interpretation and enforcement of the division of powers that is part of federal constitutions as well as the enforcement of those provisions establishing the basic institutions of government."[23]

The second core task performed by courts entrusted with reviewing the constitutionality of legislation is to uphold the fundamental rights of individuals against infringements by the actions (or inactions) of those wielding public power.[24]

a.) <u>The Origins of Judicial Review in the European Economic Community</u>

When viewed against this basic template, the original role of the CJEU as set down in the Treaty establishing the European Economic Community (EEC)[25] was in no way analogous to that of national courts tasked with reviewing the constitutionality of legislation.[26] Not only was there no constitutionally entrenched bill of fundamental rights, but the Court's

[21] Writing in 2008, Ginsberg noted that 158 out of 191 constitutional systems include some formal provision for constitutional review Tom Ginsburg, 'The Global Spread of Constitutional Review' in Gregory A Caldeira, R Daniel Kelemen and Keith E Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008) 81.
[22] Martin Shapiro, 'The European Court of Justice: Of Institutions and Democracy' (1998) 32 Israel Law Review 3, 4; For an overview see Allan-Randolph Brewer Carías, *Constitutional Courts as Positive Legislators: a Comparative Law Study* (Cambridge University Press 2013).
[23] A Stone, 'Judicial Review without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review' (2008) 28 Oxford Journal of Legal Studies 1, 2; Jeremy Waldron, 'The Core of the Case against Judicial Review' [2006] The Yale Law Journal 1346, 1357–1358.
[24] Shapiro (n 22) 4; According to Cappelletti, "constitutionalism and federalism have been the two major political forces leading to, and providing the intellectual justification for, judicial review of legislation" Mauro Cappelletti, 'The Mighty Problem of Judicial Review and the Contribution of Comparative Analysis Symposium: Conference on Comparative Constitutional Law' (1979) 53 Southern California Law Review 409, 430.
[25] Treaty of Rome establishing the European Economic Community (EEC) 1957, 298 U.N.T.S. 3.
[26] Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (M Nijhoff ; Distributors, for the US and Canada, Kluwer Academic Publishers 1986) 209.

jurisdiction was not directed towards addressing the sorts of division of competences issues routinely dealt with in national legal systems.[27]

The CJEU was initially designed as an administrative court, whose principal task was to review the legality of executive-type measures enacted by the supranational European Commission and/or the intergovernmental Council of Ministers.[28] In discharging this responsibility, Article 173 EEC provided the Court with only four grounds of review. These were: lack of competence; infringement of an essential procedural requirement; infringement of the Treaty or of any rule of law relating to its application and misuse of powers.[29]

This administrative law framework of judicial review applied within a European Economic Community whose core purpose was to establish a Common Market and progressively approximate the economic policies of its Member States. [30] Unlike the wide variety of legislative competences enjoyed by the modern European Union of 28 Member States, the law-making powers of the EEC were geared towards adopting complex technical regulations in policy fields such as the Common Agricultural Policy (CAP). The early decades of the European integration project were thus characterized by a functional, market making logic. As a result, the "core subject matter of the Court's early jurisdiction" allowed it to focus "on issues of relatively low political salience and thus to develop its jurisprudence protected behind a veil of technocratic obscurantism."[31]

b.) <u>The Gradual Emergence of "Constitutional" Review</u>

The Court's role slowly began to change following successive rounds of Treaty amendment, on the one hand, and a series of landmark judgments from the CJEU itself, on the other. In

[27] Loïc Azoulai and Renaud Dehousse, 'The European Court of Justice and the Legal Dynamics of Integration' in Erik Jones, Anand Menon and Stephen Weatherill (eds), *The Oxford Handbook of the European Union* (Oxford University Press 2012) 352.
[28] Anne Boerger-De Smedt, 'Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome' (2012) 21 Contemporary European History 339, 346–353. Both the Commission and Council initially lacked any form of "legislative" power. Under the EEC Treaty, they merely had a power to "take decisions." See Articles 145 and 155 EEC respectively.
[29] Article 173 EEC.
[30] Article 2 EEC.
[31] R Daniel Kelemen, 'The Court of Justice of the European Union in the Twenty-First Century' (2016) 79 Law & Contemporary Problems 117, 118.

particular, an increasingly "constitutional" dimension came to be added to the CJEU's task of reviewing the legality of EU legal acts.[32]

The first major development in this regard was the Court establishing that fundamental rights formed part of the EEC legal order as unwritten general principles of law.[33] This was followed by the insertion of the principles of conferral, subsidiarity and proportionality into the EU Treaties by the Treaty of Maastricht.[34] In light of increased concerns about EU "competence creep", these structural constitutional principles were added in an attempt to more clearly delineate the division of powers between the EU and its Member States.[35] These novel constitutional limits upon the existence and exercise of EU legislative power served to add an increasingly "constitutional function" to the Court's role.[36] Unlike its original mandate under the EEC Treaty, the Court came to be increasingly involved in reviewing EU legislation for its compliance with Treaty-based principles that sought to uphold the EU's "federal order of competences."[37] Most recently, the Charter of Fundamental Rights has been elevated to the same, "constitutional" status as the EU Treaties following the entry into force of the Lisbon Treaty.[38]

When taken together, these developments have resulted in the CJEU now being responsible for reviewing EU legislation to ensure that it: (i) complies with the EU's federal order of competences; and (ii) does not infringe the rights and principles contained in the Charter. As was noted above, when viewed in comparative perspective, these twin tasks serve as the

[32] As the Court famously held in Les Verts, 'the European Economic Community is a Community based on the rule of law, inasmuch as...its institutions [cannot] avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty' *Case 294/83, Parti écologiste 'Les Verts' v European Parliament,* ECLI:EU:C:1986:166 para 23.
[33] Takis Tridimas, *The General Principles of EU Law* (Oxford University Press 2006).
[34] See Article 5 TEU.
[35] Stephen Weatherill, 'Competence Creep and Competence Control' (2004) 23 Yearbook of European Law 1.
[36] Koen Lenaerts, 'The Basic Constitutional Charter of a Community Based on the Rule of Law' in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU law : The Classics of EU law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 298–303.
[37] Robert Schütze, 'Lisbon and the Federal Order of Competences: A Prospective Analysis.' (2008) 33 European Law Review 709; There is a wealth of literature analysing the post-Maastricht Treaty EU in federal terms, see generally Kalypso Nicolaïdis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001).
[38] Article 6(1) TEU.

hallmarks of constitutional review of legislation as performed by innumerable national constitutional and supreme courts.[39]

c.) The Evolving Concept of "EU Legislation"

Alongside these changes to the system of judicial review, there has also been a continual refinement of how the concept of "legislation" is understood in the EU. Initially, the law-making powers of the institutions of the EEC were not conceived of as being akin to national conceptions of primary or parliamentary legislation.[40] The dominance of the Commission and Council in the law-making process, coupled with minimal input from the Assembly (now European Parliament), meant that measures of Community law lacked the imprimatur of a veritable, democratically elected parliamentary body.[41] As a result, legal acts adopted by Community institutions were conceived of as being functionally equivalent to delegated or secondary legislation adopted by the executive in national legal systems. [42]

In time, however, a series of amendments to the EU Treaties from the Single European Act 1987 (SEA) onwards fundamentally altered: (i) the procedures and institutions involved in the adoption of EU legislation; (ii) the sources of democratic legitimacy underpinning EU legislation; and (ii) the status of EU legislation within the overall hierarchy of EU legal acts.[43] Of particular note here was the move from unanimity to qualified majority voting (QMV) in the Council, and the concurrent empowerment of the directly elected European Parliament within in the law-making process.[44]

As noted above in the introduction, the Treaty of Lisbon marks a watershed moment in the historical evolution of the concept of legislation in the EU. For the first time, a procedural or parliamentary definition of legislative power has been provided in the EU Treaties: according to which legal acts adopted by a legislative procedure shall constitute legislative

[39] Lenaerts, 'The Basic Constitutional Charter of a Community Based on the Rule of Law' (n 36) 298–303.
[40] Robert Schütze, 'The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers' (2006) 25 Yearbook of European Law 91, 92.
[41] The Assembly was only empowered to "exercise the powers of deliberation and of control", Article 137 EEC.
[42] "From the viewpoint of national democracies, it seemed that all decision-making powers of the European Community were executive in character." Schütze, 'The Morphology of Legislative Power' (n 40) 92.
[43] See generally Paul Craig, 'Institutions, Power and Institutional Balance' in P Craig and G De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011).
[44] ibid 56–59. Direct elections to the European Parliament first occurred in 1979.

acts.[45] These legislative acts are legally distinct from "non-legislative acts" adopted under different law-making procedures, thus elevating the status of legislative acts within the EU's hierarchy of norms.[46] Moreover, as the Lisbon Treaty makes clear:

> "The functioning of the Union shall be founded on representative democracy. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens."[47]

Consequently, primary EU legislation enacted in accordance with a legislative procedure is now explicitly founded upon the principle of representative democracy. Whereas the Commission represents the EU interest in proposing legislation, it is the European Parliament and Council who, together, provide a dual basis of democratic legitimacy to contemporary EU legislation.[48]

d.) <u>The Changing Subject Matter of Litigation</u>

This evolution in the Court's powers of constitutional review and the concept of EU legislation has also been accompanied by a continuous expansion in the legislative competences of the EU as a whole. The EU has gained increased power to legislate across a variety of different fields; ranging from consumer protection and the environment to asylum and immigration policy and counter-terrorism measures. [49] Unlike the technical types of economic regulation that formed the subject matter of disputes in the past, the post-Lisbon Treaty era is one in which the CJEU is increasingly called upon to review the constitutionality of EU legislation dealing with highly sensitive, politically charged issues.[50]

[45] Article 289(3) TFEU; Schütze, *European Constitutional Law* (n 12) 152.
[46] See Articles 290-291 TFEU;
[47] Article 10(1) and (2) TEU.
[48] Alexander H Türk, 'Lawmaking After Lisbon' in Biondi et al (ed), *EU Law After Lisbon* (Oxford University Press 2012).
[49] See generally Paul Craig, 'Development of the EU' in Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2017).
[50] Kelemen (n 31) 119.

For example, the Court has recently examined the constitutionality of EU legislation which: empowers national authorities to detain third country nationals who apply for international protection[51]; provides for the mass retention and processing of personal data[52]; effectively bans the trade in products procured from seal hunting [53] and regulates trade in such a way as to allegedly place excessive social and economic costs upon particular Member States.[54] Overall:

> "The establishment of a binding Charter of Fundamental rights, as well as the growth in the Union's competences, has led to a European Court that many see as carrying a 'constitutional' function. The European Courts increasingly decide cases that involve not just enforcing EU rights in national orders, but balancing various sensitive constitutional values (from freedom of expression to labour rights, non-discrimination and beyond)."[55]

Unlike previous epochs in the history of European integration, the post-Lisbon CJEU is required to balance a multitude of constitutionally entrenched rights and principles against the policy choices of an EU legislature underpinned by the principle of representative democracy.[56] Consequently, the "interrelation between legislative discretion and judicial scrutiny" which forms "an 'eternal' question of any system of constitutional justice" has taken on increased prominence in recent years.[57]

3.) **The Changing Role of the Court of Justice**

Having established that a distinct practice of constitutional review of EU legislation now takes place within a far more politically contested environment, the question necessarily arises as to *how* the Court goes about performing this task?

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[51] *Case C-601/15, J. N.* (n 4).
[52] *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 4).
[53] *Case C-398/13 P, Inuit Tapiriit Kanatami and Others v Commission* ECLI:EU:C:2015:535.
[54] *Case C-358/14, Poland v European Parliament and Council,* ECLI:EU:C:2016:323.
[55] Mark Dawson, 'Constitutional Dialogue between Courts and Legislatures in the European Union: Prospects and Limits' (2013) 19 European Public Law 369, 370.
[56] Thomas Von Danwitz, 'Rule of Law in the Recent Jurisprudence of the ECJ, The' (2013) 37 Fordham International Law Journal 1311, 1328–1330.
[57] ibid 1328.

As noted above, the present study argues that there has been a notable shift in both the methodology and intensity of constitutional review of EU legislation in the post-Lisbon Treaty era. In contrast with its pre-Lisbon Treaty jurisprudence, the Court now subjects EU legislation to strict scrutiny whenever it places serious restrictions upon fundamental rights. In a further development, the CJEU has increasingly adopted a "process-oriented" approach to constitutional review in cases where EU legislation is contested on federalism and fundamental rights grounds. The Court places increased emphasis upon the legislative process and examines whether the EU institutions took all relevant facts and circumstances into account when making policy decisions. In so doing, the Court seeks to "develop guiding principles which aim to improve the way in which the political institutions of the EU adopt their decisions."[58]

These claims may be situated within the wider literature on the CJEU and its changing role over time.

a.) The Foundational Period: "Constitutionalising" the EEC Treaty

Generally speaking, we may distinguish between three historical strands in the Court's jurisprudence, each of which reveals something about its changing role over the course of the history of the European integration project.[59]

During the first, "foundational" period in the early decades of the European Economic Community, the Court "constitutionalized" the EEC Treaty via a series of landmark judgments.[60] According to the "standard constitutionalization thesis"[61] that has gained widespread acceptance in the literature, the CJEU "fixed the relationship between

[58] Lenaerts, 'Process-Oriented Review' (n 5) 3.
[59] Dividing the Court's jurisprudence into three distinct epochs is most commonly associated with the writings of the current President of the Court of Justice, see Koen Lenaerts, 'Some Thoughts about the Interaction between Judges and Politicians' [1992] University of Chicago Legal Forum 93; Lenaerts, 'How the ECJ Thinks' (n 20). Similar accounts of the changing role of the Court over distinct periods in the history of the European integration project include Ditlev Tamm, 'The History of the Court of Justice of the European Union Since Its Origin' in Allan Rosas, Egil Levits and Yves Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Asser Press 2013); Julio Baquero Cruz, 'The Changing Constitutional Role of the European Court of Justice' (2006) 34 International Journal of Legal Information 223; Joseph HH Weiler, 'The Transformation of Europe' [1991] Yale Law Journal 2403.
[60] Weiler, 'The Transformation of Europe' (n 59) 2410–2431.
[61] Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press 2015) 410 and literature cited therein.

Community law and Member State law and rendered that relationship indistinguishable from analogous legal relationships in constitutional federal states."[62]

By finding that: (i) individuals could rely directly on provisions of primary and secondary Community law in national courts (direct effect)[63]; (ii) Community law overrides any provision of national law in cases of conflict (supremacy)[64]; (iii) the grant of internal competences to the Community institutions in the Treaties necessarily implies an external, treaty-making power (implied powers)[65]; and (iv) measures of Community law are subject to fundamental rights review (fundamental rights)[66], the Court "fashioned a constitutional framework for a federal-type structure in Europe."[67]

As the familiar narrative goes, the establishment of these doctrines meant that the "operating system" of the EEC was no longer governed by the principles of public international law, "but by a specified interstate governmental structure defined by a constitutional charter and constitutional principles."[68] The Court's jurisprudence during this foundational period "transformed the European Union from an international organization into a composite legal order"[69] and "helped turn a public-international-law construction into a truly novel legal order…containing the essence of a federal system."[70]

b.) Safeguarding the Core of European Integration: Overcoming Legislative Inertia

Following this phase of constitutionalisation, a second strand in the historical evolution of the Court's jurisprudence may be detected. Having laid the constitutional foundations of the Community legal order, the CJEU then moved to "safeguard the core of European integration set out in the Treaty." This was achieved by "providing solutions to problems

[62] Weiler, 'The Transformation of Europe' (n 59) 2413; Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press 2016) Chapter 2; Matej Avbelj, 'Questioning EU Constitutionalisms' (2008) 9 German Law Journal 1.
[63] *Case C-26/62, Van Gend en Loos v Nederlandse Administratie der Belastingen,* ECLI:EU:C:1963:1.
[64] *Case C-6/64, Flamino Costa v ENEL,* ECLI:EU:C:1964:66,.
[65] *Case 22/70, Commission v Council (ERTA)* ECLI:EU:C:1971:32.
[66] *Case 29-69, Erich Stauder v City of Ulm - Sozialamt,* ECLI:EU:C:1969:57,.
[67] Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 American Journal of International Law 1, 1; Renaud Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (St Martin's Press 1998) Chapter 2.
[68] Weiler, 'The Transformation of Europe' (n 59) 2407; Paul Craig, 'Constitutions, Constitutionalism, and the European Union' (2001) 7 European Law Journal 125, 128 (footnotes omitted).
[69] Lenaerts, 'How the ECJ Thinks' (n 20) 1306.
[70] Lenaerts, 'Judges and Politicians' (n 59) 94.

that were expected to be tackled by the EU political institutions but were not in practice as the latter could not reach the then necessary consensus."[71]

The classic example here is the Court's landmark judgment in *Cassis de Dijon,* which established the principle of mutual recognition.[72] According to this principle, in the absence of common rules at Community level, goods lawfully produced in one Member State should be admitted into the territory of any other Member State, unless the state of import is able to successfully justify a restriction to the general free movement principle.[73]

By establishing the principle of mutual recognition, the Court played a key role in liberalising intra-Community trade at a time when the law-making process in the Commission and Council was suffering from a prolonged period of inertia. Rather than waiting for the political process on the European level to respond, the judicially created principle of mutual recognition provided the legal means necessary for individuals to contest national regulatory practices that impeded free movement within the internal market.[74] Through its jurisprudence, the Court therefore sought solutions to "political deadlock that prevented the completion of the internal market, as free movers sought to tear down barriers to trade that could have been eliminated by EU harmonization."[75] By seizing the initiative and driving forward the integration process for itself, the judgment in *Cassis de Dijon* is frequently cited in support of the "common view…that the [CJEU] is most expansionist in its interpretations when the political process is blocked."[76]

When considered together, the jurisprudence of the CJEU during these first two historical strands illustrates the changing role of the Court over time. It also demonstrates the direct interaction between political and judicial processes on the Community level.[77] By "focusing

[71] Lenaerts, 'How the ECJ Thinks' (n 20) 1308.
[72] *Case C-120/78 Rewe-Zentral AG v Bundesrnonopolverwaltung fur Branntwein (Cassis de Dijon),* ECLI:EU:C:1979:42.
[73] ibid paras 8, 14-15.
[74] Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009) 205–206.
[75] Lenaerts, 'How the ECJ Thinks' (n 20) 1308; Karen J Alter and Sophie Meunier-Aitsahalia, 'Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision' (1994) 26 Comparative Political Studies 535, 555.
[76] Karen J Alter, *The European Court's Political Power: Selected Essays* (Oxford University Press 2009) 4; Joseph HH Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) 1 Yearbook of European Law 267.
[77] Koen Lenaerts, 'Some Thoughts about the Interaction between Judges and Politicians' (1992) University of Chicago Legal Forum 93, 95.

on the pressing institutional and legal needs of the European Community for successive periods of time" the CJEU adapted its role in response to those needs.[78]

c.) Upholding the Checks and Balances of the EU Legal Order

This brings us to a third and final strand in the CJEU's jurisprudence. Following its success in laying the constitutional foundations of the Community legal order and establishing the conditions necessary for completing the internal market, the Court "moved onto a new paradigm."[79] In contrast to its role as an "engine" or "motor"[80] of European integration during the first two epochs, "the *third strand* came to the forefront when the political process regained the strength to make policy decisions and pass necessary legislation."[81]

The beginnings of this third, distinct epoch in the historical evolution of Court's role may be traced back to the abovementioned reforms of the Single European Act in 1987 and the Treaty of Maastricht in 1993.[82] By extending Qualified Majority Voting (QMV) in the Council to key fields of policymaking, these reforms greatly enhanced the efficiency of the law-making process in the Community.[83] In addition, an enhanced degree of democratic legitimacy was injected into the Community law-making process by continuously expanding the powers of the European Parliament.[84] Following the entry into force of the Maastricht Treaty, the European Parliament had attained the status of a veritable co-legislature with the Council in key areas of Community law-making.[85]

These changes to the law-making process had a profound impact upon the balance of power between the Community institutions and the Member States, which in turn led to an increased number of challenges to the legality of Community legislation. The Council, European Parliament and Commission became involved in numerous disputes over the correct legal basis (and, by extension, the correct law-making procedure to be followed) for

[78] ibid 94.
[79] Lenaerts, 'How the ECJ Thinks' (n 20) 1309.
[80] Mark A Pollack, *The Engines of European Integration* (Oxford University Press 2003).
[81] Lenaerts, 'Judges and Politicians' (n 59) 95 (emphasis original); See also Cruz (n 59) 237–245.
[82] Treaty on European Union (TEU), together with the Complete Text of the Treaty Establishing the European Community (EC) [1992] OJ C 224, p. 1–130.
[83] Weiler, 'The Transformation of Europe' (n 59) 2456–2461.
[84] Craig, 'Institutions, Power and Institutional Balance' (n 43) 56–59.
[85] Article 189b EC.

adopting measures of Community law.[86] Furthermore, Member States who had been outvoted in the Council under the novel QMV rules came to more frequently contest the legality of Community legislation before the Court.[87]

The SEA and Maastricht reforms thus represent a "turning point in Community history."[88] With the political process on the European level gathering momentum, the role of the Court shifted away from driving forward the process of European integration through a creative, teleological approach to Treaty interpretation.[89] According to Lenaerts, as "the constitutional court of a more mature legal order", the post-Maastricht CJEU "now tends to be less assertive as to the substantive development of EU law." Instead, it "now sees its role primarily as one of upholding the 'checks and balances' built into the EU constitutional legal order of States and peoples, including the protection of fundamental rights."[90]

4.) Surveying the Landscape: Existing Literature on the Role of the Court

It is widely recognised in the literature that the CJEU now performs a number of tasks analogous to national constitutional and supreme courts.[91] For the purposes of the present enquiry, it is generally acknowledged that the CJEU of today is "called upon regularly to settle questions regarding the allocation of powers among the various bodies within the EU legal order and to defend the fundamental rights and principles of good governance, as defined by the treaties."[92]

Despite these general points of consensus, however, there has been surprisingly little consideration of *how* the CJEU actually conducts constitutional review of EU legislation and,

[86] Kieran St Clair Bradley, 'The European Court and the Legal Basis of Community Legislation' (1988) 13 European Law Review 379.
[87] Leonor Moral Soriano, 'Vertical Juridical Disputes over Legal Bases' (2007) 30 West European Politics 321, 326.
[88] Lenaerts, 'Judges and Politicians' (n 59) 132.
[89] For discussion of this possibility see Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26 Common Market Law Review 595, 613.
[90] Lenaerts, 'How the ECJ Thinks' (n 20) 1309; Lenaerts, 'Judges and Politicians' (n 59) 132.
[91] Monica Claes and Maartje de Visser, 'The European Court of Justice as a Federal Constitutional Court: A Comparative Perspective' in Elke Cloots, Geert de Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012); Alicia Hinarejos, *Judicial Control in the European Union* (Oxford University Press 2009) 1 at fn 2 and literature cited therein.
[92] B Vesterdorf, 'A Constitutional Court for the EU?' (2006) 4 International Journal of Constitutional Law 607, 609–610.

crucially, whether this has also changed over time.[93] In particular, the extent to which shifts may be detected in the methodology or intensity of constitutional review of EU legislation has not featured prominently in existing works on the Court. Instead, much of the scholarship focuses on the Court's creative approach to interpreting provisions of primary and secondary EU law and the impact that this has had upon individuals and/or the legal orders of the Member States.[94]

And yet, understanding how the CJEU goes about scrutinising EU legislation for compliance with a series of constitutionally entrenched rights and principles goes to the very heart of understanding its modern role as a constitutional court within a more mature EU legal order. Not only does the intensity with which the CJEU reviews EU legislation impact upon the balance of power between Court and the EU legislature, it also carries direct implications for the balance of competences between the EU and its Member States more generally.[95]

As Tridimas and Gari point out, "it makes a difference whether a Court which has ultimate authority to determine the outer bounds of political power trumps the government's choices frequently, sometimes, or rarely."[96] Thus, the way in which the Court approaches its task of reviewing the constitutionality of EU legislation "tells us something about the gap between political and judicial values, namely the differential between, on the one hand, political wisdom (the outcomes of the balancing exercises drawn by the ruling majority) and, on the other hand, the judges' own internalised conception of justice…"[97] Moreover, "the

[93] A good illustration of this oversight can be seen in 'Perpetual Momentum? Reconsidering the Power of the European Court of Justice' (2012) 19 Journal of European Public Policy. Of the 8 contributions to this special issue of the journal, none discussed the Court's task of reviewing the constitutionality of EU legislation or whether its approach had changed over time.

[94] As a representative sample only, see Thomas Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and Its Limits* (Cambridge University Press 2018); R Daniel Kelemen and Susanne K Schmidt (eds), *The Power of the European Court of Justice* (Routledge 2014); Rachel A Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press 2007); Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004); Even Weiler's seminal work on the Transformation of Europe explicitly opts not to examine judicial review of Community legal acts; choosing instead to focus on the ways in which the laws of the Member States have been reviewed by the Court for their conformity with Community law and policy Weiler, 'The Transformation of Europe' (n 59) 2419.

[95] Öberg (n 6) 248–249.

[96] Gabriel Gari and Takis Tridimas, 'Winners and Losers in Luxembourg: A Statistical Analysis of Judicial Review before the European Court of Justice and the Court of First Instance (2001-2005)' (2010) 35 European Law Review 131, 133.

[97] ibid 133–134.

larger this 'value gap', the greater the competition between the branches of government, the less predictable the standing and effect of rule-making, and the greater the temptation to use Courts as a means of influencing the decision-making process."[98]

a.) The Judicial Activism Debate

In many legal systems where courts possess the power to review the constitutionality of legislation, the striking down of arguably constitutional actions of the legislative or administrative branches of government often carries with it the charge of "judicial activism."[99] "At the broadest level, judicial activism is any occasion where a court intervenes and strikes down a piece of duly enacted legislation."[100]

Within the EU context, however, the CJEU is seldom criticised as being activist in this sense.[101] Indeed, the vast majority of contributions to the debate over the perceived judicial activism of the CJEU does not address its approach to reviewing the constitutionality of EU legislation. Instead, the longstanding disagreement amongst academics "is essentially concerned with assessing the extent to which the [CJEU] is considered to have properly or improperly overstepped the limits of its judicial function through the exercise of its interpretative discretion."[102]

Allegations of judicial activism tend to be supported by references to those landmark judgments of the Court that were handed down during the first two epochs in the historical evolution of the European integration project (see above). According to this critique, a number of the CJEU's landmark judgments from those periods unacceptably departed from the express wording of the Treaties.[103] The Court is accused of promoting a pro-

[98] ibid 134.
[99] Corey Rayburn Yung, 'Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts' (2015) 105 Northwestern University Law Review 1, 11–12; Keenan D Kmiec, 'The Origin and Current Meanings of "Judicial Activism"' (2004) 92 California Law Review 1441, 1463; Frederick L Morton, 'Judicial Activism in France' in Kenneth M Holland (ed), *Judicial Activism in Comparative Perspective* (Palgrave Macmillan UK 1991).
[100] Greg Jones, 'Proper Judicial Activism' (2001) 14 Regent University Law Review 141, 143.
[101] Anthony Arnull, 'Judicial Activism and the European Court of Justice : How Should Academics Respond?' in Mark Dawson, Bruno de Witte and Elise Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013) 216.
[102] Thomas Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: Legal Limits to Judicial Lawmaking' (2013) 50 Common Market Law Review 931, 931–932 and literature cited at fn 2.
[103] Patrick Neil, *The European Court of Justice: A Case Study in Judicial Activism* (European Policy Forum/Frankfurter Institut 1995); Rasmussen (n 26).

integrationist political agenda and straying beyond the confines of the judicial function, as its judges promoted "une certaine idée de l'Europe" of their own.[104]

In response, defenders of the Court argue that the Treaties were a result of diplomatic compromise which were intentionally drafted in ambiguous language. Moreover, the Treaties were clearly imbued with an ethos of creating an ever closer union amongst the peoples of Europe through enhanced cooperation between European states. In light of these unique conditions, the Court was left with no choice but to fill the gaps in the Community legal order through a purposive or teleological approach to Treaty interpretation.[105] As Tridimas argued:

> "The vision of furthering European integration is inherent, and expressly referred to, in the Treaties. No persuasive argument has so far been made why, in exercising its interpretative function, it would not be legitimate for the Court to seek guidance from the spirit and the scheme of the Treaties and to seek to further integration."[106]

By focusing upon the CJEU's methodology when interpreting Treaty articles and provisions of secondary law, however, both sides in the judicial activism debate tend not to address the question of constitutional review of EU legislation in any detail.[107] This omission is by no means unique to the "classic" judicial activism literature from the latter decades of the 20th century. Despite becoming "a fashionable topic of academic commentary once again,"[108] recent contributions to this body of scholarship similarly overlook the Court's approach to constitutional review of EU legislation.[109]

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[104] Pierre Pescatore, 'The Doctrine of "Direct Effect": An Infant Disease of Community Law' (1983) 8 European Law Review 155, 157; Arnull (n 101) 218; Neil (n 103) 2.

[105] Takis Tridimas, 'The Court of Justice and Judicial Activism' (1996) 21 European Law Review 199; Anthony Arnull, 'The European Court and Judicial Objectivity: A Reply to Professor Hartley' (1996) 112 Law Quarterly Review 411.

[106] Tridimas (n 105) 205 (footnotes omitted).

[107] Leczykiewicz notes that rather than addressing the Court's approach to constitutional review, "most contributions on the ECJ" focus on its "law-making activity, also described…as judicial activism" Dorota Leczykiewicz, '"Constitutional Justice" and Judicial Review of EU Legislative Acts' in Dimitry Kochenov, G De Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015) 100.

[108] Mark Dawson, Bruno de Witte and Elise Muir, 'Introduction' in Mark Dawson, Bruno de Witte and Elise Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013) 1.

[109] Horsley (n 102); Iyiola Solanke, '"Stop the ECJ"?: An Empirical Analysis of Activism at the Court' (2011) 17 European Law Journal 764; Henri de Waele, 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment' (2010) 6 Hanse Law Review 3.

b.) Overlooking the Evolution of Constitutional Review

All of this should not be taken to mean that the Court's task of reviewing the legality of measures of EU law has been entirely neglected in the literature. There are, of course, many works dealing with judicial review on those grounds originally enshrined in Article 173 EEC and subsequently fleshed out by general principles of European law.[110]

What has been lacking to date, however, is any systematic consideration of how the CJEU's task of reviewing the constitutionality of EU legislation has shifted over time and, more broadly, what this means for the contemporary role of the CJEU. Whereas many scholars agree that the Courts' role came to be more closely analogous to that of national constitutional courts following the Maastricht Treaty, a key part of that "constitutional" role has not yet been fully explored.

This gap in the existing literature is even more pronounced when one considers that both the Court's powers of review and the concept of EU legislation have changed considerably since the early 1990s. Consequently, the Court's task of upholding the "checks and balances" of a more mature EU legal order looks very different today than it did at the time of the Maastricht Treaty entering into force.

As was noted above, recent Treaty reforms and an increased emphasis upon "Better Regulation" have sought to improve the means through which compliance with the EU's "federalism" principles can be monitored and enforced.[111] Furthermore, the constitutional entrenchment of a comprehensive Bill of Rights has placed the Charter at "the very centrepiece of the EU legal order."[112] In turn, this has had a considerable impact upon the Court's powers of constitutional review and, by extension, its place within the overall balance of powers between the EU institutions. Finally, the concept of legislation has

[110] Craig, *UK, EU and Global Administrative Law* (n 61) Chapters 3 and 4; Tridimas (n 33) Chapter 3; DG Valentine, 'The Jurisdiction of the Court of Justice of the European Communities to Annul Executive Action' (1960) 36 British Yearbook of International Law 174.
[111] Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality.
[112] Sybe de Vries, Ulf Bernitz and Stephen Weatherill, 'Introduction' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument : Five Years Old and Growing* (Hart Publishing 2015) 2.

continued to evolve from Maastricht to the present day, with primary EU legislation now defined as legislative acts adopted in accordance with a legislative procedure.[113]

Overall, "these treaty changes have had a profound effect on the character of the Union and the balance of power between the institutions and Member States involved in the legislative process."[114] As Granger notes, these momentous changes to both the system of constitutional review and the EU legislative process since Maastricht "pose new challenges to the Court of Justice, whose implications on integration dynamics have not been fully analysed."[115] Indeed, "[m]ost scholarly work on legal and political integration has addressed judicial and legislative interactions before the great enlargement of 2004."[116] Accordingly, "[s]cholarship on legal integration not only sidelines many of the post-Maastricht developments, they also overlook an important area of judicial activity, the review of EU measures (annulment actions or preliminary rulings concerning the validity of EU measures) and their consequences on EU policy and political processes…"[117]

5.) <u>The Shifting Intensity of Constitutional Review</u>

When it comes to the capacity of a court to review the exercise of legislative or executive power, a range of options exist "from classifying it as a non-justiciable (political) question to fully substituting a political compromise with a judicial solution."[118] In between these two extremes - which sit at opposite ends of a spectrum - courts may subject contested legal acts to varying degrees of judicial scrutiny.[119] In essence, the question boils down to how

[113] Article 289 TFEU.
[114] Jørgen Bølstad and James P Cross, 'Not All Treaties Are Created Equal: The Effects of Treaty Changes on Legislative Efficiency in the EU: EU Treaties and Legislative Efficiency' (2016) 54 JCMS: Journal of Common Market Studies 793.
[115] Marie-Pierre Granger, 'The Court of Justice's Dilemma—Between "More Europe" and "Constitutional Mediation"' in Christopher J Bickerton, Dermot Hodson and Uwe Puetter (eds), *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (Oxford University Press 2015) 212.
[116] Dorte Sindbjerg Martinsen, *An Ever More Powerful Court? The Political Constraints of Legal Integration in the European Union* (Oxford University Press 2015) 55.
[117] Granger (n 115) 212.
[118] Robert Schütze, 'EU Competences' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 100.
[119] ibid.

intrusively a court should as scrutinise legal acts which establish a particular balance between competing interests.[120]

a.) Low Intensity Review

Within the EU legal order, two key variables determine the intensity with which the CJEU will review the constitutionality of EU legislation. The first is the scope or margin of discretion to be afforded to the EU legislature when enacting policy choices into law. The second is the intensity with which the Court chooses to review those exercises of discretion.[121] As AG Villalón has recently confirmed, "the intensity of the judicial review which the Court carries out concerning…a measure adopted by the European Union legislature is directly linked to the discretion available to the latter."[122] Simply stated, therefore, the wider the scope of discretion afforded to the EU legislature in a given case, the lower the intensity with which the CJEU will review the constitutionality of contested EU legislation.

According to established case law, when exercising the powers conferred upon it in the Treaties, the EU legislature "must be allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations."[123] In such circumstances, the Court will only review whether the contested legal act is "vitiated by a manifest error of appraisal or a misuse of powers, or whether the legislature has manifestly exceeded the limits of its discretion."[124] Similarly, the Court will often only consider whether such measures are "manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue."[125]

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[120] Benedikt Pirker, 'Democracy and Distrust in International Law' in Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford University Press 2014) 59.
[121] Alexander Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' (2010) 47 Common Market Law Review 361, 365–367.
[122] *Opinion of Advocate General Cruz Villalón, Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and others,* ECLI:EU:C:2013:845 para 96.
[123] *Case C-380/03, Germany v European Parliament and Council* ECLI:EU:C:2006:772 para 145 and case law cited therein.
[124] *Case C-343/09, Afton Chemical Limited v Secretary of State for Transport* ECLI:EU:C:2010:419 para 28.
[125] *Case C-491/01, The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd (BAT)* ECLI:EU:C:2002:741 para 123.

For much of the history of the European integration project, this recognition of a wide scope of discretion, coupled with a "light-touch" approach to review, was the norm when reviewing policy choices of the European institutions.[126] In particular, when it came to reviewing EU measures against those Treaty-based principles that seek to uphold the EU's federal order of competences (i.e. conferral, subsidiarity and proportionality)[127], the general perception was that the Court had failed to place meaningful limits upon legislative powers.[128]

The same was true where European laws were challenged on the grounds that they excessively restricted fundamental rights protected by Union law. For the most part, these cases concerned claims that rights of an economic nature, such as the right to property or freedom to pursue economic activity, had been disproportionately restricted by the European legislature.[129] Invariably, the Court would uphold the validity of the contested measure, swiftly concluding that such restrictions were proportionate, provided they did not infringe the essence or substance of the rights in question.[130]

Consequently, annulments of European legislation for overstepping the boundaries of competence or impermissibly restricting fundamental rights was rather rare.[131] Indeed, the infrequency with which the Court struck down legislation in the past led some to distinguish the CJEU's practice of review from that of national constitutional and supreme courts.[132]

Beyond these empirical assessments of the number of legislative annulments over time, it has also been contended that the Court's jurisprudence evinces a general bias in favour of EU legislation and further integration. According to a familiar line of argument, the Court

[126] Paul Craig, *EU Administrative Law* (Oxford University Press 2012) Chapters 15 and 19.
[127] Article 5 TEU.
[128] Moens and Trone (n 19); Weatherill (n 35); George A Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 Columbia Law Review 331.
[129] *Case 240/83, Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU),* ECLI:EU:C:1985:59; *Case 11-70, Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel,* ECLI:EU:C:1970:114.
[130] *Case C-292/97, Kjell Karlsson and Others,* ECLI:EU:C:2000:202, para 45; *Case 234/85, Staatsanwaltschaft Freiburg v Franz Keller,* ECLI:EU:C:1986:377,; For criticism of this light-touch approach to review, see Wolfgang Weiß, 'The EU Human Rights Regime Post Lisbon: Turning the CJEU into a Human Rights Court?' in Sonia Morano-Foadi and Lucy Vickers (eds), *Fundamental Rights in the EU: A Matter of Two Courts* (Hart Publishing 2015); Coppel and O'Neill (n 19).
[131] Chalmers (n 17) 451; Armin Von Bogdandy, 'The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union' [2000] Common Market Law Review 1307, 1326.
[132] Von Bogdandy (n 131) 1326.

subjects the laws and policies of the Member States to far more rigorous judicial scrutiny than EU legal acts when reviewing the former's legality (particularly within the context of the fundamental freedoms of the internal market).[133] Echoing aspects of the abovementioned judicial activism debate, this double standard of review is often viewed as part of the Court's wider, pro-integrationist agenda.[134]

b.) Constitutional Review in the Post-Lisbon Treaty Era

In questioning the continued validity of these assertions, the chapters which follow demonstrate how the methodology and intensity of constitutional review of EU legislation has changed in recent years. Following the abovementioned changes to the CJEU's powers of review, on the one hand, and the EU legislative process, on the other, it is contended that the modern jurisprudence of the Court reveals a marked departure with past practice. Whilst the Treaty reforms at Maastricht, Amsterdam and Nice made considerable changes to the EU's legal and political framework, it was not until the entry into force of the Lisbon Treaty that discernible shifts in the case law of the Court began to emerge.

Crucially, the present study does not provide an empirical assessment of the number of annulments of EU legal acts in previous eras and then compare them with the post-Lisbon situation.[135] Instead, the aim is to look beyond the binary nature of findings of validity or invalidity to consider the evolving reasoning of the CJEU in constitutional review cases. Whilst empirical analyses of the frequency of annulments are useful for predicting the likelihood of success in challenging measures of EU law in different policy fields, they cannot register shifts in the intensity with which judicial review is conducted over time.

As we shall discover in due course, the novel practice of variable intensity review has not always resulted in the contested measure being annulled. However, these changes in levels of judicial scrutiny have not gone unnoticed by the EU legislature, who is on notice that future legislative enactments will be subject to similarly robust examination. The approach taken here thus follows that of Weiler, who notes that "from what the Court says

[133] Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal 158, 172; George A Bermann, 'Marbury v. Madison and European Union Constitutional Review' (2004) 36 George Washington International Law Review 557, 564.
[134] Harbo (n 133) 172; Gari and Tridimas (n 96) 136.
[135] For such empirical analyses see Gari and Tridimas (n 96); Chalmers (n 17).

(constitutionally) we can learn a lot about what the Court is, or more accurately, what the Court believes itself to be, or, at least, claims to be."[136]

Taking this insight as its starting point, it is argued that recent judgments confirm that the Court will abandon its traditional, light-touch approach to review in cases where EU legislation places serious restrictions upon fundamental rights or core constitutional principles. For example, in the landmark Schrems judgment of 2015, the Court held for the first time ever that where EU legislation compromises the "essence" of fundamental rights, it will be annulled on that basis alone.[137] As a result, infringements of the "essence" of rights protected by the Charter cannot be justified with reference to objectives in the EU's general interest.[138] There is no need for the Court to review the balance struck by the EU legislature between fundamental rights and the pursuit of policy objectives in the EU general interest. Once the threshold of "essence" has been crossed, the EU legislation will henceforth be deemed unconstitutional.

Beyond interferences with the essence of fundamental rights, the CJEU has also recently held in another first that, "the extent of the EU legislature's discretion may prove to be limited, depending on a number of factors, including…the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference."[139] In Digital Rights Ireland, the nature of the rights at issue in the case, coupled with the seriousness of the interference caused by the contested EU legislation, meant that "the EU legislature's discretion is reduced, with the result that review of that discretion should be strict."[140] In carrying out this novel, high-intensity approach to review, the Court closely scrutinised the substance of the contested legislation in order to determine whether it was "limited to what is strictly necessary in the light of the objective pursued."[141]

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[136] Joseph HH Weiler, 'The Least-Dangerous Branch: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration', *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and other Essays on European Integration* (Cambridge University Press 1999) 189.
[137] *Case C-362/14, Maximillian Schrems v Data Protection Commissioner,* ECLI:EU:C:2015:650 paras 94-98.
[138] Maja Brkan, 'The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to Its Core' (2018) 14 European Constitutional Law Review 332, 360.
[139] *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 4) para 47; *Opinion of Advocate General Bobek, Case C-134/15 Lidl GmbH & Co KG v Freistaat Sachsen,* ECLI:EU:C:2016:169, para 36.
[140] *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 4) para 48.
[141] ibid paras 62-64.

This reduction in the scope of discretion and subsequent intensification of the standard of constitutional review has also recently been deployed when scrutinising whether EU legislation has infringed the principle of subsidiarity.[142] In a notable shift away from the pre-Lisbon position, AG Kokott has recently stated for the first time in the Court's history that a "stricter judicial review of subsidiarity may be necessary where an EU measure exceptionally affects matters of national identity of the Member States (Article 4(2) TEU)."[143] In the case at hand, however, there was "absolutely no suggestion of this and the review standard of a manifest error of assessment can therefore be retained."[144] Nonetheless, by relying directly upon the Court's reasoning in Digital Rights Ireland, members of the Court have indicated a willingness to also engage in high-intensity or strict scrutiny of EU legislation in both federalism and fundamental rights cases.

A subtle yet significant change in approach may also be detected in a number of post-Lisbon cases where EU legislation restricts or impinges upon constitutionally protected rights and principles to a certain (but not serious) extent.

Here, the default position of the Court has been to show considerable deference to the EU legislature's policy choices. It has emphasised that the political process on the EU level is primarily responsible for resolving substantive disputes over the federal balance of competences and the trade-offs between fundamental rights and general objectives. Rather than second-guessing the appropriateness of the EU legislature's policy choices, the Court has increasingly examined whether the EU legislature has "done its work properly."[145] This is achieved by scrutinising the law-making process and evidence base upon which EU legislation was enacted, in order to determine whether the EU legislature took all relevant interests into account when legislating.[146]

In federalism cases, the Court has made numerous references to Protocol.No2 annexed to the Lisbon Treaty, Impact Assessments and other preparatory documents utilised by the EU

[142] Article 5(3) TEU.
[143] *Opinion of Advocate General Kokott, Case C-358/14, Poland v Parliament and Council,* ECLI:EU:C:2015:848 para 148.
[144] ibid para 148.
[145] Lenaerts, 'Process-Oriented Review' (n 5) 4, 7.
[146] Xavier Groussot and Sanja Bogojević, 'Subsidiarity as a Procedural Safeguard of Federalism' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press 2014) 252.

institutions throughout the legislative process.[147] Given the difficulties faced when trying to draw bright line distinctions between federal and state powers in many federal systems, the CJEU's powers of review have recently been "directed toward maintaining a vital system of political and institutional checks on federal power, not on policing some absolute sphere of state autonomy."[148]

By examining whether the EU institutions actively considered different policy options and took concerns about Member State regulatory autonomy into account, the Court uses its powers of constitutional review to prompt the political process on the EU level to "operate in a fashion that is responsive to federalism concerns."[149] In this way, the emergence of process-oriented review in the contemporary EU legal order is reminiscent of procedural theories of judicial review stemming predominantly from the United States: "while we count on the political process to resolve most substantive disputes about governmental policy, we rely on courts to enforce the basic rules of that process."[150]

A similarly process-oriented style of review may be detected in a number of post-Lisbon Treaty fundamental rights cases. In particular, the CJEU has opted to review whether the EU legislature considered alternative policy options during the legislative process that were less restrictive of the rights in question.[151] As a result, the Court scrutinises the process by which the EU legislature stuck the balance between rights and policy objective, rather than the merits of the balance ultimately struck itself.[152]

6.) Conclusions: What Role for the CJEU?

In light of these changes to the practice of constitutional review of EU legislation, it is contended that longstanding views of the Court as a "pro-integrationist" institution that seeks to enlarge and empower the Union at every opportunity should be revisited. For the

[147] *Case C-358/14, Poland v European Parliament and Council,* (n 54); *Case C-58/08, The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform,* ECLI:EU:C:2010:321.
[148] Ernest A Young, 'Two Cheers for Process Federalism' (2001) 46 Villanova Law Review 1349, 1351.
[149] Calvin R Massey, 'Etiquette Tips: Some Implications of Process Federalism' (1994) 18 Harvard Journal of Law & Public Policy 175, 211.
[150] Young (n 148) 1358.
[151] *Joined Cases C-92/09 and C-93/09, Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen,* ECLI:EU:C:2010:662.
[152] Alemanno (n 18) 335.

same reasons, it is necessary to re-evaluate accusations that the Court continues to behave in a "policymaking" or "activist" fashion by ignoring the clear wording of the Treaties in order to attain pro-integrationist policy outcomes. [153]

Recent shifts in the methodology and intensity of review offer an alternative perspective on the contemporary role of the CJEU and its wider contribution to the European integration project. By engaging in high intensity review of serious infringements of fundamental rights, the Court's jurisprudence is consistent with the elevation of the Charter to the apex of the EU's constitutional order. Similarly, by scrutinising the legislative process and evidence base of EU legislation when determining its constitutionality, the emergence of process-oriented review may be seen as a direct response to the increased proceduralisation of law-making. Far from operating in accordance with its own agenda in a manner that is divorced from the constitutional framework of the EU Treaties, therefore, post-Lisbon case law reveals a Court that is responsive to the wider legal and political context in which it now operates. By engaging in a finely calibrated, variable intensity approach to constitutional review of EU legislation, the contemporary role of the CJEU is that of a veritable constitutional court within a more mature EU legal order.

These arguments shall be presented in 8 Chapters. Chapter 2 discusses the origins of judicial review under the EEC Treaty and the initial, administrative court role envisaged for the CJEU. Chapter 3 examines the jurisprudence of the Court within the legal and political context of the pre-SEA European Economic Community. It is contended that in both competence and fundamental rights contexts, the case law was emblematic of an era of "low-intensity constitutionalism" in the history of European integration. Chapter 4 deals with the first major reforms to the EEC Treaty and the changing nature of the Court's role during this period. The Maastricht Treaty and the insertion of a series of federalism principles into the EU legal order is then analysed in Chapter 5. Despite significant changes to the constitutional framework of the EU during this period, it is argued that the post-Maastricht era continued to evince a light-touch, tersely reasoned approach to constitutional review of EU legislation. Chapter 6 contains an overview of the salient reforms to the EU legal and political order as brought about by the Treaty of Lisbon. As we

[153] For a classic statement of these views see Trevor C Hartley, *The Foundations of European Union Law* (Eighth edition, Oxford University Press 2014) 73–77.

shall see, these reforms have brought about a series of subtle yet significant shifts in the way in which the CJEU conducts constitutional review of EU legislation. This is first illustrated in Chapter 7, which argues that an increasingly process-oriented approach to constitutional review may be detected in federalism cases. This is complimented by Chapter 8, which demonstrates that contemporary fundamental rights cases are characterised by a finely calibrated, variable intensity approach to constitutional review. Chapter 9 concludes by arguing that these shifts in the methodology and intensity of constitutional review demonstrate that the contemporary role of the CJEU is that of a veritable constitutional court within a more mature EU legal order.

Chapter 2

The Foundations of Judicial Review

1.) Introduction

In laying the foundations for analysing the changing role of the Court over time, Chapter 2 begins with a general overview of the core elements of constitutional review of legislation as understood in many national legal systems. Once established, this is compared with both the concept of legislation and the judicial review powers of the Court of Justice under the European Coal and Steel Community (ECSC) and European Economic Community (EEC) Treaties.[1] Finally, the low intensity, tersely reasoned approach that the Court initially adopted when reviewing the legality of Community legal acts is analysed.

2.) Constitutional Review in Comparative Perspective

a.) Constitutional Supremacy

The justification for constitutional review of legislation (also referred to simply as judicial review) ultimately stems from the status of the constitution as the highest ranking body of law within a given legal system. This was explicitly stated in the seminal US Supreme Court decision of *Marbury v Madison,* in which Chief Justice Marshall characterised the US constitution as the "fundamental and paramount law of the nation."[2] Typically, constitutions hold the status of the supreme law of the land because they establish the institutions of government, set out their powers, duties and responsibilities and provide for limitations on the exercise of public power.[3]

In legal orders where constitutional review exists, courts are required to ensure that whenever legislation or other measures conflict with provisions of the hierarchically superior constitution, the latter prevails.[4]

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[1] Treaty of Rome establishing the European Economic Community (EEC) 1957, 298 U.N.T.S. 3; Treaty of Paris establishing the European Coal and Steel Community (ECSC) 1951, 261 U.N.T.S. 140.
[2] *William Marbury v James Madison, Secretary of State of the United States 5 US 137 (1803)* 177.
[3] Maartje De Visser, *Constitutional Review in Europe: A Comparative Analysis.* (Bloomsbury Publishing 2014) 1.
[4] ibid 54; Keith E Whittington, 'The Power of Judicial Review' in Mark Tushnet, Mark A Graber and Sanford Levinson (eds), *The Oxford Handbook of the U.S. Constitution* (Oxford University Press 2015) 388.

> "In democratic regimes, all judicial review methods have as their main purpose the guarantee of the supremacy of the constitution. Consequently, when constitutional courts exercise judicial review, they have the task of comparing statutes or primary legislation with the provisions of the Constitution. That is why judicial review is, fundamentally, a constitutional control of legislation or the exercise of judicial control over the constitutionality of legislation."[5]

The very premise upon which constitutional review of legislation is founded represents a break from the relatively stable constitutional orthodoxy of the 19th century. With the exception of the United States, the prevailing view throughout this period was that "constitutions could typically be revised at the discretion of the legislature; they prohibited review of the legality of statutes by the judiciary; and they did not contain substantive constraints, such as rights, on legislative authority."[6] Consequently, conflicts between legislation and a constitutional provision were either ignored by the judiciary or resolved in favour of the former.[7]

b.) <u>The Spread of Constitutional Review</u>

Today, despite many differences in structure and jurisdiction, the basic idea of entrusting courts with upholding the supremacy of the constitution against all other conflicting legal norms "has grown and spread to all parts of the world, and is now clearly a global phenomenon."[8] This "global spread" of constitutional review of legislation throughout the 20th century thus represents a radical departure from the classic position that legislation enacted by the elected representatives of the people in Parliament was the supreme law of the land.[9]

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[5] Allan-Randolph Brewer Carías, *Constitutional Courts as Positive Legislators: a Comparative Law Study* (Cambridge University Press 2013) 20.
[6] Alec Stone Sweet, *Governing with Judges* (Oxford University Press 2000) 31.
[7] ibid.
[8] Albert HY Chen and Miguel Poiares Maduro, 'The Judiciary and Constitutional Review' in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds), *The Routledge Handbook of Constitutional Law* (2013) 102.
[9] Alec Stone Sweet, 'Why Europe Rejected American Judicial Review: And Why It May Not Matter' (2003) 101 Michigan Law Review 2744, 2744–2745; Tom Ginsburg, 'The Global Spread of Constitutional Review' in Gregory A Caldeira, R Daniel Kelemen and Keith E Whittington (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press 2008); Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 Virginia Law Review 771.

When viewed in comparative perspective, the practice of constitutional review of legislation typically involves two distinct categories of cases. The first is to settle competence disputes between different branches and/or levels of government in constitutional legal orders that divide power. The second is to protect fundamental human rights from excessive interference by those exercising public power.[10]

As initially practiced in both the United States and continental European systems, however, constitutional review was exclusively concerned with the first of these two tasks.[11] The constitutional jurisdiction of the courts was reserved for questions over which branch or level of government was competent to act in legal systems that divided power.[12] As Shapiro noted towards the end of the 20th century:

> "Until recently we might have been quite confident that the really crucial part [of the constitution] must be the division of powers part. For until recently only political systems of a federal or quasi-federal nature enjoyed successful constitutional judicial review… But what of the rights part. The U.S. Supreme Court only began an active rights jurisprudence more than a hundred years after its founding."[13]

Fundamental rights adjudication was therefore not initially part of the mandate of those courts entrusted with constitutional review. Reviewing legislation for compliance with constitutionally entrenched fundamental rights was either not included in the text of the constitution itself, or such rights were considered to be non-justiciable and thus not part of the mandate of the judiciary.[14]

Following the atrocities of the Second World War, however, constitutional law as a discipline (and the role of courts therein) witnessed a marked shift in emphasis.[15] Protecting the fundamental rights of the individual now took on paramount importance. A "new

[10] Martin Shapiro, 'The European Court of Justice: Of Institutions and Democracy' (1998) 32 Israel Law Review 3.
[11] Mark Tushnet, *Advanced Introduction to Comparative Constitutional Law* (Edward Elgar 2014) 51.
[12] Stephen Gardbaum, 'The Place Of Constitutional Law in the Legal System' in Michel Rosenfeld and András Sajo (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 176–177; John E Ferejohn, 'Constitutional Review in the Global Context' (2002) 6 New York University Journal of Legislation and Public Policy 49.
[13] Shapiro (n 10) 4.
[14] Gardbaum (n 12) 177.
[15] Sweet (n 6) 31–38; Dieter Grimm, 'Constitutional Adjudication and Democracy' (1999) 33 Israel Law Review 193, 193–194.

constitutionalism" emerged, involving an expansive role for courts in reviewing legislation against a number of constitutionally entrenched fundamental rights norms.[16] In post-war continental Europe in particular, written constitutions were enacted that created powerful constitutional courts tasked with reviewing the constitutionality of legislation on both structural and fundamental rights grounds.[17] As a result, constraining government within a system of democratic controls and protecting the fundamental rights of individuals suddenly rose to the top of the agenda.[18] "As democratic reconstruction proceeded, higher-law constitutionalism became the new orthodoxy, replacing that of legislative sovereignty and the General Will."[19]

c.) Constitutional Review versus Democracy

Despite this worldwide proliferation of constitutional review, however, the very legitimacy of courts striking down or otherwise declaring legislation to be unconstitutional continues to be widely debated in the literature.[20] In nation states with strong traditions of government by elected majority, the prospect of constitutional review leading to a "government of judges" - whereby the judiciary substitutes its views for that of the democratic majority - has long been deliberated.[21] Perhaps the most famous articulation of this problem is Bickel's "countermajoritarian difficulty" as it pertains to the United States:

> "The root difficulty is that judicial review is a counter-majoritarian force in our system. ... When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it. That, without mystical overtones, is what actually happens..."[22]

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[16] Martin Shapiro and Alec Stone, 'The New Constitutional Politics of Europe' (1994) 26 Comparative Political Studies 397; Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press 1989) 136–146.
[17] De Visser (n 3) Chapter 2; Ferejohn (n 12).
[18] Sweet (n 9) 2769.
[19] ibid 2769.
[20] Jeremy Waldron, 'The Core of the Case against Judicial Review' [2006] Yale Law Journal 1346; Grimm (n 15).
[21] Robert Schütze, *European Constitutional Law* (Cambridge University Press 2012) 265; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).
[22] Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1986) 16–17.

Many of the debates surrounding constitutional review of legislation thus come back, ultimately, to a fundamental tension between "two of our most important political ideals – constitutionalism and democracy – and between various ways of realizing these ideals in political institutions and practices."[23] Whereas the abovementioned spread of constitutional supremacy presupposes that provisions of the constitution can override all other norms in the legal system, "the basic idea of democracy (though not the only one, of course) is that a duly constituted legislature has the right to make decisions for the polity."[24]

In the United States, the foundational legitimacy of judicial review of legislation has long preoccupied scholars since the practice is not explicitly provided for in the constitution.[25] With its very origins stemming from the jurisprudence of the Supreme Court, the provenance and source of legitimacy for judicial review remains ambiguous and thus contested.[26] In many other common law jurisdictions, academics have long grappled with the difficulties posed by judicial review of primary legislation (particularly against legislatively enshrined fundamental rights standards) in systems founded upon the doctrine of Parliamentary sovereignty.[27] In contrast, questions over the foundational legitimacy of constitutional review tend not to arise in continental European systems that make explicit provision for comprehensive constitutional review by centralised constitutional courts.[28]

That being said, the fact that such courts derive their authority to engage in constitutional review of legislation explicitly from the constitution does not render their jurisprudence immune from scrutiny. In reviewing legislation on both structural and fundamental rights grounds, constitutional courts are necessarily required to interpret the meaning and scope of open-ended and often ambiguous constitutional provisions. Furthermore, it is clear that many constitutionally protected fundamental rights are not absolute in nature.[29] Many such

[23] Christopher Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press 2007) 1.
[24] A Harel and A Shinar, 'Between Judicial and Legislative Supremacy: A Cautious Defense of Constrained Judicial Review' (2012) 10 International Journal of Constitutional Law 950, 953.
[25] Hart Ely (n 21) Chapters 1-3.
[26] See generally Wolfgang Hoffmann-Riem, 'Two Hundred Years of Marbury v. Madison: The Struggle for Judicial Review of Constitutional Questions in the United States and Europe' (2004) 5 German Law Journal 685 (and literature cited therein).
[27] Tom Hickman, *Public Law after the Human Rights Act* (Bloomsbury Publishing 2010) Chapters 1-3.
[28] Sweet (n 9) 2779.
[29] For example see Articles 8-11, Protocol No.1, Article 1(2) and Protocol No.4, Article 2(3) Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 213 U.N.T.S. 221, E.T.S. 5.

rights may be legally restricted by the legislature or other public bodies in the pursuit of certain legitimate interests of the society as a whole. In reviewing the balance struck between these rights and objectives, courts have increasingly had recourse to the principle of proportionality in order to determine whether legislation is suitable to achieving a legitimate objective and does not go beyond what is necessary to achieve those objectives.[30]

Often lacking clear guidance from the text of the constitution itself, these tasks provide courts with a degree of discretion as to what provisions of the constitution mean and how they should be enforced. Furthermore, the determinations made by courts on these matters can lead to conflict with the views of the democratically elected branches of government.

For example, where courts opt for a wide interpretation of the federal government's legislative competences, federal legislation is less likely to be declared unconstitutional for going beyond the scope of constitutionally-defined powers. This approach not only allows for federal legislation to be adopted in ever greater policy fields, but also impacts upon the scope of the legislative powers of the constituent units/states in federal systems.[31] Similarly, a judicial determination that all encroachments upon the right to freedom of expression (no matter how trivial) must be strictly scrutinised to ensure that they go no further than is absolutely necessary to protect national security places considerable limits upon legislative power. Absent robust justification on national security grounds, legislation restricting freedom of expression will be declared unconstitutional; thus tilting the balance between pursuing general policy objectives and protecting individual rights in favour of the latter.[32]

As these two rudimentary examples demonstrate, much of the debate surrounding the practice of constitutional review of legislation arises beyond (or in addition to) the first order question of its foundational legitimacy. Across many legal systems where constitutional review of legislation exists, fundamental questions arise with regards to the

[30] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 72.
[31] Jacob Öberg, 'The Rise of the Procedural Paradigm: Judicial Review of EU Legislation in Vertical Competence Disputes' (2017) 13 European Constitutional Law Review 248, 249.
[32] On the balance between individual rights and public interests see Joseph HH Weiler, 'Fundamental Rights and Fundamental Boundaries', *The Constitution of Europe: 'Do the New Clothes have an Emperor?' and other Essays on European Integration* (Cambridge University Press 1999) 111–119.

appropriate standards and intensities of review and the extent to which courts should defer to the choices of the elected branches of government.[33]

d.) Constitutional Review and the Court of Justice.

Against this background, we can now turn to examine the original role of the Court of Justice under the ECSC and EEC Treaties. As was noted in Chapter 1, the present study contends that the CJEU of today is responsible for conducting constitutional review of primary EU legislation on both federalism and fundamental rights grounds. What is more, recent jurisprudence evinces a notable shift in both the methodology and intensity of constitutional review, thus giving rise to wider considerations about the contemporary role of the Court.

Before advancing these arguments in detail, however, it is first necessary to consider the origins of judicial review in the Communities and the Court's initial role within the European integration project more generally.

As shall be demonstrated below, the law-making process in both the ECSC and EEC was in no way comparable to parliamentary forms of legislating in the nation state context. Without any significant input from a directly elected parliamentary body, the process was dominated by the supranational Commission and intergovernmental Council of Ministers. Consequently, the concept of Community legislation was conceived of in functional terms as all acts of general application. This rendered it more akin to delegated or secondary legislation adopted by the executive branch in the legal systems of the Member States.

Married to this functional conception of (executive) legislation was a system of judicial review that was premised upon the principles of French administrative law and bore little resemblance to national systems of constitutional review of legislation. Fearing that a powerful court could interfere with the output of the Community law-making process, the drafters of the Treaties deliberately created a system of review that limited the Court's

[33] Hanna Wilberg and Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing 2015); Lukasz Gruszczynski and Wouter Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford University Press 2014).

ability to scrutinise the discretionary policy choices of the European institutions against substantive rights and principles.[34]

3.) The Concept of Legislative Power

Turning first to the nature of legal acts adopted by the Community institutions under the ECSC and EEC Treaties, it is to be noted that two competing conceptions of legislation have emerged in the modern era. [35]

a.) Procedural/ Parliamentary Conceptions of Legislation

The *parliamentary* conception of legislation (also known as *formal* or *procedural* legislation) is linked to an understanding of who should be in charge of the legislative function.[36] Viewed in this way, "[l]egislation is formally defined as every legal act adopted according to the *parliamentary legislative procedure.*"[37] This understanding ultimately stems from the view that legislation may only be enacted by the peoples' representatives in Parliament. It is based on a "presumption that parliament, which became the pre-dominant legislative authority claiming to represent the people, could adopt all necessary legal acts of general application."[38]

> "Where legislation is used in a formal [parliamentary] sense, it refers to a legal act that is defined by formal criteria. In this case a written constitution or an unwritten constitutional principle determines the procedure to be followed and the institution authorised for the adoption of such a legislative act. In the classical tradition of the principle of the separation of powers, the authority to adopt such acts is in principle vested in parliament, as the institution directly elected by the people."[39]

[34] Anne Boerger-De Smedt, 'Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome' (2012) 21 Contemporary European History 339, 344.
[35] Schütze, *European Constitutional Law* (n 21) 151.
[36] ibid 152.
[37] Robert Schütze, 'Sharpening the Separation of Powers through a Hierarchy of Norms? Reflections on the Draft Constitutional Treaty's Regime for Legislative and Executive Law-Making' European Institute of Public Administration Working Paper No. 2005/W/01 1, 5 (emphasis original).
[38] Alexander Türk, *The Concept of Legislation in European Community Law: A Comparative Perspective* (Kluwer Law International 2006) 238.
[39] Alexander Türk, 'The Concept of the "Legislative" Act in the Constitutional Treaty' (2005) 6 German Law Journal 1555, 1556.

Whilst the central involvement of a directly elected Parliamentary body is evidently a core component of this understanding of legislation, it is important to note that it is the legislative procedure itself which provides the resulting legislation with its legitimacy. By mandating that different institutions and individuals representing a wide variety of interests participate in the process of scrutinising and influencing legislation, the outcome of the legislative process enjoys a high degree of legitimacy.[40] Consequently, legislation enacted through a designated (parliamentary) legislative procedure often enjoys particular privileges within a given legal system. Examples here include satisfying strict standing requirements when seeking to contest the constitutionality of legislation in court and a high degree of judicial deference on the merits when those procedural hurdles have been overcome.[41]

b.) Material/Functional Conceptions of Legislation

This procedural/parliamentary conception of legislation may be contrasted with a *material* understanding of legislation (also known as *functional* legislation or *legislation in substance*). Under this material conception, legislation is understood as the "adoption of legal acts of general application without regard to the institution or procedure in which they were adopted."[42] Rather than being defined by who or how legislation is enacted, the material conception defines what legislation should be; namely, legal rules of *general application*.[43]

The distinction between procedural and material notions of legislation gained increased attention in the first half of the twentieth century. Following the expansion of state activity into ever greater areas of everyday life, wide-ranging legislative action by the executive branch of government became increasingly necessary.[44] As Türk notes, this emergence of the executive as a legislative body brought about a split in the concept of legislation and led to a distinction being drawn in the literature between legislation in form and legislation in substance.[45] "The demand for efficient law-making in modern legal systems requires and justifies the law-making activity by the executive and other bodies. Such regulatory activity

[40] ibid.
[41] See generally Victor Ferreres Comella, 'The European Model of Constitutional Review of Legislation: Toward Decentralization?' (2004) 2 International Journal of Constitutional Law 461.
[42] Türk (n 38) 238; Trevor C Hartley, *The Foundations of European Union Law* (Eighth edition, Oxford University Press 2014) 111.
[43] Schütze, *European Constitutional Law* (n 21) 152.
[44] Türk (n 38) 238.
[45] ibid.

is considered as legislation in substance, where it results in the adoption of acts of general application."[46] This alternative, functional conception of legislation therefore encompasses delegated legislation as adopted by the executive branch in many nation states.[47]

4.) Legislation in the ECSC and EEC

Having analysed the key characteristics of parliamentary and material conceptions of legislation, we can now turn to examine the nature of legal acts adopted by the institutions of the ECSC and EEC.

a.) Executive Acts of General Application

Initially, the ECSC Treaty entailed a deliberate transfer of sovereignty from the Member States to European institutions tasked with taking legally binding decisions within the coal and steel sectors of the economy.[48] This approach was "functional" in the sense that the ECSC treaty "set a specific aim - the establishment of a common market in coal and steel - and transferred genuine legislative and executive powers to the Community in order to achieve it."[49]

Lacking a veritable parliamentary chamber and providing no single law-making procedure, the ECSC Treaty vested the power to take "executive acts" in the hands of an independent, supranational High Authority.[50] Indeed, the text of the ECSC Treaty made no reference to the concept of legislation at all, instead empowering the High Authority to adopt: (i) Decisions that were binding in all their details; and (ii) Recommendations that were binding with respect to the objectives to be achieved.[51]

The entire system was thus "characterized by a limited transfer, from the spheres of national administrative authorities, of power to regulate the economic matters falling under

[46] ibid.
[47] Schütze, *European Constitutional Law* (n 21) 152.
[48] See generally Henry L Mason, *The European Coal and Steel Community: Experiment in Supranationalism* (Springer Netherlands 1955).
[49] Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press 2005) 4.
[50] Valentine refers to the High Authority and Council as "executive institutions" that were "empowered to pass executive acts" DG Valentine, *The Court of Justice of the European Communities.* (Stevens 1964) 10.
[51] Article 14 ECSC.

the narrow compass of the ECSC-Treaty."[52] "The ECSC Treaty gave the Community a real executive, the supranational High Authority, which had wide regulatory and administrative powers not just over the Member States but also over individual firms."[53]

As is clear from these pronouncements, legal acts adopted by the High Authority were not conceived of as being equivalent to parliamentary or procedural forms of legislation.[54] Instead, acts of general application were understood as legislation in the material sense and were thus akin to delegated legislation within the nation state context.[55]

b.) The Expansion of Law-Making Competences

The Treaty of Rome establishing the European Economic Community (EEC) would provide the Community institutions with far greater law-making powers than under the ECSC framework. Designed as a "Traité-cadre" (a framework Treaty), the scope of the EEC Treaty was not restricted to specific sectors of the economy.[56]

The basic tasks of the Community were set out in Article 2 EEC. By establishing a common market and progressively approximating the economic policies of Member States, the Community would, *inter alia*, seek to promote a harmonious development of economic activities throughout the EEC and raise the standard of living of the citizens of the Member States.[57] This was accompanied by Article 3 EEC, which set out the various activities of the Community which were to be undertaken in order to pursue the tasks set out in Article 2 EEC. Included amongst these activities were the abolition of customs duties on goods traded between the Member States, the adoption of a Common Agricultural Policy and the

[52] Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (M Nijhoff ; Distributors, for the US and Canada, Kluwer Academic Publishers 1986) 208.
[53] Guy Schrans, 'The Community and Its Institutions' in Commission of the European Communities (ed), *Thirty Years of Community Law* (Office for Official Publications of the European Communities 1983) 1.
[54] As Rasmussen put it, the "generally accepted view… is that it is inappropriate to classify the powers of the [High Authority] and the ECSC-Council as legislative" Rasmussen, *On Law and Policy* (n 52) 208; Schrans (n 53) 19.
[55] *Case 8-55, Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community* ECLI:EU:C:1956:7.
[56] Herwig CH Hofmann, Gerard C Rowe and Alexander H Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011) 7.
[57] Article 2 EEC.

approximation of the laws of Member States in order to ensure the proper functioning of the common market.[58]

The law-making powers of the Community institutions within a given policy field were specified in various legal bases (competences) scattered throughout the Treaty. These legal bases set out the aims to be achieved by Community policy in that area and proscribed the law-making procedure to be followed for those purposes.[59]

c.) The Law-Making Powers of the Commission and Council

In contrast to the ECSC Treaty which vested the majority of law-making powers in the High Authority, the EEC Treaty required a greater degree of power sharing between the Commission (formerly High Authority) and the Council of Ministers.[60] For the most part, the Commission was entrusted with initiating policy proposals, whereas the Council of Ministers was responsible for enacting these proposals into law.[61] "[I]t was generally accepted that the Council had to be the central decision-making organ due to the sensitive and wide-reaching economic and political nature of building a common market, and as a result the Commission should take a more limited and different role than the HA."[62] Thus, the disposition of law-making power within the EEC was encapsulated by the mantra "the Commission proposes, Council disposes."[63] However, both the Commission and Council possessed the power to adopt different types of legally binding measures under the EEC Treaty.[64]

According to Article 189 EEC, the Council and the Commission were empowered to adopt legally binding acts in the form of Regulations, Directives and Decisions. In terms of the nature of these legal acts, Article 189 EEC further provided:

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[58] Article 3 EEC.
[59] Koen Lenaerts and others, *European Union Law* (Sweet & Maxwell, Thomson Reuters 2011)7-013.
[60] Articles 145 and 155 EEC.
[61] Article 149 EEC.
[62] M Rasmussen, 'Revolutionizing European Law: A History of the Van Gend En Loos Judgment' (2014) 12 International Journal of Constitutional Law 136, 142.
[63] Paul Craig, 'Institutions, Power and Institutional Balance' in P Craig and G De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011) 43–44.
[64] The most notable exception to this general rule was in the field of Competition law where the Commission was entrusted with binding law-making powers which were largely independent of any input from the Council, see Articles 85-88 EEC.

> "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed..."[65]

Like the ECSC Treaty before it, the EEC Treaty made no reference to the concept of legislation. Rather than providing the Commission and Council with veritable "legislative" powers (*pouvoir législatif*), the drafters of the EEC Treaty deliberately stipulated that they could merely "dispose of a power of decision" (*un pouvoir de decision*).[66] This was because considering the Community institutions as a "legislature" would have implied a parliamentary composition under the separation of powers doctrine.[67]

Under the institutional framework of the EEC Treaty, the only parliamentary-type body was the Assembly (latterly the European Parliament). Unlike veritable parliamentary bodies in nation states, the EEC Assembly did not possess any legislative powers of its own. It was entitled only to exercise an advisory function by providing non-binding opinions on proposed Community legal acts.[68] This allowed the Member States to "ensure that sovereignty could be transferred in small, controllable doses" since it "would have been much more difficult to control the transfer of sovereignty if a Community parliament had been endowed with important legislative powers."[69]

As Schütze observes:

> "[w]hen the European Community was established, its 'regulatory' competences were not immediately conceived of as of a 'legislative' quality. The nature of the Community in general, and its decisionmaking procedures in particular, defied the parliamentary conception of legislation...From the viewpoint of national

[65] Article 189 EEC.
[66] Articles 145 and 155 EEC.
[67] Jürgen Bast, 'New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law' (2012) 49 Common Market Law Review 885, 891 (footnotes omitted).
[68] Article 137 EEC.
[69] G Federico Mancini and David T Keeling, 'Democracy and the European Court of Justice' (1994) 57 The Modern Law Review 175, 176.

> democracies, it seemed that all decision-making powers of the European Community were 'executive' in character."[70]

Unlike many national legal orders, the EEC Treaty did not create a hierarchy of legal acts on the basis of the institutions and or procedures involved in their enactment e.g. parliamentary legislation, delegated legislation etc.[71] Thus, the status of legal acts within the Community legal system was not linked to the democratic standing of the institution responsible for their adoption.[72] Instead, the Treaty of Rome distinguished between different types of Community legal acts on the basis of their scope of application and legal effects.[73] With both the Commission and Council capable of enacting acts of general application and decisions binding upon individuals, a functional understanding of both the separation of powers and the concept of legislation prevailed in the EEC:

> "The legislative power relates to the function of enacting rules with a general and abstractly defined scope of application; the executive power relates to the function of applying the said legislative rules to individual cases or specific categories of cases; finally, the judicial power relates to the function of settling litigation that arises on the occasion of the application of the legislative rules to individual cases or specific categories of cases."[74]

The concept of legislation in the EEC was thus defined in material or functional terms as all acts of general application. [75] "This understanding is also clear from the jurisprudence of the Court, which provided that the "essential characteristic of a decision arises from the limitation of persons to whom it is addressed, whereas a regulation, being essentially of a

[70] Robert Schütze, 'The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers' (2006) 25 Yearbook of European Law 91, 92. See footnote 7 for the relevant German literature referring to the characterization of Community legislation as 'executive legislation'.
[71] Alan Dashwood, 'Community Legislative Procedures in the Era of the Treaty on European Union' (2004) 19 European Law Review 343, 343; Jürgen Bast, 'On the Grammar of EU Law: Legal Instruments' [2003] Jean Monnet Working Paper 9/03 24–26.
[72] *Opinion of Advocate General Jacobs, Case C-50/00 P, Unión de Pequeños Agricultores v Council of the European Union* ECLI:EU:C:2002:197 para 90; Phillip Allott, 'The Democratic Basis of the European Communities' (1974) 11 Common Market Law Review 298, 301–302.
[73] Koen Lenaerts and Marlies Desomer, 'Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures' (2005) 11 European Law Journal 744, 746.
[74] Koen Lenaerts, 'Some Reflections on the Separation of Powers in the European Community' (1991) 28 Common Market Law Review 11, 13; Schütze, 'The Morphology of Legislative Power' (n 70) 92.
[75] Schütze, 'The Morphology of Legislative Power' (n 70) 98.

legislative nature, is applicable not to a limited number of persons, named or identifiable, but to categories of persons viewed in the abstract and in their entirety."[76]

5.) **The Early Role of the Court of Justice**

With the institutional framework and system of law-making established, the remainder of Chapter 2 considers the initial powers of the Court of Justice to review the legality of measures of Community law. Under the EEC Treaty, the principal task of the Court was to ensure that in the interpretation and application of the Treaty, the law was observed.[77] As part of this overall mandate, the Court was required, inter alia, to review the legality of legal acts adopted by the other Community institutions. Four grounds of review were established for this purpose. They were: lack of competence; infringement of an essential procedural requirement; infringement of the Treaty or of any rule of law relating to its application and misuse of powers.[78]

Rather than settling disputes over the allocation of legislative power or alleged infringements of fundamental rights, the Court's early case law concerned technical challenges to administrative-type regulations in the economic sphere. It was therefore widely viewed "as a new type of supranational administrative adjudicator."[79]

The Community system of judicial review was intentionally founded upon the principles of French administrative law as utilised by the French Conseil d'État.[80] According to the established position in France at the time of the ECSC and EEC Treaties, judicial review of administrative decision-making could take place according to four grounds of review. Known collectively as *Le recours pour excès de pouvoir*, these grounds were: lack of competence;

[76] *Case 117/86, Unión de Federaciones Agrarias de España (UFADE) v Council and Commission* ECLI:EU:C:1986:419 para 9.
[77] Article 164 EEC; Article 33 ECSC.
[78] Article 173(1) Treaty of Paris establishing the European Coal and Steel Community (ECSC) 1951, 261 U.N.T.S. 140.
[79] Peter L Lindseth, 'The Perils of "As If" European Constitutionalism' (2016) 22 European Law Journal 696, 704.
[80] Jean-Claude Bonichot, 'French Administrative Courts and Union Law' in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing 2012); Paul Craig, *EU Administrative Law* (Oxford University Press 2012) Chapter 3.

violation of a procedural requirement, violation of law and détournement de pouvoir (misuse of discretion).[81]

It will immediately be recognised that these are the same grounds of review that were initially enshrined in the Community legal order.[82] Indeed, officials involved in the drafting and ratification of the ECSC Treaty explicitly noted the linkage between the *Conseil d'État, t*he principles of French administrative law and the workings of the Court of Justice.[83]

As traditionally understood, judicial review of administrative action in France was aimed solely at ascertaining the legality of a contested measure according to rules of law, leaving the administration's scope of discretion virtually untouched.[84] In the same spirit, Article 33 ECSC provided that the court:

> "[M]ay not review the conclusions of the High Authority, drawn from economic facts and circumstances, which formed the basis of such decisions or recommendations, except where the High Authority is alleged to have abused its powers or to have clearly misinterpreted the provisions of the Treaty or of a rule of law relating to its application."[85]

As was stated in the Luxembourg Parliament around the time of the entry into force of the ECSC Treaty, the Court of Justice "is organised upon the model of the French contentieux administrative which in principle only controls the legality and not the advisability of a measure."[86] A similar view was expressed by Valentine, a leading authority on the ECSC and EEC, who noted that:

> "[T]he control of the Court…has been limited. It may not look at the merits of a decision, but it can consider only whether the enacting body in passing the measure in question was acting *ultra vires,* or without regard to required procedural matters,

[81] John Bell, Sophie Boyron and Simon Whittaker, *Principles of French Law* (Oxford University Press 2008) Chapter 6.
[82] Clarence J Mann, *The Function of Judicial Decision in European Economic Integration.* (Martinus Nijhof 1972) 52.
[83] DG Valentine, *The Court of Justice of the European Coal and Steel Community* (Springer Netherlands 1954) 9.
[84] Mann (n 82) 52.
[85] Article 33(1) ECSC.
[86] M. Biever, *Compte Rendu*, 1951-1952, col.1611 (reprinted in Valentine, *The Court of Justice of the European Coal and Steel Community* (n 83) 9.

> or in violation of the Treaty, or whether it has committed a *détournement de pouvoir.*"[87]

These four grounds of judicial review remained unchanged with the coming into force of the EEC Treaty; meaning that the role of the Court of Justice continued to be compared with national administrative courts.[88] Unlike Article 33 ECSC, however, the analogous provision in the Treaty of Rome (Article 173 EEC) did not contain the same prohibition on reviewing the conclusions of the High Authority drawn from economic facts and circumstances.[89]

A further reform brought about by Article 173 EEC was the ability of the Court to review the legality of legal acts adopted by both the Commission and Council, rather than of the High Authority alone under the ECSC. The division of law-making powers between the Commission and Council in the Treaty of Rome meant that both those institutions would henceforth be able to challenge the legality of Community measures before the Court. This was further complemented by Member States being able to directly challenge the legality of Community legal acts on the same four grounds contained in Article 173 EEC.[90]

The Treaty of Rome also transformed the preliminary ruling procedure by providing in Article 177 EEC that, upon the request of a national court of a Member State, the Court of Justice would provide rulings on: (a) the interpretation of the EEC Treaty; and (b) the validity and interpretation of acts of the other institutions of the Community.[91] This differed considerably from the ECSC Treaty, which provided that national courts could only send requests for preliminary rulings to the Court where the validity of Community acts were at issue.[92] The aim of giving the Court of Justice the power to issue binding rulings on the interpretation and validity of Community law was to ensure the uniform interpretation and application of Community law throughout the Member States.[93] Prior to Article 177 EEC, there was no provision in the ECSC Treaty explicitly stating that the Court of Justice was the

[87] DG Valentine, 'The Jurisdiction of the Court of Justice of the European Communities to Annul Executive Action' (1960) 36 British Yearbook of International Law 174, 175.
[88] "The ECJ's administrative review role was its initial raison d'etre" Karen J Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014) 204.
[89] Article 173(1) EEC.
[90] A similar possibility existed under Article 33 ECSC.
[91] Article 173(a)(b) EEC Treaty.
[92] Article 41 ECSC.
[93] Morten P Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (Second edition, Oxford University Press 2014) 1–3.

sole institution competent to provide such interpretations, thus meaning that national judiciaries could theoretically do so themselves.[94]

6.) **The Beginnings of Constitutional Review in the EEC?**

When taken together, the changes made to the Community legal order by the Treaty of Rome had a considerable impact upon the role of the Court of Justice. Whilst it retained its function as an administrative court akin to the Conseil d'État in the majority of cases, aspects of the Court's mandate under the EEC Treaty came to resemble that of a constitutional or supreme court.[95]

a.) Elements of Structural Constitutional Review

The reformed preliminary reference procedure – which was directly inspired by the Italian constitutional system – was said to have created a system with the "contours of a federal Supreme Court system of judicial review" that would "depend completely on the co-operation of national courts in order to function."[96]

By allowing the Member States, Commission and Council to bring direct actions before the Court of Justice, Article 173 EEC laid the foundations for disputes of a "structural" nature. To recall from above, within the nation state context, constitutional review of legislation was initially designed to settle issues concerning governmental structure.[97] In both the United States and Continental European tradition, constitutional review concerned questions over which branch of government was competent to act (horizontal competence disputes) or which level of government could act (vertical competence disputes).[98] With both types of cases now possible in the Community legal order, the Treaty of Rome appeared to place the Court in a position comparable to national constitutional courts in certain types of cases.[99]

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[94] Boerger-De Smedt (n 34) 351–352.
[95] Giancarlo Olmi, 'Introduction' in Commission of the European Communities (ed), *Thirty Years of Community Law* (Office for Official Publications of the European Communities 1983) 3.
[96] Morten Rasmussen, 'Constructing and Deconstructing "Constitutional" European Law: Some Reflections on How to Study the History of European Law' in Henning Koch and others (eds), *Europe: The New Legal Realism: Essays in Honor of Hjalte Rasmussen* (Djøf Publishing 2010) 642–643.
[97] Tushnet (n 11) 51.
[98] Gardbaum (n 12) 177.
[99] Antoine Vauchez, *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015) 20; Arved Deringer, 'European Integration: A Challenge to Lawyers' (1973) 10 Common Market Law Review 208, 213–214.

Despite such a possibility, however, Community legislation (acts of general application) was rarely challenged on competence grounds by the Member States or other Community institutions during the early decades of the EEC. As shall be examined in detail in Chapter 3, this lack of veritable structural constitutional review is explained in part by the fact that the Council typically adopted Commission proposals by unanimity, thus reducing the likelihood of subsequent challenges before the Court. Moreover, the way in which competences were distributed within the EEC legal order served to reduce the number of challenges to EU legal acts on structural grounds. Unlike many national constitutional legal orders, the Treaty of Rome did not contain a list of enumerated Community competences; nor did it make any mention of the powers reserved to the Member States.[100] Instead, the competences of the Community institutions were derived from specific legal bases dispersed throughout the Treaty, which laid down the objectives to be achieved and the law-making procedure to be followed in a given policy field. As a former Vice President of the Court once remarked:

> "[T]he Treaties do not contain a list of…powers and do not share them out at all precisely between the Community and the Member States, as is the case in federal constitutions. On the contrary, powers are specifically conferred on the Community according to sector, to a degree which varies depending on the case and with caution as to their extent and the compass of the matters covered."[101]

b.) <u>The Lack of Fundamental Rights Review</u>

Whereas certain aspects of the EEC Treaty rendered parts of the Court's role loosely analogous to national courts entrusted with structural constitutional review, the same could not be said for fundamental rights.[102] Unlike many legal orders that explicitly (or implicitly) provide for reviewing legislation against constitutionally protected fundamental rights standards, the EEC Treaty was silent on this issue. There was no "explicit bill of rights as a

[100] For example, the German Constitution follows the principle that only those powers enumerated in the Constitution itself belong to the central government, with all other powers by default remaining with the states. See Articles 30 and 70 Grundgesetz (Basic Law for the Federal Republic of Germany). Similarly, the Tenth Amendment to US Constitution provides: "The 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."
[101] Antonio Tizzano, 'The Powers of the Community' in Commission of the European Communities (ed), *Thirty Years of Community Law* (Office for Official Publications of the European Communities 1983) 63–64.
[102] Shapiro (n 10) 4.

higher law against which the administrative and legislative activities of the Community's political organs [could] be checked."[103]

The authors of the Treaty of Rome did not consider such a document to be necessary given that the EEC's core objective was to establish a common market and progressively approximate the economic policies of Member States.[104] The Community institutions were simply not considered as being active in areas of law and policymaking that would give rise to serious fundamental rights concerns.[105] Indeed, it was simply "inconceivable" that the national Parliaments of the founding Member States would have ratified a Treaty that "was capable of violating fundamental tenets of their own constitutions…"[106]

This decision not to provide for fundamental rights review of Community legal acts also fits within the wider strategy of the drafters of the Treaties to restrict the powers of the Court. Fearing that a powerful court could interfere with the aims of furthering European integration by engaging in robust judicial review of Community measures, the Court's jurisdiction had to be tightly circumscribed and restricted to questions of legality.[107] The nature of the Community law-making process also spoke in favour of limiting the Courts' powers of review. With all major Commission proposals requiring the agreement of national government Ministers in the Council, fundamental rights review carried the danger of overturning the hard-won consensus in the Community law-making process.[108]

Such sentiments were not lost on members of the Court. Under the ECSC framework, the opportunity to review the legality of a Community measure that allegedly infringed fundamental rights protected under the German Constitution was rejected. In *Stork,* the Court held that the Community institutions were only mandated to observe and apply

[103] Joseph HH Weiler, 'Community, Member States and European Integration: Is the Law Relevant?' (1982) 21 JCMS: Journal of Common Market Studies 39, 51. In contrast, the proposals for the European Political Community of 1953 gave human rights a prominent position, see Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 American Journal of International Law 649.
[104] Article 2 EEC.
[105] Takis Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 300; Mauro Cappelletti, 'The Mighty Problem of Judicial Review and the Contribution of Comparative Analysis Symposium: Conference on Comparative Constitutional Law' (1979) 53 Southern California Law Review 409, 432.
[106] Federico Mancini and David T Keeling, 'Democracy and the European Court of Justice' (1994) 57 Modern Law Review 175, 187.
[107] Boerger-De Smedt (n 34) 34; Vauchez (n 99) 48–50.
[108] Joseph HH Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities' (1986) 61 Washington Law Review 1103, 1108.

Community law and were not competent to apply the national laws of the Member States.[109] Consequently, the High Authority lacked the power to examine a complaint alleging that when it adopted a decision against certain companies for engaging in anti-competitive practices, it infringed principles of the German Constitution.[110]

The reluctance amongst members of the Court to interfere with the outcome of the political process in the Council was also evident during the early years of the EEC. In denying standing to natural and legal persons seeking to challenge the legality of a Council act of general application, Advocate General Lagrange noted "the extremely grave consequences that would follow from even a partial annulment of the regulations", since "these texts have been arrived at only after considerable difficulty, and sometimes after a compromise reached in the Council..."[111] For Alter, the remarks of the Advocate General were indicative of a more widespread concern amongst European officials during the early years of the EEC that judicial review of measures passed by the European institutions would lead to "political paralysis."[112] These concerns influenced the Court a year later in its now infamous *Plaumann* judgment that severely restricted the ability for individuals to challenge acts of general application directly before the Court.[113]

7.) **The Scope and Intensity of Review**

Thus far, the analysis of the ECSC and EEC legal orders has concerned the structure of the Court's powers of judicial review and the nature of legal acts adopted by the Community institutions. In addition to these factors, however, it is also necessary to consider how the Court went about its task of reviewing the legality of measures of Community law. As we shall see in the chapters which follow, the methodology and intensity with which the contemporary CJEU conducts constitutional review of EU legislation sits in marked contrast with previous epochs in the history of the European integration project.

[109] *Case 1/58, Friedrich Stork & Cie v High Authority of the European Coal and Steel Community* ECLI:EU:C:1959:4.
[110] ibid para 3.
[111] *Opinion of Advocate General Lagrange, Joined Cases C-16/62 and 17/62, Confédération nationale des producteurs de fruits et légumes and others v Council,* ECLI:EU:C:1962:40 p.486.
[112] Alter (n 88) 286.
[113] *Case 25-62, Plaumann & Co v Commission of the European Economic Community,* ECLI:EU:C:1963:17.

In this regard, every legal order in which judicial review exists involves courts in exercising some degree of control over the factual and discretionary determinations made by law-makers.[114] This tends to be accompanied by debates both within academia and amongst members of the judiciary as to the appropriate intensity of judicial review of questions of fact and discretion.[115] On the one hand, many take the view that robust judicial scrutiny of such issues is inappropriate since it results in a judicial encroachment upon the merits of policy decisions taken by primary decision-makers. On the other, it is contended that if review of fact and discretion is too restrictive, any meaningful degree of judicial supervision of the primary law-maker ceases to exist.[116]

As was noted above, the default rule under the ECSC was that the Court was prohibited from reviewing the conclusions of the High Authority drawn from economic facts and circumstances that formed the basis of its decisions.[117] The Court's powers of review were confined to reviewing the legality of legal acts, with considerations of discretionary policy or expediency being largely beyond the powers of judicial review.[118] Following the removal of this prohibition in Article 173 EEC, however, the question arose as to how the Court would approach questions of fact and discretion in the future? The text of the Treaty of Rome was of little help here. Beyond setting out the four grounds of review, Article 173 EEC did not give any guidance on how intensively the Court should review Community legal acts. Nor did it indicate the extent to which the Court should respect the discretionary policy choices and factual determinations made by the Commission and Council.[119]

The approach taken in the early years of the EEC is well illustrated by the *Balkan-Import Export* case, where the Court confirmed that where "the evaluation of a complex economic situation is involved" the Community law-maker enjoys "a wide measure of discretion."[120] As a consequence, when reviewing the legality of the exercise of such discretion, "the Court

[114] Craig, *EU Administrative Law* (n 80) Chapter 15.
[115] Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press 2015) 477.
[116] ibid 478.
[117] Article 33(1) ECSC.
[118] Bastiaan Van Der Esch, 'Discretionary Powers of the European Executive and Judicial Control' (1969) 6 Common Market Law Review 209, 211. The only exception under Article 33 ECSC was where the High Authority was alleged to have abused its powers or to have clearly misinterpreted the provisions of the Treaty.
[119] Alexander Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' (2010) 47 Common Market Law Review 361, 365.
[120] *Case C-55/75, Balkan-Import Export GmbH v Hauptzollamt Berlin-Packhof,* ECLI:EU:C:1976:8 para 8.

must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority did not clearly exceed the bounds of its discretion."[121] Like many national courts, the default position of the CJEU was that it should not substitute its judgement for that of the Community law-maker on questions of fact and discretion. Reasons pertaining to the separation of powers, institutional capacity and expertise have all been generally accepted as justifying the CJEU's position on these issues.[122]

Notably, in reviewing whether such a manifest error or clear excess in the bounds of discretion had been committed, the Court consistently adopted a light-touch or "low-intensity" approach. As Craig notes, the Court was "very reluctant" to annul Community legal acts on these grounds during the early decades of the EEC:

> "The ECJ gave scant attention to the Commission's reasoning when reviewing the contested decision and the Court was normally content with one or two brief paragraphs before finding that there was no manifest error. Low intensity review for manifest error prevailed."[123]

This light-touch approach to reviewing the discretionary policy choices of the Commission and Council must be viewed in light of the subject matter of review proceedings before the Court at the time. Overwhelmingly, challenges to Community legal acts during the ECSC and early EEC eras were of what one might call a technical, administrative law nature. For example, the Court was required to assess whether the Commission had committed an error in its assessment of the prevailing economic situation when reorganising the market for sugar.[124] Similarly, the Court had to review whether the Council had unlawfully discriminated between different types of starch manufacturers when administering a system of refunds in the cereals and rice sectors.[125] As Kelemen puts it, the subject matter

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[121] ibid para 8; *Case C-166/78, Italy v Council* ECLI:EU:C:1979:195 paras 14-17; *Case 29/77, SA Roquette Frères v French State,* ECLI:EU:C:1977:164 paras 19-20; A similar practice of recognising a wide margin of discretion for the Commission and Council was developed in the CAP field on accounts of the 'political responsibilities' placed upon the Community institutions in that policy field, see *Case 179/84, Piercarlo Bozzetti v Invernizzi SpA and Ministero del Tesoro, ECLI:EU:C:1985:306* ECLI:EU:C:1985:306,.

[122] Craig, *EU Administrative Law* (n 80) 408; Henry G Schermers and Denis F Waelbroeck, *Judicial Protection in the European Union* (Kluwer 2001) 397.

[123] Craig, *EU Administrative Law* (n 80) 442.

[124] *Case 57-72, Westzucker GmbH v Einfuhr- und Vorratsstelle für Zucker,* ECLI:EU:C:1973:30,.

[125] *Joined cases 103 and 145/77, Royal Scholten-Honig (Holdings) Limited v Intervention Board for Agricultural Produce ; Tunnel Refineries Limited v Intervention Board for Agricultural Produce,* ECLI:EU:C:1978:186.

of early disputes before the Court concerned "issues of relatively low political salience" with the Court developing its jurisprudence "behind a veil of technocratic obscurantism."[126]

8.) Conclusion

The preceding analysis has demonstrated that the role of the Court of Justice under the ECSC and EEC Treaties was far removed from national courts engaged in constitutional review of legislation. Fearful of an assertive judiciary that could frustrate the aims of European integration, a deliberate attempt was made to curtail the judicial review powers of the Court. Rather than being tasked with upholding a series of constitutionally entrenched rights and principles against the output of the Community's law-making institutions, the Court's powers were modelled upon those of the French administrative courts.[127] The original Member States therefore "instigated on the Community level the sort of judicial review with which they were familiar at home: a narrowly circumscribed judicial review of administrative acts."[128]

In addition to this understanding of the system of judicial review, the concept of legislation was not comparable to primary legislation enacted through national parliamentary procedures. Instead, a material or functional understanding of the concept of legislation prevailed, with measures of general application being considered as Community legislation (irrespective of the form of legal act or the institution(s) responsible for its enactment).

Overall, the typical view of the Community legal system - and the role of the Court therein - during the early decades of European integration is well summarised by A.M Donner, the second President of the Court. In his view, the EEC Treaty could not be compared to a genuine constitution in the sense typically deployed in the nation state contest. From this starting point, it was contended that:

> "Exactly because those treaties are not to be assimilated with a constitution, the dangers of a meddling in politics by 'nine old men', that exist where a constitution is concerned, which with a few brushes and some succinct formulas indicates the

[126] R Daniel Kelemen, 'The Court of Justice of the European Union in the Twenty-First Century' (2016) 79 Law & Contemporary Problems 117, 118.
[127] Weiler, 'Eurocracy and Distrust' (n 108) 1111.
[128] Rasmussen, *On Law and Policy* (n 52) 209.

> powers of constitutional institutions, are greatly diminished as regards the interpretation of the treaties. They only transfer certain powers and responsibilities for the attaining of certain well defined objectives. We should be reticent in compare the position of the Community and of its Court with the well-known examples of constitutional review and in drawing all sorts of conclusions from such comparisons."[129]

Against this background, Chapter 3 examines how a constitutional dimension came to be added to the Community system of judicial review and how a constitutional frame of analysis came to dominate thinking about the CJEU's role.

[129] Judge AM Donner, 'The Constitutional Powers of the Court of Justice of the European Communities' (1974) 11 Common Market Law Review 127, 129.

Chapter 3

The Era of "Low-Intensity Constitutionalism"

1.) Introduction

Chapter 2 demonstrated how the original system of judicial review established by the ECSC and EEC Treaties bore little resemblance to the practices of national courts engaged in constitutional review of legislation. Lacking a list of enumerated powers, an explicit doctrine of conferred competences and a written bill of fundamental human rights, the jurisdiction of the CJEU was initially founded upon the principles of French administrative law. Within this administrative law framework, substantive judicial review of questions of fact and discretion were deliberately restricted by the drafters of the Treaties.

Furthermore, the Community law-making process and resultant legal acts were conceptually distinct from parliamentary or procedural conceptions of primary legislation found in many nation states. With no clear distinction between the legislature and executive within the EEC institutional framework, a functional definition of both the separation of powers and the concept of legislation prevailed. Community legislation was conceptualised as all legal acts of general application, irrespective of the institution responsible for their enactment or the procedure that was followed when doing so.

Against this background, Chapter 3 examines how a series of changes to the legal and political order of the EEC led to the Court assuming greater "constitutional" responsibilities. It is contended that the Court's establishment of fundamental rights as general principles of Community law rendered aspects of its role analogous to national courts engaged in constitutional review of legislation. Prior to the entry into force of the Single European Act (SEA) in 1987, however, the same could not be said for structural constitutional review. The dynamics of the Community law-making process meant that it was largely for the Council, not the CJEU, to determine where the outer bounds of Community competences lay.[1]

[1] Single European Act (SEA) (1987) OJ L 169, p. 1-28.

In addition to analysing these changes to the legal and political order of the EEC, Chapter 3 also examines the intensity with which the Court conducted fundamental rights and competence review prior to the entry into force of the SEA. In so doing, it is claimed that the period from the inception of the Treaty of Rome to the late 1980s was one of "low-intensity constitutionalism."

Consisting of several different elements, the "low-intensity" of this constitutionalism was characterised, most importantly, by the Court continuing to adopt a very light touch, tersely reasoned approach to review. In both competence (structural constitutional review) and fundamental rights cases, the Court did not engage in any meaningful degree of scrutiny of contested measures of Community law; often concluding within a few short paragraphs that such measures were valid.

This state of affairs may be contrasted with the contemporary EU legal order and the Court's role therein. Following the entry into force of the Lisbon Treaty, the CJEU is now responsible for conducting constitutional review of primary EU legislation on a series of federalism and fundamental rights grounds. Moreover, the methodology and intensity deployed by the Court when doing so reveals a finely calibrated, variable intensity approach to scrutinising the constitutionality of EU legislation.

2.) **The Constitutionalisation of the Treaty of Rome**

The Court's assumption of greater "constitutional" responsibilities may be traced back to the so-called "foundational period" in the history of European integration.[2] As was discussed in Chapter 1, this foundational period was marked by a series of landmark CJEU judgments which "constitutionalized" the EEC Treaty. Of particular significance here were the judgments of *Van Gend en Loos* - which established that individuals could rely upon provisions of Community law directly before national courts (direct effect)[3]; and *Costa* – which held that national courts should dis-apply national law that conflicted with provisions of Community law (supremacy).[4]

[2] Joseph HH Weiler, 'The Transformation of Europe' [1991] Yale Law Journal 2403.
[3] *Case C-26/62, Van Gend en Loos v Nederlandse Administratie der Belastingen,* ECLI:EU:C:1963:1.
[4] *Case C-6/64, Flamino Costa v ENEL,* ECLI:EU:C:1964:66,.

According to a very familiar narrative in EU legal studies, these seminal judgments of the CJEU transformed the Community from an international organization into "a truly novel legal order…containing the essence of a federal system."[5] By establishing a direct link with the individual citizen and mandating that Community law take primacy over conflicting provisions of national law, the EEC Treaties went "much further than normal treaties establishing international organizations" and now performed "the same functions as the Constitution of a federal State."[6]

As has been well documented, the establishment of the doctrines of direct effect and supremacy were not unanimously accepted without question across all the Member States of the Community. For some legal scholars at the time (particularly in Germany), the requirement that national courts dis-apply provisions of national law and give full effect to Community law in the event of a clash of norms presented a problem: What should a national court do in a situation where a provision of Community law seemed to conflict with a fundamental right protected by the national constitution? If the doctrine of supremacy was to be interpreted as an absolute rule, national courts would have to give effect to Community law and thus dis-apply fundamental rights as protected in their national constitutions.[7]

For many, this outcome was unsatisfactory given that measures of Community law were not subject to any degree of fundamental rights scrutiny by the Court of Justice. In light of this gap, the preferred solution of some was for national courts to reject the supremacy doctrine in such circumstances and give effect to fundamental rights as protected in national constitutions.[8]

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[5] Koen Lenaerts, 'Some Thoughts about the Interaction between Judges and Politicians' [1992] University of Chicago Legal Forum 93, 94; Weiler, 'The Transformation of Europe' (n 2) 2413.

[6] Ole Due, 'A Constitutional Court for the European Communities?' in Deirdre Curtin, TF O'Higgins and David O'Keefe (eds), *Constitutional Adjudication in European Community and National Law: Essays for the Hon. Mr. Justice T.F. O'Higgins* (Butterworth 1992) 4.

[7] Ulrich Scheuner, 'Fundamental Rights in European Community Law and National Constitutional Law: Recent Decisions in Italy and in the Federal Republic of Gennany' (1975) 12 Common Market Law Review 171, 173; Manfred Zuleeg, 'Fundamental Rights and the Law of the European Communities' (1971) 8 Common Market Law Review 446, 447.

[8] Pierre Pescatore, 'The Protection of Human Rights in the European Communities' (1972) 9 Common Market Law Review 73; See generally Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials* (Cambridge University Press 2010) 232–233.

Had such a solution been put into practice, this would have resulted in different courts in different Member States subjecting measures of Community law to different national constitutional standards.[9] Consequently, a Community Regulation or Directive may have been constitutional in some Member States, yet unconstitutional and thus unenforceable in others. Given that the EEC aimed at establishing a common market with common rules, this would have been highly damaging to the "substantive unity and efficacy of Community law, lead[ing] inevitably to the destruction of the Common Market and the jeopardizing of the cohesion of the Community."[10]

3.) The Establishment of Fundamental Rights as General Principles of Law

Faced with such pressures, the solution was obvious: the CJEU had to guarantee that measures of Community law would henceforth be subject to fundamental rights review on a Community wide level. Had it not done so, there was no question that national courts (particularly in Germany and Italy) would have dis-applied Community law and given effect to national fundamental rights standards.[11]

a) The Origins of Fundamental Rights

In searching for a legal foundation upon which to build a framework of fundamental rights protection in the EEC legal order, however, the Court's powers of review remained restricted to the four grounds enshrined in Article 173 EEC. Of these four, lack of competence, infringement of an essential procedural requirement and misuse of powers were relatively discrete grounds of review. Their potential for developing a comprehensive system of general principles of judicial review of the sort found in many national legal systems was rather limited.[12] In contrast, the infringement of the Treaties or any rule of law relating to their application ground was more promising given its somewhat open ended formulation. Indeed, it would provide a gateway through which a series of general principles

[9] Lorna Woods, Philippa Watson and Marios Costa, *Steiner & Woods EU Law* (Thirteenth edition, Oxford University Press 2017) 148.
[10] *Case 44/79, Liselotte Hauer v Land Rheinland-Pfalz,* ECLI:EU:C:1979:290, para 14.
[11] Scheuner (n 7) 177–180.
[12] Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press 2015) 317.

of law would enter the EEC legal order and flesh out the system of judicial review on the European level.[13]

These general principles of law served "mainly as objective standards for administrative action" and were inspired by the traditions embedded within the systems of administrative law in the Member States.[14] Examples included: the general principle of legality of administrative action[15]; the principle of non-retroactivity of law[16]; the rights of defence[17] and other due process of law requirements, including the right to be heard[18]; the principle of equal treatment[19]; legal certainty[20] and the protection of legitimate expectations.[21] In the vast majority of cases, these general principles were applied in what might be termed "classic" administrative law contexts, such as Commission competition law proceedings against corporations or in Community staff disputes.[22]

In addition to these general principles, however, the Court also famously established that fundamental human rights formed part of Community law and that these would henceforth be protected by the CJEU.[23] Following a brief nod in this direction in *Stauder*, the Court comprehensively set out its position in *Internationale Handelsgesellschaft.*[24] In that case, the applicants had contended that a Community export licensing system - which could result in the forfeiture of deposits - constituted a disproportionate violation of their right to freedom of action, of disposition and of economic liberty as protected under the German

[13] ibid; For a judicial discussion of general principles of law adding 'flesh to the bones' of the EEC legal order see *Opinion of Advocate General Mazak, Case C-411/05, Félix Palacios de la Villa v Cortefiel Servicios SA,* ECLI:EU:C:2007:106 para 85.
[14] Jürgen Schwarze, 'The Administrative Law of the Community and the Protection of Human Rights' (1986) 23 Common Market Law Review 401, 403; Werner Lorenz, 'General Principles of Law: Their Elaboration in the Court of Justice of the European Communities' (1964) 13 American Journal of Comparative Law 1.
[15] *Joined cases 42 and 49/59, Société nouvelle des usines de Pontlieue - Aciéries du Temple (SNUPAT) v High Authority of the European Coal and Steel Community,* ECLI:EU:C:1961:5.
[16] *Case 69-63, Mrs Anne-Marie Marcillat (née Capitaine) v Commission of the European Atomic Energy Community,* ECLI:EU:C:1964:38,.
[17] *Case 32-62, Maurice Alvis v Council of the European Economic Community,* ECLI:EU:C:1963:15,.
[18] *Case 17-74, Transocean Marine Paint Association v Commission of the European Communities,* ECLI:EU:C:1974:106,.
[19] *Joined cases 117-76 and 16-77, Albert Ruckdeschel & Co and Hansa-Lagerhaus Ströh & Co v Hauptzollamt Hamburg-St Annen ; Diamalt AG v Hauptzollamt Itzehoe,* ECLI:EU:C:1977:160.
[20] *Case 13-61, Kledingverkoopbedrijf de Geus en Uitdenbogerd v Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn,* ECLI:EU:C:1962:11,.
[21] *Case 111-63, Lemmerz-Werke GmbH v High Authority of the ECSC,* ECLI:EU:C:1965:76,.
[22] Takis Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 5–7.
[23] *Case 29-69, Erich Stauder v City of Ulm - Sozialamt,* ECLI:EU:C:1969:57, para 7.
[24] *Case 11-70, Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel,* ECLI:EU:C:1970:114.

constitution. In responding to a reference from a German administrative court, the CJEU held that national courts could not review the legality of measures of Community law against national constitutional standards, since recourse to such standards "would have an adverse effect on the uniformity and efficacy of Community law."[25] "The law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question."[26]

This did not mean, however, that measures of Community law would not be subject to any form of fundamental rights review whatsoever. Instead, the Court held that it would determine "whether or not any analogous guarantee inherent in Community law has been disregarded."[27] Such guarantees were inherent in the EEC legal order because "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community."[28] Consequently, the Court of Justice, basing itself upon the common constitutional traditions of the Member States, would review measures of Community law against a series of fundamental rights which existed in the Community legal order as general principles of law.[29]

b.) The Beginnings of "Constitutional" Review of Community Legal Acts

It is widely accepted in the literature that the primary motivation behind the establishment of fundamental rights review by the CJEU was to ward off challenges from national constitutional courts to the supremacy, unity and effectiveness of the Community legal order.[30] It has also been convincingly argued that the advent of fundamental rights was

[25] ibid para 3.
[26] ibid para 3.
[27] ibid para 4.
[28] ibid para 4.
[29] ibid para 4; The CJEU also recognised international human rights treaties to which the Member States were signatories as a source of fundamental rights in the EEC, see *Case 4-73, J Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* ECLI:EU:C:1974:51 para 13; *Case 44/79, Hauer* (n 10) para 15.
[30] Takis Tridimas, 'Primacy, Fundamental Rights and the Search for Legitimacy' in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU law : The Classics of EU law Revisited on the 50th Anniversary of*

necessary in order to imbue the EEC with greater degrees of accountability and legitimacy.[31] According to this view, there was a clear incentive for the Court to increase the protection of the rights of individuals since the Community lacked a veritable parliamentary chamber, had no Bill of Rights and adopted laws in accordance with procedures dominated by the Commission and Council.[32]

For the purposes of the present enquiry, the significance of *Internationale Handelsgesellschaft* and its lineage is that it added a novel, "constitutional" dimension to the system of judicial review of Community legal acts.[33] As has already been emphasised in Chapters 1 and 2, when viewed in comparative perspective, courts engaged in constitutional review of legislation generally engage in two rather different types of tasks. One is to act as umpire or referee in boundary disputes between parts or levels of government (structural constitutional review). The other is to protect fundamental rights from being infringed by those exercising public power.[34]

In both types of cases, constitutional review involves the judiciary in upholding the hierarchically superior norms of the constitution against all legal acts enacted by the political branches of government.[35] Formally speaking, therefore, one could categorise the Court declaring a Commission Regulation of general application void for an infringement of an essential procedural requirement as formally analogous to constitutional review. After all, the Court would in such circumstances be upholding the hierarchically superior norm in Article 173 EEC against a conflicting measure of Community legislation (understood in a

the Rome Treaty (Hart 2010); Manfred A Dauses, 'The Protection of Fundamental Rights in the Community Legal Order', (1985) 10 European Law Review 398.

[31] Craig, *UK, EU and Global Administrative Law* (n 12) 372; Piet Eeckhout, 'The European Court of Justice and the Legislature' (1998) 18 Yearbook of European Law 1, 23.

[32] Joseph HH Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities' (1986) 61 Washington Law Review 1103, 1117.

[33] Federico Mancini, 'The Making of a Constitution for Europe' (1989) 26 Common Market Law Review 595; Armin Von Bogdandy, 'The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union' [2000] Common Market Law Review 1307, 1320.

[34] Martin Shapiro, 'The European Court of Justice: Of Institutions and Democracy' (1998) 32 Israel Law Review 3, 4; M Rosenfeld, 'Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court' (2006) 4 International Journal of Constitutional Law 618, 626.;

[35] Allan-Randolph Brewer Carías, *Constitutional Courts as Positive Legislators: a Comparative Law Study* (Cambridge University Press 2013) 20.

functional sense). Annulling a Council Directive for violating one of the abovementioned, judicially created general principles of administrative law could also be viewed in this way.

When considered from a more substantive perspective, however, the original EEC Treaty simply lacked many of the doctrines and principles associated with constitutional review of legislation as defined above. Indeed, the legal order established by the Treaty of Rome was initially devoid of many of the central tenets of constitutionalism itself. In this regard, constitutionalism may be generally defined as a normative theory of limited government that is concerned with legal and political norms which place limits upon public power.[36] "Broadly speaking, these norms seek to impose limits upon the exercise of public power and the procedures through which such power is exercised.[37] "Its key principles are independence of the judiciary, separation of governmental powers, respect for individual rights, and the promotion of the judiciary's role as guardians of constitutional norms."[38]

As was discussed in Chapter 2, the Treaty of Rome established a unique system of competences that bore no resemblance to the constitutional division of powers in federal or other non-unitary states. There was no specific list of Community competences or explicit doctrine of conferred powers. Nor was there a written Bill of Fundamental Rights empowering the Court to engage in a practice analogous to constitutionally-entrenched rights review. Furthermore, the drafters of the Treaties deliberately restricted the judicial review powers of the Court so as to prevent robust scrutiny of the factual determinations and discretionary policy choices of the Commission and Council. When judicial review of such issues was undertaken, the Court's early jurisprudence demonstrated an incredibly deferential approach, limiting itself to considering whether a manifest error of assessment had been committed.

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[36] Martin Loughlin, 'What Is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010) 55; "[T]he most ancient, the most persistent, and the most lasting of the essentials of true constitutionalism still remains what is has been almost from the beginning, the limitation of government by law." Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (Rev ed, Amagi/Liberty Fund 2007) 21.

[37] Loughlin (n 36) 55; See similarly Gareth Davies, 'The European Union Legislature as an Agent of the European Court of Justice: EU Legislature as an Agent of the ECJ' (2016) 54 JCMS: Journal of Common Market Studies 846, 847–848.

[38] Loughlin (n 36) 55.

By establishing that fundamental rights would hereafter be utilised by the Court to review the legality of Community legal acts, however, the role of the Court increasingly came to resemble the "constitutional court of a supranational order determined to preserve the integrity, unity, and uniformity of the system it had evolved."[39] By positioning itself as the ultimate guardian of fundamental rights in the Community legal order, the CJEU indicated to national constitutional and supreme courts that it was now responsible in the EEC for the same sort of fundamental rights adjudication that they undertook in their own domestic legal systems.[40]

As the judgments in *Stauder, Internationale Handelsgesellschaft* and subsequent cases make clear, the scope and content of fundamental rights within the EEC legal order would ultimately be determined by the CJEU. Whilst the Court would take inspiration from the common constitutional traditions of the Member States and international human rights treaties, fundamental rights within the EEC legal order would have an EEC-specific meaning as determined by the Court.[41] These developments provided "as clear an indication as any of the audacious self-perception of the European Court. The measure of creative interpretation of the Treaty was so great as to be consonant with a self-image of a constitutional court in a 'constitutional' polity."[42]

4.) **The Political Response during the Foundational Period**

Before moving to examine how the CJEU went about conducting fundamental rights review of Community legal acts in the years prior to the SEA, however, it is first necessary to consider some of the key changes to the Community law-making process during the foundational period. As shall be argued in the second half of this study, recent trends in the CJEU's contemporary federalism and fundamental rights jurisprudence must also be viewed in light of a series of changes to the EU legislative process in recent years. It is only by

[39] Weiler, 'Eurocracy and Distrust' (n 32) 1119; Robert Schütze, *European Constitutional Law* (Cambridge University Press 2012) 267; Ami Barav, 'The Judicial Power of the European Economic Community' (1979) 53 Southern California Law Review 461, 468.
[40] Joseph HH Weiler, 'Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights' in Nanette Neuwahl and Allan Rosas (eds), *The European Union and Human Rights* (Kluwer 1995) 66; Mauro Cappelletti, 'The Mighty Problem of Judicial Review and the Contribution of Comparative Analysis Symposium: Conference on Comparative Constitutional Law' (1979) 53 Southern California Law Review 409, 434–435.
[41] *Case 44/79, Hauer* (n 10) paras 13-16.
[42] Weiler, 'The Transformation of Europe' (n 2) 2417.

analysing the Court's approach to constitutional review in light of the wider constitutional and political context in which it operates that one can truly appreciate its changing role over time.

As Weiler argues in his highly influential "Transformation of Europe", the abovementioned "constitutionalisation" of the EEC Treaty prompted an (indirect) political response from the governments of the Member States.[43] Whilst typical international Treaties tend to create obligations solely between states, the EEC doctrines of direct effect and supremacy had resulted in individuals obtaining binding and enforceable rights within national legal orders.[44] From the perspective of the Member States, this meant that "Community obligations, Community law, and Community policies were "for real."[45]

Recognising this new reality, the Member States sought to assert greater control over the law-making process on the Community level. The dynamics at play here were famously stated by Weiler in the following terms:

> "[T]he 'harder' the law in terms of its binding effect both on and within states, the less willing states are to give up their prerogative to control the emergence of such law or the law's 'opposability' to them. When the international law is 'real', when it is 'hard' in the sense of being binding not only on but also in states, and when there are effective legal remedies to enforce it, decisionmaking suddenly becomes important, indeed crucial."[46]

Under the original terms of the EEC Treaty, however, the Community law-making process consisted of strong supranational elements that prevented individual Member States from exerting decisive influence over the adoption of legal acts in every instance.[47] The Commission enjoyed an almost exclusive right to propose or initiate Community legislation, allowing it to act somewhat autonomously of the Member States in the pursuit of the Community's general interests.[48] When it came to enacting Commission proposals into law,

[43] Weiler, 'The Transformation of Europe' (n 2).
[44] Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press 2016) 57.
[45] Weiler, 'The Transformation of Europe' (n 2) 2423.
[46] ibid 2426.
[47] ibid 2423.
[48] Article 155 EEC.

the EEC Treaty provided that the Council of Ministers would gradually adopt a system of majority voting in ever greater policy fields following a transitional period.[49] Accordingly, Member States faced the prospect of legally binding Community legal acts entering their domestic legal orders without having full control over the Community law-making process.

Remarkably, the Member States opted to depart from these rules in the Treaty and assert far greater control over all aspects of the Community law-making process.[50] At the policy formulation stage, the Member States obtained greater influence at the expense of the Commission with the advent of the European Council - an informal institution consisting of the heads of states and government of the Member States which provided impetus to the policy agenda of the EEC.[51] Regarding the proposal of new legislation, the Commission increasingly conducted a preliminary, unofficial round of negotiations with a sub-body of the Council known as the Committee of the Permanent Representatives of the Governments of the Member States to the European Union (COREPER).[52]

In addition to gaining greater influence over policy formulation, the Member States also tightened their grip on the enactment of Commission proposals into law by the Council of Ministers. By far the most striking example of this phenomenon was the resolution of the French "empty chair crisis" by the "Luxembourg Compromise" in the mid-1960s.[53] With the abovementioned transition to majority voting in the Council pending at the start of 1966, the French delegation opted to boycott the Council.[54] They argued that they would not retake their seat unless a compromise was reached that balanced the imminent shift to majority voting and France's national interests.[55] Following negotiations in Luxembourg, a compromise was reached which provided, in essence, that the Member States would act by

[49] Article 8 EEC Treaty.
[50] Joseph HH Weiler, 'Community, Member States and European Integration: Is the Law Relevant?' (1982) 21 JCMS: Journal of Common Market Studies 39, 46–47.
[51] Today the European Council is formally recognised as an EU institution in Article 15 of the Treaty on European Union (TEU).
[52] Weiler, 'The Transformation of Europe' (n 2) 2424. The role of COREPER is now set down in Article 240(1) of the Treaty on the Functioning of the European Union (TFEU).
[53] William Nicoll, 'The Luxembourg Compromise' (1984) 23 Journal of Common Market Studies 35.
[54] Article 8 EEC.
[55] Schütze (n 39) 20–22.

unanimity rather than majority voting whenever "very important interests" of one or more Member States were at stake.[56]

Despite much ambiguity as to the formal status and substantive content of the Luxembourg Compromise, unanimity amongst the Member States in the Council nevertheless became the default rule for enacting proposals into law.[57] From the mid-1960s until the entry into force of the Single European Act in 1987, the practice of the Council was to strive for consensus in virtually all areas of law-making.[58] As a result, "unanimity became the rule for most Council decisions, including decisions on minor matters not involving national interests."[59]

For Weiler, the seizure of ever greater control of the Community law-making process by the Member States could be explained (either directly or indirectly) as a response to the judicially created doctrines of direct effect and supremacy:

> "The insistence of the Member States in controlling every phase in the process of Community decision-making must have been influenced, consciously or unconsciously, by the knowledge that in many spheres decisions are "for real"; that they will have the force of law, will override national law and will be enforceable by virtue of direct effect in the courts."[60]

When taken together, the dominance of the Council in the law-making process, coupled with the constitutionalisation of the Treaties, resulted in a form of equilibrium being established in the EEC:

> "On the one hand stood a strong constitutional integrative process that, in radical mutation of the Treaty, linked the legal order of the Community with that of the Member States in a federal-like relationship. This was balanced by a relentless and equally strong process, also deviating radically from the Treaty, that transferred political

[56] '"Final Communiqué of the Extraordinary Session of the Council" [1966] 3 Bulletin of the European Communities 5'.
[57] Schütze (n 39) 22.
[58] ibid.
[59] Kathryn Good, 'Institutional Reform under The Single European Act' (1988) 3 American University International Law Review 299, 307.
[60] Weiler, 'Community, Member States and European Integration' (n 50) 46.

and decisionmaking power into a confederal procedure controlled by the Member States acting jointly and severally."[61]

Simply stated, therefore, the Member States tolerated the transformation of the Community legal order via the doctrines of direct effect, supremacy etc. because each retained a veto over the adoption of new Community legal acts in important policy fields. Had this de facto veto power not existed, Weiler posits that the Member States would not have accepted what the CJEU was doing.[62]

But how, if at all, did these legal and political developments impact upon the Court's task of reviewing the legality of Community legal acts during this period? Did the Court immediately move to subject Community legal acts to rigorous scrutiny for their compliance with fundamental rights norms? How did the CJEU's fundamental rights jurisprudence differ from its established position of reviewing questions of fact and discretion on a manifest error of assessment standard of review? As was discussed in Chapter 1, much of the literature analysing the role played by the Court over the course of the European integration project tends to overlook this aspect of the CJEU's jurisprudence.[63]

5.) Low-Intensity Constitutionalism

A notable exception in this regard is the work of former Advocate General (AG) Maduro, which argues that the shift towards unanimity voting in the Council had a profound impact upon the Court's approach to fundamental rights review. Of particular relevance for present purposes is Maduro's analysis of how the establishment of fundamental rights as general principles of law "add[ed] the dimension of constitutionalism" to Weiler's abovementioned theory of equilibrium.[64] In his view, the claim of Community law to "normative authority"

[61] Weiler, 'The Transformation of Europe' (n 2) 2428. Weiler's theory of equilibrium during the foundational period has proved highly influential in both the political science and legal literature. For a recent collection of essays affirming its continued relevance see Miguel Poiares Maduro and Marlene Wind (eds), *The Transformation of Europe: Twenty-Five Years On* (Cambridge University Press 2017).
[62] Weiler, 'The Transformation of Europe' (n 2) 2429.
[63] See Chapter 1, Section 1.
[64] Miguel Poiares Maduro, 'The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism' (2005) 3 International Journal of Constitutional Law 332, 335.

which resulted from the doctrines of direct effect and supremacy "required the adoption of constitutional doctrines to not only legitimate but also control that authority."[65]

In applying these constitutional controls, however, it is asserted that "fundamental rights protection…was not directed primordially at controlling intergovernmental decision making since this was perceived to benefit from the traditional indirect democratic and constitutional legitimacy provided by the states."[66] Instead, fundamental rights were only really "designed to control a *gouvernement des fonctionnaires*" - understood as the technical, executive-type measures typically passed by the Commission.[67] They were predominantly concerned with placing limits on "the Community's nascent bureaucracy and autonomous centres of power, which could no longer be controlled by the constitutional orders and democratic constituencies of its Member States."[68]

In contrast, acts of general application adopted unanimously by the Member States in the Council were deemed to possess a greater degree of indirect democratic legitimacy than measures adopted by this "independent bureaucracy" of the Commission.[69] In the former AG's view:

> "Where states fully controlled the process of decision making no real question of legitimacy was raised. This was bound to determine the nature of constitutional review in the new European Community. For example, under European constitutionalism, no one thought it a priority to provide for the review of a unanimous decision of member states in the Council."[70]

Maduro utilises the term "low intensity constitutionalism" to capture what he perceives to be the essence of this dynamic between the CJEU and the Council from the Luxembourg Compromise to the coming into force of the SEA in 1987.[71] The "low intensity of this European constitutionalism" was reflected in "the absence of a two-track democracy" on the European level, in that there was "no substantial difference between the legislative and

[65] ibid.
[66] ibid.
[67] ibid; Weiler, 'Eurocracy and Distrust' (n 32) 1117.
[68] Maduro (n 64) 336.
[69] ibid 340 at fn 20.
[70] ibid 335.
[71] ibid 334, 340–343.

constitutional processes."[72] Both the processes for amending the Treaties and for passing acts of general application required unanimity amongst the Member States.[73] As a consequence, European integration was "dominated by an intergovernmental legitimacy based on providing democracy to Europe through the states."[74]

In the former AG's view, this led to the CJEU subjecting acts of general application enacted unanimously by the Council (Community legislation in a functional sense) to less rigorous judicial scrutiny than legal acts adopted by the technocratic Commission.[75] "A higher deference was to be accorded to the intergovernmental process, which was legitimated by consensus amongst states."[76]

As shall be demonstrated below, there is little support in the case law for Maduro's claim that measures adopted unanimously by the Council were afforded a greater degree of judicial deference than other Community measures prior to the SEA. The Court made no discernable distinction between acts of general application adopted by the Council and other types of Community legal act when reviewing their legality against fundamental rights standards. Nor was there an explicit recognition in the reasoning of the Court that legal acts adopted unanimously by the Council were imbued with a greater degree of democratic legitimacy than other measures of Community law.

The jurisprudence of the Court thus reflected the fact that there was no clear-cut distinction between legislative and executive institutions or law-making procedures in the EEC. As was noted in Chapter 2, the EEC institutional framework deliberately eschewed providing a parliamentary body with veritable legislative powers, with the consequence that a functional or material concept of legislation prevailed.

Despite these doctrinal shortcomings, however, it is submitted that Maduro's characterization of the period prior to the SEA as one of "low-intensity constitutionalism" is

[72] ibid 340.
[73] Although amendments to the Treaty required ratification in accordance with national constitutional standards following agreement in the Council, See Article 236 EEC.
[74] Maduro (n 64) 340; A similar view is taken by Grimm, who notes that during the early decades of European integration, democratic legitimacy flowed exclusively from the Member States in the Council, Dieter Grimm, *The Constitution of European Democracy* (Oxford University Press 2017) 66–67.
[75] Maduro (n 64) 340.
[76] ibid 342.

valuable for both descriptive and analytical purposes. As generally defined above, constitutionalism may be understood as a normative theory concerned with placing legal and political limits upon public power.[77] Viewed in these terms, the notion of constitutionalism being of a "low-intensity" captures the essence of both the EEC legal order and the emergent practice of "constitutional" review during this period.

As noted above, when compared to many national legal orders, there were few constitutionally-entrenched limits upon the law-making powers of the Commission and Council in the EEC Treaty. Moreover, as the remainder of Chapter 3 demonstrates, the Court's competence and fundamental rights jurisprudence was characterized by light-touch or low-intensity review. The era of low intensity constitutionalism was one in which the Court subjected the discretionary policy choices of the Community institutions to minimal degrees of scrutiny. Scant attention was given to the reasoning of the Commission and Council for their policy choices, with the consequence that not much was typically required by way of justification in order for them to defend the legality of their actions before the CJEU.

6.) The Fundamental Rights Jurisprudence of the Court

This is well-demonstrated by the early fundamental rights cases that operated on the basis of an open-ended and ambiguous catalogue of general principles of law. Prior to the SEA, the majority of fundamental rights recognised by the CJEU were of an economic nature, such as the right to property or the freedom to pursue a trade or profession.[78]

a.) The Non-Absolute Nature of Fundamental Rights in the EEC

As is common in many legal systems, these economically oriented fundamental rights were not construed as absolute constraints upon the Community's law-making institutions. They could be legally restricted in certain circumstances in order to pursue policy objectives that were of general interest to the wider Community as a whole.[79] Recognition of the existence of a particular fundamental right by the Court thus marked only the beginning of the

[77] ibid 332.
[78] Mattias Kumm, 'Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm' in Loïc Azoulai and Miguel Poiares Maduro (eds), *The Past and Future of EU Law The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010); Von Bogdandy (n 33) 1323.
[79] Paul Craig, *EU Administrative Law* (Oxford University Press 2012) 609.

enquiry; since such recognition, in itself, says nothing about the level of protection to be afforded to that right or its legal value compared to other conflicting rights and interests.[80] What mattered in such instances was the balance struck between protecting the right in question and pursuing legitimate policy objectives in the Community interest.[81]

When it came to reviewing the output of the Community's law-making institutions, the early jurisprudence of the Court established a pattern that it would subsequently follow in the vast majority of fundamental rights cases.[82] First, the Court identified whether a prima facie interference with a fundamental right had occurred. For example, did a Commission Decision regulating certain terms and conditions for the sale of coal infringe the right to property and the freedom to conduct a business of small coal wholesalers?[83] In some cases, the Court would simply find that the contested measure had no impact upon a particular fundamental right, with the result that no infringement capable of effecting its validity had occurred.[84] In the majority of cases, however, a prima facie encroachment upon a right was established, with the CJEU then moving to a second step in its analysis. Here, the issue to be decided was whether such an encroachment could nevertheless be justified in the pursuit of general policy objectives of the Community?[85]

b.) The Principle of Proportionality

Within this framework of rights adjudication, the principle of proportionality came to assume vital importance at the second step of the enquiry. The principle has been referred to as "an overarching principle of constitutional adjudication, the preferred procedure for managing disputes involving an alleged conflict between two rights claims, or between a rights provision and a legitimate state or public interest."[86] Much like fundamental rights themselves, proportionality was not originally part of the Court's powers of judicial review

[80] Tridimas, *General Principles* (n 22) 310.
[81] ibid 311.
[82] Kumm (n 78) 108–109.
[83] *Case 4-73, Nold* (n 29).
[84] *Joined cases 172 and 226/83, Hoogovens Groep BV v Commission of the European Communities,* ECLI:EU:C:1985:355,.
[85] Kumm (n 78) 109.
[86] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 72, 73.

under Article 173 EEC and entered the EEC legal order as a judicially created general principle of law.[87]

The principle of proportionality has since been utilised by the Court in two distinct types of judicial review cases that are relevant to the present enquiry. The first involves determining whether restrictions placed upon fundamental rights may nevertheless be legally justified in the pursuit of the policy objectives in the Community's general interests. The second occurs outwith the fundamental rights context and entails reviewing whether the discretionary policy choices of the Community legislature are disproportionate to the aims they seek to pursue.[88]

According to established case law of the Court, proportionality requires that restrictions upon rights or other protected interests are "appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."[89]

The principle may therefore be broken down into three stages of judicial enquiry. The first stage (known as the suitability test) involves an examination of whether the measure chosen is suitable or appropriate in order to achieve the aim proposed. The second stage (the necessity test) requires an assessment of whether the chosen measure is necessary to achieve the proposed goal - meaning that the least restrictive measure for achieving the stated aim be chosen. In certain circumstances, a third stage in the proportionality test is added (known as proportionality *stricto sensu*) which involves consideration of whether a measure, although suitable and necessary, nevertheless imposes an excessive burden on the individual and is thus disproportionate.[90]

[87] *Case 11-70, Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel,* (n 24).
[88] Paul Craig and Grainne De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2015) 551–555. The Court also reviews the proportionality of penalties imposed by the Commission in fields such as competition law or state aid. These cases fall outwith the scope of the current study and shall not be considered further.
[89] *Case C-331/88 R v Minister for Agriculture, Fisheries and Food, ex p Fedesa,* ECLI:EU:C:1990:391, para 13.
[90] Craig, *EU Administrative Law* (n 79) Chapter 19.

It is clear from what has just been said that the principle of proportionality allows the CJEU to scrutinise the substantive legality or merits of measures enacted by the Commission and Council. "Conventional proportionality review…implies that the court conducts merits control. This means it will, where appropriate, potentially overrule the proportionality analysis conducted by the legislator or administrator."[91] It is for this reason that the principle has been perceived as "the most far reaching ground of review, the most potent weapon in the arsenal of the public law judge."[92]

Proportionality review thus runs the risk of the CJEU substituting its judgement for that of the Commission or Council within the context of their discretionary policy choices. If applied literally, it would be for the Court to determine whether a contested measure was suitable, necessary or imposed a disproportionate burden upon the individual in every case, and to substitute its judgment accordingly. The result would be that those institutions entrusted with enacting policy choices into law would not benefit from any margin of discretion at all. As Fritzsche points out:

> "[T]he legality of an act of another institution would in all cases be defined as the coincidence of the same analysis and evaluation by both the acting institution and the…court. Any deviation would amount to the illegality of the prior act. No matter how open-ended or ambiguous the formulation of the applicable law, the court's decision would ultimately supersede the acting institutions' findings…"[93]

c.) <u>Disproportionate and Intolerable Interferences Impinging the Substance of Rights</u>

The Court did not adopt such an intrusive approach to proportionality review during the era of low-intensity constitutionalism. As was noted above, within the context of alleged infringements of fundamental rights, the established position was that legal acts of the Community could restrict rights of an economic nature in the pursuit of general policy objectives of the EEC.[94] Such restrictions were only legal, however, where they "in fact

[91] Tor-Inge Harbo, 'Introducing Procedural Proportionality Review in European Law' (2017) 30 Leiden Journal of International Law 25, 31.
[92] Tridimas, *General Principles* (n 22) 139.
[93] Alexander Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' (2010) 47 Common Market Law Review 361, 365.
[94] *Case 265/87, Hermann Schräder HS Kraftfutter GmbH & Co KG v Hauptzollamt Gronau,* ECLI:EU:C:1989:303,; *Case 44/79, Hauer* (n 10); *Case 4-73, Nold* (n 29).

correspond to objectives of general interest pursued by the Community and…do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed."[95]

This standard of review was utilized consistently by the Court when conducting fundamental rights review during the early decades of the EEC.[96] As Craig notes, the latter part of the formulation - that restrictions should not impair the very substance of a right - is somewhat ambiguous.[97] Deriving from German law, it encapsulates the notion that a restriction should not be held to be lawful if it undermines the essence of the guaranteed right. However, the phrase can also carry a different connotation; namely, that a restriction will be deemed to be lawful where it does not infringe the essence of the right.[98]

When reviewing the jurisprudence, it is clear that the latter connotation prevailed.[99] For example, in Hauer, the applicants contended that a Council Regulation prohibiting the planting of new vines for three years in an attempt to control wine surpluses infringed their fundamental right to property. In conducting such an examination, the Court held that it was necessary to:

> "[E]xamine whether the restrictions produced by the provisions in dispute in fact correspond to objectives of general interest pursued by the Community or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property."[100]

In conducting such an examination, the Court placed much emphasis upon the Regulation's pursuit of aims in the general Community interest including structural improvements in the wine sector. With the pursuit of general Community aims established, the Court swiftly concluded that the prohibition on planting vineyards did not constitute a disproportionate

[95] *Case 265/87, Schräder* (n 94) para 15.
[96] *Case 44/79, Hauer* (n 10); *Case 59/83, SA Biovilac NV v European Economic Community,* ECLI:EU:C:1984:380,; *Case 234/85, Staatsanwaltschaft Freiburg v Franz Keller,* ECLI:EU:C:1986:377,.
[97] Paul Craig, *EU Administrative Law* (Oxford University Press 2012) 610.
[98] ibid.
[99] ibid.
[100] *Case 44/79, Hauer* (n 10) para 23.

interference infringing the substance of the right to property.[101] The Court thus set a "very high threshold" in the early fundamental rights cases: "only disproportionate and intolerable restrictions that affected the very essence of the right could be found incompatible with [Community] law."[102]

Notably, the Court could have adopted a more stringent standard of review in these cases. As was discussed in Chapter 2, the EEC Treaty provided little guidance on the scope of discretion to be afforded to the Community's law-making institutions in a given instance. Nor did it provide any indication as to how intensively the four grounds of review enshrined in Article 173 EEC should be applied when scrutinising questions of fact and discretion.[103] Absent any guidance in the foundational Treaties, it was for the Court to both establish fundamental rights as general principles of law and to render them operational in individual cases.[104]

For example, in *Rau*, a German court stated in a preliminary reference to the CJEU that "rules which interfere with the fundamental right to exercise a trade or profession are justified only if they are dictated by objectives in the general interest which are *of such overriding importance that they deserve to take precedence over that fundamental right.*"[105] Similarly, in *Handelsgesellschaft*, Advocate General Dutheillet da Lamothe stated that in all fundamental rights cases:

> "[T]he internal legality of the disputed measures are linked to one and the same problem, namely whether or not these measures comply with a principle of 'proportionality', under which citizens may only have imposed on them, for the purposes of the public interest, *obligations which are strictly necessary for those purposes attained*."[106]

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[101] ibid para 30.
[102] Albertina Albors-Llorens, 'Edging Towards Closer Scrutiny? The Court of Justice and Its Review of the Compatibility of General Measures with the Protection of Economic Rights and Freedoms' in Alan Dashwood and Anthony Arnull (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart Publishing 2011) 250.
[103] Phil Syrpis, *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 15; Fritzsche (n 93) 365.
[104] Fritzsche (n 93) 365.
[105] *Joined cases 133 to 136/85, Walter Rau Lebensmittelwerke and others v Bundesanstalt für landwirtschaftliche Marktordnung, ECLI:EU:C:1987:244* ECLI:EU:C:1987:244 para 34 (emphasis added).
[106] *Opinion of Advocate General Dutheillet de Lamothe, Case 11-70, Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel,* ECLI:EU:C:1970:100, 1146 (emphasis added).

The Court opted not to follow the views of the German courts or the AG, instead adopting the less intrusive "disproportionate and intolerable interference infringing the substance of the right" test. With this standard of review established, the Court would then move to consider whether such a high threshold had been met in the dispute at hand. Here, the established judicial practice was to first set out why the contested legal act corresponded to objectives of general interest pursued by the Community. Then, without much by way of scrutiny, the Court would hold that, in pursuing such objectives, there had been no disproportionate and intolerable interference affecting the very substance of the right in question.[107]

Unlike the two or three stage proportionality enquiry set out above, therefore, the fundamental rights jurisprudence of the CJEU during the era of low-intensity constitutionalism was somewhat unstructured. The Court focused largely on the suitability of the contested Community measure for achieving an objective in the Community's general interest - invariably finding that it did. Then, the CJEU would typically ignore the necessity stage of the enquiry before swiftly concluding that no disproportionate infringement of the substance of a right had occurred.[108]

Notably, this methodology applied equally to acts of general application enacted unanimously by the Council[109] and to other forms of Community legal acts such as implementing Regulations adopted by the Commission.[110] In contrast to Maduro's claims above, therefore, the case law does not reveal greater levels of deference being shown to measures adopted unanimously by the Council during the era of low-intensity constitutionalism.

A clear illustration of the Court's approach during this period is provided in *ABDHU*, where the validity of a Council Directive laying down a system for the collection and disposal of

[107] *Case 44/79, Hauer* (n 10) paras 23-30; *Case 4-73, Nold* (n 29) paras 14-15; *Case 11-70, Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel,* (n 24) paras 14-20.
[108] Harbo concludes that the early fundamental rights cases turned on a rudimentary form of the proportionality stricto sensu test. Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law* (Hotei Publishing 2015) 55.
[109] *Case 44/79, Hauer* (n 10).
[110] *Case 59/83, SA Biovilac* (n 96).

waste oils was challenged via the preliminary reference procedure.[111] The Directive provided that Member States could entrust one or more undertakings with the responsibility for collecting and disposing of waste oils within a designated zone, having first granted such undertakings a permit to do so.

In deciding whether the system of permits was compatible with, *inter alia*, "the freedom of trade as a fundamental right", the Court first confirmed that such a right constituted a general principle of Community law, compliance with which it would ensure.[112] It then noted that the Commission and Council had conceded that the system would have a restrictive effect on the right to freedom of trade. This could nevertheless be justified in their view since it pursued an aim of general interest in the Community; namely, avoiding harm to the environment.[113]

In line with established case law, the Court agreed that the right to freedom of trade was not absolute. It was subject to certain limits justified by objectives in the Community general interest, provided that the rights in question were not substantively impaired.[114] With this typical balancing framework established, the CJEU immediately reached the conclusion that there was "no reason to conclude that the Directive has exceeded those limits."[115] This finding was explained in a single paragraph of the Court's judgment, where it stated that provisions of the Directive established that it pursued the aim of environmental protection - one of the Community's "essential objectives."[116] Rather than examining whether the Directive constituted a disproportionate interference with the substance of the right, therefore, the Court simply held that since the measure in question pursued an aim of general Community interest, no infringement of fundamental rights had occurred. Consequently, it was difficult to detect any degree of meaningful judicial scrutiny of whether there had been a disproportionate restriction impinging upon the substance of the right.[117]

[111] *Case 240/83, Procureur de la République v Association de défense des brûleurs d'huiles usagées (ADBHU),* ECLI:EU:C:1985:59.
[112] ibid para 9.
[113] ibid para 11.
[114] ibid para 12.
[115] ibid para 13.
[116] ibid para 13.
[117] See similarly *Case 234/85, Staatsanwaltschaft Freiburg v Franz Keller,* (n 96) paras 16-18; *Case 265/87, Schräder* (n 94) paras 16-17; *Case 59/83, SA Biovilac* (n 96) paras 21-22.

d.) Light-Touch Review

Based on this jurisprudence, the foundational period of low-intensity constitutionalism was characterised by a light touch or low-intensity approach to fundamental rights review. Two factors contributed to this outcome. The first was the adoption of a very demanding test for establishing a fundamental rights violation; namely, a disproportionate interference impinging upon the substance of the right. "Such a high bar suggested that the task of obtaining the annulment of a general measure…would prove to be a formidably difficult one."[118] The second was the Court's practice of engaging in a limited degree of scrutiny of whether, on balance, a Community measure pursuing aims in the general Community interest had indeed disproportionately infringed upon the substance of the right in question.[119]

The methodology and intensity of review adopted by the Court during this period has been subject to considerable criticism in the literature. Several scholars have argued that the Court was excessively deferential to the policy choices of the Commission and the Council, with the result that it had failed to engage in any meaningful degree of fundamental rights scrutiny.[120] In addition to concerns about the standard of review deployed, the Court's terse reasoning when concluding that no infringement had occurred was also cited by some as being problematic. As De Witte puts it, the judges of the Court should have taken "extra care in developing more detailed and persuasive arguments about why they reject pleas of human rights breaches in a particular case."[121]

Whilst the fundamental rights of individuals were capable, in principle, of invalidating Community legal acts, the general consensus was that the Court's approach to review tilted the balance heavily in favour of the Community legislature's pursuit of (economic) policies in the general interest.[122] For all its noble rhetoric about protecting fundamental rights, the

[118] Albors-Llorens (n 102) 251.
[119] Harbo (n 108) 55–57.
[120] Wolfgang Weiß, 'The EU Human Rights Regime Post Lisbon: Turning the CJEU into a Human Rights Court?' in Sonia Morano-Foadi and Lucy Vickers (eds), *Fundamental Rights in the EU: A Matter of Two Courts* (Hart Publishing 2015) 73; Jason Coppel and Aidan O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 Common Market Law Review 669, 889–890.
[121] Bruno de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in Philip Alston (ed), *The EU and Human Rights* (OUP 1999) 882.
[122] Marie-Pierre Granger, 'The Future of Europe: Judicial Interference and Preferences' (2005) 3 Comparative European Politics 155, 168.

core aims and objectives of establishing a pan-European Common Market as stated in Articles 2 and 3 EEC continued to tower over all other objectives.[123]

The suggestion here is not that the outcome in particular cases would have been different had the Court engaged in more searching scrutiny of the substance of Community legal acts and the justification(s) proffered in support of their legality. Indeed, none of the cases discussed above represented egregious violations of fundamental rights which the Court had somehow failed to remedy. Instead, the crucial point for the purposes of the present study is that the era of low intensity constitutionalism was one in which the output of the Community legislative process was subject to minimal degrees of judicial scrutiny. In addition to providing minimal reasoning for its judgments, the CJEU also paid little attention to the legislative process that led to the adoption of a contested legal act. Nor did it spend much time scrutinising the reasons put forward by the Community institutions in support of contested legal acts. Consequently, the EEC legislature was typically placed under a very limited burden to justify the legality of its policy choices before the Court.

7.) Proportionality as General Ground of Review

This limited burden of justification was also clearly demonstrated in the Court's early approach to the principle of proportionality in cases outwith the fundamental rights context. Typically, such cases involved claims that policy choices taken by the Commission or Council in fields of economic regulation were disproportionate - either because the costs were excessive in relation to the benefits, or that a measure was not suitable to achieve its stated objective.[124]

Whilst these cases had little to do with fundamental rights or the division of competences between the Community and its Member States, we shall see in Chapter 5 that proportionality was enshrined as a constitutional principle of the EU legal order by the Treaty of Maastricht in 1993.[125] From that point onwards, the principle would play a vital role in challenges made to EU legislation on the grounds that such legislation infringed the EU's federal balance of competences (i.e. structural constitutional review). Moreover, when

[123] Von Bogdandy (n 33) 1308.
[124] Takis Tridimas, 'Proportionality in European Community Law: Searching for the Appropriate Standard of Scrutiny' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999).
[125] Treaty on European Union OJ C 191, pp. 1-112.

it came to utilizing proportionality in such competence disputes, the CJEU drew heavily upon its jurisprudence as established during the era of low-intensity constitutionalism. The scope of discretion to be afforded to the Community law-maker, the standard of proportionality review to be deployed by the Court and the intensity of judicial scrutiny of the merits as developed by the Court prior to the SEA all became standard points of reference in the years which followed. For these reasons, the proportionality jurisprudence of the Court during the era of low-intensity constitutionalism is considered below.

To recall from Chapter 2, the Court had consistently adopted a very restrictive approach to reviewing questions of fact and discretion during the early decades of the European integration project. According to settled case law, the Court would only intervene where the law-maker had committed a manifest error of assessment, where there was a misuse of power or when the law-maker had clearly exceeded the bounds of its discretion. This deferential approach was justified on the grounds that the Commission and Council were either: (i) required to undertake complex assessments in areas of economic regulation; or (ii) were entrusted with political responsibilities under the EEC Treaty in a given policy field.[126]

A similarly light-touch approach was adopted in the early proportionality challenges to Community legal acts. In some cases, the Court provided a very basic definition of the principle, holding that proportionality required nothing more than "the imposition of a burden to be proportionate to the objective to be attained."[127] In others, a more structured definition akin to the three-step approach referenced above was used, according to which Community legal acts had to be: (i) suitable for attaining a legitimate aim; (ii) necessary in the sense that they should be the least restrictive option amongst viable alternatives; and (iii) not be disproportionate to the aims pursued.[128]

[126] See Chapter 2, Section 7.
[127] *Case 59/83, SA Biovilac* (n 96) para 17; *Case 166/78, Government of the Italian Republic v Council of the European Communities,* ECLI:EU:C:1979:195, para 22.
[128] *Case 265/87, Schräder* (n 94) para 21.

Irrespective of the structure used, the Commission and Council were invariably afforded a wide margin of discretion whenever the proportionality of their actions was in issue.[129] The Court consistently adopted a limited standard of proportionality review, holding that "the legality of a measure…can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue."[130]

The reasons for such a deferential standard of proportionality review during the era of low-intensity constitutionalism were straightforward. Given that the majority of disputes arose in areas of technical market regulation such as the Common Agricultural Policy (CAP), the Court was reluctant to interfere with discretionary policy choices entrusted to the Commission and Council under the EEC Treaty.[131] Respect for the separation of powers thus loomed large, with the Court of Justice adhering to the mantra that it should not overturn such choices simply because they believe things should have been done differently.[132]

Despite these caveats, the reasoning of the Court during the era of low-intensity constitutionalism is to be noted for once again requiring very little by way of justification from the law-maker in defence of its policy choices.

For example, in *FEDESA*, the applicants contended that a Directive prohibiting the use in livestock farming of certain substances having a hormonal action infringed the principle of proportionality. In their view, the prohibition in question was inappropriate in order to attain the declared objectives, since it was impossible to apply in practice. Furthermore, the prohibition was not necessary since consumer anxieties about such hormones could be allayed simply by the dissemination of information and advice, rather than the more restrictive option of an outright ban. Finally, the prohibition entailed excessive disadvantages in the form of financial losses for the traders concerns that were not outweighed by the alleged benefits accruing to the general interest.[133]

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[129] *Case 179/84, Piercarlo Bozzetti v Invernizzi SpA and Ministero del Tesoro, ECLI:EU:C:1985:306* ECLI:EU:C:1985:306 para 30; *Case 138/78, Hans-Markus Stölting v Hauptzollamt Hamburg-Jonas, ECLI:EU:C:1979:46* ECLI:EU:C:1979:46, para 7.
[130] *Case C-331/88 Fedesa* (n 89) para 14; *Case 265/87, Schräder* (n 94) para 22.
[131] Paul Craig, 'Legality, Standing and Substantive Review in Community Law' (1994) 14 Oxford Journal of Legal Studies 507, 530–535.
[132] Juliane Kokott and Christoph Sobotta, 'The Evolution of the Principle of Proportionality in EU Law—Towards an Anticipative Understanding?' 167, 169.
[133] *Case C-331/88 Fedesa* (n 89) para 12.

In response, the Court held that the principle of proportionality required judicial examination of the suitability, necessity and proportionality stricto sensu of the contested measure.[134]

Regarding the first of these steps, the measure was found not to be manifestly inappropriate for achieving its stated aim. An alternative system of partial authorisations for hormones would be costly and its effectiveness had not been guaranteed by the claimants. Having found that the Council had committed no manifest error regarding the suitability of the measure, the Court then immediately concluded that the measure also complied with the necessity step of the analysis, without examining whether any less restrictive alternatives existed. In the Court's view, the Council was "entitled to take the view that, regard being had to the requirements of health protection, the removal of barriers to trade and distortions of competition could not be achieved by means of less onerous measures such as the dissemination of information to consumers and the labelling of meat."[135] Finally, when examining proportionality in the strict sense, the Court stated without any degree of scrutiny or explanation whatsoever that "the importance of the objectives pursued is such as to justify even substantial negative financial consequences for certain traders. Consequently, the principle of proportionality has not been infringed."[136]

This "low-intensity"[137] or "watered down"[138] approach to proportionality review was commonplace during the era of low-intensity constitutionalism. The Court typically did not engage in close scrutiny of whether less restrictive alternatives to the contested measure of Community law existed, or whether, on balance, the disadvantages outweighed the advantages of pursuing a particular policy aim. Nor did the CJEU place any notable emphasis upon the reasoning of the Community institutions or the law-making process through which its policy choices were arrived at. Instead, the conclusion that a contested Community measure was not manifestly disproportionate was reached within a few short paragraphs of

[134] ibid para 13.
[135] ibid para 16.
[136] ibid paras 17-18.
[137] Paul Craig, 'Proportionality, Rationality and Review' [2010] New Zealand Law Review 265, 269.
[138] Roberto Caranta, 'On Discretion' in Sacha Prechal and Bert van Roermund (eds), *The Coherence of EU Law* (Oxford University Press 2008) 208.

the judgment.[139] This "cursory examination" not only revealed an "intensely deferential" approach to reviewing acts of general application, but also indicated that annulments of Community legal acts would be extremely rare.[140]

8.) Structural Constitutional Review

Up to this point, Maduro's conceptualisation of the pre-SEA period as an era of low-intensity constitutionalism has been utilized as a means of encapsulating the essence of the Court's approach to constitutional review on fundamental rights and proportionality grounds.

In addition to these tasks, however, the Court of Justice was also required to settle disputes over the law-making competences of the Community institutions during the era of low-intensity constitutionalism. As has already been stated, within the national context, the entire premise of constitutional review of legislation as initially designed was to settle issues concerning governmental structure. In both the United States and Continental European tradition, constitutional review concerned questions over which branch of government was competent to act in a given situation, or whether the centre or periphery were capable of taking action in legal systems which divided power along federal or other lines.[141]

a.) The Unique System of Competence Allocation in the EEC Treaty

Unlike many of these national constitutional orders, the competences of the Community were not clearly defined in a list of enumerated powers. Nor was there an explicit principle of conferral limiting the competences of the Community, or a doctrine of powers reserved to the Member States. Instead, the general aims of the Community were set down in Articles 2 and 3 EEC. This was supplemented by various legal bases throughout the EEC Treaty which stipulated the purpose of Community action in a particular policy field and the law-making process to be followed therein.[142]

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[139] *Case 119/86, Spain v Council and Commission* ECLI:EU:C:1987:446 paras 35-38; *Case 137/85, Maizena Gesellschaft mbH and others v Bundesanstalt für landwirtschaftliche Marktordnung (BALM)* ECLI:EU:C:1987:493 paras 20-25; *Case 138/78, Hans-Markus Stölting v Hauptzollamt Hamburg-Jonas, ECLI:EU:C:1979:46* (n 129) para 7.

[140] Albors-Llorens (n 102) 251.

[141] Stephen Gardbaum, 'The Place of Constitutional Law in the Legal System' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 177.

[142] Koen Lenaerts and others, *European Union Law* (Sweet & Maxwell, Thomson Reuters 2011) 113.

In stark contrast with the fundamental rights jurisprudence discussed above, the practice of unanimity voting in the Council had a profound impact on the question of competence in Community law prior to the SEA. With the Luxembourg Compromise in full flow, Commission proposals in virtually all policy fields required the unanimous agreement of the Member States in the Council before they could be enacted into law. This meant that the choice of legal basis was of little practical importance during the era of low-intensity constitutionalism, since the procedure under each basis involved the same institutions and, in practice, the same law-making procedure and voting rules.[143]

This also meant that the Council was primarily responsible for determining where the outer bounds of the Community's law-making powers lay when acting upon a particular legal basis. Whenever Commission proposals appeared to go too far (or were simply politically unpalatable) Member States could individually prevent them from being enacted into law. Historically, therefore, "the representation of each Member State on the Council of Ministers has been the primary institutional guarantee of Member State autonomy in the [EEC] structure." [144]

Unanimity also served to insulate the majority of acts of general application adopted by the Council from challenge before the Court during this period.[145] Intuitively this makes sense: it would be somewhat odd for a Member State government to vote in favour of a measure in the Council only to then contest its legality on competence grounds at a later moment in time.[146] Furthermore, the European Parliament possessed limited law-making powers and initially lacked the capacity to challenge such legal acts directly before the Court.[147] Finally, natural and legal persons faced near insurmountable standing requirements when seeking to challenge acts of general application, thus further restricting the prospect of legal basis/competence challenges coming before the CJEU.[148]

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[143] Renaud Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Macmillan 1998) 155.
[144] Ernest A Young, 'Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism' (2002) 77 New York University Law Review 1612, 1689.
[145] Kieran St Clair Bradley, 'Powers and Procedures in the EU Constitution: Legal Bases and the Court' in P Craig and G De Búrca (eds), *The Evolution of EU law* (2011) 90.
[146] Theodore Konstadinides, *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States* (Kluwer Law International 2009) 23.
[147] See Article 173 EEC.
[148] *Case 25-62, Plaumann & Co v Commission of the European Economic Community,* ECLI:EU:C:1963:17.

This is not to say that the unanimous consent of the Council rendered the resulting Community legal act immune from legal challenge entirely. The Court remained, as always, empowered to review all measures of Community law for compliance with the grounds of review enshrined in Article 173 EEC (plus general principles of law.) Moreover, as the Court held in *Italy v Council*, the fact that a Member State voted to adopt a measure in the Council did not preclude it, legally speaking, from subsequently contesting its legality.[149]

Nonetheless, the institutional framework described above, coupled with the dynamics of the law-making process, meant that the Court was rarely called upon to settle disputes over the competences of the Community during the era of low-intensity constitutionalism.[150] As AG Maduro noted in *Vodafone*: "It can comfortably be said that, for a long period of time, this Court was not called on to exercise a predominant role in the control of the Community's competences precisely because there were already strong limits to those competences enshrined in their decision-making processes."[151]

b.) Article 235 EEC: The Necessary and Proper Clause of the Community

One important area in which the question of competence did arise (albeit extremely rarely) during the era of low-intensity constitutionalism was the use of Article 235 EEC as a legal basis for Community action. According to that provision:

> "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly [European Parliament], take the appropriate measures."[152]

Unlike the majority of legal bases in the Treaty, Article 235 EEC did not confine the law-making powers of the Community to a specific policy field. Instead, it was "functional" in

[149] *Case 38-69, Commission v Italian Republic, ECLI:EU:C:1970:11* ECLI:EU:C:1970:11, para 4.
[150] For an example of such a competence dispute within the framework of the Common Agricultural Policy see *Case 68/86, United Kingdom of Great Britain and Northern Ireland v Council* ECLI:EU:C:1988:85.
[151] *Opinion of Advocate General Poiares Maduro, Case C-58/08, The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform,* ECLI:EU:C:2009:596, para 1.
[152] Article 235 EEC.

nature, meaning that it could be utilised in different fields to achieve certain objectives.[153] The provision thus provided a useful ad hoc law-making procedure in policy fields where the Treaty had not conferred the necessary powers, such as environmental and regional policy.[154]

Based on its wording, Article 235 EEC seemed to require four conditions to be satisfied before it could serve as a legal basis: (i) the measure must be "necessary"; (ii) in the course of the operation of the common market; (iii) to attain one of the objectives of the Community; and (iv) where the Treaty had not provided the necessary powers.[155]

The leading case on the legality of Community measures enacted under Article 235 EEC during the era of low-intensity constitutionalism is *Massey Ferguson*.[156] In that case, a Council Regulation on the valuation of goods for customs purposes was challenged on the grounds that Article 235 was not the correct legal basis for the measure.

The Court began by noting that the establishment of a customs union between the Member States was one of the objectives of the Community under Articles 3 (a) and (b) of the EEC Treaty. Moreover, the functioning of a customs union necessarily required a uniform determination of the valuation for customs purposes of goods from third countries. This would ensure that the level of protection achieved by the Common Customs Tariff was the same throughout the entire Community.[157]

With this aim in mind, the CJEU first found, without explanation, that the power to adopt Directives under the alternative legal basis of Article 100 EEC did not "provide a really adequate solution."[158] From this, it stated that the issue to be resolved was whether the Community's powers for implementing the Customs Union and the Common Commercial Policy under the EEC Treaty provided adequate legal bases for Community action (i.e. Articles 9, 27, 28, 111 and 113 EEC).[159] According to the Court, although these provisions

[153] Bradley (n 145) 86.
[154] Craig and De Búrca (n 88) 90.
[155] Antonio Tizzano, 'The Powers of the Community' in Commission of the European Communities (ed), *Thirty Years of Community Law* (Office for Official Publications of the European Communities 1983) 52–57.
[156] *Case 8-73, Hauptzollamt Bremerhaven v Massey-Ferguson GmbH* ECLI:EU:C:1973:90; *Case 38-69, Commission v Italy* (n 149).
[157] *Case 8-73, Massey-Ferguson* (n 156) para 3.
[158] ibid para 3.
[159] ibid para 3.

could be interpreted widely and thus render recourse of Article 235 EEC not "necessary", there was, nonetheless, "no reason why the Council could not legitimately consider that recourse to the procedure of Article 235 was justified in the interest of legal certainty."[160] Consequently, the Court found that Article 235 EEC was a valid legal basis for the contested measure.

c.) Low-Intensity Review in Competence Disputes

The judgment in Massey Ferguson provides further evidence of the Court engaging in incredibly light-touch review of Community legal acts during the era of low-intensity constitutionalism. Had the Court wished, it could have found that ample specific legal bases existed under the Treaty and that, consequently, recourse to Article 235 was unnecessary.[161] Instead, it opted to conclude, without explanation, that Article 235 EEC was the correct legal basis for reasons of "legal certainty." As Schütze notes, "the early jurisprudence soon showed that even if the 'necessity' criterion was justiciable, the actual standard of review was to be extremely light. The requirement that action be adopted 'in the course of the common market' would equally pose no serious conceptual limit."[162]

With the necessity and common market criteria failing to place any meaningful limits on the use of Article 235 EEC, the outer boundaries of the provision would principally depend on how the concept of "Community objectives" was interpreted.[163] In time, the Council would come to take an ever-expanding view of the objectives of the Community for the purposes of Article 235 EEC, frequently citing the "global objectives of the Community" as set out in Article 2 EEC in addition to the tasks enshrined in Article 3 EEC.[164] From 1973 to the Single European Act (SEA) of 1987, Article 235 EEC was utilised to enact measures of Community law in a wide variety of fields including environmental policy, the free movement of workers, the freedom to exercise a trade or profession, energy policy, scientific research,

[160] ibid para 4.
[161] Franziska Tschofen, 'Article 235 of the Treaty Establishing the European Economic Community: Potential Conflicts Between the Dynamics of Lawmaking in the Community and National Constitutional Principles' (1991) 12 Michigan Journal of International Law 471, 485.
[162] Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009) 135.
[163] ibid.
[164] ibid 137; Tizzano (n 155) 53.

social policy and regional policy.[165] The result was that the "conceptual limits to the Community's competence became hard to identify."[166] "For a long time it was simply taken for granted that the Community could act. The existence of a Community competence was not really disputed."[167]

Notably, during the period between the judgment in Massey Ferguson and the entry into force of the SEA, there were no challenges to Community legislation claiming that it was incorrectly enacted on the basis of Article 235 EEC. The requirements of unanimity in the Council put political bargaining between the executives of the Member States in the driving seat when it came to determining the outer limits of Community competence. "Since Member States had the ability to control the usage of Article 235, disagreements, often acrimonious…were resolved within the Council and not brought before the Court."[168] Consequently, the Council's use of Article 235 EEC as a legal basis for measures in a number of different policy fields faced no resistance from the Court of Justice.[169] "Competence had become a political rather than a legal/constitutional matter."[170] Indeed, it has been suggested that the Court's light-touch approach in Massey Ferguson encouraged the Community institutions to make "liberal use" of Article 235 EEC and to not seriously consider whether alternative legal bases existed.[171]

9.) Conclusions

The purpose of this chapter has been to examine the early jurisprudence of the Court of Justice when engaging in constitutional review of Community legislation. Despite being originally based upon the principles of French administrative law, it was contended that the advent of fundamental rights review served to add a constitutional dimension to the Court's jurisdiction.

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[165] According to Tschofen, between 1962 and 1972, 13 directives, regulations or decisions were based on article 235, see Tschofen (n 161) 474; For a comprehensive overview of the prolific use of that legal basis after 1972 see Tizzano (n 155).

[166] Schütze (n 162) 137.

[167] Loïc Azoulai, 'Introduction' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press 2014) 7.

[168] Weiler, 'The Transformation of Europe' (n 2) 2446 fn 120.

[169] Konstadinides (n 146) 23.

[170] Stephen Weatherill, 'Competence Creep and Competence Control' (2004) 23 Yearbook of European Law 1, 7.

[171] Weiler, 'The Transformation of Europe' (n 2) 2446 at fn 120.

In examining how the Court conducted constitutional review in these types of cases, it was argued that the pre-SEA era was one of "low-intensity constitutionalism." Unlike many national legal orders, there was no comprehensive, constitutionally enshrined bill of fundamental rights with which to review the legality of Community legal acts. Instead, fundamental rights in the EEC legal order existed as an open-ended and ambiguous set of judicially created general principles of law. These rights were mostly economic in nature, such as the right to property or the freedom to pursue a trade or profession - which claimants used to challenge the legality of discretionary policy choices in areas of technical complexity such as the CAP. As a result, the Commission and Council could legally restrict the enjoyment of these rights when pursuing general policy objectives of the Community.

Whilst there was nothing controversial about this state of affairs per se, the Court adopted an incredibly light touch approach to reviewing whether the pursuit of such aims had disproportionately infringed the substance of fundamental rights. In a number of cases, the Court engaged in a very brief analysis of the proportionality of contested legal acts, concluding within a few short paragraphs that no infringement of a right had occurred. A similarly low-intensity form of review was also prevalent in proportionality cases occurring outwith the context of fundamental rights.

In addition to fundamental rights and proportionality, the present chapter has also demonstrated how profound changes to the law-making process during the era of low-intensity constitutionalism impacted upon the role of the Court. Because of the widespread practice of unanimity voting in the Council, the political process on the European level was largely responsible for ascertaining where the boundaries of EEC competences lay. In the rare instances where competence disputes did arise before the Court, the jurisprudence once again evinced a light touch and tersely reasoned approach to reviewing the legality of contested Community legal acts. Most notably, the Court failed to subject the expansive use of Article 235 EEC to any meaningful degree of scrutiny prior to the entry into force of the SEA.

Against this background, Chapters 4 and 5 turn to examine several significant reforms to the legal and political order of the Community/Union from the SEA onwards. As we will see, successive rounds of Treaty amendment fundamentally changed both the concept of

legislation in the EU and the constitutional review powers of the Court. In turn, these reforms led to aspects of the CJEU's role under the Treaties being compared to national constitutional and supreme courts engaged in constitutional review of legislation. Despite these momentous changes to the legal and political system as a whole, however, the CJEU continued to subject the constitutionality of EU legislation to minimal degrees of judicial scrutiny in the post-SEA period.

Chapter 4

Safeguarding the Core of the Agenda of European Integration

1.) Introduction

The Single European Act (SEA) of 1987 marked the first major set of reforms to the original EEC Treaty.[1] It added several new legal bases to the Treaty of Rome, which empowered the Community institutions to adopt legal acts in wide-ranging policy fields including economic and social cohesion, research, technological development and environmental protection. [2] For the most part, these novel legal bases provided the Community institutions with concrete law-making powers in specific policy fields, thus reducing the need for the Council to have recourse of the EEC's "necessary and proper" clause in Article 235 EEC.[3]

Of all the reforms introduced by the SEA, however, two would come to be widely recognised as amongst the most significant treaty reforms in the history of European integration.[4]

The first was contained in Article 13 of the SEA, which added Article 8a to the EEC Treaty.[5] Article 8a EEC contained an explicit commitment to adopting measures with the aim of progressively establishing the internal market before a deadline of 31 December 1992.[6] The internal market was defined as "an area without internal frontiers in which the free movement of goods, persons, services and capital are ensured."[7] This commitment was enshrined in the Treaty following the Commission's 1985 White Paper on completing the internal market, which recommended that close to 300 measures of Community law were necessary in order to ensure completion of a "fully unified internal market."[8]

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[1] Single European Act (SEA) (1987) OJ L 169, p. 1-28.
[2] For an overview see Kathryn Good, 'Institutional Reform under the Single European Act' (1988) 3 American University International Law Review 299.
[3] Kieran St Clair Bradley, 'Powers and Procedures in the EU Constitution: Legal Bases and the Court' in P Craig and G De Búrca (eds), *The Evolution of EU law* (2011) 88.
[4] Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (Third edition, Cambridge University Press 2014) 22.
[5] Article 13 SEA.
[6] Article 8a EEC.
[7] Article 8a EEC.
[8] 'Completing the Internal Market: White Paper from the Commission to the European Council (1985) COM (85) 310 Final' para 1.

The second momentous reform concerned the establishment of the "cooperation procedure" as a novel means of adopting legislation in the Community.[9] According to that procedure, the Commission remained responsible for initiating proposals for Community legislation. These proposals would then be enacted into law by a Qualified Majority Vote (QMV) in the Council and involved an increased amount of input from the European Parliament (EP).[10]

The most important area of Community law-making to which this novel cooperation procedure applied was unquestionably the adoption of harmonisation measures in the internal market. According to Article 100a EEC (which was added to the Treaty of Rome by Article 18 of the SEA):

> "The Council shall, acting by a qualified majority on a proposal from the Commission in co-operation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market."[11]

2.) <u>The Single European Act</u>

These changes provide the background for continuing to analyse the Court's changing approach to reviewing the legality of Community legal acts over time. By emphasising that the role of the CJEU must be viewed in light of the wider constitutional and political context in which it operates, it is contended that the SEA had significant implications for: (i) the concept of legislation in the Community; and (ii) the Court's task of reviewing such legislation on federalism and fundamental rights grounds.

a.) <u>The Concept of Legislation after the Single European Act</u>

[9] Despite only applying to 10 articles of the post-SEA EEC Treaty, the cooperation procedure nevertheless applied to several important policy fields, including the adoption of measures aimed at improving the health and safety of workers (Article 118a EEC) and the facilitation of free movement of workers, service providers and the self-employed (Articles 49, 54[2], 56[2] and 57 EEC respectively). See generally Richard Corbett, 'Testing the New Procedures: The European Parliament's First Experiences with Its New "Single Act" Powers' (1989) 27 Journal of Common Market Studies 359, 361.

[10] Article 149 EEC.

[11] Article 100a EEC.

Regarding the concept of legislation, the Single European Act was the first in a series of Treaty reforms that fundamentally altered: (i) the procedures and institutions involved in the adoption of Community legislation; (ii) the sources of democratic legitimacy underpinning Community legislation; and (ii) the status of Community legislation within the overall hierarchy of EU legal acts.

By shifting from a system of unanimity voting to QMV in the Council, the "traditional indirect democratic and constitutional legitimacy" that was previously provided to Community acts of general application by the Member States had been disrupted.[12] Unlike the pre-SEA era discussed in Chapter 3, Community legislation could now be enacted without the unanimous support of each Member State in the Council.

As a (partial) counterbalance to this shift in the underlying source of democratic legitimacy for Community legislation, the abovementioned cooperation procedure provided for much greater input by the EP into the legislative process.[13] Whereas under the Treaty of Rome the Parliament had very limited powers of consultation, the novel cooperation procedure provided the Community's only directly elected institution with (limited) legislative powers. Notably, the Parliament could approve, amend or reject the position established by the Council prior to the final adoption of a Commission proposal into law.[14]

This development fundamentally changed the previous Community law-making practice – encapsulated by the aphorism "the Commission proposes, the Council disposes" – and "began the transformation of the legislative process, giving the EP significant input into the legislative process for the first time."[15] The EP went from having a "weak and essentially unconstructive power of delay to a stronger and potentially constructive role in the drafting of legislation."[16]

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[12] Miguel Poiares Maduro, 'The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism' (2005) 3 International Journal of Constitutional Law 332, 335; Dieter Grimm, *The Constitution of European Democracy* (Oxford University Press 2017) 66–67.

[13] Good (n 2) 300–301 A further reason for increasing the powers of the European Parliament was that the Community law-making process had been dominated since the Treaty of Rome by national executives with no effective parliamentary oversight. Following direct elections to the European Parliament in 1979, increased involvement in the Community legislative process was seen as one way of remedying this problem.

[14] Article 149 EEC.

[15] Paul Craig and Grainne De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2015) 126; See also Anthony Arnull, 'The Single European Act' (1986) 11 European Law Review 358, 361.

[16] Martin Westlake, *The Commission and the Parliament: Partners and Rivals in the European Policy-Making Process* (Butterworths 1994) 39.

The empowerment of the Parliament at the SEA constituted the first major step in the gradual emergence of a procedural, parliamentary conception of legislation in the contemporary EU legal order.[17] To recall, the original law-making powers of the Commission and Council under the Treaty of Rome were not conceived of as being analogous to primary or parliamentary legislation as adopted in national systems. The drafters deliberately did not establish a parliamentary body that possessed veritable legislative powers, opting instead to create an "Assembly" with mere advisory powers. Nor did they designate one specific law-making procedure or enshrine one type of Community legal act as being "legislative" in nature. Instead, a material or functional definition of legislation prevailed, understood as acts of general application, irrespective of the procedure or institution(s) involved in their enactment.[18]

In contrast, a procedural or parliamentary conception of legislation is intimately linked to the question of who is responsible for the legislative function, with legislation being defined as every legal act adopted according to a parliamentary legislative procedure.[19] By involving the Council, representing the Member States, and the European Parliament, representing the European citizens, the beginnings of a specifically designated, bicameral legislative procedure on the European level could be detected.[20]

When viewed against this definition, however, the concept of legislation in the post-SEA Community continued to be understood in functional terms as all acts of general application. Despite enhancing the EP's input into the law-making process, the cooperation procedure nevertheless provided that the views of the Parliament could ultimately be overridden by the wishes of the Council.[21] Furthermore, legal acts adopted in accordance with the cooperation procedure were not accorded a superior rank within the Community's hierarchy of norms. Instead, all legally binding acts (Regulations, Directives and Decisions)

[17] Robert Schütze, 'The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers' (2006) 25 Yearbook of European Law 91, 92–93 at fn 9.
[18] See Chapter 2, Section 4
[19] Alexander Türk, *The Concept of Legislation in European Community Law: A Comparative Perspective* (Kluwer Law International 2006) 238.
[20] Richard Corbett, Francis Geoffrey Jacobs and Darren Neville, *The European Parliament* (John Harper Publishing 2016) 310.
[21] Article 149(d)-(g) EEC.

were of an equal status, irrespective of the procedure or institution(s) involved in their enactment.

This meant that the post-SEA system still fell short of "the essential democratic requirement that Community measures should become law only with the explicit approval not only of the Council representing the national governments but also of the Parliament representing the electorate as a whole."[22] Community legislation continued to be understood in functional terms as all acts of general application, thus rendering it distinct from primary legislation typically adopted by parliamentary bodies in national systems.

b.) The Changing Nature of Litigation

Despite retaining a functional conception of legislation, the SEA reforms nevertheless altered the dynamics of the Community legislative process in such a way as to change the nature of litigation before the CJEU.

The decline in the practice of unanimity voting, coupled with the empowerment of the EP under the cooperation procedure, led to a marked increase in challenges to the legality of Community legal acts on competence/ legal basis grounds.[23] The addition of the cooperation procedure meant that there were now different law-making procedures ascribing different institutional inputs and voting rules when it came to enacting legislation. In turn, this led to "a new type of legal dispute" in which the different institutions confronted each other before the CJEU.[24] According to Lenaerts, the resultant increase in challenges to Community legislation on legal basis grounds meant that the Court was increasingly being called upon to "umpire the federal system" in the post-SEA Community.[25]

3.) **The Impact of Article 100a EEC: A Brief History of Negative and Positive Integration**

[22] Corbett (n 9) 371 (footnotes omitted); See also Roland Bieber, 'Legislative Procedure for the Establishment of the Single Market' (1988) 25 Common Market Law Review 711, 712.
[23] Holly Cullen and Andrew Charlesworth, 'Diplomacy by Other Means: The Use of Legal Basis Litigation as a Political Strategy by the European Parliament and Member States' (1999) 36 Common Market Law Review 1243; Despite some initial uncertainties as to the continued viability of the informal Luxembourg Compromise, QMV in the Council became the norm when it came to enacting harmonisation measures in the post-SEA era, see Chalmers, Davies and Monti (n 4) 22.
[24] Leonor Moral Soriano, 'Vertical Juridical Disputes over Legal Bases' (2007) 30 West European Politics 321, 324.
[25] Koen Lenaerts, 'Some Thoughts about the Interaction between Judges and Politicians' [1992] University of Chicago Legal Forum 93, 122.

The addition of Article 100a EEC to the Community legal order has been hailed as "the single most important provision of the SEA."[26] As was noted above, this provision allowed for the Community legislature to adopt Community harmonisation measures which had as their object the establishment and functioning of the internal market.[27] Following the entry into force of the SEA, Article 100a EEC soon became the principal legal basis upon which vast swathes of Community legislation aimed at completing the internal market was enacted.[28] According to Barnard, the introduction of Article 100a EEC and subsequent proliferation of legislative activity "emphasised that the single market was essentially a lawmaking project."[29] Indeed, the establishment and functioning of the internal market has provided "the source of an unequalled range and quantity of legislation and case-law."[30]

To fully grasp the impact that Article 100a EEC had upon the Community legal order (and the Court's role therein), however, it is first necessary to recall that the EEC's core task under the Treaty of Rome was to establish a common market and progressively approximate the economic policies of the Member States.[31]

a) Negative Integration

The functioning of this common market required barriers to trade between the Member States to be abolished. For example, tariffs that increased the cost of imports or quotas limiting the number of exports between Member States had to be precluded. The practice of abolishing such barriers - whether through provisions of the EEC Treaty itself,[32] or via measures adopted by the Commission and Council[33] - is known as "negative integration."[34]

[26] Joseph HH Weiler, 'The Transformation of Europe' [1991] Yale Law Journal 2403, 2458.
[27] Article 100a EEC.
[28] Chalmers, Davies and Monti (n 4) 23.
[29] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Fifth edition, Oxford University Press 2016) 11.
[30] Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 European Law Journal 2, 7–8; By the end of 1990, all 300 or so measures deemed necessary to complete the internal market by the end of 1992 had been proposed by the Commission. By the time of the deadline itself, close to 95% of the measures had been enacted and 77% had entered into force in the Member States, see Chalmers, Davies and Monti (n 4) (footnotes omitted).
[31] Article 2 EEC.
[32] E.g. Article 13 EEC mandated that customs duties on imports in force between the Member States be progressively abolished.
[33] E.g. Article 54(3) EEC provided that the Council should progressively abolish national rules and practices which formed obstacles to the freedom of establishment.
[34] Paul Craig, 'Development of the EU' in Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2017) 19.

During the early years of the European integration project, the Community had achieved considerable success when it came to negative integration. Customs duties as applied between the Member States had been progressively abolished and a common customs tariff vis-à-vis 3rd states had been established.[35] In addition, around 50 measures were enacted pursuant to general programmes aimed at the abolition of restrictions on the freedom of establishment and the freedom to provide services.[36]

b.) Positive Integration and the Problems of Harmonisation

Beyond negative integration, the completion of a common European market also required certain issues to be regulated on the European as opposed to the national level. This is because each Member State had specific rules on, say, banking, which pursued important objectives like the prevention of fraud or the protection of deposits. This diversity of national rules hindered the creation of a common market, since companies (in this case banks) had to comply with different laws in different member states, thus significantly increasing the cost of doing business.

The solution envisaged by the EEC Treaty was to create one set of Community wide rules in a particular area, thus removing obstacles to free movement and reducing compliance costs on business. This is known as "positive integration" or "harmonisation."[37]

Prior to the SEA, the principal legal basis for enacting harmonisation measures was Article 100 EEC. Much like the Community's "necessary and proper" clause contained in Article 235 EEC, Article 100 EEC did not confine the Community legislature to a specific policy field (e.g. common agricultural policy, consumer protection etc.) Instead, it provided the legislature with a seemingly "open-ended" power to enact harmonisation measures across different policy fields aimed at the establishment and functioning of the common market.[38]

[35] 'Completing the Internal Market: White Paper from the Commission to the European Council (1985) COM (85) 310 Final' (n 8) para 5.
[36] Paul Craig, 'Institutions, Power and Institutional Balance' in P Craig and G De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011) 51.
[37] Craig (n 34) 19.
[38] Koen Lenaerts, 'Constitutionalism and the Many Faces of Federalism' (1990) 38 American Journal of Comparative Law 205, 214; According to Bradley, Article 100 EEC was employed as a legal basis from the mid-1960s onwards in order to enact harmonisation measures in areas such as food safety, pharmaceutical products and environmental protection Bradley (n 3) 94.

However, the adoption of harmonisation measures under Article 100 EEC required unanimity in the Council and involved minimal input from the European Parliament. As we saw in Chapter 3, consistent recourse to unanimity voting meant that national governments were effectively in control of delimiting the scope of EEC legislative power, including Article 100 EEC. The domination of the legislative process by the Council also served to limit the number of challenges to the legality of acts adopted on the basis of Article 100 EEC by other Community institutions and/or the Member States. As Weatherill puts it, "constitutionally dubious adventurism was typically shielded from constitutional review by the assembly of political consensus."[39]

Gradually, this requirement of unanimity made it increasingly difficult to enact harmonisation legislation - not least because the Community had expanded in size following the accession of new Member States.[40] Moreover, during the 1970s and early 1980s, attempts at achieving comprehensive harmonisation by agreeing upon detailed, Community wide standards for goods, services, establishment etc. had resulted in limited legislative output.[41] Few national laws were harmonised and many significant impediments to free movement remained, as Member States refused to make the necessary compromises.[42] Most notably, goods and services lawfully produced and marketed in their Member State of origin were frequently subject to different rules in other Member States, thus impeding their free movement within the Community.[43]

4.) **From Constitutionalisation to Safeguarding the Core of Integration: The Changing Role of the CJEU**

Against this background, Chapter 4 considers the changing role of the Court of Justice within the legal and political order of the EEC around the time of the Single European Act in 1987. According to a number of influential judges and EU legal scholars, the continued problem of legislative inertia in the Community resulted in the Court adapting its role in order to

[39] Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 German Law Journal 827, 830.
[40] Craig (n 36) 51.
[41] Robert Schütze, *European Union Law* (Cambridge University Press 2018) 571–574.
[42] Koen Lenaerts, 'Some Thoughts about the Interaction between Judges and Politicians' (1992) University of Chicago Legal Forum 93, 110.
[43] ibid 107.

respond to the pressing institutional and legal needs of the day.[44] Having first "constitutionalised" the EEC Treaty via the doctrines of direct effect, supremacy, fundamental rights etc. during the foundational period, the Court then moved in this second epoch to "safeguard the core of European integration set out in the Treaty."[45]

Unwilling to accept the status quo and frustrated by the lack of progress by the Community legislature on the issue of harmonisation, the Court moved in the years leading up to the SEA to drive the European integration project forward itself.[46] This was done by "providing solutions to problems that were expected to be tackled by the EU political institutions but were not in practice as the latter could not reach the then necessary consensus."[47]

a.) Overcoming Political Deadlock

The most significant solution proposed by the CJEU during this period came in *Cassis de Dijon,* where the principle of mutual recognition was established as a cornerstone of the internal market.[48] According to this judicially-created principle, absent harmonisation, goods lawfully produced in one Member State should be free to enter any other Member State without further restriction.[49] For example, wine produced legally in France would henceforth be able to be sold in Germany without having to first comply with the German rules on wine production. Under the principle of mutual recognition, Germany would recognise the French rules as equivalent to its own and thus allow the unimpeded access and sale of French wine on the German market.[50]

The establishment of the principle of mutual recognition in the internal market sphere is widely cited as an example of the Court adopting a creative, teleological approach to Treaty

[44] See Chapter 1, Section 3.
[45] Koen Lenaerts, 'How the ECJ Thinks: A Study on Judicial Legitimacy' (2013) 36 Fordham International Law Journal 1302, 1308; Joseph HH Weiler, 'The Political and Legal Culture of European Integration: An Exploratory Essay' (2011) 9 International Journal of Constitutional Law 678, 688.
[46] Schütze, *European Union Law* (n 41) 575; Thomas Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: Legal Limits to Judicial Lawmaking' (2013) 50 Common Market Law Review 931, 944; Stephen Weatherill, *Law and Integration in the European Union* (Clarendon Press 1995) 273.
[47] Lenaerts, 'How the ECJ Thinks' (n 45) 1308; George A Bermann, 'Subsidiarity and Proportionality' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002) 7.
[48] *Case C-120/78 Rewe-Zentral AG v Bundesrnonopolverwaltung fur Branntwein (Cassis de Dijon),* ECLI:EU:C:1979:42.
[49] ibid para 14.
[50] Barnard (n 29) 93.

interpretation in order to overcome political deadlock in the Community.[51] Rather than wait for common rules to be adopted through legislation on the European level, a different, judicially created strategy was pursued: Member States would now, in principle, be required to recognise the rules of other Member States as being equivalent to their own.

b.) Furthering Integration by Removing National Barriers to Trade

That being said, it is important to note that the principle of mutual recognition did not preclude Member States from applying their own rules or standards to imported products per se. According to the CJEU, in the absence of harmonisation legislation, Member States could continue to apply national rules to imported goods. However, such rules must be necessary in order to satisfy "mandatory requirements" in the public interest, such as consumer protection, fairness in commercial transactions, public health and environmental protection.[52] Furthermore, such restrictions on trade in the pursuit of mandatory requirements must be proportionate to the aim pursued; meaning that, amongst equally effective measures, Member States should choose those which were least restrictive to free movement.[53] Consequently, the default rule became one of mutual recognition and free movement, with national rules derogating from this rule being limited to mandatory requirements that were proportionate in nature.

To greatly simplify a complex and much researched phenomenon, this novel framework of mutual recognition, mandatory requirements and proportionality review led to an increase in litigation before national courts.[54] Economically active individuals and companies sought to challenge the legality of national regulatory policies, claiming that such policies constituted disproportionate restrictions upon the free movement principles of the internal market.[55] Faced with these claims, national courts increasingly made references for preliminary rulings to the CJEU on the compatibility of national measures with these

[51] Craig and De Búrca (n 15) 63; Sionaidh Douglas-Scott, *Constitutional Law of the European Union* (Pearson Education 2002) 294; Miguel Poiares Maduro, *We The Court: The European Court of Justice and the European Economic Constitution* (Hart Publishing 1998) 32; Weatherill, *Law and Integration in the European Union* (n 46) 273.
[52] *Case C-120/78, Cassis de Dijon* (n 48) para 8.
[53] *Case 261/81, Walter Rau Lebensmittelwerke v De Smedt PVBA* ECLI:EU:C:1982:382.
[54] For an overview see Turkuler Isiksel, *Europe's Functional Constitution: A Theory of Constitutionalism Beyond the State* (Oxford University Press 2016) 136–146.
[55] Karen J Alter and Sophie Meunier-Aitsahalia, 'Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision' (1994) 26 Comparative Political Studies 535, 555.

fundamental principles of Community law.[56] In return, the Court regularly found that the justifications proffered by the Member States for derogating from the default rules of free movement in the internal market should be subject to rigorous proportionality review. In short, exceptions to the general principles of mutual recognition and free movement should be interpreted narrowly and subject to close judicial scrutiny.[57]

The result of this dynamic interaction between litigants, national courts and the CJEU was that many of these national rules were ultimately found to constitute unjustified or disproportionate impediments to the fundamental freedoms of the internal market.[58] With such rules being subsequently annulled or dis-applied, a powerful incentive for positive integration through Community harmonisation legislation was created, as the need for common rules in important areas of the internal market came to be recognised.[59]

c.) A Pro-Integrationist Court?

Viewed in this way, the establishment of the principle of mutual recognition and its aftermath is frequently cited as evidence that the CJEU had assumed the role of an "engine" of European integration during this period.[60] By allowing "interest-driven litigation to overcome the political deadlock that prevented the completion of the internal market" the CJEU's jurisprudence facilitated "free movers" who sought to "tear down [national] barriers to trade that could have been eliminated by EU harmonization."[61]

This jurisprudence is also said to evince a general, "pro-integrationist" stance being taken by the Court.[62] In particular, the manner in which the Court came to subject national regulatory barriers to trade to strict proportionality review has been said to highlight the Court's strong bias in favour of furthering European integration.[63]

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[56] Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004) 127–132.
[57] Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal 158, 172.
[58] Lenaerts, 'How the ECJ Thinks' (n 45) 1308.
[59] Stone Sweet (n 56) 133–139.
[60] Henri de Waele, 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment' (2010) 6 Hanse Law Review 3, 11–13; Mark A Pollack, *The Engines of European Integration* (Oxford University Press 2003) Chapter 5.
[61] Lenaerts, 'How the ECJ Thinks' (n 45) 1308; Stone Sweet (n 56) 128–146.
[62] de Waele (n 60) 11; Stone Sweet (n 56) Chapter 3; Renaud Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Macmillan 1998) Chapter 3.
[63] Takis Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 193.

From a more critical perspective, the landmark judgments of the Court which: (i) constitutionalised the EEC Treaty during the foundational period; and (ii) subsequently sought to overcome legislative inertia and drive the European integration process forward, feature prominently in accounts that charge the Court with "judicial activism."[64]

On this view, the Court is alleged to have overstepped the acceptable limits of the judicial function, departing from orthodox canons of interpretation and impermissibly deviating from the text of the Treaty.[65] By reading principles like direct effect and mutual recognition in to the Community legal order, the Court is accused of "unwavering and illegitimate promotion of the Union interest"[66] and effectively engaging in "supranational judicial policymaking."[67] As Judge Rosas puts it, the Court has "often been criticized for judicial activism and, more precisely, for favoring, by applying teleological methods of interpretation, an integration agenda, and the broad objectives expressed in the Community Treaties at the expense of the explicit rules of those Treaties."[68]

In response, defenders of the Court insist that the Court was perfectly within its rights to establish such principles given the ambiguity of the text and the overarching objective of laying the foundations of an ever-closer union among the peoples of Europe.[69]

Although the origins of the judicial activism debate may be traced back several decades, the core claims made by both sides continue to influence much of the contemporary work on the role of the CJEU and its contribution to the development of the European integration

[64] Lenaerts, 'How the ECJ Thinks' (n 45) 1309; Trevor C Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 112 Law Quarterly Review 95.
[65] See generally Horsley (n 46) 931–941 and literature cited therein.
[66] ibid 938.
[67] Donna Starr-Deelen and Bart Deelen, 'The European Court of Justice as a Federator' (1996) 26 Publius 81, 87. Other landmark examples of the Court behaving in an "activist" manner by deviating from the text of the Treaty in order to pursue pro-integrationist objectives include: (i) the establishment of the principle of Member State liability in damages for breaches of EU law in *Joined cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and others v Italian Republic* ECLI:EU:C:1991:428.; and (ii) finding that the European Parliament had standing to bring actions for annulment against acts of the Council despite the relevant Treaty articles being silent on this possibility in *Case C-70/88, European Parliament v Council* ECLI:EU:C:1990:217 8. On the accusations of policymaking and judicial activism, see Trevor C Hartley, *The Foundations of European Union Law* (Eighth edition, Oxford University Press 2014) 73–77.
[68] Allan Rosas, 'Separation of Powers in the European Union' (2007) 41 The International Lawyer 1033, 1037.
[69] See the Preamble to the Treaty of Rome establishing the European Economic Community (EEC) 1957, 298 U.N.T.S. 3; For a defense of the Court see Takis Tridimas, 'The Court of Justice and Judicial Activism' (1996) 21 European Law Review 199.

project.[70] That being said, much of the literature dealing with the perceived judicial activism and pro-integrationist ethos of the CJEU tends to focus upon: (i) the Court's methodology when interpreting provisions of the Treaty and/or provisions of Community legislation; and/or (ii) the ways in which the Court has subjected national impediments to free movement to robust judicial scrutiny.[71]

In contrast, as was noted in Chapter 1, very little has been said on whether the Court's jurisprudence pertaining to constitutional review of Community legislation is equally "activist" or "pro-integrationist" in nature and, crucially, whether this has changed over time. [72] Indeed, what has been lacking in much of the work on the Court to date is any comprehensive examination of how the CJEU has approached its task of reviewing the constitutionality of EU legislation, whether this has shifted over time and, ultimately, what this tells us about the (changing) role of the CJEU more generally.

In seeking to address this gap, the remainder of Chapter 4 analyses how the CJEU reviewed the constitutionality of Community legislation in the period between the Single European Act 1987 and the Treaty of Maastricht in 1993. As we shall see, the CJEU's jurisprudence pertaining to questions of structural constitutional review (competence) and fundamental rights was consistent with the wider, pro-integrationist philosophy of the CJEU during this second epoch in its historical evolution.

5.) Fundamental Rights Review after the Single European Act

Turning first to fundamental rights, the previous chapter demonstrated how the CJEU consistently engaged in light-touch review of acts of general application prior to the SEA. It was contended that this jurisprudence was one of the defining characteristics of an era of "low-intensity constitutionalism" in the Community.

Understood simply as normative theory that is concerned with placing legal and political limits upon public power, the notion of constitutionalism being of a "low-intensity" during this period stemmed from the fact that there were very few constitutionally-entrenched

[70] Mark Dawson, Bruno de Witte and Elise Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013).
[71] See Chapter 1, Section 4.
[72] See Chapter 1, Section 4.

limits upon the law-making powers of the Community legislature.[73] Furthermore, fundamental rights claims involved the assertion of economically-oriented rights such as the right to property or freedom to conduct a business against Community legal acts that regulated technical aspects of the Common Market.

Within this framework, the Court typically granted the Community institutions a wide margin of discretion and opted not to scrutinise the substance of Community legal acts to any meaningful extent. Limited attention was paid to the justifications proffered by the Commission and Council for their policy choices and judgments typically concluded within a few short paragraphs that no infringement of fundamental rights had occurred.

Following the entry into force of the SEA, the Community legal order continued to lack a written bill of fundamental rights which the Community institutions were bound to respect. The only reference to fundamental rights in the amended EEC Treaty was in its preamble, which now provided that the Community was "determined to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the member states, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice."[74]

At the same time, the core aim and objective of the Community as laid down in Articles 2 and 3 EEC remained that of furthering integration through the creation of a pan-European Internal Market.

Consequently, fundamental rights review of Community legislation continued to be conducted on the basis of an open-ended and somewhat ambiguous catalogue of general principles of law within a legal framework that remained geared towards economic integration.

a.) Fundamental Rights Review of Member State Action

Somewhat remarkably, there were very few fundamental rights challenges to Community legislation in the years between the SEA entering into force in 1987 and the Treaty of

[73] See Chapter 3, Section 5
[74] Preamble to SEA.

Maastricht in 1993.[75] Instead, the landmark rights cases of this period concerned the extent to which the Member States were obliged to comply with Community-wide fundamental rights norms when they were implementing, or derogating from, Community law obligations.

Owing their existence to the CJEU's creative general principles of law jurisprudence, it was unclear whether fundamental rights in the Community legal order applied solely to the Community institutions or were also capable of curtailing the actions of the Member States. Through landmark judgments such as *Wachauf* and *ERT* in the early 1990s, the Court determined that the actions of Member States would indeed be henceforth be subject to Community-wide fundamental rights obligations in circumstances where they implemented or derogated from Community law obligations.[76]

This development led Coppell and O'Neill to famously argue that the Court's jurisprudence was strategically aimed at expanding the influence of Community law over the activities of the Member States.[77] In their view, the Court's "high rhetoric of human rights protection" was to be seen as "no more than a vehicle for the Court to extend the scope and impact of European law."[78] By insisting that an increasing number of Member State actions and derogations from Community law fell within the scope of Community law as interpreted by the CJEU, this strand in the jurisprudence served ultimately to further integrate the legal systems of the Member States with that of the Community.[79] Moreover, given that fundamental rights review of Member State action was not explicitly provided for in the founding Treaty of the EEC, the judgments in *Wachauf* and *ERT* are often viewed as further

[75] There were challenges to the investigative powers and administrative decisions of the Commission in the area of competition law, but these did not concern Community legislation understood as acts of general application e.g. *Case C-85/87, Dow Benelux v Commission* ECLI:EU:C:1989:379; *Case C-46/87, Hoechst v Commission* ECLI:EU:C:1989:337.
[76] *Case 5/88, Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* ECLI:EU:C:1989:321; *Case C-260/89, Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* ECLI:EU:C:1991:254.
[77] Jason Coppel and Aidan O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 Common Market Law Review 669, 669.
[78] ibid 692.
[79] ibid 691–692.

evidence of judicial activism and the pro-integrationist bias of the CJEU during this second epoch in its historical evolution.[80]

b.) The Persistence of Low-Intensity Review

This brings us to the CJEU's record in subjecting Community legislation to fundamental rights review in the post-SEA era.

The approach taken by the Court is well-illustrated by the *Kühn* case, where the applicants contested the legality of a Community Regulation in the Common Agricultural Policy (CAP) field which organised a system of levies to be payed by producers and purchasers of milk over a certain quantity in any given year.[81] In their view, the rules governing exemptions from this obligation to pay such levies should be interpreted to include situations, such as their own, where milk companies had been leased to third parties. In rejecting applicant's arguments, the Court found that the system of exemptions was exhaustive and did not cover the situation of the applicants, thus meaning that they could not benefit from an exemption to pay the levy.[82]

According to the CJEU, this interpretation of Community legislation also did not infringe the applicant's rights to property or their freedom to pursue an occupation. In keeping with established case law, it was held that such rights were not absolute and must be considered in light of their social function. Accordingly, restrictions on such rights were permissible provided they corresponded to objectives in the EEC's general interest and did not constitute, with regard to the aim pursued, a disproportionate interference, impairing the very substance of the rights in question.[83]

The CJEU first found that the Regulations formed part of a body of measures aimed at remedying surpluses in the Community milk market and thus corresponded to a general interest in the Community. Then, without any further degree of scrutiny of the Regulation, or any attempt to elaborate on its reasoning, the Court swiftly concluded in a single

[80] Elise Muir, 'The Court of Justice : A Fundamental Rights Institution Among Others' in Mark Dawson, Bruno de Witte and Elise Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar Publishing 2013) 96–97.
[81] *Case C-177/90, Kühn* ECLI:EU:C:1992:2.
[82] ibid para 11.
[83] ibid para 16.

paragraph that the Regulation did not affect the very substance of the right to property and of the freedom to pursue an occupation.[84]

Much like before the SEA, therefore, fundamental rights cases involved claims by natural and legal persons that rights of an economic nature had been disproportionately restricted by Community legislation in areas of complex, technical regulation such as the CAP. In response, the same light-touch, tersely reasoned approach to reviewing Community legislation on fundamental rights and proportionality grounds was deployed by the CJEU.[85] Rather than engaging with the suitability, necessity and proportionality in the strict sense aspects of proportionality review in this context, the Court was content with accepting that contested Community legislation pursued legitimate community interests. Moreover, the light-touch approach to scrutinising the substance of contested legislation has been said to fit within the wider, pro-integrationist philosophy of the CJEU during this period.[86] Whilst the brevity of many of the Court's judgments makes it difficult to clearly ascertain the underlying policy choices of the CJEU, its apparent reluctance to closely scrutinise the legality of Community legislation may be said to stem from a desire not to frustrate the project of furthering European integration.[87]

6.) The Question of Competence

The same pro-integrationist ethos may also be detected in the way in which the CJEU went about reviewing Community legislation on competence/legal basis grounds in the years after the SEA. According to Granger, the jurisprudence in this area is perceived as being "biased", since it "almost always gave priority to Treaty provisions which granted greater influence to supranational institutions and favoured supranational modes of decision-making."[88] Moreover, when it came to policing the boundary between Community and Member State areas of competence, the Court typically favoured recourse to open-ended,

[84] ibid paras 16-17; See similarly *Case C-359/89, SAFA Srl and Amministrazione delle finanze dello Stato* ECLI:EU:C:1991:145 paras 15-22; *Case C-143/88, Zuckerfabrik Süderdithmarschen* ECLI:EU:C:1991:65 paras 72-78.
[85] For a rare example of the CJEU annulling a CAP Regulation on the grounds that it infringed the principle of proportionality outwith the fundamental rights context during this period see *Case C-24/90, Hauptzollamt Hamburg-Jonas v Werner Faust Offene Handelsgesellschaft KG* ECLI:EU:C:1991:387.
[86] On the pro-integrationist bias of the CJEU in this regard see Tridimas, *General Principles* (n 63) 193.
[87] Marie-Pierre Granger, 'The Future of Europe: Judicial Interference and Preferences' (2005) 3 Comparative European Politics 155, 168.
[88] ibid 169.

functional legal bases in the Treaty which allowed the EEC institutions to more easily expand the scope of Community activity.[89]

In demonstrating how this played out in the case law, the remainder of this chapter first addresses the impact that the SEA reforms had upon the Court's task of reviewing the legality of Community legislation. This is followed by an examination of the CJEU's jurisprudence when reviewing Community legislation on competence/legal basis grounds.

a.) The Shift to QMV: An End of an Era?

To recall from the previous Chapter, the widespread use of unanimity voting in the Council before the SEA had effectively obviated the need for judicial review of Community legislation on competence grounds. With acts of general application being unanimously agreed to by the governments of the Member States, challenges to the legality of such acts before the CJEU were incredibly rare. The political process provided the principal check upon the existence of legislative powers on the Community level, which in turn led national ministers in the Council to often take a rather expansive view of the scope of the EEC's competences.

The legal and political order of the EEC during this period may therefore be contrasted with many national systems where issues of governmental structure and the division of powers between different levels of government forms "the most 'explosive' of federal battlegrounds."[90] Typically, within those legal orders that divide power between a central authority and constituent entities (often along federal lines), an expansive interpretation of the law-making powers of the central authority comes at the expense of the powers of the constituent states or regions.[91]

During the early decades of the EEC, however, the near total control of the Member States over the law-making process resulted in the Community appearing "more as an instrument in the hands of the governments rather than as a usurping power."[92] "In federal states, the

[89] ibid (footnotes omitted).
[90] Weiler (n 26) 2432.
[91] ibid 2449.; see also Antonio Tizzano, 'The Powers of the Community' in Commission of the European Communities (ed), *Thirty Years of Community Law* (Office for Official Publications of the European Communities 1983) 63.
[92] Weiler (n 26) 2449.

classical dramas of federalism in the early formative periods presuppose two power centers: the central and the constituent parts. In the Community…the constituent units' power was the central power."[93] Consequently, the core question of delimiting competences between the centre and the periphery was far less important in the EEC than it was in many nation states.[94]

This state of affairs was radically altered with the entry into force of the Single European Act. The significance of the change is apparent when one recalls that, at a foundational level, every legal act adopted by the Community institutions must be based upon a legal basis in the Treaty. These legal bases provide the scope of the Community's competence to act within a particular policy area (e.g. the Common Agricultural Policy, Competition law, internal market etc.) and stipulate the law-making procedure to be followed therein.[95] The choice of legal basis thus determines the scope of the Community's powers per se; as well as the degree of influence enjoyed by the Community institutions and the Member States over the legislative output of the Community.

Following the SEA reforms, this meant that whenever a legal basis to which the cooperation procedure applied was chosen, the Council operated by QMV and the Parliament enjoyed considerable input into the process. In contrast, whenever the cooperation procedure did not apply, most other legal bases in the Treaties continued to provide for unanimity voting in the Council and a reduced, consultative role for the EP.

The adoption of legislation via the cooperation procedure therefore necessarily entailed the loss of individual national vetoes on the Community level. In drawing attention to the ramifications that this reform had upon the Member States, Weiler emphasised at the time that "unlike any earlier era in the Community, and unlike most of their other international and transnational experience, Member States are now in a situation of facing binding norms, adopted wholly or partially against their will, with direct effect in their national legal orders."[96]

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[93] ibid.
[94] Loïc Azoulai, 'Introduction' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press 2014) 2.
[95] Koen Lenaerts and others, *European Union Law* (Sweet & Maxwell, Thomson Reuters 2011) 113.
[96] Weiler (n 26) 2462.

Faced with the prospect of having to comply with Community legislation that they had opposed during the law-making process, the Member States came to recognise that defining the scope of the Community's law-making competences was of far greater importance than during the pre-SEA era.[97] As Weatherill points out, "[a] regime of QMV in Council, in place of unanimity, generates a sharper appreciation of the importance of defining the limits of [Community] competence from that which prevails in times when an anxious State knew the Council acted only if every State was in agreement."[98]

In addition to the Member States, the other Community institutions also came to realise that the choice of legal basis carried with it direct implications for the degree of input that they would each have over the formulation and adoption of Community legislation.

b.) The Increasingly Constitutional Role and Rhetoric of the CJEU

As stated above in the introduction, this increase in contestation over the legal basis and competence of Community legislation resulted in the Court being faced with new types of cases in which it was called upon to "umpire the federal system" in the Community. In much the same way as national constitutional and supreme courts are responsible for conducting structural constitutional review of legislation, the CJEU was now required to engage in "the interpretation and enforcement of the division of powers that is part of federal constitutions as well as the enforcement of those provisions establishing the basic institutions of government."[99]

Aspects of the Court's task were now "essentially constitutional", in the sense that the CJEU was required to adjudicate upon disputes between the Community institutions and the Member States within the context of reviewing the legality of Community legislation.[100] This analogy with national systems of structural constitutional review is clearly implicit in Advocate General Van Gerwen's observation in 1989 that "ensuring that the legal basis is the correct one is crucial to preserving the balance of powers laid down in the Treaties as

[97] Takis Tridimas, 'Competence after Lisbon: The Elusive Search for Bright Lines' in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon* (Cambridge University Press 2012) 73.
[98] Stephen Weatherill, 'Competence Creep and Competence Control' (2004) 23 Yearbook of European Law 1, 5.
[99] A Stone, 'Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review' (2008) 28 Oxford Journal of Legal Studies 1, 2.
[100] Francis G Jacobs, 'Europe after 1992: The Legal Challenge' [1992] University of Chicago Legal Forum 1, 15.

between the Community and the Member States and as between the Community institutions inter se."[101]

In addition to assuming these greater "constitutional" responsibilities, it has also been noted that the CJEU "started using more aggressively the rhetoric of a constitutional court" around the time of the SEA.[102] For example, in the landmark 1986 judgment of Les Verts, the CJEU proclaimed for the first time that the Community legal order was "based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty."[103]

This novel, constitutional rhetoric was soon complemented by the Court's judgment in Foto Frost, which determined that national courts were precluded from ruling upon the validity of measures of Community law. In all such cases where issues of validity were raised before them, national courts were required to refer the matter to the Court of Justice via a reference for a preliminary ruling.[104] The power to declare acts of Community law invalid was to be reserved solely to the Court of Justice. This resulted in a strictly centralised system of constitutional review in the Community legal order that drew comparisons with many constitutional orders (particularly in the continental European tradition).[105]

By proclaiming that the Court was itself ultimately responsible for reviewing the legality of Community legislation against the Community's "basic constitutional charter", the reasoning in Les Vertes and Foto Frost permitted "recourse to a classic system of constitutional control in the Member States and the comparison of the Court to a constitutional court."[106] Henceforth, every "exertion of authority" by the Community institutions would have to

[101] *Opinion of Mr Advocate General Van Gerven, Case C-70/88 European Parliament v Council of the European Communities* ECLI:EU:C:1989:604 para 3; See also Cullen and Charlesworth (n 23) 1246.
[102] Lenaerts, 'Judges and Politicians' (n 25) 122.
[103] *Case 294/83, Parti écologiste 'Les Verts' v European Parliament,* ECLI:EU:C:1986:166 para 23.
[104] *Case 314/85, Foto-Frost v Hauptzollamt Lübeck-Ost* ECLI:EU:C:1987:452.
[105] Monica Claes and Bruno de Witte, 'Competences: Codification and Contestation' in Adam Łazowski and Steven Blockmans (eds), *Research Handbook on EU institutional law* (Edward Elgar Publishing 2016) 70.
[106] Jean-Paul Jacqué, 'Les Verts v European Parliament' in Miguel Poiares Maduro and Loïc Azoulai (eds), *The Past and Future of EU law : The Classics of EU law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010) 319.

"filter through the mesh of constitutional validity" provided by the Treaties and umpired by the CJEU.[107]

But how, if at all, did the CJEU's approach to reviewing the legality of Community legislation on competence grounds change following the entry into force of the SEA? In light of "the new relevancy of the question of competences in the post-SEA era" would the Court come to subject Community legislation to stricter competence control than during previous periods in the history of the Community?[108]

7.) Establishing the Basic Principles of Structural Constitutional Review

In discharging this novel "constitutional" responsibility of "umpiring the federal system", the Court began by holding that the correct legal basis for Community legislation was not a matter to be determined solely by the political process. Prior to the SEA, the Council had contended that since it bore responsibility under the Treaties for amending Commission proposals, disputes over the correct legal basis were to be resolved through the political process and were not a matter for the Court.[109]

a.) Objective Factors Amenable to Judicial Review

In rejecting this viewpoint, the Court held that "the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review."[110] In particular, the aim and content of the measure must be taken into consideration.[111]

These principles were first articulated in deciding an action for annulment raised by the Commission against two Council Regulations that applied generalized tariff preferences to certain industrial and textile products originating in developing countries.[112] In the Commission's view, the Regulations should have been annulled for failing to state the

[107] Isiksel (n 54) 62.
[108] Joseph HH Weiler and Jean-Paul Jacqué, 'On the Road to European Union - A New Judicial Architecture: An Agenda for the Intergovernmental Conference' (1990) 27 Common Market Law Review 185, 191.
[109] *Opinion 1/78 of the Court of Justice, International Agreement on Natural Rubber* ECLI:EU:C:1979:224 paras 29-31.
[110] *Case 45/86, Commission v Council* ECLI:EU:C:1987:163, para 11.
[111] *Case C-300/89, Commission of the European Communities v Council of the European Communities* ECLI:EU:C:1991:244, para 10.
[112] *Case 45/86, Commission v Council* (n 110).

precise legal basis upon which they were enacted and for violating the Treaty by relying upon an incorrect legal basis.[113] According to the Council, the contested Regulations had to be enacted on the basis of *both* Article 235 EEC (the Community's 'necessary and proper clause) *and* Article 113 EEC (empowering the Community to enact measures in the field of the Common Commercial Policy via QMV). This was because the Regulations pursued not only commercial policy objectives but also development policy aims beyond the scope of Article 113 EEC.

In resolving the dispute, the Court noted that the choice of legal basis was not merely a question of formality, "since Articles 113 and 235 of the Treaty entail different rules regarding the manner in which the Council may arrive at its decision. The choice of the legal basis could thus affect the determination of the content of the contested regulations."[114] Then, in articulating a principle that would be frequently repeated in the post-SEA era, the Court held that "[i]t follows from the very wording of Article 235 that its use as the legal basis for a measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question."[115]

b.) Restricting the Use of Article 235 EEC

In marked contrast to the period depicted in Chapter 3, therefore, the Council would no longer have seemingly unrestricted recourse to the "necessary and proper clause" when enacting Community legislation in a wide variety of policy fields. Moreover, the abovementioned changes to the dynamics of the Community legislative process meant that acts of general application adopted unanimously by the Council would no longer be effectively immune from challenge by other institutions and/or the Member States. Indeed, in several instances where the Council opted for Article 235 EEC as a legal basis, the Commission and Parliament contested that choice of legal basis before the Court. In their view, specific legal bases that mandated Community action in a particular policy field and

[113] ibid para 4.
[114] ibid para 12.
[115] *Case 45/86, Commission v Council* (n 110) paras 13-14; *Case 242/87, Commission of the European Communities v Council of the European Communities* ECLI:EU:C:1989:217 para 6; *Joined cases C-51/89, C-90/89 and C-95/89, United Kingdom of Great Britain and Northern Ireland, French Republic and the Federal Republic of Germany v Council* ECLI:EU:C:1991:241, para 6.

which provided for the cooperation procedure should have been utilised (thus requiring QMV in the Council and an enhanced role for the EP).[116]

Disputes of this nature required the CJEU to undertake two distinct yet interrelated tasks when reviewing the legality of Community legislation. The first was to examine the content of the contested Community legislation to determine its aims and objectives. The second was to provide an authoritative interpretation of the scope of those legal bases in the Treaty which empowered the Community to legislate in policy fields such as the CCP, environmental protection, vocational training etc. Whenever these specific legal bases were found to possess adequate scope for adopting Community legislation in a given field, the consequence was that the legislation had been incorrectly adopted on the basis of Article 235 EEC. [117]

In a number of cases during this period, the Court sided with the claims of the Commission and/or Parliament that specific legal bases under the EEC Treaty were sufficient for adopting the contested legislation.[118] As a result, the circumstances in which the Council could have recourse to Article 235 EEC to adopt legislation in key policy fields was considerably reduced.[119]

8.) The Internal Market Unlimited?

Having limited recourse to Article 235 EEC for the adoption of Community legislation in the post-SEA era, attention soon turned to the scope of the Community's competence to enact harmonisation legislation under the newly inserted Article 100a EEC. As noted above, unlike many specific legal bases in the Treaty, Article 100a EEC possessed an open-ended, functional quality that was similar to Article 235 EEC. Both legal bases did not confine the scope of the Community legislature's powers to a particular policy field.[120]

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[116] Cullen and Charlesworth (n 23) 1248–1249.
[117] George A Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 Columbia Law Review 331, 362.
[118] *Case 45/86, Commission v Council* (n 110); *Joined cases C-51/89, C-90/89 and C-95/89, United Kingdom v Council* (n 115).
[119] Rather than core Community legislation, Article 235 EEC came to be used instead for 'general external matters' and 'institutional and financial matters' Theodore Konstadinides, *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States* (Kluwer Law International 2009) 26 (footnotes omitted).
[120] Armin Von Bogdandy and Jürgen Bast, 'The Federal Order of Competences' in Armin Von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2009) 287–288.

In contrast to Article 235 EEC, however, harmonisation legislation under Article 100a EEC could henceforth be adopted by QMV in the Council. Consequently, majority voting became a central feature of much of the Community's legislative output, as the overarching objective of progressively establishing the internal market was pursued with renewed enthusiasm.[121]

Given its central importance to the European integration project as a whole, the ways in which the Court has approached its task of reviewing the constitutionality of harmonisation legislation sits at the core of the present enquiry into the changing role of the CJEU. This is because "[n]o other provision of the Treaties provides a better yardstick of the way the EU lawmaking institutions understand the limits of their own powers, and the Court understands its role in reviewing the competence of the EU, than that provision."[122] Moreover, as Advocate General Jacobs remarked almost ten years after the entry into force of the SEA, Article 100a EEC and its successors have led to "Community legislation touching the most diverse areas of national law, such as the protection of the environment, of public health, of the consumer, and…the protection of intellectual property."[123]

When viewed from the perspective of comparative federalism, the Community's power to enact harmonisation legislation has long been compared to the Commerce Clause of the United States Constitution, since both seek to empower their respective legislatures with broadly framed powers in order to abolish obstacles to interstate commerce.[124] "Quantitatively, that grant of power is of paramount importance, as most of US and EU legislation currently in force is grounded in that constitutional authority."[125] Article 100a EEC and its successors have formed a key "battlefield" for contests over whether the Community

[121] Weiler (n 26) 2456–2461.
[122] Tridimas, 'Competence after Lisbon: The Elusive Search for Bright Lines' (n 97) 73.
[123] *Case C-350/92, Opinion of Mr Advocate General Jacobs, Kingdom of Spain v Council of the European Union* ECLI:EU:C:1995:64 para 26.
[124] Article 1, Section 8, Clause 3 of the U.S. Constitution provides Congress with the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." On the comparison with the powers of the EU legislature see Jukka Snell, 'The Internal Market and the Philosophies of Market Integration' in Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2017) 330.
[125] José A Gutierrez-Fons, 'Transatlantic Adjudication Techniques: The Commerce Clause and the EU's Internal Market Harmonisation Clause in Perspective' in Elaine Fahey and Deirdre Curtin (eds), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders* (Cambridge University Press 2014) 69.

or its Member States are competent to regulate a particular issue.[126] In essence, when reviewing the constitutionality of harmonisation legislation, "the main issue the Court has to deal with is whether the [Community] is entitled to act and how much power is left to member states."[127]

a.) Titanium Dioxide

The first major dispute over the scope of Article 100a EEC in the post-SEA era arose in *Titanium Dioxide*. The Commission challenged a Council Directive which pursued the twin goals of (i) harmonizing national programmes for the reduction of pollution from industrial establishments; and (ii) improving the conditions of competition in the titanium dioxide industry.[128]

The Directive was enacted on the basis of Art.130s EEC, which empowered the Council to unanimously adopt measures in the field of environmental policy. In the Commission's view, the Directive should have been adopted on the basis of Art.100a EEC, thus entailing recourse to the cooperation procedure of QMV in the Council and strong input from the Parliament.[129]

In examining the aims and content of the Directive, the Court found that it was inextricably linked to both the protection of the environment and eliminating disparities in conditions of competition.[130] According to settled case law, Community measures which pursued two different policy aims should be based upon both legal bases in the Treaty.[131] However, the difference in law-making procedure in Art.100a (cooperation procedure) and Article 130s (unanimity in Council, consultation of the EP) meant that such an approach could not be taken, since this would "divest the cooperation procedure of its very substance."[132]

[126] Weiler (n 26) 2460.
[127] Soriano (n 24) 324.
[128] Council Directive 89/428/EEC of 21 June 1989 on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry [1989] OJ L 201/56.
[129] *Case C-300/89, Commission v Council* (n 111) paras 2-3.
[130] ibid paras 13, 16.
[131] *Case 165/87, Commission of the European Communities v Council of the European Communities* ECLI:EU:C:1988:458 para 11.
[132] *Case C-300/89, Commission v Council* (n 111) para 17.

Based on the fact that the SEA had inserted a specific legislative competence in the field of environmental protection into the Treaty, one might have expected the CJEU to find that the correct legal basis was Article 130s EEC rather than the general, open-ended harmonisation competence of Article 100a EEC.

However, the CJEU rejected this outcome, annulling the contested legislation on the grounds that it had been incorrectly adopted under Article 130s EEC and that Article 100a EEC was the correct legal basis. In so doing, the Court placed much emphasis upon the purpose of Art.100a and the cooperation procedure when viewed within the broader context of the development of European integration. According to the CJEU, the cooperation procedure was intended to "increase the involvement of the European Parliament in the legislative process of the Community" with participation reflecting "a fundamental democratic principle that the peoples should take part in the exercise of power through the intermediary of a representative assembly."[133]

The judgment also provided important guidance on the scope of Article 100a EEC in the post-SEA era. According to the Court, a precondition for the existence of a pan-European internal market is the existence of undistorted conditions of competition.[134] In order to give full effect to the fundamental economic freedoms of the internal market, therefore, "harmonizing measures are necessary to deal with disparities between the laws of the Member States in areas where such disparities are liable to create or maintain distorted conditions of competition."[135]

In the absence of harmonisation on the Community level, national measures which are necessary to address environmental concerns may not only create a burden upon the undertakings to which they apply, but also lead to competition being appreciably distorted.[136] Consequently, "action intended to approximate national rules concerning production conditions in a given industrial sector with the aim of eliminating

[133] ibid para 20.
[134] ibid para 14.
[135] ibid para 15.
[136] ibid para 23.

distortions of competition in that sector is conducive to the attainment of the internal market and thus falls within the scope of Article 100a."[137]

This aspect of the Court's judgment in *Titanium Dioxide* is widely recognised as entailing an incredibly broad understanding of the scope of the Community legislature's internal market competence under Article 100a EEC.[138] The reasoning of the Court not only confirmed that this legal basis could be utilised to eliminate distortions to competition, but "suggested that *any* disparities in national laws liable to create *any* distortion of competition could be harmonised."[139] Furthermore, by expressing a clear preference for the use of the cooperation procedure on the grounds that it sought to "accelerate the process of Community integration and to strengthen the democratic safeguards attached to the legislative process"[140], the Court had further emphasised the diminution of unanimity voting that had dominated in the past.

The pro-integrationist policy choices underlying the judgment are more clearly explained by Advocate General Tesauro in the case, who noted that a broad interpretation of Article 100a EEC was "fully consistent with the fundamental objectives of the reforms pursued by the Single Act."[141] In this regard, the most important innovation of the SEA was the cooperation procedure, which shifted to QMV in the Council and empowered the European Parliament. These reforms were intended "to accelerate the process of Community integration and to strengthen the democratic safeguards attached to the legislative process."[142] Article 100a EEC represented "the most significant case in which majority voting and the cooperation procedure are applicable" due to its "central importance to the attainment of the internal market."[143] The fundamental objectives underpinning the SEA were said to be "renewed integration through greater recourse to faster decision-making procedures

[137] ibid 23.
[138] Kenneth A Armstrong and Simon Bulmer, *The Governance of the Single European Market* (Manchester University Press 1998) 212; René Barents, 'The Internal Market Unlimited: Some Observations on the Legal Basis of Community Legislation' (1993) 30 Common Market Law Review 85, 87–88.
[139] Schütze, *European Union Law* (n 41) 557 (emphasis original).
[140] *Case C-300/89, Opinion of Advocate General Tesauro,* ECLI:EU:C:1991:115 para 13.
[141] Ibid para 13.
[142] Ibid.
[143] Ibid.

and the enhancement of democratic guarantees through more effective involvement of the Parliament in the legislative process."[144]

b.) Spain v Council

Having confirmed the central importance of Article 100a EEC to the future development of the European integration project, the Court subsequently confirmed a broad interpretation of the scope of the Community's harmonisation competence in *Spain v Council*.[145] Spain challenged the legality of a Regulation which created a supplementary certificate for medicinal products that could be granted under the same conditions as national patents by the Member States. In their view, Article 100 or Article 235 EEC was the correct legal basis for the Regulation, since adopting Community legislation on these legal bases would "require the unanimity of all Member States and therefore...[would] not affect their sovereignty."[146]

The Court swiftly rejected this argument, emphasising that Article 235 EEC could only be utilised as a legal basis where no other provision of the Treaty provided the Community with the necessary powers to adopt the contested legislation. Moreover, no arguments had been put forward to support the claim that Article 100 EEC was the correct legal basis. The question to be resolved, therefore, was whether the novel Article 100a EEC constituted the correct legal basis for the Regulation.[147]

Spain raised three separate issues which suggested that the Regulation went beyond the scope of the Community's power to enact harmonisation measures on the basis of Article 100a EEC. First, Article 100a EEC could only be utilised to harmonise existing national rights and not to create new Community wide rights. Second, the Regulation did not pursue the objective enshrined in Article 8 EEC (to which Article 100a EEC referred) of establishing an internal market: the supplementary certificate extended the duration of national patents, thus extending the compartmentalisation of the internal market into distinct national markets. Third, at the time of the Regulation's adoption, only two Member States had enacted national rules regarding a

[144] Ibid.
[145] *Case C-350/92, Spain v Council* ECLI:EU:C:1995:237.
[146] ibid para 25.
[147] ibid paras 26-29.

supplementary certificate, thereby raising the question of whether the Community's harmonisation power was triggered in such circumstances.[148]

Regarding the first of these questions, the Court simply held without explanation that it was undisputed in this case that the contested regulation did not create a new right.[149] In similarly terse fashion, the Court failed to directly address the second issue and did not discuss whether the Regulation did in fact hinder the free movement of pharmaceutical goods between states. Instead, the Court focused on the third issue raised by the applicants, holding that harmonizing measures were "necessary to deal with disparities between the laws of the Member States in so far as such disparities are liable to hinder the free movement of goods within the Community."[150] In this regard, the Regulation aimed to "prevent the heterogeneous development of national laws leading to further disparities which would be likely to create obstacles to the free movement of medicinal products within the Community and thus directly affect the establishment and the functioning of the internal market."[151]

Consequently, following *Spain v Council*, the Community appeared to be competent to adopt harmonisation measures under Article 100a EEC so as to prevent future obstacles to trade or a potential fragmentation of the internal market.[152] As stated by Conway, since "almost any diversity of national laws could be understood as a potential future obstacle to free movement or undistorted competition, they could be brought within this framework."[153] Accordingly, the Court was believed to possess "a tendency to adopt a pro-integration interpretation in questions of competence" in the years following the entry into force of the SEA.[154] When it came to the delimitation of competences between the Community and the Member States, the CJEU's wide interpretation of Article 100a EEC and its light-touch approach to review suggested a strong preference for favouring the former.

[148] ibid paras 25-34.
[149] ibid para 27.
[150] ibid para 33.
[151] ibid para 35.
[152] Robert Schütze, *European Constitutional Law* (Cambridge University Press 2012) 158.
[153] Gerard Conway, 'Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ' (2010) 11 German Law Journal 966, 970.
[154] Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2014) 37.

9.) Conclusion

The purpose of Chapter 4 has been to demonstrate how the role of the CJEU changed around the time of the Single European Act in 1987. Having constitutionalised the Treaty of Rome during the foundational period, the Court then moved in this second epoch to "safeguard the core of European integration set out in the Treaty."[155] Faced with legislative inertia in the Community, the Court adapted its role in order to meet the pressing needs of the EEC at this time.

By establishing the principle of mutual recognition in the internal market, the CJEU demonstrated a willingness to provide judicial solutions to problems that were supposed to be addressed by the political process. Subsequently, through a combination of creative, teleological Treaty interpretation and strict scrutiny of national impediments to free movement, the CJEU played a leading role as an "engine" of European integration during this second epoch in its history.[156]

In addition to breaking the political deadlock on the Community level, the Court's jurisprudence also proved to be something of a catalyst for Treaty reform. Following the Commission's influential White Paper on completing the Internal Market (which was itself inspired, in part, by the jurisprudence of the CJEU) the Single European Act of 1987 brought about a series of fundamental changes to the legal and political order of the Community.

Of paramount importance in this regard was the advent of the cooperation procedure and its application to the Community's core competence for enacting harmonisation legislation in the internal market. By moving to a system of QMV in the Council and empowering the Parliament within the legislative process, the SEA marked the first in a series of reforms which would culminate in a procedural concept of legislation emerging in the post-Lisbon Treaty era.

These changes to the dynamics of the legislative process also had a considerable impact upon the CJEU's task of conducting constitutional review of Community legislation. The combination of QMV and enhanced European Parliamentary involvement gave rise to

[155] Lenaerts, 'How the ECJ Thinks' (n 45) 1308.
[156] R Daniel Kelemen and Susanne K Schmidt, 'Introduction – the European Court of Justice and Legal Integration: Perpetual Momentum?' (2012) 19 Journal of European Public Policy 1.

increased litigation over the correct legal basis for Community legislation. Recognising that the choice of legal basis would determine the scope of the Community's powers and the degree of influence that different actors would enjoy over the legislative process, both the Community institutions and the Member States sought to contest the constitutionality of Community legislation on competence grounds. The result was that the CJEU assumed greater responsibilities of a "constitutional" nature, as it was increasingly called upon to "umpire the federal system" within the post-SEA Community.[157]

When it came to reviewing Community legislation on legal basis/competence grounds, however, Chapter 4 has argued that the same pro-integrationist ethos that was present in other areas of the Court's jurisprudence was also evident in these cases of structural constitutional review.[158]

Notably, the CJEU adopted an expansive interpretation of the scope of Article 100a EEC, with the abovementioned judgments of Titanium Dioxide and Spain v Council resulting in such a wide sweeping understanding of the Community's harmonisation powers that they appeared "devoid of constitutional boundaries."[159]

This pro-integrationist approach to the question of competence was also reflected in the CJEU's fundamental rights jurisprudence during this period. Much like the cases discussed in Chapter 3, the Court continued its established practice of rapidly concluding without much explanation that contested Community pursued legitimate aims and did not disproportionately impinge upon fundamental rights. It was therefore submitted that the case law evinces a reluctance on the part of the CJEU to frustrate the advancement of European integration by strictly scrutinising the constitutionality of Community legislation.

It was not long, however, before this light-touch, pro-integrationist approach to constitutional review came to be viewed as part of a wider problem in the Community. The SEA reforms had made a momentous contribution to facilitating the enactment of Community legislation. With the legislative process on the Community level gathering

[157] Lenaerts, 'Judges and Politicians' (n 25) 122.
[158] For a classic statement of this view see Hartley (n 67) 73–77.
[159] Schütze, *European Constitutional Law* (n 152) 158.

momentum, vast swathes of legal acts aimed at completing the internal market were enacted in an attempt to complete the internal market by the end of 1992.

This proliferation of internal market legislation, coupled with the Court's seemingly "unlimited"[160] interpretation of the scope of Article 100a EEC, led to increased concerns about "competence creep" in the years following the entry into force of the SEA.[161] In particular, concerns were raised over the extent to which Community law had come to encroach upon policy areas that were thought to have remained the responsibility of the Member States. Consequently, the "vexed question of the dividing line between Community competences and those of the Member States" gained widespread attention and came to be placed firmly at the top of the agenda for future Treaty reform.[162]

With regards to the role that the CJEU could play in addressing this question, however, a problem presented itself: the system of judicial review remained rooted in the traditions of French administrative law, consisting of the four grounds of review enshrined in Article 173 EEC (supplemented by a series of general principles of law). As Weiler and Jacqué argued in the early 1990s, whilst the lack of competence ground of review found in Article 173 EEC could theoretically be used in the future to address issues of competence creep, "since to date no Commission or Council measure has been struck down for pure and simple lack of competences our assessment is that this existing provision in itself will not satisfy the fears of the Member States."[163]

The problem in the post-SEA Community, therefore, remained one of "low-intensity constitutionalism." When compared to many national legal orders, the Community continued to lack significant, constitutionally-entrenched limits upon the existence and exercise of legislative power. When coupled with the absence of a written bill of rights, the low-intensity of this constitutionalism also rendered the Court's task of reviewing the legality of Community legislation distinct from many national constitutional and supreme courts. Finally, the light-touch, tersely reasoned approach taken by the CJEU in federalism and fundamental rights cases to date served to further emphasise the "low-intensity"

[160] Barents (n 138).
[161] Weatherill, 'Competence Creep and Competence Control' (n 98).
[162] Weiler and Jacqué (n 108) 191.
[163] ibid 202.

nature of constitutionalism during this second epoch in the history of the European integration process.

Chapter 5

From Maastricht to Lisbon: Competence Creep and Constitutionalisation

1.) Introduction

The Maastricht Treaty of 1993 marked the next major phase in the evolution of the European integration project. The Treaty fundamentally reorganized the legal architecture of the Community by creating a European Union (EU) consisting of three separate pillars.[1] Subsequent rounds of Treaty amendment at Amsterdam and Nice would amend various aspects of the legal and political order of the EU whilst retaining this 3 pillar structure.[2]

The first of these pillars consisted of the EEC Treaty, which was now renamed the European Community (EC) Treaty. Within this first pillar, a number of notable additions were made to the competences of the Community, including in the fields of: Economic and Monetary Union (EMU); European citizenship; culture; public health; consumer protection; trans-European networks and development cooperation.[3]

The second pillar dealt with Common Foreign and Security Policy (CFSP), the third with Justice and Home Affairs (JHA). These two pillars concerned intergovernmental forms of cooperation in particularly sensitive areas of national policy. For the most part, the Community's "supranational" institutions – the Commission and the Court – had a very limited role to play, with the Council and European Council asserting a firm grip over the decision-making processes in these fields.[4]

For the purposes of the present enquiry, attention shall be focused on the first, EC pillar and the impact that the Maastricht, Amsterdam and Nice reforms had upon: (i) the system of

[1] See generally Deirdre Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30 Common Market Law Review 17.
[2] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [1997] OJ C 340, p. 1–144; Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [2001] OJ C 80, p. 1–87.
[3] Paul Craig and Grainne De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2015) 11–12.
[4] ibid 11.

judicial review in the EC (ii) the legislative process and concept of legislation in the EC; and (iii) the changing role of the Court when reviewing the legality of Community legislation.

2.) The Constitutionalisation of the System of Judicial Review

When viewed in historical perspective, these successive rounds of Treaty amendment resulted in a profound shift in how one conceives of the concepts of constitutionalism, constitutionalisation and the nature of constitutional review of legislation in the EC.

a.) Constitutionalism and Constitutionalisation

As was noted in Chapter 3, constitutionalism may be generally defined as a normative theory that is concerned with legal and political instruments that limit power.[5] Closely related to this basic conception of constitutionalism is the phenomenon of "constitutionalisation", which Loughlin defines as "the process by which an increasing range of public life is being subjected to the discipline of the norms of liberal-legal constitutionalism."[6] By also defining constitutionalism as a set of legal and political limits upon power, Loughlin notes that, at its core, "constitutionalisation presupposes legalisation; as greater swathes of public life are brought within the ambit of constitutional norms, so too are they disciplined by formal legal procedures. Constitutionalisation is the process of extending the main tenets of liberal-legal constitutionalism to all forms of governmental action."[7]

In light of this basic definitional framework, the previous chapter noted that the pre-Maastricht Community lacked many of the same constitutionally-entrenched legal and political limits that one typically finds in national constitutional systems. Unlike the US and many continental European constitutions, the EEC Treaty did not contain a clearly defined list of enumerated powers to be exercised by the Community institutions. Nor was there an explicit principle of attributed competences or a doctrine of powers that were reserved to the Member States.[8] Furthermore, the Community legal order did not contain a written bill of legally binding fundamental rights commitments. For these reasons, Chapters 3 and 4 argued that the EEC legal order was one of "low-intensity constitutionalism."

[5] See Chapter 3, Section 5.
[6] Martin Loughlin, 'What Is Constitutionalisation?' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010) 61.
[7] ibid.
[8] Antonio Tizzano, 'The Powers of the Community' in Commission of the European Communities (ed), *Thirty Years of Community Law* (Office for Official Publications of the European Communities 1983) 63.

b.) Limiting the Existence and Exercise of Legislative Power

This state of affairs was radically altered by the Maastricht, Amsterdam and Nice Treaties. According to Article F TEU, the EU would henceforth "respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms…and as they result from the constitutional traditions common to the Member States, as general principles of Community law."[9] These commitments were then re-affirmed by the Amsterdam Treaty 1997 via Article 6 TEU, which also established for the first time that the EU was founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.[10]

For Von Bogdandy, the decision at Amsterdam to explicitly found the EU upon these "constitutional principles" meant that the authors of the Treaty intended to create a "European political Union" that was "founded on the postulates of liberal-democratic constitutionalism."[11] Whereas the European Community's core objective remained that of establishing an Internal Market and thus furthering integration through economic means, Article 6 TEU made clear that these aims and objectives were now situated within an EU construct that was founded upon a "core programme of liberal-democratic constitutionalism."[12]

In addition to founding the EU upon the constitutional principles of Article 6 TEU, the Member States also used the Maastricht Treaty to address growing concerns about the seemingly ever-expanding competences of the EC into sensitive areas of national policymaking. Of particular note in this regard was the addition of Article 3b to the EC Treaty.[13] This provision provided that the Community institutions were now bound to respect the principles of conferral, subsidiarity and proportionality, which Dashwood describes as three "general organising principles of the [EC] constitutional order."[14]

[9] Article F Treaty on European Union (TEU), together with the Complete Text of the Treaty Establishing the European Community (EC) [1992] OJ C 224, p. 1–130.
[10] Articles 6(1) and (2) Treaty on European Union (TEU)(consolidated version) [1997] OJ C 340, p. 145–172.
[11] Armin Von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' (2010) 16 European Law Journal 95, 106.
[12] ibid.
[13] Article 3(b) EC.
[14] Alan Dashwood, 'The Limits of European Community Powers' (1996) 21 European Law Review 113, 114.

According to the principle of conferral, the Community "shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein."[15] This inclusion of an explicit principle of conferral in the Treaties for the first time in the history of the European integration project had two principal consequences. First, it explicitly acknowledged, in plain terms, that the Community's legislative powers were limited. Second, the wording of Article 3b EC implicitly confirmed that the Community was not endowed with general law-making powers that could be utilised extensively in the pursuit of diverse policy choices.[16]

In addition to the principle of conferral, the principle of subsidiarity was to act as a limit upon the exercise of Community legislative competence. It was defined by the Maastricht Treaty in the following terms:

> "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."[17]

Despite the somewhat awkward way in which the principle was drafted, subsidiarity generally operates "by setting a functional criteria to decide whether the [Community] – or rather the states – should act in a given field."[18] It therefore deals with a specific question in the vertical allocation of powers between the Community and the Member States.[19]

Alongside the principles of conferral and subsidiarity, Article 3b EC also provided a Treaty-based definition of the principle of proportionality for the first time, according to which "[a]ny action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."[20]

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[15] Article 3(b) EC.
[16] Dashwood (n 14) 115.
[17] Article 3(b) EC.
[18] Federico Fabbrini, 'The Principle of Subsidiarity' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union Law* (2018) 224.
[19] ibid.
[20] Article 3(b) EC.

Whereas proportionality was first developed as a general principle of Community law during the early years of the EEC, the principle was traditionally utilised as a means of protecting the rights and interests of individuals and companies from excessive Community interference. Following its inclusion in Article 3b EC, however, prominent scholars argued that the proportionality principle had also taken on a different, competence-protecting function.[21] According to this view, proportionality was now also concerned with "limiting the intensity of Union intervention in order to protect national regulatory autonomy."[22] It was "designed to safeguard primarily the interests of the Member States vis-à-vis the Community."[23]

c.) Safeguarding the Federal Order of Competences

The addition of novel, constitutionally-entrenched limits to the powers of the Community institutions resulted in a significant "constitutionalization" of the system of judicial review. While constitutionalisation was traditionally associated with the Court's transformation of the EEC legal order via the doctrines of direct effect, supremacy etc. during the foundational period, Article 3b EC represented constitutionalisation in the sense articulated above by Loughlin. In contrast to the low-intensity constitutionalism of the past, this next phase of constitutionalisation led to the EC legislature being subject to a greater number of constitutional norms aimed at "safeguarding the federal balance of competences" between the Community and its Member States.[24] Accordingly, what was now at stake was "a dimension of constitutionalism that concentrate[d] on providing reliable limits to the competence of the Community to intrude on national autonomy."[25]

This focus on the balance of competences between the EC and its Member States formed part of a wider and rapidly increasing body of scholarship that analysed the post-Maastricht

[21] Takis Tridimas, 'The Principle of Proportionality in Community Law: From the Rule of Law to Market Integration' (1996) 31 Irish Jurist 83, 99.
[22] Robert Schütze, 'EU Competences' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 97.
[23] Tridimas, 'The Principle of Proportionality in Community Law: From the Rule of Law to Market Integration' (n 21) 99.
[24] Schütze, 'EU Competences' (n 22) 76. Similarly Von Bogdandy refers to Title I TEU as enshrining "the founding principles of the federal relationship between the EU and its Member States." Bogdandy (n 11) 106.
[25] Stephen Weatherill, 'Competence Creep and Competence Control' (2004) 23 Yearbook of European Law 1, 8.

EU in federal terms.[26] Generally speaking, federalism's "basic tenet is that power will be divided between a central authority and the component entities of a nation-state or an international organization so as to make each of them responsible for the exercise of their own powers."[27] Presented in this way, the "federal idea" is broad enough to encompass a variety of different governmental structures that are not restricted to the nation state.[28]

> "[F]ederalism is treated as a modest concept derived from comparative analysis. The notion of federalism will not be restricted to refer only to fully fledged federal states. Instead federalism will be used to signal a range of political situations and institutions in which sovereignty is shared, covering a variety of federal states and federal unions or confederations."[29]

For present purposes, the addition of conferral, subsidiarity and proportionality to the EC legal order meant that the CJEU was now entrusted with resolving "conflicts of competence between the EU and the Member States in a way reminiscent of the role of a constitutional court in a federal state…"[30] Whether it be questions relating to the existence of a Community competence to act in a given policy field (conferral), or the legality of exercises of Community competences (subsidiarity and proportionality), "[a]ll refer to the problem of the coexistence of different political entities within a larger polity to which they are bound up and as such may readily be cast in 'federalist' terms."[31]

3.) The Federalisation of the Community Legislative Process

a.) The Co-Decision Procedure

In addition to rendering the CJEU responsible for safeguarding the federal order of competences, successive rounds of Treaty amendment from Maastricht onwards also led to

[26] Kalypso Nicolaïdis and Robert Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001); Daniel Wincott, 'Federalism and the European Union: The Scope and Limits of the Treaty of Maastricht' (1996) 17 International Political Science Review 403; Thomas C Fischer, '"Federalism" in the European Community and the United States: A Rose by Any Other Name…' (1993) 17 Fordham International Law Journal 389.
[27] Koen Lenaerts, 'Federalism: Essential Concepts in Evolution - The Case of the European Union' (1998) 21 Fordham International Law Journal 746, 748.
[28] ibid; See similarly Daniel J Elazar, *Exploring Federalism* (University of Alabama Press 1987).
[29] Wincott (n 26) 404 (footnotes omitted).
[30] Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015) 13.
[31] Loïc Azoulai, 'Introduction' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press 2014) 1.

further "federalisation" in the legislative processes of the EC.[32] As noted above, any system that divides power along federal lines is characterized by the existence of a central government or law-making authority that is responsible for the areas of competence entrusted to it. Whilst the constituent entities or states in federal systems may somehow impact upon the law-making processes of this central level, one typically finds that these processes enjoy a large degree of autonomy and independence.[33]

Following the advent of the cooperation procedure in the Single European Act (SEA), the Maastricht Treaty continued the incremental process of strengthening the power of the Community institutions in relation to the Member States within the EC legislative process.[34] The most significant reform was the addition of a novel "co-decision" procedure to the EC Treaty and its application to enacting legal acts in a wide variety of policy fields.[35] Under the rules of this procedure, the Commission remained responsible for drafting and submitting proposals for draft legal acts to the Council and the European Parliament. When it came to adopting such proposals, the Council continued to operate by QMV. Crucially, however, unlike the cooperation procedure discussed in Chapter 4, the European Parliament was given an effective veto over the adoption of Community legislation.[36]

By operating on the basis of QMV in an expanded Council (now consisting of 12 Member States) and requiring the agreement of the European Parliament, the co-decision procedure "had a profound effect on the character of the Union and the balance of power between the institutions and Member States involved in the legislative process."[37] Whereas the legislative processes during the early decades of the EEC were dominated by national governments in the Council who each wielded an effective veto, the co-decision procedure had "federalized

[32] David H McKay, *Federalism and European Union: A Political Economy Perspective* (Oxford University Press 1999) 18–22.
[33] Lenaerts, 'Federalism: Essential Concepts in Evolution - The Case of the European Union' (n 27) 752–753.
[34] McKay (n 32) 18–19.
[35] The Co-Decision procedure applied to most of the competences previously covered by the cooperation procedure under the SEA, as well as to many new areas of competence introduced by the Maastricht Treaty such as education, consumer protection and culture, see Simon Hix and Bjørn Kåre Høyland, *The Political System of the European Union* (3rd ed, Palgrave Macmillan 2011) 53.
[36] Article 189b EC.
[37] Jørgen Bølstad and James P Cross, 'Not All Treaties Are Created Equal: The Effects of Treaty Changes on Legislative Efficiency in the EU: EU Treaties and Legislative Efficiency' (2016) 54 JCMS: Journal of Common Market Studies 793, 793.

even more strongly the procedures of political decisionmaking within the Community."[38] The co-decision procedure could credibly be considered in "federal" terms, since the law-making process had reached "a high degree of decisional autonomy from the Member States."[39]

The federal analogy was at its strongest when it came to the Community's core competence to enact harmonisation legislation for the purposes of the establishment and functioning of the internal market.[40] As was discussed in Chapter 4, legal scholars had often compared the scope of the Community's competence under what was then Article 95 EC (ex 100a EEC) to the wide-ranging legislative powers of the US federal government under the US Constitution's Commerce Clause.[41] Following the entry into force of the Maastricht Treaty, this comparison was also explicitly recognised from the bench of the CJEU itself, with Advocate General (AG) Geelhoed noting that "the Community's power is comparable to that enjoyed by the federal authorities in the United States in regard to inter-State trade."[42]

b.) The Concept of Legislation in the Post-Maastricht Community

This "federalization" of EC law-making at Maastricht also served as a significant next step in the gradual shift towards of a procedural or parliamentary conception of legislation in the contemporary EU.

By elevating the European Parliament to status of a veritable a co-legislative body alongside the Council whenever the co-decision procedure applied, these reforms were "widely heralded as a major advance for the European Parliament and the cause of parliamentary democracy at the European level."[43] Henceforth, Community acts of general application in important policy fields could not be enacted without agreement being reached between a qualified majority of national ministers in the Council and an absolute majority of directly elected Members of the European Parliament (MEPs). For some, this joint adoption of legal acts by the representatives of the Member State governments and European citizens

[38] Koen Lenaerts, 'Some Thoughts about the Interaction between Judges and Politicians' [1992] University of Chicago Legal Forum 93, 95.
[39] ibid 124.
[40] Fischer (n 26) 397–398.
[41] See Chapter 4, Section 8
[42] *Opinion of Advocate General Geelhoed, Joined Cases C-154/04 and C-155/04, The Queen, on the application of Alliance for Natural Health and others v Secretary of State for Health* ECLI:EU:C:2005:199 para 108.
[43] Michael Shackleton, 'The Politics of Codecision' (2000) 38 Journal of Common Market Studies 325, 325.

respectively meant that the co-decision procedure was comparable to bicameral legislative processes in national systems.[44]

That being said, the European Parliament remained unhappy with its position in the institutional framework of the Community. In the years following the SEA, it demanded the creation of a superior layer of European parliamentary legislation that would sit above all other legal acts in the Community's hierarchy of norms.[45] In accordance with its conventional understanding in national legal orders, such a hierarchy would involve "a pre-established ranking of different types of legal acts in accordance with the democratic legitimacy of their respective authors and adoption procedures."[46] In essence, what was called for was a fundamental reform to the institutional balance of power within the Community, with legal acts adopted jointly by the Council and Parliament enjoying a higher rank than mere "executive rule-making" by the Commission and the Council."[47]

Ultimately, however, a different approach was taken in the Maastricht Treaty, with the co-decision procedure simply being added to the various different ways in which acts of general application could be enacted in the EC.[48] Furthermore, legally binding acts which arose from these various law-making procedures continued to take the form of Regulations, Directives and Decisions – all of which had equal ranking in the hierarchy of Community norms. This much was made clear in Declaration No. 16 to the Final Act of the negotiating conference at Maastricht, which provided that a future conference would examine the possibility of reclassifying Community acts according to an "appropriate hierarchy."[49]

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[44] Christophe Crombez, 'Codecision: Towards a Bicameral European Union' (2000) 1 European Union Politics 363; Fabbrini refers to an "emerging parliamentary democracy with two houses" Sergio Fabbrini, *Democracy and Federalism in the European Union and the United States: Exploring Post-National Governance* (Routledge 2005) 63.

[45] Robert Schütze, 'Sharpening the Separation of Powers through a Hierarchy of Norms? Reflections on the Draft Constitutional Treaty's Regime for Legislative and Executive Law-Making' European Institute of Public Administration Working Paper No. 2005/W/01 1, 9 at fn 19 for various resolutions of the European Parliament on the hierarchy of norms.

[46] Koen Lenaerts and Marlies Desomer, 'Towards a Hierarchy of Legal Acts in the European Union? Simplification of Legal Instruments and Procedures' (2005) 11 European Law Journal 744, 745.

[47] Jürgen Bast, 'New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law' (2012) 49 Common Market Law Review 885, 892 (footnotes omitted).

[48] See Article 189b EC (Maastricht Version).

[49] Declaration 16 on the Hierarchy of Community Acts annexed to Treaty on European Union (TEU) [1992] OJ C 224.

Despite these calls for "a greater dose of hierarchy"[50] in the Community legislative process, however, subsequent rounds of Treaty amendment at Amsterdam in 1997 and Nice in 2001 failed to make radical changes. Instead, the drafters of the Treaties continued down the same path of reforms that began with the SEA; reforming and extending the co-decision procedure to ever-greater fields of Community competence.[51]

Consequently, there remained no single legislative procedure that produced Community legal acts of a hierarchically superior status between the Maastricht Treaty and the Treaty of Lisbon in 2009.[52] Instead, as Dashwood points out, Community legislation post-Maastricht was to be understood "broadly as covering procedures for the adoption of legally binding acts of all kinds under powers directly conferred by the Treaty itself, regardless of whether such acts would be treated, in national law, as having a legislative, regulatory or administrative character."[53]

4.) What Role for the CJEU in Federalism Disputes?

When taken together, these reforms to the legal and political order of the EU speak to a fundamental and persistent tension at the heart of the European integration process.[54]

On the one hand, successive rounds of Treaty amendment from Maastricht onwards added several new powers to the Community. Furthermore, the advent and expansion of the co-decision procedure continued the SEA's twin goals of enhancing the efficiency and democratic legitimacy of Community legislation. By expanding QMV in the Council and enhancing the role of the European Parliament in a number of policy fields, the powers of the European institutions evidently increased relative to that of the Member States.[55]

[50] Roland Bieber and Isabelle Salomé, 'Hierarchy of Norms in European Law' (1996) 33 Common Market Law Review 909, 915.
[51] Article 251 Consolidated Version of the Treaty establishing the European Community [2002] OJ C 325, p. 33–184.
[52] Armin von Bogdandy, Felix Arndt and Jürgen Bast, 'Legal Instruments in European Union Law and Their Reform: A Systematic Approach on an Empirical Basis' (2004) 23 Yearbook of European Law 91, 121.
[53] Alan Dashwood, 'Community Legislative Procedures in the Era of the Treaty on European Union' (2004) 19 European Law Review 343, 343.
[54] Julio Baquero Cruz, 'The Changing Constitutional Role of the European Court of Justice' (2006) 34 International Journal of Legal Information 223, 233–234.
[55] McKay (n 32) 19.

On the other, the decision of the Member States to insert Article 3b EC into the Treaties clearly illustrated widespread concerns about "competence creep" into sensitive areas of national policy and a desire redress the federal balance of competences in the Community.[56]

a.) A More Appropriate Federal Analogy

This tension between furthering the process of European integration whilst simultaneously safeguarding a meaningful balance of competences between the Community and its Member States also gave rise to much speculation about the future role of the CJEU.[57]

As has been emphasised at several points throughout this study, the early years of the EEC saw the CJEU play a predominant role in laying the constitutional foundations of the Community legal order. Following this first, foundational period, the role of the Court changed as it sought to drive forward the integration process in the face of legislative inertia in the Community. During this second epoch, the CJEU assumed the role of an "engine" of European integration; making a seminal contribution to removing national barriers to free movement and reinvigorating the law-making process on the Community level.

As chapters 3 and 4 have argued, this pro-integrationist ethos was also evident in the consistently light-touch, tersely reasoned way in which the Court approached its task of reviewing the legality of Community legal acts. Not only did the Court adopt an expansive interpretation of the scope of the Community's core legislative competences, it also routinely engaged in low intensity review of Community legislation on fundamental rights grounds. Indeed, this failure to subject Community legislation to any meaningful degree of judicial scrutiny was cited as further evidence of the prevailing, "low-intensity" nature constitutionalism during this period.

Following the entry into force of the Maastricht Treaty, however, the "logical question" to be asked was whether the Court's role would change yet again?[58] As Jacobs put it at the time:

[56] Mark A Pollack, 'The End of Creeping Competence? EU Policy-Making Since Maastricht' (2000) 38 Journal of Common Market Studies 519.
[57] Francis G Jacobs, 'Europe after 1992: The Legal Challenge' [1992] University of Chicago Legal Forum 1; Joseph HH Weiler and Jean-Paul Jacqué, 'On the Road to European Union - A New Judicial Architecture: An Agenda for the Intergovernmental Conference' (1990) 27 Common Market Law Review 185.
[58] Jacobs (n 57) 16.

> "As powers are increasingly transferred to the centre - and here, at last, the analogy with a federal system may begin to come into its own - will the emphasis of the [CJEU's] role also shift? Will the [CJEU's] function become that of protecting the rights of the Member States against alleged encroachments by the Community Institutions?"[59]

Much would depend on how the Court approached its task of reviewing Community legislation for compliance with the principles enshrined in Article 3b EC. As Kumm asks "what is the appropriate institutional role of the Court of Justice in policing jurisdictional boundaries in the EU? To what extent is the application of the relevant standards a political question best left to the political process?"[60] In a similar vein, Young perceptibly notes in his comparison of federalism in the US and the EU that even where it is established that courts should play a role in enforcing the federal balance of competences within a given legal order (by no means an uncontroversial proposition), we still face tough questions of institutional and doctrinal design. "How *much* should courts be involved and to what extent should they defer to political actors? What sort of doctrines should courts construct for protecting federalism?"[61]

b.) Upholding Checks and Balances

According to a number of influential accounts in the literature, the role of the CJEU did indeed change around the time of the Maastricht Treaty. Unlike the previous two epochs in the history of the European integration process, the Court came to be "less assertive as to the substantive development of EU law."[62] The gathering momentum of legislative processes in the EC, coupled with frequent rounds of Treaty amendment from Maastricht onwards, meant that the CJEU was no longer required to actively fill in the constitutional gaps in the Treaties.[63] With political processes in the Community functioning more effectively, it is

[59] ibid.
[60] Mattias Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union' (2006) 12 European Law Journal 503, 504.
[61] Ernest A Young, 'Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism' (2002) 77 New York University Law Review 1612, 1643.
[62] Koen Lenaerts, 'How the ECJ Thinks: A Study on Judicial Legitimacy' (2013) 36 Fordham International Law Journal 1302, 1309.
[63] Cruz (n 54) 237–238.

claimed that the CJEU moved onto "a new paradigm" in the post-Maastricht era and assumed the role of "the constitutional court of a more mature legal order."[64]

Having assumed this role as a constitutional court for the EC, this third epoch was "merely one of judicial review of the legislative and administrative acts of the Community institutions"[65] Rather than continuing to drive forward the European integration process, the Court now saw "its role primarily as one of upholding the 'checks and balances' built into the [Community] constitutional legal order of States and peoples, including the protection of fundamental rights."[66]

c.) Conducting Constitutional Review of Legislation

The assertion that the CJEU came to perform a number of tasks that were analogous to national constitutional and supreme courts in the post-Maastricht era is widely supported in the literature.[67] Indeed, the Court itself publicly stated in a 1995 report that it was now responsible for certain issues that were carried out by constitutional courts in the legal systems of the Member States. In particular, its "constitutional role" included ruling on "the respective powers of the Communities and of the Member States" and examining "whether fundamental rights and general principles of law have been observed by the institutions..."[68]

Despite these widely shared views on the changing role of the Court, however, the question of *how* the CJEU actually went about conducting constitutional review of Community legislation during this period has not been fully explored. As chapter 1 demonstrated in detail, the extent to which shifts in the methodology and intensity of constitutional review may be detected over the years has not yet featured prominently in existing works on the Court.[69]

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[64] Lenaerts, 'How the ECJ Thinks' (n 62) 1309; Dashwood also speaks of 'the growing maturity of the [Community] order' Dashwood (n 14) 128.
[65] Lenaerts, 'Judges and Politicians' (n 38) 132.
[66] Lenaerts, 'How the ECJ Thinks' (n 62) 1309.
[67] Monica Claes and Maartje de Visser, 'The European Court of Justice as a Federal Constitutional Court: A Comparative Perspective' in Elke Cloots, Geert de Baere and Stefan Sottiaux (eds), *Federalism in the European Union* (Hart Publishing 2012); B Vesterdorf, 'A Constitutional Court for the EU?' (2006) 4 International Journal of Constitutional Law 607.
[68] Report of the Court of Justice on Certain Aspects of the Application of the Treaty on European Union (Luxembourg, May 1995) 2.
[69] See Chapter 1, Section 4

And yet, one of the core contentions of this thesis is that one cannot fully understand the changing role of the CJEU and its contribution to the European integration process without scrutinising how it has conducted constitutional review of legislation over time. When viewed in light of Kumm and Young's remarks pertaining to the role of the CJEU in settling federalism disputes, it is clear that the intensity of constitutional review carries implications not only for the balance of power between Court and the EU legislature, but also between the EU and its Member States more generally.[70] Simply stated, strict or intensive review of EU legislation has the potential to tilt the federal balance of power in favour of the Member States vis-à-vis the EU, and the CJEU vis-à-vis the EU legislature. In contrast, deferential or light-touch review of EU legislation indicates that the Court neither wishes to interfere in the discretionary policy choices of the EU legislature, nor impose strict limits upon the EU legislature's powers in relation to the Member States.[71]

With this in mind, the remainder of Chapter 5 analyses the Court's record in reviewing the constitutionality of Community legislation on federalism and fundamental rights grounds in the period between the Treaty of Maastricht and the Treaty of Lisbon. In both sets of cases, the Court's jurisprudence continued to be characterised by low-intensity review. Much like previous periods in the history of the European integration process, the Court's approach to scrutinising Community acts of general application served to place the EC legislature under a very limited burden to justify the constitutionality of its policy choices. Far from responding to the "political impulses" that had "fuelled the demand" for Article 3b EC at Maastricht, the post-Maastricht jurisprudence of the Court generally failed to place meaningful limits upon the existence and exercise of Community legislative power.[72]

5.) The Principle of Conferral as a Judicial Safeguard of Federalism

The first issue to be considered when examining the Court's federalism jurisprudence is the impact of the principle of conferral. As noted above, the addition of conferral via Article 3b

[70] Jacob Öberg, 'The Rise of the Procedural Paradigm: Judicial Review of EU Legislation in Vertical Competence Disputes' (2017) 13 European Constitutional Law Review 248, 248–249.
[71] Öberg (n 70)249 (footnotes omitted).
[72] George A Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 Columbia Law Review 331, 395.

EC made it explicit, for the first time, that the Community was obliged to act within the limits of powers conferred upon it by the Treaties.[73]

For all that is seemingly straightforward about this proposition, Chapters 3 and 4 highlighted the difficulties associated with locating the outer limits of some of the Community's core legislative competences. The problem was particularly acute with regards to the Community's power to enact harmonization legislation under Article 95 EC (ex Article 100a EEC). Unlike many of the specific legal bases in the Treaties, the EC's "commerce clause" power was framed in "purposive" terms - understood as the power to take measures to achieve a particular goal i.e. the establishment and functioning of an internal market.[74] Moreover, this competence was not limited to one specific policy field, but could be utilised to legislate across a wide variety of different areas for the purposes of the internal market.

This open-ended, functional orientation of Article 95 EC was seized upon by the Community institutions, who adopted a broad interpretation of the scope of the internal market competence. Furthermore, the shift to QMV in the Council at the SEA had removed the possibility of individual Member States vetoing the adoption of harmonisation legislation and thereby "seriously reduced the effectiveness of the political safeguards of federalism within Europe."[75] Finally, this expansive interpretation of the Community's competence to enact harmonisation legislation was reinforced by the CJEU, with its jurisprudence seeming to confirm that the mere "abstract risk" of the emergence to future obstacles to trade was sufficient for recourse to Article 95 EC.[76] "The jurisprudence of the Court, up to the end of the twentieth century, unequivocally confirmed the widest possible reading of the European Commerce Clause."[77]

a.) Tobacco Advertising One

[73] For judicial recognition see *Opinion 2/94 of the Court of Justice, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:1996:140 para 23.
[74] Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 European Law Journal 2.
[75] Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009) 185.
[76] *Case C-350/92, Spain v Council* ECLI:EU:C:1995:237; *Case C-300/89, Commission v Council* ECLI:EU:C:1991:244.
[77] Schütze, *From Dual to Cooperative Federalism* (n 75) 144.

Against this background, the Court's seminal judgment in Tobacco Advertising One is to be noted as the first and only time that the CJEU has annulled harmonisation legislation for infringing the principle of conferral.[78]

The case concerned a challenge by Germany to the constitutionality of a Directive that sought to ban practically all forms of tobacco advertising and sponsorship within the Community. In Germany's view, Article 95 EC did not constitute a proper legal basis for the Directive, since it lacked the necessary link to the internal market and was, in essence, concerned with the protection of public health.[79] This connection to public health measures served to render the Directive unconstitutional, since Article 152(4) EC explicitly stated that the Community institutions could adopt measures relating to health "excluding any harmonization of the laws and regulations of the Member States."[80]

b.) The Limits of Article 95 EC

According to the Court, despite this explicit exclusion of harmonization in the field of public health, it did not necessarily follow that harmonization measures enacted upon other legal bases in the Treaty could not have any impact upon public health.[81] When it came to Article 95 EC, so long as the conditions for recourse to that provision were satisfied, the Community institutions could have recourse to that legal basis, notwithstanding the fact that public health protection was "a decisive factor" in the choices made when legislating in the internal market. Moreover, Article 95(3) EC expressly mandated that harmonisation legislation ensure that a high level of human health protection was achieved.[82]

Whilst recognising that the creation of an internal market with unfettered free movement was a core aim of the European integration project, the CJEU noted that, in the post-Maastricht Treaty era, interpreting Article 95 EC as vesting the Community legislature with a "general power to regulate the internal market" would be incompatible with the principle of conferral enshrined in Article 3b EC.[83]

[78] *Case C-376/98, Germany v European Parliament and Council (Tobacco Advertising One)* ECLI:EU:C:2000:544.
[79] ibid paras 9, 12-25.
[80] Article 152(4) EC.
[81] However, those other legal bases should not be utilised as a means of circumventing the exclusion contained in Article 152 EC *Case C-376/98 Tobacco Advertising One* (n 78) paras 78-79.
[82] ibid para 88.
[83] ibid para 83.

Rather than being devoid of any limits, harmonisation legislation "must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market."[84] Moreover, a "mere finding of disparities between national rules" or an "abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition" could not justify recourse to Article 95 EC.[85]

Consequently, harmonization legislation would henceforth be required to "actually contribute" to the elimination of obstacles to free movement, or to the elimination of distortions to competition, in the internal market.[86] In refining its position from *Spain v Council* discussed in Chapter 4, the Court also held that whilst Article 95 EC could be utilised if the aim was to prevent the emergence of future obstacles to trade resulting from the diverse development of national laws, the emergence of such obstacles must be "likely" and the Community measure in question must be "designed to prevent them."[87] Finally, Article 95 EC could only be used to legislate for the elimination of distortions to competition where such distortions were "appreciable."[88] Otherwise, without such an appreciability threshold, "the powers of the Community legislature would be practically unlimited" if national laws which produced "the smallest of distortions of competition" could be harmonised.[89]

c.) Applying the Limits in Practice

Having read these limits into Article 95 EC in light of the principle of conferral, the Court then moved to consider whether the contested legislation had complied with those limits in the case at hand.[90] The implications that these judicially-created criteria had for the federal balance of competences between the EC and the Member States are summarised by Weatherill:

> "These words carry immense constitutional weight. Find that an effect on the market is *direct*, a distortion of competition *appreciable* or emergence of obstacles *likely* and the diversity between national laws is of sufficient magnitude to impact on the functioning of the internal market: the matter falls within the limits of [Article

[84] ibid para 84.
[85] ibid para 84.
[86] ibid paras 95, 108.
[87] ibid para 86.
[88] ibid para 106.
[89] ibid para 107.
[90] ibid para 89.

95]…Take away that crucial quality of directness or appreciability or likelihood and the matter rests with the Member States, for it is legislative diversity of a type that does not harm the EU's market-making project."[91]

Against this background, the Court found that the Directive's prohibition of tobacco advertising in "static" advertising media such as posters, parasols and ashtrays could not be based upon Article 95 EC. The Community legislature had failed to demonstrate how such a prohibition could be justified by the need to eliminate obstacles to free movement, and the ban did nothing to facilitate trade in those products which served as the media for such advertising.[92] Moreover, the Directive did not contain a "free movement clause" which would have guaranteed that those products which complied with the Directive would be entitled to unimpeded circulation throughout the internal market. This meant that the Member States remained free to subject imports of such products to stricter national rules over and beyond the rules laid down by the Directive. Consequently, the EU legislature could not rely upon Article 95 EC to prohibit tobacco advertising in these types of media, since the Directive did not remove obstacles to free movement.[93]

When it came to distortions to competition, the Court found that disparities in national laws regulating tobacco advertising - whilst economically advantageous to undertakings established in Member States with few restrictions - only had a remote and indirect effect on competition.[94] The distortions were held not to be appreciable and could not justify the use of Article 95 EC as a legal basis for an outright prohibition of tobacco advertising.[95]

Ultimately, therefore, the Directive was annulled in its entirety for going beyond the scope of the powers conferred upon the EU legislature under Article 95 EC.[96]

d.) Evaluation

When compared with the Court's pre-Maastricht jurisprudence, Tobacco Advertising One suggested a new era of constitutional review in which Community legislation was subject to

[91] Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 German Law Journal 827, 832.
[92] *Case C-376/98 Tobacco Advertising One* (n 78) para 99.
[93] ibid paras 101-105.
[94] ibid para 109.
[95] ibid para 111.
[96] ibid para 118.

"stricter" legal limits.[97] The CJEU had confirmed that it was "both willing and able to assert itself as the highest court in a constitutional order adjudicating on competences."[98]

Notably, the Court's findings were based explicitly upon considerations flowing from the newly inserted principle of conferral in Article 3b EC, rather than the original lack of competence ground of review contained in Article 173 EC.[99] This suggested that the abovementioned constitutionalisation of the system of judicial review by the Maastricht Treaty had not only led to a shift in the grounds of constitutional review (from lack of competence to infringement of the principle of conferral) but also to the intensity of such review.[100]

When viewed against the staunchly pro-integrationist jurisprudence of the pre-Maastricht era, the judgment also hinted at a possible shift in the role of the CJEU. Rather than facilitating the pursuit of further European integration though teleological interpretation and low-intensity review, the CJEU would now police the EC's federal order of competences by subjecting harmonisation legislation to meaningful judicial scrutiny.

That being said, it is important to note that the CJEU did *not* annul the Directive for impinging upon the reserved powers or sovereignty of the Member States to regulate public health. Nor was the prohibition in Article 152(4) EC on adopting harmonisation legislation in this policy field decisive in the Court's reasoning. Consequently, the judgment in Tobacco Advertising One is not to be understood as the beginnings of a judicially enforceable doctrine of "dual federalism" in the post-Maastricht Community.[101] There was no finding that the Community and Member States possessed "two mutually exclusive, reciprocally limiting fields of power" that "confront each other as equals across a precise constitutional line, defining their respective jurisdictions."[102] Instead, the judgment turned on the finding that the EC legislature had strayed beyond the scope of its competences by failing to justify

[97] Allard Knook, 'Guns and Tobacco: The Effect of Interstate Trade Case Law on the Vertical Division of Powers' (2004) 11 Maastricht Journal of European and Comparative Law 347, 358.
[98] Armin Von Bogdandy and Jürgen Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for Its Reform' (2002) 39 Common Market Law Review 227, 237–238; George Tridimas and Takis Tridimas, 'The European Court of Justice and the Annulment of the Tobacco Advertisement Directive: Friend of National Sovereignty or Foe of Public Health?' (2002) 14 European Journal of Law and Economics 171.
[99] *Case C-376/98 Tobacco Advertising One* (n 78) paras 83, 107.
[100] 'Editorial Comments, Taking (the Limits of) Competences Seriously' (2000) 37 Common Market Law Review 1301, 1303.
[101] For an overview of dual federalism see Schütze, *From Dual to Cooperative Federalism* (n 75) 76–79.
[102] Young (n 61) 1645.

how an outright ban on tobacco advertising contributed to the establishment and functioning of the internal market. Consequently, much would depend on how stringently the Court would apply the conditions of Article 95 EC when reviewing Community legislation in subsequent cases.

6.) Subsequent Developments in the Case Law

As has been documented elsewhere in meticulous detail, the CJEU largely failed to subject harmonisation legislation to any meaningful limits in the decades following Tobacco Advertising One.[103] Indeed, there is a general consensus in the literature that since 2000 the Court has "largely reversed the competence restricting effects" of its judgment in that case."[104]

a.) Encroachments upon Sensitive Areas of National Policymaking

In a number of cases, the Court emphasised that so long as the conditions for recourse to Article 95 EC had been satisfied, the Community legislature could not be prevented from using that legal basis simply because considerations of public health, industrial policy, scientific research etc. were decisive factors in the choices to be made.[105] Consequently, sensitive areas of national policy that the Treaties seemed to either exclude from harmonisation and/or leave (predominantly) to the Member States to regulate were not immune from Community harmomisation legislation.[106] This resulted in both the practices of the EC legislature and the Court's subsequent case law being criticised as "too liberal and granting the EC an unlimited power to regulate subject matters still belonging to the Member States' fields of competences."[107]

b.) The Existence and Likely Future Emergence of Disparities between National Laws

[103] Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Fifth edition, Oxford University Press 2016) Chapter 15; Derrick Wyatt, 'Community Competence to Regulate the Internal Market' in Michael Dougan and Samantha Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Pub 2009) 115–127.
[104] Barnard (n 103) 566; Paul Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 Common Market Law Review 395, 409.
[105] *Joined cases C-154/04 and C-155/04, The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health* ECLI:EU:C:2005:449; *Case C-377/98, Netherlands v European Parliament and Council* ECLI:EU:C:2001:523.
[106] Davies (n 74) 10.
[107] Donald Slater, 'The Scope of EC Harmonising Powers Revisited?' (2003) 4 German Law Journal 137, 137.

With so much resting on the judicially created conditions which operationalised the principle of conferral within the context of Article 95 EC, the most striking feature of the CJEU's case law during this period was the extremely light-touch approach to review.

For example, when it came to ascertaining whether divergent national laws which obstructed free movement either existed or were likely to emerge in the future, the Court often cited statements from the EC institutions and recitals to the contested legislation. In so doing, the CJEU accepted these statements and findings at face value without engaging in any degree of examination as to their accuracy.[108] In particular, the Court required very little by way of justification from the EC legislature in order to prove that the emergence of future obstacles to trade was likely. In some cases, it went so far as to accept the seemingly unsubstantiated claim that "increased public awareness" about the health implications of tobacco would "likely" lead to diverse national regulation and future obstacles to trade.[109] As Ludwigs points out, the Court did not require the EC institutions to provide anything by way of justificatory evidence capable of supporting the claim that the emergence of disparate national laws was likely.[110]

c.) Impact upon the Internal Market and Distortions to Competition

A similarly light touch approach to review was evident when determining whether existing or potential future divergences in national laws would actually impede free movement and thus impact upon the functioning of the internal market. This is well demonstrated by the second tobacco advertising case (Tobacco Advertising Two).[111]

Following the judgment in the first Tobacco Advertising case, the Community legislature enacted another Directive harmonising national laws relating to the advertising and

[108] *Case C-210/03, Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health,* EU:C:2004:802 paras 37-38; *Case C-491/01, The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd (BAT)* ECLI:EU:C:2002:741 paras 68-72; See similarly *Case C-377/98, Netherlands v European Parliament and Council* (n 105) paras 16-17.
[109] *Case C-380/03, Germany v European Parliament and Council* ECLI:EU:C:2006:772 para 61; *Case C-491/01, BAT* (n 108) para 67.
[110] Markus Ludwigs, 'Case C-380/03, Germany v. European Parliament and Council (Tobacco Advertising II)' (2007) 44 Common Market Law Review 1159, 1167–1168.
[111] *Case C-380/03, Tobacco Advertising Two* (n 109).

sponsorship of tobacco products.[112] Unlike the previous legislation that was annulled by the CJEU, however, the new Directive did not contain an outright ban on the advertising and sponsorship of tobacco products. Instead, it laid down a series of prohibitions on tobacco advertising in the press, on the radio and in information society services; whilst also making exceptions for such advertising in periodicals, magazines etc. intended solely for those in the tobacco trade.[113]

In reviewing whether the new prohibition on tobacco advertising in the press was validly adopted on the basis of Article 95 EC, the CJEU noted that disparate national laws prohibiting or restricting tobacco advertising would impede access to the market for foreign products more than they would for domestic products. Such laws also restricted the opportunities for publishers to offer advertising space in their publications to advertisers established in other Member States.[114] Furthermore, the Court was convinced that, even if in reality certain publications were not sold in other Member States, divergences amongst national laws nevertheless created, or were likely to create, obstacles to trade in press products. Therefore, such obstacles to trade existed even for publications placed principally on a local, regional or national market and which are sold in other Member States only by way of exception or in small quantities.[115]

This suggested that even minimal impacts upon trade (either now or in the future) were sufficient to render recourse to Article 95 EC constitutionally valid. With such a low standard being deployed for justifying the constitutionality of legislation, concern was raised that the CJEU was "coming frightfully close to being satisfied with a mere showing of disparities among national laws in contrast to Tobacco Advertising [One]."[116]

The CJEU also found that differences in national laws meant there was an appreciable risk of distortions to competition. This was done by simply citing the relevant recitals to the contested Directive itself, which provided nothing more than a statement confirming that

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[112] Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products [2003] OJ L 152, p. 16–19.
[113] *Case C-380/03, Tobacco Advertising Two* (n 109) paras 1-11.
[114] ibid paras 56-57.
[115] ibid para 58.
[116] Kathleen Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis* (Oxford University Press 2014) 338 footnotes omitted; For an example see *Case C-301/06, Ireland v European Parliament and Council* ECLI:EU:C:2009:68.

national regulatory diversity gave rise to an appreciable risk of distortion to competition.[117] No separate, judicial scrutiny of the appreciability criterion was conducted as part of the constitutional review process. Instead, by uncritically relying upon statements made by the legislature whose actions were under review, the Court appeared content with simply ensuring that the constitutional boxes had been ticked.[118]

d.) Contributing to the Establishment and Functioning of the Internal Market.

Having found that the conditions for recourse to Article 95 EC had been satisfied, the Court then analysed whether the contested provisions of the Directive were actually designed to eliminate or prevent obstacles to free movement or remove distortions of competition.[119] Here, the EU legislature had evidently learned its lesson from Tobacco Advertising One: it had included a "free movement clause" prohibiting Member States from banning or restricting free trade in products which complied with the Directive in issue.[120] It swiftly followed, therefore, that the contested legislation was in fact designed to improve conditions in the internal market.[121]

Finally, the Court rejected Germany's argument that the Directive could not be based upon Article 95 EC since the prohibitions contained therein applied only to advertising media of a local or national nature which lacked cross-border effects. In so doing, the Court adopted a remarkably wide interpretation of the Community legislature's harmonisation competence, noting that:

> "Recourse to Article 95 EC as a legal basis does not presuppose the existence of an actual link with free movement between the Member States in every situation covered by the measure founded on that basis…[T]o justify recourse to Article 95 EC as the legal basis what matters is that the measure adopted on that basis must

[117] *Case C-380/03, Tobacco Advertising Two* (n 109) para 66-68; See similarly *Joined cases C-154/04 and C-155/04, Alliance for Natural Health* (n 105) para 106.
[118] Weatherill (n 91) 849.
[119] *Case C-380/03, Tobacco Advertising Two* (n 109) para 69.
[120] For recognition of the fact that the legislature had seemed to learn its lesson, see *Opinion of AG Léger in Case C-380/03 Germany v Parliament and Council* ECLI:EU:C:2006:392 paras 140-143, 157-162.
[121] *Case C-380/03, Tobacco Advertising Two* (n 109) para 78.

actually be intended to improve the conditions for the establishment and functioning of the internal market."[122]

e.) Evaluation

These developments in the CJEU's case law since *Tobacco Advertising One* led to renewed claims that Article 95 EC was devoid of meaningful constitutional limits and effectively operated as a general power for the EC to regulate the internal market.[123]

Rather than restricting EC legislative power, Weatherill has argued that the jurisprudence provided little more than a "drafting guide" to the Community institutions.[124] Following the CJEU's annulment of the first tobacco advertising directive, the EC legislature was careful to subsequently draft legislation in such a way as to make explicit reference to the "constitutionally approved vocabulary" articulated by the CJEU in *Tobacco Advertising One*.[125]

For example, in *Alliance for Natural Health*, the Directive under review contained in its recitals a reference to the "direct" impact that national regulatory diversity had on the functioning of the internal market. Similarly, in *Tobacco Advertising Two*, the recitals to the new Directive asserted that there was an "appreciable" risk of distortion to competition and that increased future barriers to trade were "likely."[126]

This same vocabulary was then used by the Community institutions when defending the constitutionality of their legislation before the CJEU.[127] For its part, the Court then accepted the declarations in recitals to contested legislation - as well as written and oral statements made by the EC institutions during review proceedings - with minimal scrutiny of their content or accuracy. In short, constitutional review of harmonisation legislation came to be characterised by low-intensity review, leading to the conclusion that the case law "[does] *not* disclose an effective basis for policing the limits of EU competence… The case law is a

[122] ibid para 80.
[123] Bruno De Witte, 'A Competence to Protect' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 28; Craig, 'The ECJ and Ultra Vires Action' (n 104) 409–410; Schütze, *From Dual to Cooperative Federalism* (n 75) 148–149.
[124] Weatherill (n 91).
[125] ibid 848–849.
[126] ibid.
[127] ibid 848.

drafting guide for the legislature: the Court is empowering, not restraining, the legislative institutions."[128]

Despite this forceful critique, Weatherill and others acknowledged that part of the problem stemmed from the wording of Articles 3b and 95 EC themselves, which were drafted in ambiguous terms and failed to provide any "hard legal criteria" for the purposes of constitutional review."[129] In particular, the overarching aim of legislating for the establishment and functioning of the internal market did not lend itself to clearly identifiable limits.[130]

That said, there is little doubt that the Court could have adopted a more rigorous approach to reviewing the constitutionality of internal market legislation during this period. It certainly does not necessarily follow from the open-ended framing of legislative competence that the CJEU had no choice but to uncritically accept assertions and recitals purporting to demonstrate regulatory diversity, impacts upon trade, distortions to competition etc.

As Craig has argued, the Court could and should have demanded more by way of justificatory evidence that the conditions for legislating under Article 95 EC were present.[131] In particular, Impact Assessments and other documents utilised in the preparatory phases of the legislative process could have provided useful tools for the Court when conducting constitutional review in this area. In Craig's view, the Court "should be willing to consider the adequacy of the reasoning for [EC] legislative action" and "look behind the formal legislative preamble to the arguments that underpin it derived from the Impact Assessment."[132] In the event that the justificatory reasoning of the legislature was deficient, the CJEU should then annul the relevant legislation, thus "signal[ling] to the political institutions that the precepts in the Treaty are to be taken seriously."[133]

As we shall see in Chapter 7, shifts in this direction have indeed materialised in the post-Lisbon Treaty era, with the Court coming to adopt an increasingly process-oriented approach to constitutional review in federalism cases. In stark contrast to any other period in its

[128] ibid 850 emphasis original.
[129] Öberg (n 70) 252; Weatherill (n 91) 848.
[130] Davies (n 74) 7–12.
[131] Craig, 'The ECJ and Ultra Vires Action' (n 104) 411; See similarly Davies (n 74) 18.
[132] Craig, 'The ECJ and Ultra Vires Action' (n 104) 412.
[133] ibid 312.

history, the CJEU now places considerable emphasis upon the legislative process and evidence base upon which EU legislation was enacted when reviewing its constitutionality. For the time being, however, one can conclude that from the period between the Maastricht Treaty and the Lisbon Treaty of 2009, the CJEU failed to subject EU legislation to any meaningful degree of scrutiny on competence grounds.

7.) Subsidiarity as a Judicial and Political Safeguard of Federalism

A similar pattern may be detected in cases where the CJEU reviewed the constitutionality of EC legislation on subsidiarity grounds.

As was noted above, the principle of subsidiarity dictates that, outwith areas of exclusive Community competence, the Community legislature shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, but can rather, by reason of the scale or effects of the proposed action, be better achieved at EU level.[134]

Unlike the contemporary EU legal order, the addition of subsidiarity to the EC Treaty at Maastricht occurred at a time when the precise division between exclusive and shared Community competences was uncertain.[135]

Generally speaking, an exclusive Community competence means that the mere existence of a legal basis to this effect in the Treaties prohibits the Member States from acting in the policy area concerned. From the moment such a competence is laid down in the Treaties (and for as long as it remains in force) the Member States cannot legislate on the subject matter concerned - subject to express authorisation from the competent Community institution.[136]

In contrast, shared competences permit the Member States to adopt autonomous national legislation in the policy area concerned, provided that the Community level has not exercised its legislative competence. Once European legislation is adopted in an area of

[134] Article 5(3) TEU.
[135] Paul Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) 50 JCMS: Journal of Common Market Studies 72, 73–74. The Treaty of Lisbon now distinguishes between Exclusive, Shared and Coordinating Competences of the EU, see Articles 2-6 TFEU.
[136] Armin Von Bogdandy and Jürgen Bast, 'The Federal Order of Competences' in Armin Von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2009) 289.

shared competence, however, the Member States are prohibited from adopting additional laws regulating the same matter.[137]

After some initial uncertainty, the CJEU confirmed that legislating for the purposes of the establishment and functioning of the internal market fell within the shared competences of the Community and the Member States.[138] Consequently, whenever the Community legislature sought to adopt harmonisation legislation on the basis of Article 95 EC, it had to comply with the principle of subsidiarity.

a.) The Community Legislature and Subsidiarity

Within the context of the Community's federal balance of competences, subsidiarity required the Community legislature to consider whether it should "refrain from acting, even when constitutionally permitted to do so, if their objectives could effectively be served by action taken at or below the Member State level."[139] It is for this reason that the principle has been referred to as a "constitutional safeguard of federalism that should limit the *exercise* of powers granted to the European Union"[140] and a principle "employed to safeguard the autonomy of national regulatory powers."[141]

Based on the wording of Article 3b EC, the principle appeared to consist of two tests. The first, known as the *national insufficiency test,* provided that the Community could only act where the objectives of the proposed action could not be sufficiently achieved by the Member States.[142] The second test, known as the *comparative efficiency test*, stated that the EU should not act unless it could better achieve the objectives of the proposed action.[143]

As Schütze notes, there is much ambiguity and perhaps tension between these two tests. When taken together, do they mean that the Community "would not be entitled to act

[137] Dashwood (n 14) 126.
[138] *Case C-491/01, BAT* (n 108) para 179.
[139] Bermann (n 72) 334.
[140] Schütze, *From Dual to Cooperative Federalism* (n 75) 247; See similarly Koen Lenaerts, 'The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism' (1993) 17 Fordham International Law Journal 846, 850–851.
[141] Sanja Bogojević, 'Judicial Protection of Individual Applicants Revisited: Access to Justice through the Prism of Judicial Subsidiarity' [2015] Yearbook of European Law yev001, 2.
[142] Robert Schütze, *European Constitutional Law* (Cambridge University Press 2012) 178.
[143] ibid.

where it is – in relative terms – better able to tackle a social problem, but where the Member States could – in absolute terms – still achieve the desired result?"[144]

In an attempt at resolving these uncertainties, the conclusions from the European Council meeting in Edinburgh in 1992 provided that:

> "For Community action to be justified, both aspects of the subsidiarity principle shall be met: the objectives of the proposed action cannot be sufficiently achieved by Member States' action in the framework of their national constitutional system and can therefore be better achieved by action on the part of the Community."[145]

In making this subsidiarity calculation, the Edinburgh Guidelines also provided that the Community institutions should consider: (i) whether the issue under consideration has transnational aspects which cannot be satisfactorily regulated by action by Member States; and/or (ii) if actions by Member States alone or lack of Community action would conflict with objectives of the Treaty or would otherwise significantly damage Member States' interests; and/or (iii) that action at Community level would produce clear benefits by reason of its scale or effects compared with action at the level of the Member States.[146] Furthermore, the guidelines stated that the "reasons for concluding that a Community objective cannot be sufficiently achieved by the Member States but can be better achieved by the community must be substantiated by qualitative or, wherever possible, quantitative indicators."[147]

These non-binding guidelines as to the substantive aspects of subsidiarity were subsequently "constitutionalised" and incorporated into the Community legal framework by Protocol No.30 annexed to the Amsterdam Treaty in 1997.[148] Additionally, the Protocol "proceduralised" the principle of subsidiarity by setting down certain steps that the EC institutions should take to ensure that proposed Community action complied with the

[144] ibid; see also Edward T Swaine, 'Subsidiarity and Self-Interest: Federalism at the European Court of Justice' (2000) 41 Harvard International Law Journal 1, 51–52.
[145] Conclusions from the European Council [Edinburgh Summit 1992], Edinburgh, 11-12 December 1992, Annex 1: Overall Approach to the Application by the Council of the Subsidiarity Principle and Article 3b of the Treaty on European Union.
[146] ibid.
[147] ibid.
[148] Protocol (No 30) annexed to the Treaty establishing the European Community by the Treaty of Amsterdam [1997] OJ C 340 paras 4-5.

principles of subsidiarity and proportionality.[149] Proceduralisation in this context required the Commission to: consult widely before proposing legislation; publish consultation documents; justify the relevance of its proposals with regard to the principle of subsidiarity in explanatory memoranda and submit an annual report to the other Community institutions.[150] Additionally, the European Parliament and Council were required to scrutinise Commission proposals and subsequent amendments for their compliance with the principles of conferral, subsidiarity and proportionality.[151]

b.) Subsidiarity as a Ground of Structural Constitutional Review

In the first instance, it is clear from these guidelines that the decision to exercise a shared competence and legislate at the European level - or to refrain from doing so and thus leave matters to the Member States - is political in nature.[152]

Prior to the entry into force of the Lisbon Treaty in 2009, the general consensus was that the Community's legislative institutions had failed to take the subsidiarity principle very seriously.[153] Whenever the Commission and a qualified majority of states in the Council favoured legislation on the European level, subsidiarity ultimately posed no obstacle to such an outcome.[154] Moreover, as Wyatt has demonstrated, the Community legislature typically provided very little by way of explanation as to why a particular legal act complied with the subsidiarity principle.[155] This lack of detailed consideration and reasoning vis-à-vis subsidiarity compliance highlighted the problem of entrusting the Community institutions with being judges in their own cause.[156] Despite the intentions of the drafters of the

[149] Gráinne De Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam' [2000] Harvard Jean Monnet Working Paper 7/99 1, 24; Schütze, *From Dual to Cooperative Federalism* (n 75) 252.
[150] Protocol No. 30 para 9.
[151] ibid para 11.
[152] For example see Inter-institutional Agreement on the Procedures for Implementing the Principle of Subsidiarity [1993] OJ C 329, p.135.
[153] Robert Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism' (2009) 68 Cambridge Law Journal 525, 526; George A Bermann, 'Subsidiarity and Proportionality' in Catherine Barnard and Joanne Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002) 86.
[154] Weatherill (n 25) 11.
[155] Derrick Wyatt, 'Subsidiarity: Is It Too Vague to Be Effective as a Legal Principle?' in Kalypso Nicolaïdis and Stephen Weatherill (eds), *Whose Europe? National Models and the Constitution of the European Union* (Oxford University Press 2003).
[156] Gabriél A Moens and John Trone, 'The Principle Of Subsidiarity in EU Judicial And Legislative Practice: Panacea Or Placebo?' (2015) 41 Journal of Legislation 65, 85.

Maastricht Treaty, subsidiarity had failed to allay fears about EC "competence creep" and excessive European intervention into areas of national policymaking.[157]

i.) The Substantive Dimension

But it was not only the political process that failed to take subsidiarity seriously prior to the entry into force of the Lisbon Treaty in 2009. The CJEU also failed to utilise the principle as a meaningful, judicially enforceable safeguard of the EC's federal balance of competences during this period.[158] Indeed, as a ground of structural constitutional review of Community legislation, the jurisprudence has variously been described as "very timid"[159], of "little value as a standard of scrutiny"[160] and even "to put it bluntly, an embarrassment."[161]

In a number of cases, the Court's reasoning was both ambiguous and unhelpfully concise. The CJEU also consistently engaged in an incredibly deferential, low-intensity standard of review when scrutinising EC legislation for subsidiarity compliance.[162]

The approach is well illustrated by the British American Tobacco (BAT) case, where a number of tobacco companies contested the validity of an EC Directive that harmonised national laws on the manufacture, presentation, and sale of tobacco products.[163] In addition to challenging the Directive on conferral grounds, the claimant's also contended that the subsidiarity principle had been infringed. In their view, prior to the adoption of the contested Directive, harmonisation legislation already existed which eliminated barriers to trade in tobacco products, thus removing the need for further action on the European level. Moreover, it was claimed that no evidence had been adduced by the EU legislature demonstrating that the Member States could not adopt the measures of public health protection they considered necessary.[164]

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[157] Weatherill (n 25) 9–11.
[158] Moens and Trone (n 156) 72–80.
[159] Aurdlian Portuese, 'The Principle of Subsidiarity as a Principle of Economic Efficiency' (2011) 17 Colombia Journal of European Law 231, 247.
[160] Christoph Ritzer, Marc Ruttloff and Karin Linhart, 'How to Sharpen a Dull Sword - The Principle of Subsidiarity and Its Control' (2006) 7 German Law Journal 733, 760.
[161] Peter L Lindseth, 'Equilibrium, Demoi-Cracy, and Delegation in the Crisis of European Integration' (2014) 15 German LJ 529, 558.
[162] *Case C-84/94, United Kingdom of Great Britain and Northern Ireland v Council* ECLI:EU:C:1996:431 paras 46-47, 55; *Joined cases C-154/04 and C-155/04, Alliance for Natural Health* (n 105) paras 104-108.
[163] *Case C-491/01, BAT* (n 108).
[164] ibid para 174.

In response, the Court stated that in reviewing Community legislation for compliance with the subsidiarity principle, "it must first be considered whether the objective of the proposed action could be better achieved at Community level."[165] In determining this question, the Court drew upon its previous findings regarding the Directive's compliance with the principle of conferral - noting that its objective was to eliminate barriers to trade caused by divergent national laws while ensuring a high level of health protection.[166] This fact alone was enough, in the Court's view, to conclude that such an objective could not be sufficiently achieved by the Member States individually and, therefore, called for action at Community level.[167] Consequently, without any further degree of scrutiny or explanation, it was held that the Directive complied with the principle of subsidiarity.[168]

This approach to the substantive aspects of subsidiarity review was consistently adopted by the Court in the years between Maastricht and Lisbon.[169] In so doing, the CJEU focused exclusively on the national insufficiency test, thus "short-circuiting" the comparative efficiency test.[170] The reasoning in these cases assumed that whenever the Community legislature wanted to harmonise national laws, that objective could never be attained by Member State action, thus necessarily requiring Community legislation.[171] The national insufficiency test was thus answered with an erroneous tautology - since only the Community can harmonize national laws through legislation, the Community must be deemed to have complied with the subsidiarity test.[172]

ii.) The Procedural Dimension

[165] ibid para 180.
[166] ibid para 181.
[167] ibid paras 182-183.
[168] ibid para 185.
[169] *Case C-377/98, Netherlands v European Parliament and Council* (n 105) paras 30-34; *Case C-84/94, United Kingdom of Great Britain and Northern Ireland v Council* (n 162) paras 46-47, 55.
[170] Schütze, *European Constitutional Law* (n 142) 183; For examples see *Case C-377/98, Netherlands v European Parliament and Council* (n 105) 8484 paras 30-34; *Case C-84/94, United Kingdom of Great Britain and Northern Ireland v Council* (n 162) paras 46-47, 55.
[171] Garreth Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 Common Market Law Review 63, 74.
[172] Schütze, 'EU Competences' (n 22) 92.

The Court was also unsuccessful in enforcing procedural aspects of the subsidiarity principle during this period.[173] As was noted above, Protocol No.30 annexed to the Amsterdam Treaty placed a series of procedural obligations upon the Community institutions to consider whether proposed legislation complied with subsidiarity and to provide reasons for its conclusions on this matter.

In some cases, Community legislation was challenged for failing to comply with these procedural aspects of the subsidiarity principle. Rather than claiming that the content of the Community legislation infringed the national insufficiency or comparative efficiency tests per se, the contention here was that the legislation in question lacked sufficient reasons explaining why it complied with the principle of subsidiarity.[174]

For example, in the Deposit Guarantee case, Germany challenged the legality of a directive requiring all credit institutions to have guaranteed schemes for depositors in the event that the institution ran into financial difficulty.[175] In their view, the Directive should have been annulled for failing to state the reasons on which it was based.[176] In particular, the Directive did not explain how it was compatible with the principle of subsidiarity. Germany claimed that the Directive did not provide detailed reasons explaining why only the Community, and not the Member States, were empowered to act in the area in question. Moreover, the Directive did not "indicate in what respect its objectives could not have been sufficiently attained by action at Member State level or the grounds which militated in favour of Community action."[177]

In disposing of the case within a few short paragraphs, the CJEU cited three recitals to the Directive which, in its view, demonstrated that the Community legislator had concluded that the aim of the legislation could be best achieved at Community level.[178] On this basis alone, it was held that the Community legislature had given adequate consideration to the principle of subsidiarity, despite the fact that the principle itself was not explicitly mentioned in the

[173] The distinction between substantive and procedural aspects of the subsidiarity principle is well recognised in the literature, see Craig and De Búrca (n 3) 100.
[174] *Case C-377/98, Netherlands v European Parliament and Council* (n 105) para 30; *Case C-233/94, Germany v European Parliament and Council* ECLI:EU:C:1997:231 para 24.
[175] *Case C-233/94, Germany v Parliament and Council* (n 174).
[176] Article 190 EC required all EC legal acts to state the reasons on which they were based.
[177] *Case C-233/94, Germany v Parliament and Council* (n 174) paras 22-23.
[178] ibid paras 26-27.

text of the legislation. Instead, based on the overall context of the Directive as derived from its recitals, the Community legislature had (implicitly) explained why it considered that its action was in conformity with the principle of subsidiarity and, therefore, complied with the duty to state reasons. In the Court's view, "[a]n express reference to that principle cannot be required."[179]

The approach taken in Deposit Guarantee was also repeated in subsequent case law, thus suggesting that the procedural requirements would be satisfied even when there was "no evidence to suppose that the institutions actually considered whether the measure satisfied the principle of subsidiarity."[180] By simply repeating the Community legislature's brief assertions in the recitals to contested legislation that that legislation (explicitly or even implicitly) complied with subsidiarity, the Court did nothing to ensure that the reasons provided by the Community legislature were supported by qualitative or quantitative indicators (as required by the Amsterdam Protocol).[181]

c.) Subsidiarity's Failure

Following the entry into force of the Maastricht Treaty, the Court not only failed to engage in any meaningful review of the substance of Community legislation on subsidiarity grounds, but also seemed unwilling to enforce even the most rudimentary, procedural aspects of the principle.[182] As a result, the Community legislature was once again placed under a very limited burden to justify the constitutionality of its legislative output before the Court.

Much like the problems identified above in relation to the principle of conferral within the context of Article 95 EC, the structure and wording of the subsidiarity principle unquestionably contributed to its under-enforcement by the EC institutions and the Court.[183] As framed in Article 3b EC, subsidiarity did not provide any meaningful, substantive and legally operable criteria that could be utilised when seeking to balance legislative action on the Community level versus the benefits of continued national regulatory autonomy over a

[179] ibid paras 26-29.
[180] Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (Third edition, Cambridge University Press 2014) 399; For example see *Case C-377/98, Netherlands v European Parliament and Council* (n 105) para 33.
[181] Protocol No. 30 para 4; For a critique see Michael Marc Delehanty, 'Subsidiarity and Seanad Éireann' (2010) 13 Trinity College Law Review 133, 135–136.
[182] Young (n 61) 1680.
[183] Schütze, *European Constitutional Law* (n 142) 178; Swaine (n 144) 51–52.

particular issue.[184] Furthermore, some have argued that the very nature of the subsidiarity enquiry is unsuited to judicial review, since it involves quintessentially political questions about the appropriate level of governance, the right balance between federal uniformity and national diversity and the trade-offs between different (and often competing) policy choices.[185]

That being said, the open-ended texture of the norms involved and the politically sensitive nature of the questions asked are not sufficient reasons, in themselves, to justify the Court's approach to subsidiarity. After all, evaluating and reviewing the legality of laws which often contain delicately balanced tradeoffs between competing rights and interests is an integral part of the judicial function.[186] Moreover, the Treaties quite clearly required that EC legislation comply with the constitutional principles enshrined in Article 3b EC without reservation.

In this regard, there is little doubt that the Court could have done more in the post-Maastricht era to subject Community legislation to more meaningful constitutional review on subsidiarity grounds.[187] This is particularly so with regards to the procedural aspects of the principle. As De Búrca argued:

> "Even if it is accepted that the deeply political nature of the questions underlying subsidiarity make them inappropriate for the Court rather than the political institutions ultimately to decide, it must surely be the case that if subsidiarity is a justiciable principle of judicial review, the institutions must be obliged to provide something more substantial by way of justification than a simple assertion that they consider their legislation to be compatible with that principle"[188]

8.) **Two Conceptions of Proportionality**

[184] Fabbrini (n 18) 226; Jacob Öberg, 'Subsidiarity as a Limit to the Exercise of EU Competences' (2016) 36 Yearbook of European Law 1, 16.
[185] Young (n 61) 1679; Bermann (n 72) 391; Anthony L Teasdale, 'Subsidiarity in Post-Maastricht Europe' (1993) 64 The Political Quarterly 187, 191.
[186] For a similar point see Öberg (n 184) 18.
[187] Craig, 'The ECJ and Ultra Vires Action' (n 104) 427; Bermann (n 72) 390–402.
[188] Gráinne de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36 JCMS: Journal of Common Market Studies 217, 225.

a.) Federal Proportionality

In light of subsidiarity's failure as a constitutional limit upon the exercise of EC legislative power, calls were raised for the principle to be reformulated or (re)interpreted so as to incorporate an element of "federal proportionality."[189] This echoes the abovementioned view that the addition of a Treaty-based definition of proportionality in Article 3b EC at Maastricht had added a competence protecting dimension to the proportionality principle.

In essence, federal proportionality would involve taking the "shall act only if and in so far as" aspect of the principle of subsidiarity in Article 3b EC and interpreting it through the lens of proportionality stricto sensu.[190] This would require the CJEU to "spell out the competence function of proportionality, and the role of national autonomy in the balance, and have a go at addressing competence concerns in this way."[191] In so doing, the CJEU would review the balance struck by the EC legislature between the added value to the Community of acting on the federal level, on the one hand, and any possible harm to national interests, on the other.[192] The question for the Court under federal proportionality, therefore, would be whether the EC legislature had "unnecessarily restricted national autonomy?', or was "the importance of the [Community] measure sufficient to justify its net effect on Member States?'"[193]

Despite being advocated in the literature, the CJEU never explicitly endorsed a federal dimension to proportionality review in the period between the Treaties of Maastricht and Lisbon. Perhaps the closest the Court came to articulating the beginnings of a doctrine federal proportionality came in BAT, where the CJEU held that "the intensity of the action undertaken by the Community in this instance was also in keeping with the requirements of the principle of subsidiarity."[194] In reaching this conclusion, however, the Court simply cross-referenced the relevant passage from the same judgment where it had found the contested EC legislation to be in compliance with the principle of proportionality as understood in its

[189] Moens and Trone (n 156) 78; Schütze, 'Subsidiarity after Lisbon' (n 153) 533.
[190] Schütze, *From Dual to Cooperative Federalism* (n 75) 263; Davies (n 171) 63, 81.
[191] Davies (n 171) 83.
[192] Xavier Groussot and Sanja Bogojević, 'Subsidiarity as a Procedural Safeguard of Federalism' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press 2014) 249.
[193] ibid; See also Schütze, *From Dual to Cooperative Federalism* (n 75) 263.
[194] *Case C-491/01, BAT* (n 108) para 184.

liberal, rights-protecting sense.[195] Consequently, no separate consideration of whether the contested legislation placed a disproportionate or excessive restriction upon national regulatory autonomy was considered.

b.) Protecting Liberal Values: The Continuation of Low-Intensity Review

This brings us to the Court's jurisprudence concerning constitutional review of Community legislation for compliance with the traditional, liberal conception of the proportionality principle. To recall, Article 3b EC simply provided that "any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."[196]

Despite this novel, constitutionally-entrenched definition of the principle, the CJEU continued to utilise the more comprehensive definition that it had itself articulated when developing proportionality as an unwritten general principle of Community law. According to settled case law, the principle of proportionality required EC legislation to be appropriate for attaining the objective pursued (suitable) and not go beyond what was necessary to achieve that objective (necessity).[197] In some (but not all) instances, the CJEU also added that when there was a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (stricto sensu).[198]

In-keeping with its jurisprudence during the era of low-intensity constitutionalism (discussed in Chapters 3 and 4), however, the Court typically found that the EC legislature was to be "allowed a broad discretion in areas in which its action involves political, economic and social choices and in which it is called upon to undertake complex assessments and evaluations."[199] This approach was also consistently taken with regards to the EC's core competence to adopt harmonisation legislation under Article 95 EC.[200]

[195] ibid para 184; See also *Case C-84/94, United Kingdom of Great Britain and Northern Ireland v Council* (n 162) paras 54-55.
[196] Article 3b EC.
[197] *Case C-210/03, Swedish Match* (n 108) para 47 and case law cited therein.
[198] *Joined Cases C-27/00 and C-122/00, The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte Omega Air Ltd and others* ECLI:EU:C:2002:161 para 62 and case law cited therein.
[199] *Case C-380/03, Tobacco Advertising Two* (n 109) para 145 and case law cited therein.
[200] *Case C-491/01, BAT* (n 108) para 123 and case law cited therein.

In addition to the continued recognition of a wide scope of discretion, the CJEU also adopted a very deferential standard of review. Community legislation would only be annulled on proportionality grounds where it was "manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue."[201] There was, therefore, a judicial choice in favour of granting wide discretion to the legislature and subsequently engaging in low-intensity review. As one member of the Court put it when writing extra-judicially, "there is a long line of cases where the Court has refused to scrutinise the proportionality of [EC] measures strictly. This judicial self-restraint has resulted in a rather strong presumption of the legality of [Community] law."[202]

As has already been pointed out in relation to the Court's earlier case law, there are valid reasons behind the Court's deferential approach to discretionary policy choices and complex evaluations. When viewed from the perspective of relative expertise and institutional capacity, it is clear that the CJEU is ill-equipped to subject the intricate, technical findings of the legislature to robust proportionality review.[203] Furthermore, the separation of powers and superior democratic legitimacy of the EC's main legislative institutions (Parliament and Council) dictate that the Court should be reluctant to overturn the policy choices of the legislature by engaging in robust, substantive review via the proportionality principle.[204]

Nonetheless, the CJEU's approach to proportionality review of EC legislation was conducted in such a low-intensity fashion at times that it was difficult to detect any degree of meaningful judicial scrutiny whatsoever. This was particularly true when it came to the necessity and/or proportionality stricto sensu aspects of the enquiry.[205] The Court often seemed hesitant to engage in any detailed consideration of alternatives or less restrictive measures when conducting the necessity stage of the proportionality examination.[206]

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[201] ibid.

[202] Juliane Kokott and Christoph Sobotta, 'The Evolution of the Principle of Proportionality in EU Law—Towards an Anticipative Understanding?' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart Publishing 2017) 168.;

[203] Paul Craig, *EU Administrative Law* (Oxford University Press 2012) 600.

[204] For an illuminating discussion see *Opinion of Advocate General Geelhoed, Case C-244/03,France v European Parliament and Council* ECLI:EU:C:2005:178 paras 90-93.

[205] *Case C-233/94, Germany v Parliament and Council* (n 174) paras 57-58.

[206] *Case C-434/02, Arnold André GmbH & Co KG v Landrat des Kreises Herford, 14 December 2004,* EU:C:2004:800 paras 54-55; *Case C-491/01, BAT* (n 108) para 130.

Similarly, in those instances where proportionality stricto sensu was mentioned as part of the test, an explicit balancing of costs and benefits was not then undertaken.[207]

c.) Evaluation: Subsidiarity and Proportionality

To reiterate, the contention here is not that there were instances of EC legislation flagrantly imposing disproportionate or excessive burdens upon individuals and that this was not dealt with by the CJEU. Rather, it is to demonstrate that, when viewed alongside the Court's conferral and subsidiarity jurisprudence, the Court was evidently reluctant to exercise its powers of constitutional review in a manner that placed effective limits upon the existence and exercise of EC legislative power.[208]

Despite hopes that the Court might help to redress the federal balance of competences after the Maastricht Treaty, the abovementioned constitutionalisation of the system of judicial review via Article 3b EC did not result in the Court adopting a more searching enquiry into the constitutionality of contested EC legislation. Whilst recognising that there are strong reasons against courts engaging in robust constitutional review of the merits of contested legislation, it is nevertheless clear that the Court could have required more by way of justification from the EC legislature during this period.

9.) **Fundamental Rights Review after Maastricht**

The final aspect of the Court's jurisprudence pertaining to constitutional review of Community legislation concerns fundamental rights.

As was noted above, the Maastricht and then Amsterdam Treaties provided that the EU was now founded upon the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. Article 6 TEU also provided that the EU would protect fundamental rights as general principles of law, taking inspiration from the ECHR and the common constitutional traditions of the Member States.[209] This was supplemented by

[207] Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 Cambridge Yearbook of European Legal Studies 439, 447–452.
[208] Kumm (n 60) 504; Weatherill (n 25) 46.
[209] Article 6(1) and (2) TEU.

Article 46 TEU, which stated that the jurisdiction of the CJEU involved reviewing EC legal acts for compliance with fundamental rights deriving from these sources.[210]

a.) Continuity with the Past?

Far from empowering the CJEU with the power to review Community legislation against a constitutionally-entrenched, written bill of rights, however, these provisions merely provided textual recognition of the Court's longstanding practices based upon general principles of law.[211]

At first glance, the solemn declaration of the EU Charter of Fundamental Rights (CFR) by the EU institutions at the Nice European Summit of December 2000 appeared to have dramatically changed this state of affairs.[212] The Charter contained a variety of fundamental human, civil, political, economic and social rights that went beyond both the ECHR and the existing case law of the CJEU.[213] According to Article 51 CFR, its provisions were addressed to the institutions and bodies of the EU, thus suggesting that the law-making institutions of the EU would henceforth face the prospect of their legislative output being scrutinised by the CJEU for compliance with the CFR's provisions.[214]

Crucially, however, the CFR was not aimed at creating new, legally binding fundamental rights commitments which the CJEU would then guarantee through its powers of constitutional review. Instead, its overarching purpose was to catalogue *existing* fundamental rights and principles in a single document so as to make "their overriding importance and relevance more visible to the Union's citizens."[215] Furthermore, the solemn declaration at Nice was political in nature, meaning that the CFR itself was not integrated into the EU Treaties and was not legally binding upon the EU legislature.[216] By virtue of its

[210] Article 46 TEU.
[211] Albertina Albors-Llorens, 'Changes in the Jurisdiction of the European Court of Justice under the Treaty of Amsterdam' (1998) 35 Common Market Law Review 1273, 1285–1286.
[212] The Charter of Fundamental Rights of the European Union (CFR) [2000] OJ C 364/01.
[213] Eddy de Smijter and Koen Lenaerts, 'A "Bill of Rights" for the European Union' (2001) 38 Common Market Law Review 273, 279–280.
[214] Article 51 CFR.
[215] Conclusions of the Presidency at the occasion of the European Council of Cologne (3 and 4 June 1999) on the Drawing up of a Charter of Fundamental Rights of the European Union, 150/99 REV 1 Annex IV.
[216] The debate over whether to make the CFR legally binding at Nice was hotly contested. See Lord Goldsmith Q.C., 'A Charter of Rights, Freedoms and Principles' (2001) Common Market Law Review 1201, 1214–1215.

non-binding and declaratory nature, the CFR was not utilised as a stand-alone means of contesting the validity of EU legislation during this period.[217]

The question to be resolved for the purposes of the present enquiry, however, was whether these changes to the underlying values and principles of the EU legal order had brought about any shift in the methodology and intensity of fundamental rights review as conducted by the CJEU?

b.) Judicial Caution towards Substantive Policy

It will be recalled from Chapters 3 and 4 that, prior to the Maastricht Treaty, the Court had consistently adopted a deferential approach to reviewing Community legislation that had allegedly restricted fundamental rights in a disproportionate manner. The threshold for establishing a violation was set high: contested legislation had to constitute a disproportionate and intolerable interference which infringed upon the very substance of the right in question.[218] In addition, the Court did not to engage in any meaningful degree of scrutiny of the substance of contested legislation. Community legislation that restricted fundamental rights in some way was frequently found to be justified on the grounds that it pursued legitimate objectives in the Community's general interest.

When viewed against this background, very little changed in the nature of the Court's task of conducting fundamental rights review in the post-Maastricht era. Much like the era of low-intensity constitutionalism, the subject matter of legislation under review often involved complex technical aspects of economic regulation in areas related to the internal market. Furthermore, the fundamental rights asserted by those contesting EC legislation were typically of an economic nature, such as the right to property or freedom to pursue a trade or profession.[219] As De Witte notes, this is readily explicable by the fact that fundamental

[217] Sara Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' (2012) 49 Common Market Law Review 1565, 1580–1581.
[218] See Chapter 3, Section 6
[219] *Joined cases C-184/02 and C-223/02, Spain and Finland v European Parliament and Council* ECLI:EU:C:2004:497; *C-200/96, Metronome Musik* ECLI:EU:C:1998:172; *Joined cases C-248/95 and C-249/95, SAM Schiffahrt GmbH and Heinz Stapf v Bundesrepublik Deutschland* ECLI:EU:C:1997:377.

rights review continued to be conducted within the confines of an EC Treaty that remained heavily geared towards economic integration.[220]

In addition to the subject matter and overall context of fundamental rights litigation, the CJEU's approach to reviewing EC legislation on fundamental rights grounds also represented continuity with the past. The Court consistently based itself upon established, pre-Maastricht case law which provided that such rights were not absolute and had to be viewed in light of their social function. Accordingly, the right to property and the freedom to conduct a business could be restricted by the Community legislature, provided that such restrictions corresponded with objectives in the Community's general interest and did not constitute disproportionate and intolerable interferences which impaired the very substance of those rights.[221]

In much the same way as it had done during the era of low-intensity constitutionalism, the Court placed considerable emphasis upon the contested Community legislation being appropriate for pursuing objectives in the EC's general interest. Having established that the appropriateness aspect of the test had been satisfied, the Court then swiftly concluded that interferences with fundamental rights were justified.[222]

There was evidently a reluctance to engage in any meaningful degree of scrutiny of whether any less restrictive measures were available (necessity) and/or whether the overall balance between rights and objectives was proportionate (proportionality stricto sensu).[223] As Tridimas notes, the Court opted instead to rely upon some notion of reasonableness or arbitrary conduct. Rather than seriously engaging with some form of two or three step proportionality test, the CJEU was content with reviewing whether the EC legislature

[220] Article 46 TEU excluded actions taken under the intergovernmental second and third pillars of the EU construct from review by the CJEU. For discussion see Bruno de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in Philip Alston (ed), *The EU and Human Rights* (OUP 1999) 866–869.
[221] *Joined cases C-248/95 and C-249/95, SAM Schiffahrt GmbH and Heinz Stapf v Bundesrepublik Deutschland* (n 219) para 71; *Case C-280/93, Germany v Council* ECLI:EU:C:1994:367 para 78.
[222] *Case C-210/03, Swedish Match* (n 108) paras 72-74; *Joined cases C-184/02 and C-223/02, Spain and Finland v European Parliament and Council* (n 219) paras 58-61; *Case C-306/93, SMW Winzersekt* ECLI:EU:C:1994:407 paras 28-29.
[223] Takis Tridimas, 'Proportionality in European Community Law: Searching for the Appropriate Standard of Scrutiny' in Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart 1999) 72.

committed some manifest error when deciding that its policy was appropriate to achieve objectives in the Community interest.[224]

The fundamental rights jurisprudence of the CJEU in the period between the Maastricht and Lisbon Treaties therefore continued to be characterised by low-intensity review. The stance taken by the Court revealed an unwillingness to undertake an elaborate or comprehensive substantive assessment of [EC] legislation and failed to "provide for very structured or illuminating reasoning as to its approach…"[225]

This line of case law led Von Bogdandy to comment that the CJEU had "little in common with the role forceful constitutional courts have had in…national political processes."[226] In his view, "in its role as a constitutional court", the CJEU had been "very cautious with respect to substantive policy" and was "very cautious about substantively guiding the European legislative process."[227]

10.) Conclusions

The purpose of this chapter has been to examine how successive rounds of Treaty amendment from Maastricht onwards significantly impacted upon: (i) the system of judicial review in the EC (ii) the legislative process and concept of legislation in the EC; and (iii) the changing role of the Court when reviewing the legality of Community legislation.

When compared to earlier periods in the history of the Community, these reforms served to more closely approximate aspects of the CJEU's tasks under the Treaties with those carried out by national constitutional and supreme courts. The addition of Article 3b EC had equipped the Court with a set of constitutionally-entrenched grounds of review that were intended to safeguard the federal balance of competences in the Community. Furthermore, the advent of the co-decision procedure had resulted in a substantial change to the EC legislative process by elevating the status of the European Parliament to that of a co-legislature alongside the Council. These changes also rendered the concept of legislation in

[224] ibid.
[225] Malu Beijer, 'Procedural Fundamental Rights Review by the Court of Justice of the European Union' in Eva Brems and Janneke Gerards (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017) 203.
[226] Armin Von Bogdandy, 'The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union' [2000] Common Market Law Review 1307, 1325.
[227] ibid 1325–1326.

the Community more closely (but not exactly) analogous to parliamentary understandings of legislation in the nation state.

With regards to the changing role of the Court within the overall legal and political order of the Community, the Maastricht reforms are widely said to mark a pivotal moment in its evolution over time. Unlike the first two epochs in its history, the Court is said to have become less interested in driving forward the process of European integration by engaging in creative methods of interpretation. With the political process on the European level operating effectively, the Court now saw itself as the "constitutional court" of a "more mature legal order" whose primary responsibility was to uphold the "checks and balances built into the [Community] constitutional legal order of States and peoples, including the protection of fundamental rights."[228]

In subjecting these claims to closer scrutiny, Chapter 5 has argued that the Court largely failed to place meaningful limits upon the existence and exercise of EC legislative power in the post-Maastricht era. In subjecting EC legislation to constitutional review on both federalism and fundamental rights grounds, the Court's jurisprudence continued to evince a light-touch, tersely reasoned approach. In a number of cases, the Court was evidently reluctant to closely examine the substance or merits of contested legislation. An equally deferential stance was taken when examining whether the legislature had complied with its procedural obligations under the Treaties. As a result, the Community legislature was placed under a very limited burden to justify the constitutionality of its actions in the years after the Maastricht Treaty.

For some, this pervasive, low-intensity approach to constitutional review of Community legislation was yet further evidence of the Court's continuing, pro-integrationist bias.[229] The Court's case law in this area was said to demonstrate its continuing preference for furthering integration through centralising and strengthening Community powers.[230] This critique was most forceful when one compared the CJEU's record in reviewing EC legislation against its record in scrutinising national impediments to the fundamental freedoms of the internal market. Much like its earlier jurisprudence on this score, the Court continued to apply a

[228] Lenaerts, 'How the ECJ Thinks' (n 62) 1309.
[229] Sauter (n 207) 452; Takis Tridimas, *The General Principles of EU Law* (Oxford University Press 2006) 193.
[230] Moens and Trone (n 156) 80–85.

more stringent form of necessity test to national measures, often closely examining whether less restrictive measures were available.[231] In Harbo's view, this meant that proportionality review was "not objective in the sense that it is value-neutral. On the contrary, the analysis is informed by a very strong substantial bias, namely that of promoting European integration."[232]

Some went even further and contended that the failure to engage in meaningful constitutional review of Community legislation demonstrated that the Court was failing to give effect to the law as set down in the Treaties. Whereas in the past the CJEU had been accused of judicial activism for departing from the text of the Treaties so as drive forward the integration process, a new form of activism accusation arose in the post-Maastricht era. According to Moens and Trone, the CJEU was now behaving in an "activist" and thus illegitimate fashion by "continuing to give effect to its preference for centralisation in the face of express Treaty provisions that have the contrary intention."[233]

With this in mind, the remaining chapters of this study move to consider the contemporary, post-Lisbon Treaty jurisprudence of the Court. It is argued that in both federalism and fundamental rights cases, a series of subtle yet significant shifts in the methodology and intensity of constitutional review may be detected. Unlike any other period in the history of the European integration project, recent judgments evince a finely calibrated, variable intensity approach to constitutional review of EU legislation.

These developments in the methodology and intensity of constitutional review of EU legislation then form the basis for evaluating the contemporary role of the CJEU within the post-Lisbon Treaty European Union.[234] It is contended that these changes require one to reconsider those longstanding views of the Court as a "pro-integrationist" institution that seeks to enlarge and empower the Union at every opportunity. For the same reasons, it is necessary to re-evaluate accusations that the Court continues to behave in a "policymaking"

[231] For example *Joined cases C-171/07 and C-172/07, Apothekerkammer des Saarlandes and Others v Saarland and Ministerium für Justiz, Gesundheit und Soziales* ECLI:EU:C:2009:316.
[232] Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal 158, 172.
[233] Moens and Trone (n 156) 83.
[234] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306, p. 1–271.

or “activist” fashion by ignoring the clear wording of the Treaties in order to attain a (pro-integrationist) policy outcome. [235]

Crucially, these recent shifts in the methodology and intensity of constitutional review correspond to changes in both the EU’ constitutional framework and the EU legislative process. As the system of constitutional review and the concept of legislation have been refined over time, so too has the Court’s jurisprudence. Far from operating in accordance with its own agenda or in a manner that is divorced from the constitutional framework of the EU Treaties, therefore, the post-Lisbon case law reveals a Court that is responsive to the wider legal and political context in which it now operates. As such, it is argued that the contemporary CJEU is one that takes its responsibilities as the “Constitutional court” of “a more mature legal order” seriously.[236]

[235] For a classic statement of these views see Trevor C Hartley, *The Foundations of European Union Law* (Eighth edition, Oxford University Press 2014) 73–77.
[236] Lenaerts, ‘How the ECJ Thinks’ (n 62) 1309.

Chapter 6

The Lisbon Treaty: Towards Veritable Constitutional Review of EU Legislation

1.) Introduction

Two core claims have been advanced during the present study into the changing role of the CJEU when reviewing the legality of measures of European Union (EU) law.

The first is that a series of reforms to the legal and political order of the European Community (and then European Union) have gradually resulted in the CJEU assuming responsibility for conducting constitutional review of EU legislation. This may be summarised as changes to the concepts of constitutionalism (understood as political and legal limits upon power) and legislation respectively.

With regards to the constitutional side of this equation, a combination of CJEU jurisprudence and successive rounds of Treaty amendment resulted in an increasing number of constitutionally entrenched limits being placed upon the European legislature. In turn, the proliferation of constitutional limits upon legislative power has led to aspects of the CJEU's tasks resembling constitutional review of primary legislation as broadly understood in many national contexts. In particular, the CJEU has gradually assumed responsibility for reviewing EU legislation against: (i) a series of constitutionally-entrenched federalism principles; and (ii) fundamental rights standards.

In addition to these developments in the system of constitutional review, there has also been a gradual refinement of how the concept of "legislation" is understood in the EU.

Originally, a material or functional definition of legislation prevailed in the EEC. According to this understanding, all acts of general application constituted Community legislation; irrespective of the institution(s) or procedure(s) involved in their enactment. Following the first wave of reforms to the legislative process in the Single European Act (SEA), further rounds of Treaty amendment have sought to expand the use of Qualified Majority Voting (QMV) in the Council and empower the European Parliament. In so doing, a default legislative procedure that involves the joint adoption of EU legal acts by the Parliament and the Council gradually began to emerge.

At the same time, however, the concept of legislation in the Community remained markedly different from primary legislation enacted through parliamentary procedures in many nation states. Not only was there no single, parliamentary-type legislative process, there was also no hierarchy of legal norms in the pre-Lisbon EU.

Alongside this gradual emergence of a veritable system of constitutional review of EU legislation, the second major claim of this thesis is that the methodology and intensity of constitutional review has also shifted over time. For much of the history of European integration, the Court engaged in light-touch, tersely reasoned review of Community legislation in both federalism and fundamental rights contexts. As was argued in Chapters 3 and 4, part of the explanation for this lay in the fact that the Community legal order simply lacked many of the same constitutionally-entrenched legal and political limits upon power that one typically finds in national constitutional orders. This low-intensity approach to review was further explained by a reluctance on the part of the Court to frustrate the further advancement of European integration. Whilst considerations of institutional capacity, expertise and the separation of powers unquestionably played a role, it was argued that the CJEU's low-intensity approach to review was also underpinned by its "pro-integrationist" ethos during this period.

Against this background, Chapter 6 provides an overview of the salient reforms to the EU's legal and political order by the Treaty of Lisbon in 2009.[1] By continuing to focus upon changes to constitutionalism and legislation over time, it demonstrates how the Lisbon reforms significantly altered: (i) the EU legislative process and the concept of EU legislation; and (ii) the system of constitutional review in the EU.

When considered together, these reforms further approximated part of the CJEU's responsibilities under the EU Treaties with the practice of constitutional review of primary legislation as carried out by many national courts. For the first time in its history, the CJEU was now responsible for reviewing primary EU legislative acts, adopted via formal legislative procedures, for a series of constitutionally-entrenched federalism and fundamental rights principles.

[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306, p. 1–271.

Furthermore, as Chapters 7 and 8 shall go on to demonstrate, these reforms have also laid the foundations for a series of subtle yet significant shifts in the methodology and intensity of constitutional review of EU legislation in recent years.

2.) Towards a Procedural, Parliamentary Conception of EU Legislation

For the purposes of the present enquiry, the first major reform to be considered is the Lisbon Treaty's creation of a procedural or parliamentary definition of legislative power. Today, for the first time in the EU's history, Article 289 TFEU formally defines primary EU legislation as EU legal acts adopted in accordance with designated legislative procedures.[2] Furthermore, legislative acts adopted in accordance with legislative procedures are distinguished from non-legislative acts, thus creating a novel, Treaty based hierarchy of legal acts.[3]

Under what is now the default, "ordinary legislative procedure", EU legislation consists of legal acts that are jointly adopted by the European Parliament and Council; typically following a proposal from the Commission.[4] As the name implies, this ordinary legislative procedure is now the principal means of enacting legislation in the EU, thus meaning that vast swathes of legislation pertaining to the internal market and many other areas of EU competences are adopted via this procedure.

a.) From a Material to a Procedural Definition of Legislative Power

According to Schütze, Article 289 TFEU demonstrates that the EU now "follows a procedural definition of legislative power" with EU legislation being formally defined as "an act adopted by the bicameral Union legislator."[5] This procedural definition of legislative power was carried over from Article I-34 of the failed Constitutional Treaty of 2004, which intended to create the presumption that EU legislative acts "correspond[ed] to legislation in form as employed in the constitutional systems of its Member States."[6]

[2] Article 289(3) Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2016] OJ C 202; For discussion see Robert Schütze, *European Constitutional Law* (Cambridge University Press 2012) 152.
[3] Article 290 and 291 TFEU.
[4] Articles 289 and 294 TFEU.
[5] Schütze, *European Constitutional Law* (n 2) 169.
[6] Alexander Türk, 'The Concept of the "Legislative" Act in the Constitutional Treaty' (2005) 6 German Law Journal 1555, 1558.

In addition to laying down a procedural definition of legislative power, the Lisbon Treaty also explicitly recognises the democratic foundations of legislative acts that are enacted jointly by the Council and the European Parliament. According to Article 10 TEU:

> "The functioning of the Union shall be founded on representative democracy. Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens."[7]

This means that the "democratic legitimacy of the Union is founded on its states and peoples, and consequently an act of a legislative nature must always come from the bodies which represent those states and peoples, namely the Council and the Parliament."[8] For some, this foundational principle of representative democracy and its operation through the ordinary legislative procedure served to allay concerns about the EU's persistent "democracy deficit."[9] Like many federal polities, the post-Lisbon EU was now founded upon a "dual legitimacy" stemming from the peoples and states of Europe. Moreover, this dual legitimacy was expressed through the "compound nature" of the EU's legislative process, which now formally operated on the basis of the consent of the majority in both the Council and the European Parliament.[10]

b.) Legislative Acts as Primary EU Legislation

But can EU legislative acts that result from these legislative procedure(s) be accurately defined as being akin to parliamentary conceptions of primary legislation as typically understood in national legal systems?[11] The issues at stake are succinctly stated by Bast,

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[7] Article 10(1) and (2) Consolidated Version of the Treaty on European Union (TEU) [2016] OJ C 202.
[8] Final Report of Working Group IX on Simplification of 29 November 2002, CONV 424/02, 2.
[9] Robert Schütze, *European Union Law* (Cambridge University Press 2015) 71–73; On the democracy deficit debate in general see Dieter Grimm, *The Constitution of European Democracy* (Oxford University Press 2017) Chapter 4.
[10] Schütze, *European Union Law* (n 9) 71. This thesis does not seek to engage in these wider sociological or political aspects of the EU's democratic deficit debate. Rather, its focus is on the narrower question of how CJEU interacts, through constitutional review, with this novel, procedural conception of EU legislative power and the legislative acts which result from such procedures.
[11] Herwig Hofmann, 'Legislation, Delegation and Implementation under the Treaty of Lisbon: Typology Meets Reality' (2009) 15 European Law Journal 482, 484.

who notes that "[i]n an emphatic understanding, the exercise of legislative power denotes more than simply producing rules and regulations of any kind or form. Legislation evokes a mode of law-making by elected representatives and hence a democratic form of coupling the spheres of law and politics."[12]

On the one hand, there continue to be some crucial differences between legislative acts in the post-Lisbon Treaty EU and national concepts of parliamentary legislation.[13] First of all, the EU is neither sovereign nor a state.[14] Thus, the concept of legislation in the EU legal order should not be considered as analogous to the national concept of parliamentary legislation.[15] On this view, the EU remains a very advanced type of international organisation, and it is inappropriate to utilise terminology that is inextricably linked to the nation state - such as "legislation" - to analyse legal acts produced by such organisations.[16] Despite Articles 10(1) and 14(2) TEU providing that the directly elected European Parliament represents the citizens of the EU, the European Parliament cannot be considered as the central legislative body in a manner analogous to national systems, since "the European Parliament is not a representative body of a sovereign European people."[17] Finally, EU legislative acts can only be adopted following a proposal from the Commission (except where the Treaties state otherwise).[18] This arrangement clearly distinguishes EU legislative acts from primary legislation in national contexts, since the right of legislative initiative typically rests with elected members of Parliament and/or the Government and not a non-elected, technocratic institution.[19]

On the other hand, it has been argued that the Lisbon Treaty reforms to the EU legislative procedure, coupled with the foundational principle of representative democracy, assumes that the concept of legislation – "which constitutes a key characteristic of constitutional

[12] Jürgen Bast, 'New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law' (2012) 49 Common Market Law Review 885, 891.
[13] For a wide-ranging analysis see Grimm (n 9) Chapter 4.
[14] Schütze, *European Constitutional Law* (n 2) 152–153.
[15] Barbara Mielnik, 'Comment on Alexander Türk – The Concept of the "Legislative Act' (2005) 6 German Law Journal 1571.
[16] ibid.
[17] *Bundesverfassungsgericht (BVerfG), Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08* para 280.
[18] Article 17(2) TEU.
[19] Damian Chalmers, 'The Democratic Ambiguity of EU Law Making and Its Enemies' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 320.

states" - can be legitimately employed in the European Union.[20] In developing this argument, Turk states that:

> "It might well be the case that the Union after Lisbon does not constitute a state and that the Union Treaties lack the characteristics of a Constitution comparable to that found in nation states. However, it does not follow that the term 'legislation' cannot validly be used in Union law provided it serves a purpose which is functionally equivalent to that employed in states."[21]

According to this view, the EU system is not premised upon the classical, state based understanding of the Parliament representing the nation, but rather a system of "functional representation" in which each EU institution represents specific interests in the legislative process.[22] In addition to the European citizens and Member States being represented through the European Parliament and Council respectively, therefore, one can also add "the general interest of the Union" which is represented by the Commission.[23] Despite the distinct characteristics of the EU's institutional framework, it is nonetheless possible to discern similarities with national concepts of legislation when one considers that the process of legislating in many national contexts comprises a variety of "constitutionally relevant institutions in a deliberative process of lawmaking."[24]

Consequently, a conception of primary legislation that is functionally equivalent to national legislation exists in the EU legal order whenever the EU institutions participate fully in the legislative process and, in so doing, represent the specific interest assigned to them in accordance with the Treaties.[25]

This is further supported by the fact that, in the post-Lisbon era, legislative acts are subject to a greater number of procedural requirements than other types of EU legal acts of a non-legislative nature. This not only reinforces the formal hierarchy of norms in the

[20] Alexander H Türk, 'Lawmaking After Lisbon' in Biondi et al (ed), *EU Law After Lisbon* (Oxford University Press 2012) 67.
[21] ibid 68.
[22] ibid 69; Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Text and Materials* (Third edition, Cambridge University Press 2014) 153.
[23] Article 17(1) TEU.
[24] Türk (n 20) 69.
[25] ibid.

contemporary EU legal order, but also seeks to ensure a high degree of transparency and consultation in the EU legislative process.[26]

For example, the Commission is obliged to consult widely before proposing legislative acts and, where appropriate, such consultations must take into account the regional and local dimension of the action envisaged.[27] When it comes to considering draft legislative acts, Article 15(2) TEU provides that the European Parliament shall meet in public.[28] Similarly, under Article 16(8) TEU, the Council shall meet in public when it deliberates and votes on a draft legislative act.[29] To this end, each Council meeting shall be divided into two parts, dealing respectively with deliberations on Union legislative acts and non-legislative activities. When taken together, these procedural requirements combine to ensure that legislative acts in the post-Lisbon era are acts which are subject to enhanced public scrutiny.

Unlike previous periods in the history of European integration, EU legislative acts are now enacted through a formally defined legislative procedure in which the interests of the Union, the Member States and European citizens are articulated and debated in a public, transparent forum. For the purposes of the present enquiry, therefore, we may define legislative acts adopted in accordance with the ordinary legislative procedure as representing a veritable conception of primary legislation in the contemporary EU.[30]

3.) The Charter of Fundamental Rights as a Written Bill of Rights for the EU

In addition to reforming the EU legislative process and the concept of EU legislation, the Lisbon Treaty also further strengthened the CJEU's powers to conduct constitutional review of EU legislation on both federalism and fundamental rights grounds.

With regards to fundamental rights, Article 6(1) TEU now provides that the EU "recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights…" and that the Charter (CFR) "shall have the same legal value as the Treaties."[31]

[26] Hofmann (n 11) 503.
[27] Consolidated Version of the Treaty on the Functioning of the European Union - Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2008] OJ C 115, p. 206–209, Article 2.
[28] Article 15(2) TEU.
[29] Article 16(8) TEU.
[30] Türk (n 20) 69; For similar arguments see Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2011) 178–182, 199–200.
[31] Article 6(1) TEU.

As was discussed in Chapter 5, the initial purpose behind codifying a series of fundamental rights and principles in the EU legal order was *not* to add anything new to the existing body of law in this area. The CFR's preamble is explicit in stating that its provisions simply "re-affirm" EU fundamental rights as they result from the constitutional traditions and international obligations of the Member States, along with the jurisprudence of the CJEU and European Court of Human Rights.[32]

a.) The Constitutional Entrenchment of Fundamental Rights Review

By elevating the CFR to the same status as the TEU and TFEU in Article 6 TEU, however, the Lisbon Treaty provided the EU legal order with a constitutionally-entrenched, written Bill of Rights for the first time in its history. This entrenchment of a legally binding catalogue of fundamental rights commitments that the EU legislature was bound to respect, and the CJEU bound to uphold, placed the Charter at "the very centrepiece of the EU legal order."[33]

Furthermore, the subjugation of EU legislative power to the legal and political limits of the CFR represents a crucial next phase in the "constitutionalisation" of the system of judicial review.[34] When viewed alongside the EU's federalism principles enshrined in Article 5 TEU (ex Article 3b EC), the post-Lisbon Treaty CJEU is now responsible for conducting constitutional review of EU legislation on both federalism and fundamental rights grounds. Whereas the Court had previously been responsible for some variant of these two tasks, the significance of the Lisbon Treaty is that the grounds of review open to the CJEU for these purposes are now explicitly set down in the text of the Treaties themselves.

Having begun its existence as a court of limited jurisdiction that was modelled upon the principles of French administrative law, the Lisbon treaty marked the end point in a gradual process of the CJEU assuming responsibility for engaging in a veritable practice of constitutional review of EU legislation.

[32] Consolidated Version of the Charter of Fundamental Rights of the European Union [2016] OJ C 202 Preamble; For discussion see Paul Craig and Grainne De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2015) 396.
[33] Sybe de Vries, Ulf Bernitz and Stephen Weatherill, 'Introduction' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument : Five Years Old and Growing* (Hart Publishing 2015) 2.
[34] See Chapter 5, Section 2

b.) The Future of Fundamental Rights Review

For some, the decision to accord the CFR the same legal status as the EU Treaties would likely increase the profile of rights-based claims within the context of challenges to the legality of EU legal acts.[35] Claimants would now be able to point to a clear set of rights that are legally binding upon the EU institutions.[36] In turn, this would lead to the CJEU being "faced with a change in the profile of judicial review actions, with an increasing number of such claims having a strong rights-based component."[37]

Stone Sweet predicted in 2010 that as rights-oriented litigation increased in the EU legal order, the CJEU would also come to find fundamental rights issues being implicated in almost any case that arose before it.[38] In his view, there was "every reason to expect that rights preoccupations will gradually infuse the exercise of all of the Court's competences, much like it does that of other national constitutional courts in Europe."[39] Furthermore, the obligation that the EU accede to the ECHR[40], along with increased references from national courts regarding the compatibility of EU legislation with fundamental rights norms, would put pressure on the CJEU and "force [it] to review the legality of EU acts much more robustly than it has to this point in time."[41]

The possibility that the CJEU would come to subject EU legislation to more rigorous or intensive fundamental rights review in the post-Lisbon era was further supported by the Charter's limitation clause in Article 52(1) CFR. According to that provision:

> "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms.

[35] Paul Craig, *EU Administrative Law* (Oxford University Press 2012) 493.
[36] ibid.
[37] ibid; See similarly Damian Chalmers, 'Judicial Authority and the Constitutional Treaty' (2005) 3 International Journal of Constitutional Law 448, 463.
[38] Alec Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance' (2010) 5 Living Reviews in European Governance 5, 37.
[39] ibid.
[40] Article 6(2) TEU inserted by the Treaty of Lisbon required the EU to accede to the ECHR. At the time of writing, this has not been achieved. The prospects of such accession being attained in the near future seem unlikely following the CJEU's opinion that the draft agreement on EU accession to the ECHR was incompatible with various aspects of the EU legal order, see *Opinion 2/13 of the Court of Justice, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:2014:2454.
[41] Sweet (n 38) 37.

> Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."[42]

In contrast to previous epochs in the history of the European integration project, the limitation clause in Article 52(1) CFR explicitly required the CJEU to consider whether the essence of rights had been respected. Moreover, the reference to the principle of proportionality, necessity and the need to genuinely meet EU objectives of EU general interest suggested a more robust form of fundamental rights review might take hold in the post-Lisbon era.[43] As shall be demonstrated in Chapter 8, the elevation of the CFR to legally binding has indeed resulted in a notable shift in the methodology and intensity of constitutional review of EU legislation in recent years.

4.) Reforming the Federal Order of Competences

A further major reform to the EU legal order by the Treaty of Lisbon relates to the question of competence. In recognition that the insertion of a series of federalism principles via Article 3b EC in the Maastricht Treaty had largely failed to allay concerns about EU "competence creep", the desire to establish a clearer division of competences between the EU and its Member States was placed firmly on the political agenda from the early 2000s onwards.[44]

Declaration 23 of the Nice Treaty provided that future discussions over Treaty reform should consider "how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity."[45] Similar calls were made in the Laeken Declaration of 2001 on the future of the European Union, which sought "a better division and definition of competence in the European Union."[46]

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[42] Article 52(1) CFR.
[43] Dorota Leczykiewicz, '"Constitutional Justice" and Judicial Review of EU Legislative Acts' in Dimitry Kochenov, G De Búrca and Andrew Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015) 104–105.
[44] Stephen Weatherill, 'Competence Creep and Competence Control' (2004) 23 Yearbook of European Law 1.
[45] Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts [2001] Declarations Adopted by the Conference - Declaration on the Future of the Union, OJ C 80.
[46] Laeken Declaration of 15 December 2001 on the Future of the European Union, SN 300/1/01 REV 1 3.

In the run up to the Lisbon Treaty, further consideration was given to the question of competence and the balance of powers between the EU and the Member States. A particular emphasis was placed upon those open-ended, purposive legal bases in the Treaty. The competence to enact harmonisation legislation for purposes of the establishment and functioning of the internal market attracted considerable attention.[47] For Craig, these discussions amongst the leaders of the Member States reflected a "predominant concern…that Article 5 provided scant protection for State rights, and little safeguard against an ever-increasing shift of power from the states to the EU…"[48]

a.) Limiting the Existence of EU Legislative Power: Conferral and the Catalogue of Competences

Against this background, the Lisbon Treaty is to be noted for the emphasis that it placed upon the principle of conferral in the common provisions of the TEU and TFEU.

Article 5(1) TEU now provides that the limits of Union competences are governed by the principle of conferral. This is followed by Article 5(2) TEU, which states that "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."[49] Furthermore, Article 4(1) TEU further stresses that, in accordance with Article 5 TEU, competences not conferred upon the EU in the Treaties remain with the Member States.[50]

This reinforcement of the principle of conferral is supplemented by an attempt to distinguish between: (i) exclusive; (ii) shared and; (iii) supporting, coordinating or supplementary competences in Articles 2-6 TFEU. These three categories of competence seek to provide "expectations to citizens, as well as public officials, as to the fields in which the Union may legitimately act."[51] Despite not explicitly including a list of specific

[47] Michael Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) 45 Common Market Law Review 617, 654.
[48] Paul Craig, *The Lisbon Treaty* (Oxford University Press 2013) 156.
[49] Article 5(2) TEU.
[50] Article 4(1) TEU.
[51] Mark Dawson, 'The Political Face of Judicial Activism: Europe's Law-Politics Imbalance', *Judicial activism at the European Court of Justice* 14.

competences reserved exclusively to the Member States (and thus beyond the legislative reach of the EU institutions), the Lisbon reforms nonetheless seek to limit the scope of EU legislature's competences in certain ways. For example, the EU legislature is prohibited from enacting harmonisation legislation in areas of supporting, coordinating or supplementary competences per Article 2(5) TFEU.[52]

In Azoulai's view, this "overabundance" of provisions limiting the existence of EU competences in the Lisbon Treaty illustrates that the Member States "were clearly concerned with setting boundaries to the Union's action."[53]

b.) Striking a Balance Between Competence Control and Flexibility

One plausible interpretation of these reforms is that the drafters of the Treaties were seeking to establish a balance of competences in the EU legal order that operated along the lines of dual federalism as discussed in Chapter 5. According to this view, the overarching purpose behind the persistent references to the limits of EU competences was to carve out two, mutually exclusive and reciprocally limiting fields of EU and Member State powers.[54]

If such an approach were to be followed, the result, for example, would be that harmonisation legislation enacted under Article 114 TFEU would henceforth be deemed to be unconstitutional whenever it impacted upon policy fields where harmonisation had been explicitly excluded by the EU Treaties (e.g. public health, education, tourism etc.[55]) This would involve a considerable shift away from the established, pre-Lisbon position which provided that, so long as the conditions for recourse to Article 114 TFEU were satisfied, EU legislation could not be impugned on the grounds that public health protection etc. were decisive factors in the choices taken by the EU legislature.[56]

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[52] Read alongside Article 6 TFEU, the prohibition on harmonisation legislation applied to policy areas such as tourism, culture and the protection and improvement of human health see Robert Schütze, 'Co-Operative Federalism Constitutionalized: The Emergence of Complementary Competences in the EC Legal Order' (2006) 2 European Law Review 167.

[53] Loïc Azoulai, 'Introduction' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press 2014) 10–11.

[54] Ernest A Young, 'Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism' (2002) 77 New York University Law Review 1612, 1464–1469.

[55] Articles 2(5) and 6 TFEU.

[56] *Case C-210/03, Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health,* EU:C:2004:802 para 31.

That being said, it is generally accepted the drafters of the Lisbon Treaty did *not* intend to strictly separate EU and Member State competences in this way.[57] Whilst recognising the need for better competence monitoring and control, it was also deemed necessary from the early 2000s onwards to retain a considerable degree of flexibility within the system. The pursuit of further European integration within the context of the broadly stated aims and objectives of the Treaties continued to speak against placing rigid limits upon the existence of EU competences.[58] Indeed, attempts at strictly separating EU from Member State competences were viewed as posing significant costs in terms of inflexibility, with the prospect of diminishing the EU's capacity to effectively act to address the manifold objectives entrusted to it under the Treaties.[59]

This much is clear when one considers the EU's competence to enact harmonisation legislation under Article 114 TFEU. Despite being specifically cited as a major source of "competence creep" in the 2001 Laeken Declaration, the Member States decided *not* to amend Article 114 TFEU.[60] Somewhat remarkably, for all the discussion over the problems of open-ended, functional competences during the Treaty reform process, the EU legislature's power to enact internal market harmonisation legislation "survived that reform process unscathed."[61] Indeed, the wording of this core legislative competence remained virtually identical to its predecessor provision of Article 95 EC.[62] The Lisbon Treaty therefore did not provide the Court with new, legally operational criteria that could be utilised to further limit the existence of EU legislative powers in the internal market. The same open-ended, purposive framing of Article 114 TFEU would continue alongside the same generally worded principle of conferral in Article 5 TEU.

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[57] Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 German Law Journal 827, 850–851; For a discussion of the relevant provisions of the failed European Constitutional Treaty which then made it in to the Treaty of Lisbon see Franz C Mayer, 'Competences—Reloaded? The Vertical Division of Powers in the EU and the New European Constitution' (2005) 3 International Journal of Constitutional Law 493, 498–500.

[58] "How are we to ensure at the same time that the European dynamic does not come to a halt?" Laeken Declaration of 15 December 2001 on the Future of the European Union, SN 300/1/01 REV 1 4.

[59] Weatherill (n 57) 851.

[60] Dougan (n 47) 654.

[61] Bruno De Witte, 'A Competence to Protect' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 45.

[62] Kathleen Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis* (Oxford University Press 2014) 318.

Given the central importance of the EU's competence to enact harmonisation legislation and its major contribution to concerns about competence creep over the years, the degree of continuity with the past is indicative here. By leaving things pretty much as they were, the Member States were not seeking to place excessive or overly restrictive limits upon the existence of EU legislative power. There was certainly no intention of redesigning this core legislative competence along the lines of dual federalism mentioned above. As Tridimas puts it, the Lisbon Treaty does not aim to:

> "[C]reate bright lines between EU and national competences, nor does it avoid intricate problems of interpretation. The division of powers between the EU and the Member States, as in any constitutional model, is inherently unstable. The pursuit of red lines that politicians crave so much and the search for impregnable bastions of national sovereignty remain elusive."[63]

At the same time, however, there can be little doubt that the Lisbon Treaty sought to address the persisting problem of competence creep and to prevent the expansion of EU legislative power into sensitive policy areas.[64]

This further highlights the fundamental and persistent tension which sits at the heart of the European integration process. As noted in the previous chapter, successive rounds of Treaty amendment have continuously expanded the competences of the EU institutions into ever-greater areas of policymaking. These same reforms have also sought to render law-making on the European level more efficient, by enhancing the role of the EU institutions and decreasing the influence that individual member states have within the EU legislative process.[65] At the same time, however, the Member States have sought to place more meaningful legal and political limits upon the powers of the EU institutions.

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[63] Takis Tridimas, 'Competence after Lisbon: The Elusive Search for Bright Lines' in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon* (Cambridge University Press 2012) 49.

[64] Sacha Garben and Inge Govaere, 'The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future' in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing 2017) 7.

[65] The expansion of QMV in the Council and the empowerment of the European Parliament are the classic examples here.

The key question to be resolved, therefore, was how to achieve the aim of placing more meaningful limits upon EU legislative power without excessively restricting its flexibility to meet the challenges of further integration?

5.) The Further Proceduralisation of the EU Legislative Process

Rather than seeking to place novel, robust limits upon the *existence* of core EU legislative competences, the answer provided by the Lisbon Treaty was to reinforce the means through which the *exercise* of EU legislative power could be effectively monitored and controlled.[66] In particular, the Lisbon Treaty aimed at strengthening the principles of subsidiarity (Article 5(3) TEU) and proportionality (Article 5(4) TEU). This appeared to be a more promising way of ensuring an effective balance of competences while also preserving a sufficient degree of EU legislative discretion and flexibility.[67]

In seeking to render these principles more effective as limits upon the exercise of EU competences, much faith was placed in an enhanced degree of "proceduralisation" in the EU legislative process.[68]

As Chapter 5 has demonstrated, the Amsterdam Treaty had already attempted to inject a degree of proceduralisation into the EU legislative process by laying down a series of guidelines on the application of the principle of subsidiarity and proportionality.[69] However, this largely failed to bring about a satisfactory system for ensuring that these principles were adequately considered and enforced. The EU's legislative institutions appeared not to give much consideration to the principles during the law-making process, with final legal acts often containing terse explanations as to why subsidiarity and proportionality had been complied with.[70]

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[66] On the distinction between the existence and exercise of EU competences see Paul Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 Common Market Law Review 395, 425–426.

[67] For an institutional endorsement of this balanced view see Convention on the Future of Europe Draft Constitution - Commission Statement, IP/03/836, Brussels (13 June 2003).

[68] Xavier Groussot and Sanja Bogojević, 'Subsidiarity as a Procedural Safeguard of Federalism' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press 2014).

[69] Protocol (No 30) annexed to the Treaty establishing the European Community by the Treaty of Amsterdam [1997] OJ C 340.

[70] Derrick Wyatt, 'Could a "Yellow Card" for National Parliaments Strengthen Judicial as Well as Political Policing of Subsidiarity?' (2006) 2 Croatian Yearbook of European Law & Policy 1, 10.

Furthermore, the CJEU was widely criticized for failing to engage in any meaningful degree of scrutiny of whether EU legislation complied with the substantive or even procedural aspects of subsidiarity. It was therefore argued in the previous Chapter that, within the context of federalism disputes, the EU legislature was placed under a very limited burden to justify the constitutionality of its actions prior to the Lisbon Treaty.

a.) Protocol No.2

In light of these failings, the most important example of enhanced "proceduralisation" of EU law-making in the Lisbon Treaty is Protocol No. 2, which offers specific guidelines for rendering the principles of subsidiarity and proportionality operational in practice.[71] When compared to its predecessor in the Treaty of Amsterdam, it has been noted that the new Protocol has been almost completely rewritten so that it now focuses almost entirely on procedural aspects.[72]

Under Protocol No.2, the Commission is obliged to consult widely before proposing legislative acts and must forward draft legislative acts to national parliaments at the same time as it does to the Union legislator (i.e. Council and European Parliament.)[73] These draft legislative acts must be justified with regard to the principles of subsidiarity and proportionality and must contain a detailed statement making it possible to appraise compliance with those principles.[74] Article 5 of the Protocol provides a series of guidelines for determining whether the requirements of subsidiarity have been met in a given instance. According to that provision, the statement justifying EU legislation's compliance with the principles of subsidiarity and proportionality should contain some assessment of the proposal's financial impact. Furthermore, the reasons for concluding that an EU objective can be better achieved at European level must be substantiated by qualitative and, wherever possible, quantitative indicators. Finally, all draft legislative acts must ensure that financial or administrative burdens falling upon the EU, national governments, regional

[71] Groussot and Bogojević (n 68) 237; Robert Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism' (2009) 68 Cambridge Law Journal 525, 531.
[72] Groussot and Bogojević (n 68) 237; Jean-Victor Louis, 'The Lisbon Treaty: The Irish "No".: National Parliaments and the Principle of Subsidiarity – Legal Options and Practical Limits' (2008) 4 European Constitutional Law Review 429, 433.
[73] Protocol No. 2 Articles 2 and 4.
[74] ibid Article 5.

and local authorities, economic operators and citizens be minimised and commensurate with the objective being pursued.[75]

When it comes to monitoring and enforcement, national parliaments have been given a role in ensuring that draft legislative acts of the EU institutions comply with the principle of subsidiarity. Providing that certain voting thresholds are met by national parliamentary chambers across the Member States, the national parliaments may collectively issue non-binding warnings that a particular proposal does not comply with subsidiarity.[76] In response to such concerns being expressed, the Commission may decide to maintain, amend or withdraw its legislative proposal and it must provide reasons for its decision.[77]

Crucially, the involvement of national parliaments in the initial stages of the legislative process applies only to draft legislative acts and not to other forms of EU legal acts. This serves to further distinguish, in legal terms, EU legislative acts from all other types of EU acts.[78] Moreover, it has been claimed that the recruitment of national parliaments as monitors of subsidiarity compliance, coupled with the enhanced procedural obligations placed upon the EU institutions when drafting legislative acts, will serve to enhance parliamentary and thus public scrutiny of the EU's legislative process.[79]

Overall, the Lisbon Treaty reforms sought to place the EU legislature under an increased number of procedural obligations to consider the subsidiarity implications of proposed legislative activity.[80] By instilling a duty to circulate draft legislative acts around national parliaments and the EU's legislative institutions, an incentive to take subsidiarity more seriously than hitherto was created. In future, draft legislation would not only have to be sufficiently justified in terms of its compliance with subsidiarity, but these justifications would then be subject to scrutiny by a greater number of actors.

[75] ibid Article 5.
[76] See Article 12 TEU and Protocol No.2 Articles 6 and 7.
[77] Protocol No.2 Article 7.
[78] Herwig CH Hofmann, Gerard C Rowe and Alexander H Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011) 127.
[79] Ian Cooper, 'The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU' (2006) 44 JCMS: Journal of Common Market Studies 281.
[80] Groussot and Bogojević (n 68).

In particular, the enhanced monitoring role of national parliaments had the potential to increase the quality of ex ante subsidiarity compliance by the EU legislature.[81]

b.) The Rise of Better Regulation

In addition to Treaty reform, a similar shift towards enhanced proceduralisation in the EU legislative process has also taken place through a series of non-binding, "Better Regulation" initiatives in recent years.[82] Generally speaking, these initiatives aim to ensure that political decisions at the EU level are prepared in an open and transparent manner, informed by the best evidence available and supported by the comprehensive involvement of citizens and other key stakeholders.[83]

The flagship initiative in this regard is the Impact Assessment (IA). According to the most recent IA guidelines published by the European Commission, the IA process involves the gathering and analysing of evidence in order to support policymaking.[84] It "verifies the existence of a problem, identifies its underlying causes, assesses whether EU action is needed, and analyses the advantages and disadvantages of available solutions."[85] IAs are required for all Commission initiatives that are likely to have significant economic, environmental or social impacts.[86] Consequently, they have become a key feature in the early stages of the EU policymaking process and are consistently used when preparing proposals for EU legislation in core areas of competence such as the internal market.

From the perspective of the EU's federal balance of competences, IAs require that policy proposals be scrutinised for compliance with the principles of subsidiarity and proportionality.

[81] Dougan (n 47) 659.
[82] Anne Meuwese and Patricia Popelier, 'Legal Implications of Better Regulation: A Special Issue' (2011) 17 European Public Law 455.
[83] Commission Staff Working Document, "Better Regulation Guidelines", SWD (2017) 350 (Brussels, 7 July 2017) 4.
[84] Better Regulation Guidelines 2017; There were also previous versions of the guidelines. For the purposes of the present enquiry, the salient provisions in the latest IA guidelines remain virtually unchanged from previous versions. Reference is therefore made to the most recent version of the guidelines throughout, see Commission Staff Working Document, "Better Regulation Guidelines", SWD (2015) 111 (Strasbourg, 19 May 2015); European Commission, Impact Assessment Guidelines, SEC(2009) 92 (Brussels, 15 January 2009); European Commission, Impact Assessment Guidelines, SEC (2005) 791/3 (Brussels, 15 June 2005).
[85] Better Regulation Guidelines 2017 15.
[86] ibid.

With regards to subsidiarity, the guidelines provide that consideration should be given to: "whether the problem addressed has transnational aspects which cannot be adequately addressed by action by the Member States and whether action at the EU level would produce greater benefits compared to action taken solely at the level of the Member States due to its scale or effectiveness."[87]

Furthermore, all policy proposals must be evaluated in light of the principle of proportionality, with particular attention being paid to less restrictive alternatives. Consideration must be given to: (i) whether different options would achieve the same objectives; (ii) the benefits versus the costs; (iii) the coherence of different options with the overarching objectives of the EU; (iv) whether the proposed option goes beyond what is necessary to achieve those objectives; and (v) if the option is limited to issues that the EU can better address and which the Member States cannot satisfactorily achieve on their own.[88]

There must be a continual process of evaluation of these issues. The Commission is required to provide reasoning as to subsidiarity and proportionality compliance at the early stages of policy planning and throughout the preparatory phases of drawing up legislative proposals.[89] Throughout this process, different stakeholders are able to comment on, inter alia, the subsidiarity and proportionality aspects of proposed EU legislative action. Only once all relevant information is collected and analysed will it then be possible to make a final determination as to the proposal's compliance with the principles of subsidiarity and proportionality.[90]

Oversight of the IA process is conducted by a Regulatory Scrutiny Board (formerly Impact Assessment Board) which provides independent quality support and control for IAs prepared by the Commission.[91] The Board carries out an objective quality assessment of draft IAs and issues an opinion on each draft that is submitted to it. For IAs, a positive opinion from the Board is required before the next phases in finalizing a legislative proposal

[87] ibid 19.
[88] ibid 28–29.
[89] ibid 17–27.
[90] ibid 19.
[91] Decision of the President of the European Commission on the Establishment of an Independent Regulatory Scrutiny Board, C (2015) 3263 final, (Strasbourg, 19 May 2015).

can continue. In situations where a negative opinion is provided, the draft report must be reviewed and resubmitted to the Board.[92] The opinions on IAs are then made public once the Commission has formally adopted the relative legislative proposal.[93]

Of particular note here is the role that the Board plays in scrutinizing the Commission's reasoning with regards to a particular proposals' compliance with the principles of subsidiarity and proportionality. As the annual reports on subsidiarity and proportionality make clear, the Board has "frequently asked for stronger justification of the need for action at EU level."[94] In particular, it has highlighted "the need for more evidence of problems that require action at EU level"[95]; "concluded that the evidence base to demonstrate the need for and proportionality of an EU legislative initiative remained weak"[96]; asked "for a better justification of the proportionality of the initiative"[97], and "sought to clarify the added value and necessity of action at EU level as opposed to Member State level."[98]

Once approved, the final Impact Assessment forms part of an Explanatory Memorandum which provides an overall explanation of the Commission's legislative proposal. This memorandum is required for all legislative proposals that are to be adopted by the European Parliament and Council and it is transmitted alongside the legislative proposal to the EU institutions.[99]

Amongst other things, the Explanatory Memorandum explains the legal basis of the proposed legislation, along with the reasons why the proposal complies with the principles of subsidiarity and proportionality. It also contains an overview of the results from stakeholder consultations and the findings of any Impact Assessment(s) that have been conducted. Reference is made to revisions of the Impact Assessment in light of opinion(s) from the Regulatory Scrutiny Board. An explanation is also provided as to which policy

[92] Better Regulation Toolbox, Tool #3, Role of the Regulatory Scrutiny Board, available at: https://ec.europa.eu/info/sites/info/files/file_import/better-regulation-toolbox-3_en_0.pdf (last accessed 09.05.2019) 15–16.
[93] Decision Establishing Regulatory Scrutiny Board, C (2015) 3263 5.
[94] Report from the Commission on Subsidiarity and Proportionality (19th Report on Better Lawmaking covering the year 2011) COM/2012/0373 final Section 2.1.
[95] ibid.
[96] ibid.
[97] Report from the Commission Annual Report 2014 in Subsidiarity and Proportionality, COM/2015/0315 final Section 2.1.
[98] ibid.
[99] Better Regulation Guidelines 2017 38.

alternatives were examined, how they compare and why the final legislative proposal was chosen as the best means of proceeding.[100]

c.) Evaluation

When taken together, the obligations contained in Protocol No.2, coupled with the increased use of Impact Assessments, have led to a much greater degree of proceduralisation in the EU legislative process. By requiring the EU institutions to consider the principles of subsidiarity and proportionality at various stages in the law-making process - and to provide reasons for their conclusions - the reforms "go a long way towards fostering a justificatory practice and help limit the danger of arbitrary intergovernmental or supranational rule-making."[101] Moreover, the decision to involve national parliaments in subsidiarity monitoring speaks to an "enhanced general need for justification in legislative drafts as to how they may be considered respectful of the EU's constitutional framework."[102]

When viewed from the perspective of the EU's federal balance of competences, these reforms represent a significant strengthening of the political safeguards of federalism in the post-Lisbon EU.[103] Moreover, the emphasis placed upon proceduralisation and the involvement of different national and European political actors indicates a strong preference for entrusting the federal balance of competences to the political process.[104]

This much is clear when one considers the process that led to the drafting of the relevant sections of the rejected Constitutional Treaty that were largely retained by the Lisbon Treaty.[105] According to the working group on subsidiarity, monitoring compliance with subsidiarity should be primarily preventative in nature and occur within the legislative

[100] ibid 38–39.
[101] Jürgen Neyer, *The Justification of Europe: A Political Theory of Supranational Integration* (Oxford University Press 2012) 139.
[102] Isidore Maletić, 'The Role of the Principle of Subsidiarity in the EU's Lifestyle Risk Policy' in Alberto Alemanno and Amandine Garde (eds), *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets* (Cambridge University Press 2014) 202.
[103] Schütze, 'Subsidiarity after Lisbon' (n 71) 529.
[104] Ernest A Young, 'A Comparative Perspective' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles of European Union law* (Oxford University Press 2018) 154–155; Weatherill (n 44) 48.
[105] Gabriél A Moens and John Trone, 'The Principle Of Subsidiarity in EU Judicial And Legislative Practice: Panacea Or Placebo?' (2015) 41 Journal of Legislation 65, 85.

process itself.[106] Since the principle was "of an essentially political nature" and involved exercises of political discretion as to the appropriate level of legislative intervention, monitoring compliance with that principle should take place prior to the entry into force of the measure in question.[107]

This general shift towards proceduralisation and increased emphasis upon the legislative process also led to some speculation about the CJEU's approach to conducting constitutional review of EU legislation in the post-Lisbon Treaty era.[108] For some, the addition of a series of novel procedural obligations upon the EU institutions to consistently evaluate whether EU legislative proposals complied with the principles of subsidiarity and proportionality could impact upon the CJEU's approach to constitutional review.[109] For example, Bermann posited that such obligations would result in an "analytic and documentary trail" being available to the Court should it wish to "take a harder look" at the output of the other EU institutions.[110] In essence, the more information made available from the making of the initial legislative proposal will result in more evidence being accessible to the Court when checking its legality.[111]

6.) Conclusion

These reforms to the legal and political order of the EU bring one back to the core research question of the changing role of the CJEU over time. In the post-Lisbon Treaty era, how would the Court conduct constitutional review of primary EU legislation in both federalism and fundamental rights cases? Would any change in the reasoning of the Court materialize when compared to its previous record of consistently adopting a light-touch, tersely reasoned approach to scrutinising EU legislation? Given that legislative acts adopted under a

[106] Conclusions of Working Group I on the Principle of Subsidiarity, CONV 286/02.
[107] ibid 2.
[108] George A Bermann, 'The Lisbon Treaty: The Irish 'No': National Parliaments and Subsidiarity' (2008) 4 European Constitutional Law Review 453, 457–458; Alberto Alemanno, 'The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission's Walls or the Way Forward?' (2009) 15 European Law Journal 382, 382.
[109] David Keyaerts, 'Courts as Regulatory Watchdogs : Does the European Court of Justice Bark or Bite?' in Mazmanyan and Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2012); Elaine Mak, 'Judicial Review of Regulatory Instruments: The Least Imperfect Alternative?' (2012) 6 Legisprudence 301.
[110] Bermann (n 108) 458; Groussot and Bogojević (n 68) 248–249; Craig, 'The ECJ and Ultra Vires Action' (n 66) 411–412.
[111] Alemanno, 'A Meeting of Minds' (n 77) 504.

legislative procedure were now premised upon the principle of representative democracy, would they be entitled to (even more) deference from the CJEU? What impact, if any, would the proceduralisation of the legislative process and the concerted effort to strengthen the political safeguards of federalism have in this regard?

With these questions in mind, the remainder of this thesis moves to examine the federalism and fundamental rights jurisprudence of the CJEU in the post-Lisbon Treaty era. It is contended that in both categories of constitutional review cases, a series shifts in the methodology and intensity of constitutional review may be detected.

In marked contrast with its earlier jurisprudence, the Court has recently come to subject EU legislation to "high-intensity" review. In cases of serious interference with fundamental rights or core constitutional principles of the EU legal order, the CJEU has explicitly limited the scope of discretion afforded to the EU legislature and engaged in strict scrutiny of the substance of contested legislation.

Beyond these rare examples of serious interference, the Court increasingly adopts a "process-oriented" approach to constitutional review. This is achieved by scrutinising the legislative process and evidence base upon which contested EU legislation was enacted to ensure that all relevant facts and circumstances were taken into consideration by the EU legislature. In recognition that the abovementioned trend towards proceduralisation has entrusted the political process with the primary responsibility for ensuring that the EU's core constitutional rights and principles are respected, the Court's process-oriented approach seeks to bolster that process and improve the ways in which the EU legislature takes its decisions.

These developments in the methodology and intensity of constitutional review of EU legislation then form the basis for evaluating the contemporary role of the CJEU within the post-Lisbon Treaty European Union. By engaging in a finely calibrated, variable intensity approach to constitutional review, it is argued that the contemporary CJEU is one that takes its responsibilities as a veritable constitutional court within a more mature EU legal order seriously.

Chapter 7

Towards Process-Oriented Review in Federalism Cases

1.) Introduction

The final two chapters of this thesis examine the jurisprudence of the CJEU in cases where it has been called upon to review the constitutionality of EU legislation on federalism and fundamental rights grounds. By focusing upon the principles of conferral, subsidiarity and proportionality enshrined in Article 5 TEU, the present chapter argues that there have been a series of shifts in the Court's federalism jurisprudence in recent years.

In a notable departure from past practice, the CJEU has shown an increased willingness to refer to the legislative process and evidence base upon which EU legislation was enacted when reviewing its constitutionality.[1] Under this novel, "process-oriented" approach to constitutional review, the CJEU examines whether the EU legislature has complied with the procedural obligations laid down in the Treaties and scrutinises whether legislative choices are based upon sufficient evidence and reasoning.[2] In particular, the CJEU has made reference to Protocol No.2 on the principles of Subsidiarity and Proportionality, Impact Assessments and other preparatory documents used throughout the legislative process when reviewing whether the EU's federalism principles have been complied with.

In adopting such a process-oriented approach to constitutional review, the CJEU indicates to the EU institutions that the political process on the European level is primarily responsible for ensuring that the EU's federalism principles are respected. The Court then typically defers to the substantive outcomes of that political process. It opts not to second-guess the merits of legislative choices by engaging in high-intensity or strict review of EU legislation for compliance with the principles enshrined in Article 5 TEU. Instead, the CJEU's objective is to ensure that the political process on the federal level takes all relevant facts and

[1] Jacob Öberg, 'The Rise of the Procedural Paradigm: Judicial Review of EU Legislation in Vertical Competence Disputes' (2017) 13 European Constitutional Law Review 248, 256; Ittai Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6 Legisprudence 271.

[2] K Lenaerts, 'The European Court of Justice and Process-Oriented Review' (2012) 31 Yearbook of European Law 3, 3.

circumstances into account and operates in a manner that is responsive to federalism concerns.[3] In so doing, the focus moves towards "improving the decision-making process of the EU institutions, rather than on second-guessing their substantive findings."[4]

These changes in the Court's case law have not come about in isolation, but are to be viewed in light of recent trends towards enhanced proceduralisation of the EU legislative process. As Chapter 6 demonstrated, the EU's legislative institutions have come under an increased number of procedural obligations in recent years. When preparing, proposing and considering draft EU legislation, the institutions are required to consult widely, obtain input from a variety of different actors and accompany such proposals with robust justification vis-à-vis their compliance with the EU's federalism principles.[5] With the political safeguards of federalism strengthened, the Court plays an important, yet secondary, role as a "referee" within that multifaceted EU political process, "policing and maintaining the system of political and institutional checks that we ordinarily rely on to prevent or resolve most problems."[6] This approach "increases judicial scrutiny over the decision-making process of the EU institutions" whilst preventing the CJEU from "intruding into the realm of politics."[7]

2.) **The Principle of Conferral Post Lisbon**

The claim that the contemporary jurisprudence of the CJEU evinces a shift towards process-oriented review in federalism cases rests primarily upon changes to its reasoning around the principles subsidiarity and proportionality. This is consistent with the general thrust of reforms in both the Lisbon Treaty and Better Regulation initiatives, which have sought to "proceduralise" those constitutional principles governing the *exercise* rather than the *existence* of EU competences.

a.) A Shift in Focus: From the Existence to the Exercise of EU Competences

[3] For a US perspective see Calvin R Massey, 'Etiquette Tips: Some Implications of Process Federalism' (1994) 18 Harvard Journal of Law & Public Policy 175, 211.
[4] Lenaerts (n 2) 15.
[5] Consolidated Version of the Treaty on the Functioning of the European Union - Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality [2008] OJ C 115, p. 206–209,.
[6] Ernest A Young, 'Two Cheers for Process Federalism' (2001) 46 Villanova Law Review 1349, 1354; Tuan N Samahon, 'No Praise for Process Federalism: The Political Safeguards Mirage and the Necessity of Substantial, Substantive Judicial Review' (2016) 61 605, 609.
[7] Lenaerts (n 2) 15.

This shift in emphasis away from curtailing the *existence* of EU competences (conferral) towards placing meaningful limits upon the *exercise* of EU competences (subsidiarity and proportionality) was recently recognised by Advocate General (AG) Kokott. In the case of *Poland v Parliament and Council*, Poland challenged the validity of EU internal market legislation that regulated, inter alia, flavourings in tobacco products. In Poland's view, the legislation in question went beyond the permissible scope of Article 114 TFEU, thus infringing the principle of conferral. Furthermore, it was alleged that aspects of the legislation infringed the principles of subsidiarity and proportionality.[8]

In rendering her opinion in the case, AG Kokott began by stating that the dispute at hand was different from previous Article 114 TFEU cases since it did not, in principle, question the suitability of Article 114 TFEU as a legal basis for the legislation per se. Instead, the case concerned only certain specific aspects of exercising that internal market competence.[9] In her view, therefore, "legislative competence no longer plays such a central role as it previously did." Instead, "[i]nterest is now focused on the question whether [the Directive] is compatible with the principle of proportionality. It is also necessary to clarify the requirements stemming from the principle of subsidiarity for provisions like those at issue."[10]

Despite this increased emphasis being placed upon subsidiarity and proportionality, it is nonetheless necessary to first examine how, if at all, the CJEU's jurisprudence pertaining to the principle of conferral has altered in recent years.

b.) <u>The Story so Far</u>

The principle of conferral provides that the EU shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the EU in the Treaties remain with the Member States.[11] As discussed in Chapter 5, within the context of the EU's core competence to enact harmonisation legislation, the CJEU has rendered the principle of conferral

[8] *Case C-358/14, Poland v European Parliament and Council,* ECLI:EU:C:2016:323.

[9] *Opinion of Advocate General Kokott, Case C-358/14, Poland v Parliament and Council,* ECLI:EU:C:2015:848 para 2.

[10] ibid para 2.

[11] Article 5(2) TEU.

operational by stipulating a number of conditions that must be met before legislation may be enacted on the basis of Article 114 TFEU.[12]

In essence, in order to be "constitutionally valid", the EU legislature must "make a plausible case that the act either helps to remove disparities between national provisions that hinder the free movement of goods, services or persons or that cause distorted conditions of competition."[13] Additionally, the legislature may demonstrate that EU legislation aims to prevent the emergence of future obstacles to trade arising from the divergent development of national rules, provided the emergence of such obstacles is likely and the EU measure is designed to prevent them.[14] Without making such a plausible case, the Court will annul the measure in question as going beyond the scope of the EU legislature's powers as set down in Article 114 TFEU.[15]

Prior to the entry into force of the Lisbon Treaty, the Court's jurisprudence was notable for engaging in low intensity review of EU legislation when determining whether these conditions had been satisfied. In a number of cases, the EU legislature seemed to be able to satisfy the Court that harmonization legislation fell within the scope of Article 114 TFEU (and thus complied with the principle of conferral) by simply inserting statements to that effect in the recitals to EU legislation.[16] These recitals were routinely cited with approval by the CJEU, who opted not to subject the underlying assumptions or veracity of such statements to any meaningful degree of scrutiny. The consensus, therefore, was that the Court had not "traditionally shown a great deal of interest in closely examining the question whether a given exercise of legislative authority is or is not constitutionally justified by reference to the…[EU] Treaty's harmonization provisions."[17]

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[12] See Chapter 5, Section 5

[13] Bruno De Witte, 'A Competence to Protect' in Philip Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2012) 36.

[14] *Case C-380/03, Germany v European Parliament and Council* ECLI:EU:C:2006:772 para 38.

[15] *Case C-376/98, Germany v European Parliament and Council (Tobacco Advertising One)* ECLI:EU:C:2000:544.

[16] Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law Has Become a "Drafting Guide"' (2011) 12 German Law Journal 827.

[17] Kalypso Nicolaïdis, Robert Howse and George A Bermann (eds), 'The Role of Law in the Functioning of Federal Systems', *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford University Press 2001) 199.

This unsatisfactory state of affairs led to calls for the Court to demand more by way of justificatory evidence and reasoning as to why the conditions necessary for recourse to Article 114 TFEU had been satisfied.[18] To recall from Chapter 5, the CJEU was urged to look beyond the recitals to the legislative act itself and to closely examine documents utilised throughout the legislative process such as explanatory reports and Impact Assessments (IA).[19] In so doing, the Court could determine whether the EU legislature sufficiently considered and justified why its proposed action fell within the scope of Article 114 TFEU.[20]

When viewed against these aspirations, something of a mixed picture emerges in the post-Lisbon Treaty jurisprudence pertaining to the principle of conferral. On the one hand, there continue to be examples of the Court subjecting EU legislation to incredibly light-touch review where it is challenged on the basis of going beyond the constitutionally permissible limits of Article 114 TFEU. On the other, there are sporadic examples of the Court adopting a more process-oriented approach of the sort described above.

c.) Continuity with the Past

One of the key conditions which operationalises the principle of conferral within the context of Article 114 TFEU is that EU harmonisation legislation is aimed at, and designed to prevent, the "likely" emergence of future obstacles to trade caused by divergent national laws.[21] In terms of what constitutes an obstacle to trade, the Court has held that the mere existence (or likely future emergence) of divergent national measures laying down requirements to be met by particular products are liable, in themselves, to constitute obstacles to the free movement of goods.[22] With such a wide-ranging interpretation being consistently given to the concept of obstacles to trade, much depends on how the "likelihood" criterion is interpreted and applied by the Court.

i.) Inuit

[18] Paul Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 Common Market Law Review 395, 411.

[19] See Chapter 5, Section 6

[20] Craig (n 18) 412; Gareth Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 European Law Journal 2, 18.

[21] *Case C-210/03, Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health,* EU:C:2004:802 para 30.

[22] *Case C-491/01, The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd (BAT)* ECLI:EU:C:2002:741 para 64.

Indications that not much had changed on this front after the Lisbon Treaty had entered into force came in the *Inuit* case.[23] The applicants challenged the legality of an EU Regulation banning the placing of seal products on the internal market (except for those procured by traditional Inuit hunts) on the grounds that this went beyond the permissible scope of Article 114 TFEU. In their view, the preamble to the Regulation contained only vague and general assertions regarding the disparities between national rules, the risk of infringements to fundamental freedoms, or distortion to competition. These were not sufficient to justify recourse to Article 114 TFEU. Furthermore, the recitals to the Regulation did not contain any specific information on which Member States had adopted - or were likely to adopt in the future - measures regulating seal products that would have created obstacles to trade.[24]

In upholding the constitutionality of the EU legislation, the CJEU began by recalling its established, pre-Lisbon jurisprudence on the scope of Article 114 TFEU - thus confirming that the broad parameters of what was acceptable under that provision had not changed.[25] The Court then found that the recitals to the Regulation were sufficient to justify recourse to Article 114 TFEU, since the EU legislature was only required to indicate the general situation which led to the adoption of the Regulation and to indicate the general objectives that it was intended to achieve.[26] The legislature could not be criticised for only setting out that there were divergences between national rules and the consequent impact on the internal market in general terms. In particular, the EU legislature was not obliged to specify the number and identity of the Member States who had adopted or would adopt divergent national rules.[27] Furthermore, the Court was entitled to take into account statements made at the hearing by the Commission explaining why divergences in national laws existed or were likely to enter into force in the future.[28] Since the general statement of reasons was sufficient, the Commission's claims at the hearing served merely to clarify these claims and the Court was permitted to take account of such clarifications.[29]

[23] *Case C-398/13 P, Inuit Tapiriit Kanatami and Others v Commission* ECLI:EU:C:2015:535.
[24] ibid para 19.
[25] ibid paras 26-27.
[26] ibid para 29.
[27] ibid para 29.
[28] ibid paras 28, 30.
[29] ibid para 30.

As a consequence of Inuit, the EU legislature seemed to be required to only set out, in general terms, why it believed that recourse to Article 114 TFEU was justified. Furthermore, in the event that justification was lacking in the text of the legislation itself, this could be rectified by supplementary information and statements by the EU institutions at the oral hearing before the CJEU. Consequently, the EU legislature remained under a very limited burden to justify the constitutionality of its actions. The CJEU did not enquire into the legislative process leading to the adoption of the contested legislation. Nor did it scrutinise any justificatory evidence contained in legislative documents such as the explanatory memorandum or Impact Assessment.

ii.) ESMA

A further example of the Court continuing to engage in light-touch, tersely reasoned review of internal market legislation came in *ESMA*, where the claimants argued that the object of an EU legislative act was not genuinely to improve the conditions for the establishment and functioning of the internal market.[30] According to settled case law, recourse to Article 114 TFEU is permissible only "where it is actually and objectively apparent from the legal act that its purpose is to improve the conditions for the establishment and functioning of the internal market."[31] In the claimant's view, EU legislation which empowered an EU agency, in the place of previously competent national authorities, to adopt measures that were legally binding upon natural and legal persons, did not have as its object the establishment and functioning of the internal market.

The Court swiftly rejected this argument within the space of two paragraphs. It reached the conclusion that EU legislation of this nature could be based upon Article 114 TFEU by uncritically citing two recitals to the contested legislation. This "very light review"[32] is well-demonstrated by the Court's finding that "recital 2 in the preamble to [the Regulation] states that the purpose of the regulation is to ensure the proper functioning of the internal market and to improve the conditions of its functioning, in particular with regard to the financial

[30] *Case C-491/01, BAT* (n 22) para 60.

[31] *Case C-270/12, United Kingdom of Great Britain and Northern Ireland v Parliament and Council,* ECLI:EU:C:2014:18, para 113 and case law cited therein.

[32] Annette AM Schrauwen, 'From the Board: Review of the Balance of Competences' (2014) 41 Legal Issues of Economic Integration 127, 131.

markets."[33] Based on this assertion, the Court then held, without further explanation, that the harmonisation of rules governing such transactions was aimed at preventing the creation of obstacles to the proper functioning of the internal market and the continuing application of discrepant national rules.[34]

d.) Towards Process-Oriented Competence Review?

In contrast to the approach taken in Inuit and ESMA, other judgments in the post-Lisbon Treaty era suggest a subtle shift in the direction of a more process-oriented type of review.

i.) Vodafone

In Vodafone, the applicants challenged the legality of an EU Regulation which capped the wholesale and retail costs for mobile phone roaming charges on the grounds that Article 114 TFEU was not the correct legal basis for such action.[35] In their view, the established conditions necessary for recourse to Article 114 TFEU had not been satisfied by the legislation at issue.

In response, the Court referred to the explanatory memorandum accompanying the proposal for the Regulation. When read alongside the relevant recitals to the Regulation, the CJEU held that the level of retail charges for international roaming services was high at the time of the adoption of the contested legislation. Moreover, the relationship between costs and prices was not such as would prevail in fully competitive markets.[36]

In light of this situation in the roaming charges market, the EU legislature had determined that Member States were coming under increased pressure to address the problem of high costs of retail roaming charges. In addition to the explanatory memorandum, the Court also cited the Impact Assessment (IA) for the proposed EU legislation for the first time in history. Based on these additional sources of justificatory evidence, the CJEU concluded that the EU

[33] *Case C-270/12, UK v Parliament and Council* (n 31) para 114.
[34] ibid para 114. The swift rejection of the applicants' arguments is all the more surprising when one considers that the Advocate General in the case took the view that the legislation went beyond the scope of Article 114 TFEU. See *Opinion of Advocate General Jääskinen, Case C-270/12 UK v Parliament and Council* ECLI:EU:C:2013:562.
[35] *Case C-58/08, The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform,* ECLI:EU:C:2010:321.
[36] ibid para 39.

legislature "was actually confronted with a situation in which it appeared likely that national measures would be adopted aiming to address the problem of the high level of retail charges for [EU] wide roaming services" and that "such measures would have been likely to lead to a divergent development of national laws."[37] It was in light of those circumstances that the EU legislature sought to prevent the likely emergence of divergent national laws being enacted in the future which would disrupt the functioning of the internal market and distort competition. [38]

Ultimately, therefore, the CJEU was satisfied that the EU legislature had demonstrated that it had considered the existing and possible future situation in the Member States and adequately justified the need for a legislative response at the EU level.

The Court's reference to an Impact Assessment when engaging in constitutional review of EU legislation on competence grounds has been hailed as "revolutionary."[39] Alemanno notes that it is the first time that the CJEU has explicitly established a linkage between ex-ante legislative evaluation and ex-post judicial review.[40] By stressing the importance of the travaux préparatoires, considering evidence from the legislative process and deferring to the merits of the outcome of that process, the Court adopted a distinctly process-oriented approach to review."[41]

ii.) The Tobacco Products Directive Litigation

This shift towards process-oriented review was further emphasized in recent litigation over the Tobacco Products Directive, where the Court demonstrated an increased willingness to engage with the legislative process and evidence base when reviewing the constitutionality of internal market legislation.

[37] ibid para 45.

[38] ibid para 46.

[39] Xavier Groussot and Sanja Bogojević, 'Subsidiarity as a Procedural Safeguard of Federalism' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press 2014) 246.

[40] Alberto Alemanno, 'A Meeting of Minds on Impact Assessment: When Ex Ante Evaluation Meets Ex Post Judicial Control' (2011) 17 European Public Law 485; see also Rob van Gestel and Jurgen de Poorter, 'Putting Evidence-Based Law Making to the Test: Judicial Review of Legislative Rationality' (2016) 4 The Theory and Practice of Legislation 155, 170–171.

[41] José A Gutierrez-Fons, 'Transatlantic Adjudication Techniques: The Commerce Clause and the EU's Internal Market Harmonisation Clause in Perspective' in Elaine Fahey and Deirdre Curtin (eds), *A Transatlantic Community of Law: Legal Perspectives on the Relationship between the EU and US Legal Orders* (Cambridge University Press 2014) 41.

In Poland v Parliament and Council, the claimants challenged the validity of an EU Directive which prohibited the placing of tobacco products containing a "characterising flavour" such as menthol on the internal market.[42] In their view, the EU legislature had failed to demonstrate that there were divergences between the national rules regarding the use of menthol as an additive in tobacco products when the EU legislation was adopted. Furthermore, there were no objective reasons capable of showing that divergences in national rules would likely arise in the future. Finally, the intervening Romanian government argued that the aim of the legislation was not to improve the conditions for the functioning of the internal market (Article 114 TFEU), but was primarily to ensure a high level of health protection, despite Article 168(5) TFEU excluding harmonisation in that field.[43]

In finding that the legislation was validly based upon Article 114 TFEU, the Court referred to specific provisions of the Impact Assessment, along with recitals to the Directive, to find that there was, when the directive was adopted, "significant divergences between the regulatory systems of the Member States, given that some of them had established different lists of permitted or prohibited flavourings, whilst others had not adopted any specific rules on the matter."[44]

Decisive in the Court's findings was the fact that EU legislature had taken into account the Partial Guidelines for Implementation of Articles 9 and 10 of the World Health Organization Framework Convention on Tobacco Control (FCTC) during the legislative process. These guidelines recommended that signatories to the FCTC "regulate, by prohibiting or restricting, ingredients that may be used to increase palatability in tobacco products', including menthol."[45]

Despite being non-binding, the guidelines aimed at assisting the contracting parties to the FCTC with implementing the binding provisions of that Convention. In the CJEU's view, the guidelines were based on the best available scientific evidence, the experience of the Parties

[42] *Case C-358/14, Poland v European Parliament and Council,* (n 8).
[43] ibid paras 25-26.
[44] *Case C-358/14, Poland v European Parliament and Council,* (n 8) para 57. See also *Case C-547/14, Philip Morris Brands SARL and Others v Secretary of State for Health,* ECLI:EU:C:2016:325, paras 98, 117, 132.
[45] Section 3.1.2.2, Partial Guidelines for Implementation of Articles 9 and 10 of the World Health Organisation Framework Convention on Tobacco Control, adopted by the Conference of Parties to the WHO Framework Convention on Tobacco Control at its fourth session in Punta del Este (2010), FCTC/COP/4(10), and amended at its fifth session in Seoul (2012), FCTC/COP/5(6).

to the Convention and were adopted by consensus by, inter alia, the EU and its Member States.[46] They were intended to have a "decisive influence on the content of the rules adopted by the European Union" - a point confirmed by the EU legislature's express decision to take them into account when adopting the contested Directive.[47] Consequently, it was "foreseeable, with a sufficient degree of probability, that in the absence of measures at EU level, the relevant national rules could have developed in divergent ways, including with regard to the use of menthol."[48] By prohibiting the placing on the market of tobacco products with a characterising flavour, the EU legislation sought to guard against such divergences in the rules of the Member States by establishing a common, EU wide regulatory framework.[49] In turn, this common regulatory framework for the composition of all tobacco products, including the prohibition of certain additives, sought to facilitate the smooth functioning of the internal market in compliant tobacco products.[50]

e.) Evaluation

The above overview demonstrates that the Court's approach to reviewing EU legislation on conferral grounds has not always been consistent in the post-Lisbon Treaty era.

On the one hand, cases such as *ESMA* and *Inuit* suggest continuity with the past. The Court took little interest in the legislative process or evidence base upon which the contested legislation was founded and swiftly concluded that no violation of the principle of conferral had occurred. On the other, recent judgments like *Poland v Parliament and Council* and *Phillip Morris* suggest a subtle shift in approach. Building upon its previous use of explanatory reports and Impact Assessments in *Vodafone*, the Court has indicated a willingness to defer to the substantive outcomes of the political process whenever the EU legislature can demonstrate that it has "done its work properly" by basing its choices upon relevant facts and circumstances.[51] This is achieved by examining the legislative process to

[46] *Case C-358/14, Poland v European Parliament and Council,* (n 8) para 46.
[47] ibid para 47.
[48] ibid paras 58, 60; *Case C-547/14, Philip Morris Brands SARL and Others v Secretary of State for Health,* (n 44) paras 99, 109-126.
[49] *Case C-358/14, Poland v European Parliament and Council,* (n 8) para 60.
[50] ibid para 64.
[51] Lenaerts (n 2) 7.

ascertain whether sufficient justificatory evidence exists to support the EU legislature's conclusion that its legislative choices fell within the permissible scope of Article 114 TFEU.

Given that the EU legislature's core competence to enact harmonisation legislation continues to be framed in open-ended, purposive terms as goals to be achieved, it is submitted that process-oriented review of this sort fits within the overall scheme of the EU Treaties.[52] It provides a means of ensuring that the conditions which operationalise the principle of conferral have been sufficiently considered and respected by the EU legislature at all stages of the legislative process. At the same time, it does not normally put the Court in the difficult position of having to delineate hard, substantive limits between EU and Member State competences in areas such as the internal market, where such a division of powers is "inherently unstable" and unsuited to the drawing of bright line distinctions between the two levels of government.[53] Nor does it require the Court to limit the scope of Article 114 TFEU by carving out "impregnable bastions of national sovereignty" which have long proved elusive when legislating to ensure the functioning and effectiveness of the internal market.[54] What matters is that the conditions necessary for enacting legislation on the basis of Article 114 TFEU have been considered by the legislature, and that sufficient evidence has been proffered to support its conclusions that these conditions have indeed been satisfied.

Under this process-oriented approach to competence review, primary responsibility for determining where the boundaries of the EU legislature's internal market powers lie rests with the political process. It is for the Commission (representing the EU interest), the Council (representing the Member States' interests) and the European Parliament (representing the EU citizens' interests) to consider whether proposed EU legislation satisfies the conditions which operationalize the principle of conferral in the internal market, and to justify their conclusions accordingly.[55]

For its part, the Court retains ultimate responsibility on the basis of its Tobacco Advertising One line of jurisprudence for striking down EU legislation which clearly exceeds the

[52] Davies (n 20).

[53] Takis Tridimas, 'Competence after Lisbon: The Elusive Search for Bright Lines' in Diamond Ashiagbor, Nicola Countouris and Ioannis Lianos (eds), *The European Union after the Treaty of Lisbon* (Cambridge University Press 2012) 49; See also Öberg (n 1) 251–254.

[54] Tridimas (n 53) 49.

[55] See Articles 10(2) and 17(1) TEU.

boundaries of competence.[56] However, unlike the pre-Lisbon Treaty situation depicted in Chapter 5, the CJEU today increasingly engages in "greater scrutiny of the political process that accompanies the adoption of the contested act."[57] By explicitly referring to Impact Assessments, explanatory memoranda, scientific studies etc. when reviewing the constitutionality of EU legislation on federalism grounds, the Court strives to "develop guiding principles which aim to improve the way in which the political institutions of the EU adopt their decisions."[58] The role of the Court is to police the rules of the game, directing its powers of review towards "maintaining a vital system of political and institutional checks on federal power, not on policing some absolute sphere of state autonomy."[59]

3.) The Rise of Process-Oriented Proportionality Review

As was noted above, the shift towards process-oriented review within the context of federalism disputes is most clearly demonstrated by the Court's recent subsidiarity and proportionality jurisprudence. This reflects the Lisbon Treaty's emphasis on strengthening the means of monitoring and enforcing those rules governing the *exercise* rather than the *existence* of EU competences.

To recall, the principle of proportionality typically implicates courts in reviewing the substance of contested EU legislation so as to ensure that is suitable, necessary and, in some cases, strikes an appropriate balance between competing interests (proportionality in the strict sense).[60] Within the context of reviewing EU legislation, the Court traditionally granted the EU legislature a wide margin of discretion, opting to review its policy choices in both federalism and fundamental rights cases against a low-intensity, manifestly disproportionate standard of review.[61]

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[56] *Case C-376/98 Tobacco Advertising One* (n 15).

[57] Alberto Alemanno, 'The Emergence of the Evidence-Based Judicial Reflex: A Response to Bar-Siman-Tov's Semiprocedural Review' (2013) 1 The Theory and Practice of Legislation 327.

[58] Lenaerts (n 2) 3.

[59] Young (n 6) 1351.

[60] Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal 158.

[61] Paul Craig, *EU Administrative Law* (Oxford University Press 2012) Chapter 19.

On the one hand, this approach was defended on the basis of considerations pertaining to the separation of powers, democratic legitimacy and institutional capacity/expertise.[62] The Court should not substitute its judgment on complex technical, economic and political matters for that of the EU legislature.[63] On the other, the reluctance to engage in anything but cursory review of EU legislation led some influential commentators to "encourage the Court to be more aggressive and demand fuller elaboration of just why the legislature has concluded that the measure in question is compatible with the dictates of proportionality and subsidiarity."[64]

In the sections which follow, it is argued that these demands for greater scrutiny of the justification proffered by the EU legislature has been heeded by the Court in recent years. This has been achieved through the adoption of an increasingly "process-oriented" approach to proportionality review in the post-Lisbon era. In essence, under this novel approach, the CJEU now requires the EU legislature to present and explain material relied upon during the law-making process in order to justify the proportionality of its actions.[65]

a.) The Beginnings of a Shift in Approach: Spain v Council

The first landmark case in which the CJEU adopted a process-oriented approach to proportionality review actually came prior to the entry into force of the Lisbon Treaty in *Spain v Council*.[66] The case concerned EU legislation that reformed the rules on support schemes for cotton producers as part of the Common Agricultural Policy (CAP). In challenging this new support scheme, Spain argued that the amount of specific aid to be granted for cotton, and the rules on eligibility for the aid, were manifestly inappropriate.

The Court began by reciting its classic formulation that proportionality review involves the Court in ensuring that EU legal acts do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question. Furthermore, where there is a choice between different measures, recourse must be had to

[62] Öberg (n 1) 252–254.

[63] *Case C-203/12, Billerud Karlsborg and Billerud Skärblacka* EU:C:2013:664, para 35 and case law cited therein.

[64] Weatherill (n 16) 845.

[65] David Keyaerts, 'Courts as Regulatory Watchdogs : Does the European Court of Justice Bark or Bite?' in Mazmanyan and Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2012) 280–282.

[66] *Opinion of Advocate General Sharpston, Case C-310/04, Spain v Council* ECLI:EU:C:2006:179.

the least onerous, with the disadvantages caused not being disproportionate to the aims pursued.[67] That said, in policy fields where the legislature enjoys a wide margin of discretion such as the CAP, the legality of EU measures can only be affected where they are manifestly inappropriate in terms of the objective pursued.[68]

From this orthodox starting point, the Court added a novel aspect to its proportionality assessment. Even where the legislature enjoys broad discretion, the legislature must nevertheless show that in adopting the contested act they "actually exercised their discretion", which "presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate'.[69] "It follows", held the CJEU, "that the institutions must at the very least be able to produce and set out clearly and unequivocally the basic facts which had to be taken into account as the basis of the contested measures of the act and on which the exercise of their discretion depended."[70]

When applying this "new test" the Court found that the proportionality principle had been infringed, since the EU law-maker had failed to sufficiently take account of basic facts in two respects.[71] First, when conducting a preparatory study that formed the basis of the Council's decision, labour costs were not taken into consideration.[72] Second, by not assessing the potential socio-economic effects of the proposed reform of the cotton sector - particularly since similar studies had been carried out for other sectors of the economy.[73]

In light of these shortcomings, the CJEU held that the legislature had not demonstrated that it had actually exercised its discretion in adopting the contested measure – something which would have involved the taking into consideration of basic facts. Consequently, the principle of proportionality had been infringed.[74]

This line of reasoning is more clearly developed by the Advocate General (AG) in the case, who noted that while there was no legally binding obligation upon the EU legislature to

[67] ibid para 97.
[68] ibid para 98.
[69] ibid para 122.
[70] ibid para 123.
[71] On the novelty of the test see Xavier Groussot, 'Case C-310/04, Kingdom of Spain v. Council of the European Union' (2007) 44 Common Market Law Review 761, 777.
[72] *Opinion of Advocate General Sharpston, Case C-310/04, Spain v. Council* (n 66) paras 124-127.
[73] ibid paras 103, 128.
[74] ibid para 133.

conduct an Impact Assessment, the absence of any impact study meant that "certain choices made by the Commission and the Council appear arbitrary."[75] Furthermore, the lack of an Impact Assessment (IA) meant that the EU legislature had not been able to justify its actions convincingly during the course of the proceedings. [76]

The judgment in *Spain v Council* may be interpreted, therefore, as signaling to the EU legislature that its policy choices stand a greater chance of withstanding judicial scrutiny when they are adopted via a process that demonstrably considers all relevant facts and circumstances. As Alemanno puts it, "[a]ccording to the *a contrario* reasoning of the judgment, it seems that this would have enabled the Court to assess whether the EU institutions 'had exceeded the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation into question.'"[77] In his view, "[w]hat better way for the EU legislature to prove 'the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate' than by producing an IA before the ECJ?"[78]

This process-oriented understanding of the CJEU's reasoning was confirmed by the European General Court (EGC) in *Sungro*, where it was held that in *Spain v. Council* "it was not the contested provisions themselves, but the failure to take account of all the relevant factors and circumstances, in particular by carrying out a study of the reform's impact, before their adoption which was criticized from the point of view of an infringement of the principle of proportionality."[79]

b.) Legislation Must be Based on Objective Criteria

During the years following *Spain v Council,* the Court did not explicitly demand that the EU legislature demonstrate that it "actually exercised its discretion" by "taking into consideration of all the relevant factors and circumstances of the situation the act was

[75] *Opinion of Advocate General Sharpston, C-310/04 Spain v Council,* ECLI:EU:C:2006:179 para 94. For recognition of the non-binding nature of IA's, see *Case C-343/09, Afton Chemical Limited v Secretary of State for Transport* ECLI:EU:C:2010:419 para 30.
[76] *Opinion of Advocate General Sharpston, C-310/04 Spain v Council,* (n 75) para 94.
[77] Alemanno (n 40) 501.
[78] ibid.
[79] *Joined Cases T-252/07, T-271/07, and T-272/07, Sungro, SA and Others* ECLI:EU:T:2010:17 para 60.

intended to regulate."[80] Rather than using this terminology, the majority of cases where the Court adopted a process-oriented approach to proportionality review contained a requirement that the EU legislature demonstrate that it has based measures on "objective criteria."

i.) Vodafone & Luxembourg v Parliament and Council

In the previously discussed *Vodafone* judgment, in addition to the question of competence, the Court also made extensive use of Impact Assessments and the explanatory memoranda when engaging in proportionality review.[81]

Having recognised the broad discretion enjoyed by the EU legislature, the Court then added that, despite this broad discretion, the EU legislature must base its policy choices upon "objective criteria." Furthermore, in assessing the burdens associated with different policy choices, the EU legislature "must examine whether objectives pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators."[82] On the basis of these criteria, it was for the Court to determine whether the Regulation breached the proportionality principle by imposing caps on both wholesale and retail roaming charges, as well as obliging service providers to give information about such charges to customers.[83]

When it came to scrutinizing the appropriateness of the Regulation, the Court noted the "exhaustive study" carried out by the Commission that was summarised in the Impact Assessment. This demonstrated that the Commission had examined various different options, including the possibility of regulating retail charges only, wholesale charges only, or both. The legislature had also assessed the economic impact of those various different policy choices.[84] A similar approach was taken in *Luxembourg v Parliament and Council*, where the Court noted during its proportionality assessment that the Commission had carried out an

[80] On the inconsistencies in the Court's reasoning see Darren Harvey, 'Towards Process-Oriented Proportionality Review in the European Union' (2017) 23 European Public Law 93, 108–109.
[81] The Court referred to the impact assessments and explanatory memorandum in eight paragraphs of its judgment. *Case C-58/08, Vodafone* (n 35) paras 39, 43, 45, 55, 58, 59, 63, 65.
[82] ibid para 53.
[83] ibid para 54.
[84] ibid para 55.

Impact Assessment which examined various options before preparing a proposal for a Directive regulating airport charges.[85]

Returning to *Vodafone*, the Court then found that the Regulation was appropriate for achieving the aim of protecting consumers from high charges, reaching this conclusion with reference to the Impact Assessment, explanatory memorandum and recitals to the Regulation. [86] Similarly, the Court had recourse to the explanatory memorandum and Impact Assessment at the necessity stage of the proportionality analysis, concluding that the regulation of both wholesale and retail prices did not go beyond what was necessary to achieve the stated objectives.[87] Based on the evidence that the EU legislature had considered various alternatives throughout the legislative process, and in light of the EU legislature's broad discretion in this area, the EU legislature "could legitimately take the view that regulation of the wholesale market alone would not achieve the same result as regulation such as that at issue, which covers at the same time the wholesale market and the retail market, and that the latter was therefore necessary."[88] Finally, in a rather confused paragraph, the Court concluded without further explanation that the Regulation was proportionate in the strict sense, even where it had negative economic consequences for some operators, since the intervention in the market was time limited and protected consumers against excessive prices.[89]

ii.) Poland v Parliament and Council

More recently, the CJEU has adopted a more coherent, process-oriented approach to reviewing EU legislation for compliance with this third aspect of the proportionality assessment. In the abovementioned judgment of *Poland v Parliament and Council*, the Court also had to determine whether an EU Directive outlawing menthol as a characterising flavour in tobacco products was disproportionate on account of the negative economic and social consequences that that prohibition would give rise.[90]

[85] *Case C-176/09 Luxembourg v Parliament and Council,* ECLI:EU:C:2011:290 para 65.
[86] *Case C-58/08, Vodafone* (n 35) paras 56-60.
[87] ibid paras 61-67.
[88] ibid para 68.
[89] ibid para 69.
[90] *Case C-358/14, Poland v European Parliament and Council,* (n 8).

In upholding the constitutionality of the EU legislation, the CJEU held that, despite enjoying broad discretion in the internal market field, "the EU legislature must base its choice on objective criteria and examine whether aims pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators."[91]

In embarking upon this analysis, the Court made reference to Protocol No.2 on the application of subsidiarity and proportionality for the first time in the history of its proportionality jurisprudence. According to the CJEU, Article 5 of that Protocol requires draft legislative acts to "take account of the need for any burden falling upon economic operators to be minimised and commensurate with the objective to be achieved."[92] In reviewing whether this obligation had been fulfilled, the Court noted that aspects of the ban would not come into force until 2020, thus giving businesses time to adapt to the changes. Furthermore, as the Impact Assessment had demonstrated, the changes would result in a decrease of cigarette consumption of 0.5-0.8% over a 5 year period. "Those elements show that the EU legislature weighed up, on the one hand, the economic consequences of that prohibition and, on the other, the requirement to ensure…a high level of human health protection…"[93]

c.) Market Stability Reserve

Most recently, the central tenets of process-oriented proportionality review as initially articulated by the Court in *Spain v Council* were followed by the CJEU in the *Market Stability Reserve* Case. [94] In that case, Poland claimed that an EU legislative Decision establishing a Market Stability Reserve (MSR) was contrary to the principle of proportionality. The aim of the MSR was to hold emissions trading allowances in the Reserve, rather than releasing them to be auctioned to market actors as normally envisaged by the EU's Emissions Trading Scheme (ETS). By establishing the MSR and mandating that these allowances be held, the EU legislation sought to address malfunctions in the EU's ETS policy.[95]

[91] ibid para 97.
[92] ibid para 98.
[93] ibid paras 100-102; *Case C-547/14, Philip Morris Brands SARL and Others v Secretary of State for Health,* (n 44) paras 185-191.
[94] *Case C-5/16, Poland v Parliament and Council (MSR),* ECLI:EU:C:2018:483.
[95] ibid paras 14-20.

In Poland's view, the EU legislation contravened the necessity criterion of the proportionality test and imposed excessive charges on entities participating in the ETS, since it would result in achieving higher emissions reduction targets than those required by the EU's international commitments.[96]

In substantiating these claims, Poland pointed to several flaws in the EU legislative process, including: an inadequate Impact Assessment which did not sufficiently consider the impact of the Decision on Member States; non-transparent negotiations leading to the adoption of the Decision, and substantially amending the original Commission proposal without carrying out a full assessment of the impact of the proposed reforms.[97]

In reviewing the constitutionality of the legislation, the CJEU considered Poland's proportionality argument and wider arguments concerning the EU legislative process together. In so doing, it held that, notwithstanding the broad discretion enjoyed by the EU legislature, the EU institutions "must be able to show before the Court that in adopting the act they actually exercised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate."[98] With explicit reference to its previous judgment in *Spain v Council*, the Court continued that the EU legislature must, at the very minimum, be able to produce and clearly set out the basic facts that "had to be taken into account as the basis of the contested measures of the act and on which the exercise of their discretion depended."[99]

In concluding that the EU legislature did take all available facts and circumstances into account during the legislative process - and thus exercised its discretion properly - the CJEU made extensive reference to preparatory reports and the Impact Assessment. In the Court's view, these documents demonstrated that the Commission had considered various different options when seeking to address problems with the existing ETS and "examined in detail a whole series of social and economic aspects connected to the various options considered."[100]

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[96] ibid para 137.

[97] ibid paras 142-145.

[98] ibid 152.

[99] *Case C-5/16, Poland v Parliament and Council (MSR),* (n 94) para 153.

[100] ibid paras 154-158.

Furthermore, whilst confirming that Impact Assessments are non-binding upon the Parliament and Council, those institutions had nonetheless demonstrated through documents submitted to the CJEU that "the legislature also took into account other findings that became available during negotiations prior to the adoption of the contested decision."[101] This was demonstrated by the fact that the EU institutions had organized meetings of experts and workshops in order to give guidance to the debates in the Council and Parliament, many of which were open to the public.[102] Moreover, it was clear from the documents submitted to the Court that during meetings in the Council, experts presented their appraisals of the effects of different policy options. This proved that "the deliberations on the proposal for a decision were supplemented by the factual basis on which the delegates of all Member States relied in order to define their position during those meetings."[103]

It followed, therefore, that the EU legislature had adequately demonstrated that it had actually exercised its discretion, taking into consideration of all the relevant factors and circumstances. It had demonstrably considered various alternatives to the proposal and based its policy choices upon sufficient justificatory evidence.[104]

d.) Evaluation

When taken as a whole, it is contended that this body of jurisprudence represents a shift towards an increasingly process-oriented approach to proportionality review. Rather than closely scrutinising the merits of the discretionary policy choices of the EU legislature, the Court places greater emphasis upon the EU legislative process when verifying whether the principle of proportionality has been complied with.[105] Cases like *Vodafone, Market Stability Reserve* and *Poland v Parliament and Council* "herald more stringent 'procedural' review of

[101] ibid para 160.
[102] ibid para 161.
[103] ibid para 162.
[104] ibid paras 168, 172, 173, 175.
[105] Lenaerts (n 2) 7; Patricia Popelier, 'Preliminary Comments on the Role of Courts as Regulatory Watchdogs' (2012) 6 Legisprudence 257, 257.

proportionality in terms of verifying compliance with this principle on the basis of the documents issued by the Union institutions…"[106]

Moreover, these judgments further emphasise that, in the post-Lisbon era, the political process on the EU level is primarily responsible for ensuring that all relevant facts and circumstances are taken into account when determining whether proposed legislation is suitable, necessary and proportionate. Subsequently, the focus of the judicial enquiry is not chiefly into whether EU legislation breached the principles enshrined in Article 5 TEU per se, but whether the EU legislature has sufficiently considered these principles during the legislative process and provided justificatory evidence to this effect.[107]

By having recourse to preparatory documents and the evidence base upon which EU legislation was enacted, the Court provides "important incentives to the EU legislator to investigate alternative mechanisms and policies seriously."[108] The Court's role is therefore to check that the EU legislature has done its work properly and based its policy decisions on adequate justificatory evidence, rather than to second guess the merits of those policy choices through robust substantive review.[109] As Hofmann puts it:

> "Increasingly…in the context of review of legislative acts of the Union, the CJEU does not review the substance of an act but instead checks whether the institutions can prove that they themselves reviewed the proportionality of a measure before adopting it."[110]

This not only enhances judicial scrutiny over EU legislation when compared to the pre-Lisbon Treaty case law of the Court, but also prevents the CJEU from illegitimately encroaching upon the policymaking prerogatives of the EU legislature.[111] This ensures respect for the separation of powers in a contemporary EU where legislative acts are underpinned by the

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[106] Kathleen Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis* (Oxford University Press 2014) 353; David Keyaerts, 'Ex Ante Evaluation of EU Legislation Intertwined with Judicial Review?' (2010) 35 European Law Review 869.

[107] Loïc Azoulai, 'The Complex Weave of Harmonization' in Damian Chalmers and Anthony Arnull (eds), *The Oxford Handbook of European Union Law* (Oxford University Press 2015) 597.

[108] Lenaerts (n 2) 9; Keyaerts (n 65) 280–282.

[109] Bar-Siman-Tov (n 1) 278.

[110] Herwig CH Hofmann, 'General Principles of EU Law and EU Administrative Law' in Catherine Barnard and Steve Peers (eds), *European Union Law* (Oxford University Press 2014) 205.

[111] Lenaerts (n 2) 15.

principle of representative democracy stemming from the Parliament and Council respectively.[112]

4.) **Emphasising the Political Safeguards of Federalism: Subsidiarity in the Post-Lisbon Era**

We now turn to consider recent judgments of the CJEU in which EU legislation has been reviewed for compliance with the principle of subsidiarity. To recall, Article 5(3) TEU provides:

> "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."[113]

Alongside the principles of conferral and proportionality in Article 5 TEU, subsidiarity was intended "to function as a constitutional safeguard of federalism that should limit the exercise of powers granted to the European Union."[114]As was documented in Chapter 5, the Court's subsidiarity jurisprudence has been widely criticized in the literature on the grounds that the principle has traditionally been interpreted too narrowly. In a number of cases, the Court effectively found that whenever the EU institutions were competent to act within the scope of the internal market under Article 114 TFEU, they automatically complied with the subsidiarity principle. This resulted in minimal judicial scrutiny of whether EU legislation complied with the substance of the subsidiarity principle.[115]

In addition, the Court engaged in very low-intensity review of whether the EU legislature had considered the subsidiarity implications of its legislative choices and provided adequate reasoning to that effect. The result was that the EU legislature was placed under a very limited burden to justify the constitutionality of its discretionary policy choices in light of the principle of subsidiarity. It was contended that this failure to subject EU legislation to meaningful review stemmed from the pro-integrationist bias of the CJEU. The Court was said

[112] Article 10 TEU; Article 289 TFEU.

[113] Article 5(3) TEU.

[114] Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press 2009) 247.

[115] See Chapter 5, Section 7

to be reluctant to frustrate the furthering of European integration by engaging in robust judicial scrutiny of EU legislation that was often passed after complex and difficult negotiations.

Dissatisfaction with this state of affairs can be seen in the conclusions of a working group on Subsidiarity in the European Convention, which raised the point that "judicial review carried out by the Court of Justice concerning compliance with the principle of subsidiarity could be reinforced."[116] In the end, however, major proposals for reform were rejected. The idea of establishing a system of ex-ante judicial review of legislative proposals for their compliance with subsidiarity were not taken up. Nor was the establishment of a specialized Court tasked with dealing with competence and subsidiarity matters.[117]

Instead, the Lisbon Treaty reforms and Better Regulation initiatives opted for increased proceduralisation of the EU legislative process as a means of strengthening the monitoring and enforcement of the subsidiarity principle.[118] As discussed in the previous chapter, the EU legislature must now consider the subsidiarity implications of proposed legislation and justify its policy choices in light of a series of criteria relevant to the subsidiarity enquiry. Moreover, national parliaments now play a role under Protocol No.2 on the principles of subsidiarity and proportionality as the "watchdogs of subsidiarity."[119]

Once again, it is contended that this proceduralisation of the legislative process has been seized upon by the Court in the post-Lisbon era, with recent subsidiarity judgments evincing a subtle shift in the direction of process-oriented review. The trend here is somewhat less pronounced than it was in relation to the principle of proportionality discussed above. Nonetheless, the CJEU has clearly come to emphasise the core elements of a process-oriented approach to subsidiarity review of EU legislation in recent years. For the first time in its history, the Court has explicitly stated that primary responsibility for ensuring subsidiarity compliance lies with the EU legislative process. It has further confirmed that its

[116] Conclusions of the Working Group I on the Principle of Subsidiarity, CONV 286/02 at 7 (emphasis added)
[117] Robert Schütze, 'Subsidiarity after Lisbon: Reinforcing the Safeguards of Federalism' (2009) 68 Cambridge Law Journal 525, 531–532.
[118] Groussot and Bogojević (n 39) 235.
[119] Ian Cooper, 'The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU' (2006) 44 JCMS: Journal of Common Market Studies 281.

contemporary role is to examine whether the EU legislature considered all facts and circumstances relevant to the subsidiarity enquiry throughout the legislative process.

a.) Early Indications of a Change in Approach

If the pre-Lisbon Treaty subsidiarity jurisprudence of the Court was widely derided as ineffective, the opinion of AG Maduro in the abovementioned *Vodafone* case suggests members of the Court taking subsidiarity review more seriously than hitherto.[120] In the AG's view, the decision to regulate a matter at the EU rather than national level requires justification in the light of the principle of subsidiarity. Therefore, it would have to be established that the EU legislature was in a better position than the national legislator to regulate roaming charges in the case at hand.[121] "[T]he judgment to be made under the principle of subsidiarity is not about the objective pursued but whether the pursuit of that objective requires [Union] action. Certain [Union} objectives…may be better pursued by the Member States (with the consequence that the exercise of that competence is not justified.)"[122] In Maduro's view, what was required was:

> "[A] reasonable justification for the proposition that there is a need for [Union] action. This must be supported by more than simply highlighting the possible benefits accruing from [Union] action. It also involves a determination of the possible problems or costs involved in leaving the matter to be addressed by the Member States. In requiring this, the Court is not substituting its judgment for that of the [Union] legislator but simply compelling it to take subsidiarity seriously."[123]

The Court did not follow the AG's expansive approach to interpreting the scope of the subsidiarity principle in Vodafone. Instead, it limited itself to a characteristically terse examination of the substance of the Directive, concluding that the EU legislation aimed to contribute to the smooth functioning of the internal market and to allow companies to operate within a single coherent regulatory framework. Basing itself solely upon a recital to the Regulation, the Court found that the regulation of both wholesale and retail prices was

[120] Paul Craig and Grainne De Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press 2015) 101.
[121] *Opinion of Advocate General Poiares Maduro, Case C-58/08, The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform,* ECLI:EU:C:2009:596, para 28.
[122] ibid para 30.
[123] ibid para 30.

required in order to ensure such a smooth functioning of the market.[124] In concluding that no violation of the subsidiarity principle had been established, the Court held that the interdependence between wholesale and retail prices meant that "the Community legislature could legitimately take the view that it had to intervene at the level of retail charges as well. Thus…the objective pursued by that regulation could best be achieved at Community level."[125]

The reasoning here has come in for familiar criticism from some quarters on accounts of the Court's "reluctance to review the substantive issues of the subsidiarity principle"[126] Despite its concision, however, the reasoning of the CJEU in Vodafone indicated that the standard of review in subsidiarity cases would henceforth be whether the EU legislature could "legitimately take the view" that action could be best obtained at the EU level. This approach has since been confirmed by the CJEU in Estonia v Parliament and Council.[127]

In other words, the question for the Court is not whether contested EU legislation complies with the principle of subsidiarity per se, but whether the legislative process and factual record sufficiently supports the EU legislature's "legitimate view" that legislation complied with the principle. This subtle hint in the direction of a more process-oriented approach to subsidiary review suggested that, henceforth, the CJEU would be prepared to enquire into the reasoning and evidence base utilised by the EU legislature to ascertain whether, on the basis of this evidence, the EU legislature could reasonably conclude that legislation on the EU level was required.

b.) Process-Oriented Subsidiarity Review and the Role of the Political Process

Recent case law concerning constitutional review of EU legislation for compliance with the principle of subsidiarity builds upon this hint and adopts an increasingly process-oriented approach to review in the post-Lisbon era.[128] This is demonstrated by the Court's recent

[124] *Case C-58/08, Vodafone* (n 35) paras 76-77.
[125] ibid para 78.
[126] Martin Brenncke, 'Case C-58/08, Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform, Judgment of the Court of Justice (Grand Chamber) of 8 June 2010' (2010) 47 Common Market Law Review 1793, 1813.
[127] *Case C-508/13, Estonia v Parliament and Council* ECLI:EU:C:2015:403, para 48.
[128] For the contrary view that nothing has changed in the Court's post-Lisbon subsidiarity jurisprudence (a view which, evidently, the present author respectfully disagrees with), see Christian Timmermans, 'The Competence

judgments surrounding the abovementioned Tobacco Products Directive. In these cases, the Court held for the first time in its history that:

> "[a]n initial review of compliance with the principle of subsidiarity is undertaken, at a political level, by national Parliaments in accordance with the procedures laid down for that purpose by Protocol (No 2). Subsequently, responsibility for that review lies with the EU judicature, which must verify both compliance with the substantive conditions set out in Article 5(3) TEU and compliance with the procedural safeguards provided for by that Protocol."[129]

In reviewing whether the contested EU legislation complied with the substantive aspects of subsidiarity, the Court held that henceforth it must "determine whether the EU legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at EU level."[130] Accordingly, the Commission, Council, European Parliament and National Parliaments all have a role to play in ensuring that EU legislation complies with the subsidiarity principle. Moreover, the decision to pursue objectives on the EU as opposed to Member State level must be justified on the basis of a detailed statement.

Subsequently, in light of the broad discretion enjoyed by the EU legislature, judicial review is limited in scope. It is for the Court to examine "whether those institutions were able to rely on an adequate factual basis for their appraisal of the question of subsidiarity in a specific case and whether they committed a manifest error of assessment in this regard"[131]

In engaging in such review, the CJEU first found that the legislation pursued a twin objective of facilitating the smooth functioning of the internal market for tobacco products while ensuring a high level of protection of human health (especially for young people).[132] Despite Poland's plausible contention that the second of these objectives could be better attained at

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Divide of the Lisbon Treaty Six Years After' in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Hart Publishing 2017) 19–20.

[129] *Case C-358/14, Poland v European Parliament and Council,* (n 8) paras 112-113; *Case C-547/14, Philip Morris Brands SARL and Others v Secretary of State for Health,* (n 44) paras 216-217.

[130] *Case C-358/14, Poland v European Parliament and Council,* (n 8) para 114.

[131] *Opinion of Advocate General Kokott, Case C-358/14, Poland v Parliament and Council,* (n 9) para 147.

[132] *Case C-358/14, Poland v European Parliament and Council,* (n 8) para 116.

the level of the Member States, the Court held that pursuing it at national level would likely entrench and/or create a scenario in which some Member States permitted, and others prohibited, placing flavoured tobacco products on the internal market.[133] This would be fundamentally incompatible with the Directive's first objective of improving the functioning of the internal market for tobacco and related products.[134] Consequently, the interdependence of the two objectives meant that "the EU legislature could legitimately take the view that it had to establish a set of rules for the placing on the EU market of tobacco products with characterising flavours and that, because of that interdependence, those two objectives could best be achieved at EU level."[135]

Moreover, when it came to examining the adequacy of the EU legislature's justification for action in light of the principle of subsidiarity, the CJEU held that the Commission's proposal for the EU legislation and its impact assessment include sufficient information showing clearly and unequivocally the advantages of taking action at EU level rather than at national level.[136] As a result, it was "established to the requisite legal standard that that information enabled both the EU legislature and national Parliaments to determine whether the proposal complied with the principle of subsidiarity…"[137]

Finally, in further emphasizing the central role played by the political process in ensuring respect for the EU's federal balance of competences, the CJEU noted that Poland had participated in the EU legislative process in accordance with the arrangements laid down in the EU Treaties. That process had produced the contested legislation in the case at hand, which was addressed to Poland in the same way as all other Member States who were represented in the Council.[138] Consequently, Poland was precluded from complaining that the EU legislature (Parliament and Council) "did not place it in a position to know the grounds for the choice of measures which they intended to implement."[139]

c.) Evaluation

[133] ibid para 117.
[134] ibid para 117.
[135] ibid para 118; *Case C-508/13, Estonia v Parliament and Council* (n 127) paras 47-48.
[136] *Case C-358/14, Poland v European Parliament and Council,* (n 8) para 123.
[137] ibid para 124.
[138] ibid para 125.
[139] ibid para 125.

It is submitted that this line of reasoning contains many of the core components of process-oriented review as discussed in this chapter. As the CJEU makes clear, subsidiarity compliance is largely left to the political process to consider and resolve, with input from national parliaments alongside the EU's legislative institutions.[140] The Court's task is then to ensure that the political safeguards of federalism in the EU function properly. This is done by examining the legislative process and evidentiary basis upon which the EU legislature based its conclusions that policy objectives would be better achieved at the EU rather than the Member State level.

This is further supported by the Court's novel doctrine that when it comes to subsidiarity review, its task is to "examine whether the EU legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at EU level."[141] Rather than substituting its judgment by engaging in strict scrutiny of the substance of EU legislation, the Court directs its attention towards ensuring that the EU legislature has done its work properly.

That said, there is no doubt that the CJEU's reasoning in these recent subsidiarity cases remains concise. Scarce explanation is provided as to why the Commission proposal and accompanying Impact Assessment contain sufficient information demonstrating the benefits of EU as opposed to Member State action. There is very little overt discussion of what constitutes "detailed evidence" for the purposes of appraising subsidiarity compliance. Nor is the "requisite legal standard" in such cases explained in any detail by the Court. For Wyatt, the Court's approach in recent subsidiarity cases continues to be "undemanding and uncritical."[142]

On the one hand, one must not lose sight of the fact that the manner in which the subsidiarity principle is drafted in the Treaties renders it exceptionally difficult to

[140] See *Case C-477/14, Pillbox 38 (UK) Ltd v The Secretary of State for Health,* ECLI:EU:C:2016:324, para 147.
[141] ibid para 148.
[142] Derrick Wyatt, 'Does the European Court of Justice Need a New Judicial Approach for the 21st Century?' Lecture at Bingham Centre on 2 November 2015 11 <https://www.biicl.org/documents/760_derrick_wyatts_paper.pdf?showdocument=1>; see also Oliver Bartlett, 'The EU's Competence Gap in Public Health and Non-Communicable Disease Policy' (2016) 5 Cambridge International Law Journal 50, 69.

operationalise through hard legal criteria suitable for judicial review.[143] As discussed in chapter 5, decisions on whether the EU or Member State level is best placed to regulate a given matter are unquestionably matters of political judgement and comparative efficiency that depend on many non-legal factors.[144] Moreover, the judiciary is not well placed in terms of democratic legitimacy or institutional capacity to undertake the kind of "comprehensive, subjective, and non-legal assessment of social, or political factors" that subsidiarity seems to demand.[145]

On the other, scholars have long contended that more could be done to subject EU legislation to more meaningful subsidiarity review by focusing upon the legislative process and reasoning of the EU institutions.[146] In this regard, a more demanding process-oriented approach to review would involve the CJEU in examining whether the EU legislature genuinely considered the capacity of the Member States to attain the objectives of the proposed legislation and adequately explained its reasons for concluding that the EU level was best suited to act.[147] The EU legislature should be compelled to demonstrate that it "articulated the choices at hand, enumerated the arguments for and against Union harmonization and explained how the balancing exercise between different values—such as national diversity, localism, and democracy—and the need for maintaining the internal market was undertaken."[148]

Despite continuing to suffer from a number of shortcomings, recent developments in the direction of process-oriented subsidiarity review as identified above represent an encouraging step in the right direction. Given the doctrinal and normative difficulties with placing meaningful, substantive limits upon the exercise of EU legislative power, process-oriented review "may be the only way of judicially enforcing principles that have a clear political nature, such as the principle of subsidiarity."[149] By referring to explanatory

[143] George A Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 Columbia Law Review 331, 391.
[144] See Chapter 5, Section 7
[145] Jacob Öberg, 'Subsidiarity as a Limit to the Exercise of EU Competences' (2016) 36 Yearbook of European Law 1, 17.
[146] Gráinne de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36 JCMS: Journal of Common Market Studies 217, 225.
[147] Bermann (n 143); Groussot and Bogojević (n 39).
[148] Öberg (n 145) 19.
[149] Lenaerts (n 2) 15; Öberg (n 1) 255–261.

memoranda, Impact Assessments etc. when engaging in subsidiarity review, the Court emphasises that its role is not one of placing hard legal limits upon the exercise of EU competences, but on ensuring that the EU legislature provides sufficient justification capable of demonstrating subsidiarity compliance.

The opinion of AG Kokott in the Tobacco Products Directive arguably contains the blueprint for this nascent process-oriented approach. In the AG's view, "where compliance with the principle of subsidiarity is under examination, it must be clear from the statement of reasons for the EU measures whether the Union legislature gave sufficient consideration to questions relevant to the principle of subsidiarity and, if so, what conclusions it reached with regard to subsidiarity."[150] Moreover, in light of the EU legislature's boilerplate statement in a recital to the Directive that the legislative objectives could be better achieved at the EU level, the AG noted that such wording was "not exactly a shining example of the frequently invoked technique of 'better regulation' to which the EU institutions have for some time been committed."[151] Whilst these shortcomings would not necessarily, in themselves, mean that the EU legislature had failed to demonstrate subsidiarity compliance, it was nonetheless "not precisely clear what reasoning it followed with regard to the issue of subsidiarity or how comprehensively it addressed that subject."[152]

Ultimately, however, the AG was satisfied that the EU legislature had adequately considered the subsidiarity implications of the proposed legislation and provided sufficient evidence to justify its choice that the objectives could be best achieved at the EU level. Once again, this was done by examining the EU legislative process and considering the explanatory memorandum and impact assessment upon which the EU legislature based its decisions.[153]

This approach is strikingly similar to that adopted by the CJEU when it comes to proportionality review in recent years. In essence, the AG is demanding that, within the context of subsidiarity review, the EU legislature demonstrate that it considered all relevant facts and circumstances and examined alternative options before adopting the legislation in question. Provided that it has done so, the CJEU will defer to the outcome of the political

[150] *Opinion of Advocate General Kokott, Case C-358/14, Poland v Parliament and Council,* (n 9) para 174.
[151] ibid paras 175-177.
[152] ibid para 178.
[153] ibid paras 182-188.

process with regards to the principle of subsidiarity. By adopting a robust stance on the need for the EU legislature to demonstrate that it had taken subsidiarity considerations seriously throughout the legislative process, AG Kokott adopts "an approach that focuses on improving the decision-making process of the EU institutions, rather than on second-guessing their substantive findings."[154]

5.) What Role for Federal Proportionality?

The final issue to be considered when examining the CJEU's post-Lisbon Treaty federalism jurisprudence is federal proportionality. As Chapter 5 highlighted, the insertion of the proportionality principle into the Treaties via Article 3b of the Maastricht Treaty was considered by many to have added a "federal" dimension to the principle. By situating proportionality alongside conferral and subsidiarity in Article 5 TEU, it was suggested that the Court should henceforth use proportionality as a means of umpiring the EU's federal order of competences.[155]

This federal dimension to the proportionality principle was to be distinguished from the liberal or rights protecting understanding of the principle as traditionally utilised in EU law. For some, it would also serve as a more useful ground of constitutional review than the ambiguous and somewhat unworkable subsidiarity principle.[156] Rather than engaging with the sort of comparative efficiency calculus that subsidiarity demands, the CJEU was urged to utilise a federal variant of the proportionality principle to review whether EU legislation disproportionately restricted national autonomy.[157]

Prior to the coming into force of the Lisbon Treaty, the Court did not explicitly engage in any degree of scrutiny of EU legislation for compliance with federal proportionality. In contrast, recent case law suggests that the CJEU is beginning to develop a federal dimension to its proportionality jurisprudence.

Before moving to examine the relevant case law, an important caveat must be kept in mind. Many of the cases discussed above clearly possess a federal dimension already. Indeed, the

[154] Lenaerts (n 2) 15.

[155] Robert Schütze, *European Constitutional Law* (Cambridge University Press 2012) 184.

[156] Garreth Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 Common Market Law Review 63.

[157] Schütze, 'Subsidiarity after Lisbon' (n 117) 532–533.

very raison d'être for inserting the principles contained in what is now Article 5 TEU into the EU legal order was to "limit federal intervention" by curtailing EU legislative power and thus protect the powers of the Member States.[158] Had the CJEU annulled the EU legislation in question above for violating the principles of conferral, subsidiarity or proportionality, this would have resulted in the Member States being free to continue to regulate roaming charges, tobacco flavourings, electronic cigarettes etc. While cases such as *Vodafone* seemed to focus upon the excessive burden placed upon economic operators, it has nonetheless been pointed out that the role played by proportionality in such cases is (implicitly) also that of a "constitutional tool designed to protect the Member States from an EU 'competence creep."[159]

That said, the novelty in some of the post-Lisbon Treaty cases stems from the CJEU's willingness to entertain claims that EU legislation imposes excessive social, economic or other costs on the Member States when engaging in constitutional review on the basis of Article 5 TEU principles.

a.) Balancing Different Interests Involved

The strongest indication that the Court would take the federal dimension to proportionality more seriously than hitherto came in AG Maduro's abovementioned opinion in *Vodafone.* According to AG Maduro, the CJEU should examine whether EU legislation addressing excessive roaming charges was proportionate in light of the aims of Article 114 TFEU and consumer protection "when balanced against the loss of autonomy on the part of Member States and the interference with the rights of the claimants."[160] Proportionality thus required the CJEU to also ascertain whether achieving internal market objectives at the EU level could be justified in light of the resulting "loss of Member State autonomy involved in the approach chosen by the legislature."[161]

Once again, the Court did not follow this line of reasoning. Instead, as discussed above, it adopted a process-oriented approach to reviewing whether the contested EU legislation

[158] Edward T Swaine, 'Subsidiarity and Self-Interest: Federalism at the European Court of Justice' (2000) 41 Harvard International Law Journal 1, 5–6.
[159] Lenaerts (n 2) 10.
[160] *Opinion of Advocate General Poiares Maduro, Case C-58/08, Vodafone* (n 121) para 37.
[161] ibid para 44.

imposed a disproportionate burden upon individual economic operators and not the Member States.

More recently, however, the CJEU has taken an approach to federal proportionality that is somewhat different from that advocated by influential quarters in the academic literature. Rather than focusing on whether EU legislation has unnecessarily restricted national regulatory autonomy, the Court considers whether EU legislation imposes excessive social, economic or other costs on a specific Member State or States.

In *Estonia v Parliament and Council*, Estonia challenged the constitutionality of EU legislation regulating certain financial reporting obligations of small and medium sized businesses. In the claimant's view, the legislation infringed the principle of proportionality on the grounds that, inter alia, the EU legislature did not take account of its particular situation as a Member State which is advanced in electronic administration.[162] Similarly, in *Poland v Parliament and Council*, Poland (supported by Romania) challenged the constitutionality of the Tobacco Products Directive on federal proportionality grounds. In their view, prohibiting the placing of mentholated tobacco products on the EU internal market would impose disproportionate social and economic costs such as lost jobs and revenue in Member States, like Poland, where there was significant manufacturing and consumption of mentholated tobacco products.[163]

In response to these arguments, the CJEU adopted an identical form of reasoning in both cases, holding (for the first time in *Estonia v Parliament and Council*) that the contested EU legislation:

> "[Has] an impact in all Member States and requires that a balance between the different interests involved is ensured, taking account of the objectives of that Directive. Therefore, the attempt to strike such a balance, taking into account not the particular situation of a single Member State, but that of all EU Member States, cannot be regarded as being contrary to the principle of proportionality."[164]

[162] *Case C-508/13, Estonia v Parliament and Council* (n 127).
[163] *Case C-358/14, Poland v European Parliament and Council,* (n 8) para 73.
[164] *Case C-508/13, Estonia v Parliament and Council* (n 127) para 39; *Case C-358/14, Poland v European Parliament and Council,* (n 8) para 103.

It is submitted that this reference to striking a balance and taking account of the situation in all member states suggests some form of judicial scrutiny on federal proportionality grounds may emerge in the future. Admittedly, the passage from these two judgments provides no indication to the EU legislature of what striking such a balance in this context should entail. Further guidance on this score was arguably provided in the Market Stability Reserve case, where the CJEU held that "the legislature does not have to take into consideration the particular situation of a Member State where the EU measure has an impact in all Member States and requires that a balance between the different interests involved is ensured, taking account of the objectives of that measure."[165]

From this, it seems that EU legislation which disproportionately impacts upon one Member State will not suffice. However, the reasoning here could be interpreted as leaving open the possibility for a number of Member States to contend that the EU legislature did not sufficiently consider the economic, social or other impacts of proposed EU legislation. Once again, a process-oriented approach to review in this instance could be envisaged. The Court would scrutinise the EU legislative process and evidence base upon which policy decisions were based in order to ascertain whether the EU legislature considered the economic, social or other impacts that the proposed EU legislation would have upon the Member States.

While the Court has not yet explicitly made this link in the abovementioned jurisprudence, adopting such a process-oriented approach to review in these circumstances would also give added bite to the EU legislature's obligations under Article 5 of Protocol No.2 on the principles of subsidiarity and proportionality. According to that provision, draft legislative acts must contain a detailed statement making it possible for the political process to appraise the proposal's compliance with the principles of subsidiarity. This statement should contain, among other things, some assessment of the proposal's financial impact and ensure that any burden, whether financial or administrative, falling upon the EU and national governments, be minimised and commensurate with the objective being pursued.[166]

b.) <u>National Identity and the Federal Order of Competences</u>

[165] *Case C-5/16, Poland v Parliament and Council (MSR),* (n 94) para 167.
[166] Protocol No. 2 Article 5.

One final point to consider in relation to contemporary constitutional review of EU legislation on federalism grounds is the role that Article 4(2) TEU may come to play in the future. According to this provision, which was added to the EU legal order by the Lisbon Treaty:

> "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."

To date, the majority of cases in which this provision has been utilised by the CJEU have entailed Member State derogations from the fundamental freedoms of the EU internal market.[167] Much rarer have been instances in which Article 4(2) TEU has been used to contest the constitutionality of EU legislation. The question here is whether EU legislation that pursues a legitimate objective (e.g. the functioning of the internal market) could nevertheless be unconstitutional on the grounds that it encroached upon Member State competences in sensitive areas related to their "fundamental structures, political and constitutional."[168]

In this regard, AG Kokott has recently stated, for the first time in the history of the Court's case law, that a "stricter judicial review of subsidiarity may be necessary where an EU measure exceptionally affects matters of national identity of the Member States (Article 4(2) TEU)."[169] However, in the case at hand, there was "absolutely no suggestion of this and the review standard of a manifest error of assessment can therefore be retained."[170]

Whilst the CJEU did not pick up on this aspect of the AG's opinion in its judgment, the reasoning of AG Kokott nonetheless suggests that the CJEU may come to abandon its orthodox position of deferring to the outcomes of the political process in all circumstances.

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[167] Barbara Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause' (2012) 31 Yearbook of European Law 263, 300.
[168] ibid 300–308.
[169] *Opinion of Advocate General Kokott, Case C-358/14, Poland v Parliament and Council,* (n 9) para 148.
[170] ibid para 148.

On this view, the CJEU would abandon its light-touch approach to subsidiarity review and move to engage in high intensity or strict review of EU legislation whenever that legislation allegedly encroached upon aspects of national identity of the Member States. Accordingly, the role of the Court would ordinarily be to ensure that the political process operated effectively and considered all facts and circumstances relevant to the EU's federalism principles when legislating. Only when that political process had produced outcomes which carried serious implications for national identity as set down in Article 4(2) TEU would the CJEU move to engage in robust scrutiny of the substance of the legislation in question.

As we shall see in Chapter 8, this sort of calibrated, variable intensity approach to constitutional review has recently been developed by the CJEU within the context of fundamental rights review. In cases of serious infringements with fundamental rights, the CJEU stands ready to abandon its typical approach of affording the EU legislature a wide margin of discretion and engaging in light touch review. In its place, the CJEU engages in high intensity review of the substance of contested legislation and stands ready to strike down EU legislation that places severe restrictions upon fundamental rights. Consequently, a degree of doctrinal coherence is beginning to emerge across the federalism and fundamental rights case law of the CJEU in the post-Lisbon Treaty era.

6.) Conclusion

Chapter 7 has demonstrated how the CJEU has come to adopt a process-oriented approach to reviewing whether EU legislation has complied with the EU's federalism principles enshrined in Article 5 TEU. This shift in the jurisprudence has occurred against the background of increased proceduralisation in the EU legislative process in recent years. The EU institutions are now placed under a series of procedural obligations to consult widely, consider various policy options and justify their legislative choices in light of the principles enshrined in Article 5 TEU. In return, the Court has increasingly had recourse to the procedures under Protocol No.2, along with Impact Assessments, explanatory memoranda, scientific studies etc. utilised throughout the EU legislative process when conducting constitutional review.

In areas of open-ended, purposive competence such as the internal market, the Court emphasises that the political process on the EU level (including input from national

parliaments) is primarily responsible for policing the balance of competences between the EU and its Member States.[171] Rather than "second-guessing the merits of the substantive choices made by the EU legislator", the Court opts to ensure that the EU institutions have "done their work properly" by requiring that the EU legislature demonstrate that it "has taken into consideration all the relevant interests at stake."[172] When compared with previous eras in the history of the European integration project, the Court has come to demand more by way of justificatory evidence from the EU legislature when examining whether the principles contained in Article 5 TEU have been respected.[173] In this way, "judicial deference in relation to 'substantive outcomes' has been counterbalanced by a strict 'process review."[174]

Consequently, the CJEU's role in the post-Lisbon Treaty EU legal order is not to strictly umpire the EU's federal balance of powers by delineating hard boundaries between EU and Member State competence. Instead, the Court adopts a process-oriented approach to constitutional review in federalism cases, ensuring that the political safeguards of federalism function effectively.[175]

Whilst the default position in federalism cases is that the outcome of the political process will be entitled to considerable judicial deference, the Court emphasises that it will to step in and annul EU legislation where it clearly exceeds the bounds of legislative competence, or manifestly infringes the principles of subsidiarity and proportionality. Constitutional review thus seeks to bolster the political safeguards of federalism whilst providing some ultimate, substantive backstop to EU legislative power.[176] More recently, the Court has also hinted that the ordinary position of deference may be abandoned and strict scrutiny of the substance of EU legislation may be appropriate within the context of federalism cases. This may occur whenever EU legislation affects matters pertaining to the national identity of the Member States (Article 4(2) TEU).

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[171] Groussot and Bogojević (n 39) 251; Young (n 6) 1654–1655.
[172] Lenaerts (n 2) 7.
[173] Thomas Von Danwitz, 'Rule of Law in the Recent Jurisprudence of the ECJ, The' (2013) 37 Fordham International Law Journal 1311, 1328–1330.
[174] Lenaerts (n 2) 4.
[175] ibid 16.
[176] Young (n 6) 1390–1395.

This nascent, process-oriented approach to constitutional review corresponds to recent changes to the legal and political order of the EU, and fits within the overarching objectives of the Lisbon Treaty reforms.

As was noted in Chapter 6, these reforms did not intend to establish two mutually exclusive spheres of EU and Member State competence. Nor did they seek to redefine the EU's internal market competence or fundamentally restructure the powers of the CJEU. Whilst it is true that a key aim of the Lisbon Treaty was to bring about a clearer delineation of competences between the EU and its Member States, this was counterbalanced by a desire amongst the Treaty's drafters to retain a substantial degree of flexibility within the EU's core legislative competences. Moreover, the procedural reforms in Procedural No.2 clearly emphasised that controlling and monitoring the exercise of EU legislative competence would be largely entrusted to the political rather than judicial safeguards of federalism.[177] Finally, process-oriented review provides a means of enhancing judicial scrutiny of EU legislation whilst not illegitimately encroaching upon the policymaking prerogatives of the EU legislature - thus ensuring respect for the separation of powers in an era EU legislative acts are now underpinned by the principle of representative democracy.[178]

When considered in its entirety, the "procedural turn" in the post-Lisbon case law reveals a Court that is responsive to the wider legal and political context in which it now operates. Far from operating in accordance with its own agenda or in an "activist" manner that is divorced from the constitutional framework of the EU Treaties, the contemporary federalism jurisprudence supports the claim that the CJEU now operates as a veritable constitutional court of a more mature EU legal order.

[177] Schütze, 'Subsidiarity after Lisbon' (n 117) 529.

[178] Article 10 TEU; Article 289 TFEU.

Chapter 8

Fundamental Rights Review after the Lisbon Treaty

1.) Introduction

The final chapter of this thesis follows on from Chapter 7 and examines the post-Lisbon Treaty jurisprudence of the CJEU when reviewing the constitutionality of EU legal acts in light of the Charter of Fundamental Rights (CFR). It contends that the CJEU has come to develop a highly-calibrated, variable intensity approach to review in cases of alleged infringements of fundamental rights. In a novel development, the Court has held that in cases where EU legal acts infringe upon the essence of fundamental rights, they will be annulled on that basis alone. This means that infringements of the essence of rights contained in the Charter cannot be justified by balancing the pursuit of objectives in the EU general interest against fundamental rights. Additionally, the Court has held that in cases where EU legal acts result in "serious" interferences with fundamental rights, the typically wide discretion of the EU legislature will be "reduced" and proportionality review will be "strict."[1]

Consequently, the Court has indicated to the EU legislature that whenever interferences with fundamental rights pass a particular threshold of gravity, the ordinary rule of judicial deference to the outcomes of the political process will be moderated. In such cases, the CJEU will engage in "high-intensity" review of the substance of the contested legal act in order to ascertain whether its provisions are limited to what is "strictly necessary" to achieve the objectives pursued.

These recent shifts in fundamental rights cases have resulted in a degree of doctrinal coherence beginning to emerge across the CJEU's post-Lisbon Treaty constitutional review jurisprudence. When it comes to serious restrictions of fundamental rights or incursions into core constitutional principles such as the national identity of the Member States, the Court will

[1] *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and others,* ECLI:EU:C:2014:238 paras 47-48.

engage in much more intensive or strict scrutiny of the substance of EU legislation.[2] Outwith the rather exceptional scenario of serious interferences with such rights and principles, the Court increasingly has recourse towards process-oriented review. In line with developments in its federalism jurisprudence discussed in Chapter 7, a number of recent fundamental rights judgments are to be noted for their examination of the legislative process and evidence base leading to the enactment of the contested EU legal act. Rather than second guessing the merits of the balance struck by the EU legislature between objectives of EU general interest and (non-absolute) fundamental rights, the CJEU reviews whether the EU institutions themselves considered all relevant facts and circumstances when attempting to strike such a balance. Drawing once again upon preparatory documents, policy proposals and other aspects of the law-making process, the CJEU seeks to ensure that the political process considered the fundamental rights implications of its proposed actions before enacting them into law.[3]

2.) Clarifying the Scope of the Enquiry

Before moving to develop these arguments in full, it is first necessary to clarify the scope of the present enquiry into the Court's fundamental rights jurisprudence. In this regard, the above use of the term EU legal acts - as opposed to EU legislation - is deliberate. As we shall see when discussing the case law, the CJEU does not vary the intensity of its proportionality review of fundamental rights infringements on the basis of the legislative character of the contested act. Instead, the key variables are whether the measure compromises the essence of a protected fundamental right, the seriousness of the interference with such a right, and the nature of the right concerned.[4]

The approach taken by the Court with regards to the structure and intensity of proportionality review in fundamental rights cases is consistently applied to all acts of general application. Therefore, when examining how the CJEU conducts constitutional review of EU legislation in

[2] ibid; *Opinion of Advocate General Kokott, Case C-358/14, Poland v Parliament and Council,* ECLI:EU:C:2015:848 para 148.
[3] *Case C-101/12, Herbert Schaible v Land Baden-Württemberg,* ECLI:EU:C:2013:661; *Case C-356/12, Wolfgang Glatzel v Freistaat Bayern,* ECLI:EU:C:2014:350.
[4] *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 1) para 47.

the post-Lisbon Treaty era, it is appropriate to consider judgments that do not involve challenges to EU legislative acts adopted in accordance with a legislative procedure. In other words, judgments containing fundamental rights review of an EU legal act of general application are directly relevant to the question of how the CJEU conducts constitutional review of EU legislation in the post-Lisbon Treaty era.[5]

This may be contrasted with the analysis in the previous chapter, where the shift towards process-oriented review is based almost entirely upon constitutional review of EU legislative acts for compliance with the EU's federalism principles. There are two main reasons for this. First, the key legal bases in the Treaties which empower the EU institutions provide for the adoption of legislative acts adopted in accordance with a legislative procedure.[6] Second, the procedural obligations enshrined in Protocol No.2 annexed to the Lisbon Treaty – including the role of national parliaments in subsidiarity monitoring – applies exclusively to post-Lisbon Treaty legislative acts.[7]

Consequently, the present analysis into how the CJEU conducts constitutional review of EU legislation on both federalism and fundamental rights grounds consists of: (i) federalism jurisprudence involving only legislative acts; and (ii) fundamental rights jurisprudence involving a variety of EU legal acts, the reasoning from which is nonetheless directly applicable to fundamental rights review of EU legislative acts.

3.) In Search of an Appropriate Standard of Review in Fundamental Rights Cases

Having clarified the scope of the enquiry, we can now turn to the Court's contemporary fundamental rights jurisprudence.

As was noted in Chapter 6, the elevation of the CFR to the same legal status as the EU Treaties resulted in the EU legal order having a written bill of fundamental rights for the first time in its

[5] The focus remains acts of general application, whether they be legislative acts or other types of legal acts adopted by the EU institutions. Review of EU legal acts addressed to specific individuals or groups of individuals shall not be examined.

[6] See Article 114(1) TFEU, read in light of Article 289(3) TFEU. See also the legislative competences of the EU institutions in specific areas of the internal market which also provide for the adoption of legislative acts only, e.g. Articles 43(2), 46, 48, 50(1), 53(1) and 56(2) TFEU.

[7] Article 12(a) TEU; Protocol No.2 on the Application of the Principles of Subsidiarity and Proportionality.

history. This constitutional entrenchment of fundamental rights gave rise to speculation over the future of rights adjudication in the EU moving forward.[8] For the purposes of the present analysis, the core question to be resolved was whether the CJEU would come to engage in more intensive fundamental rights review of EU legislation than it had done in the pre-Lisbon Treaty era depicted in Chapters 3, 4 and 5.[9]

The starting point for this analysis is the limitation clause contained in Article 52(1) CFR, which provides:

> "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."[10]

On the one hand, the Explanations to the Charter provide that the wording of this clause is based on the existing case law of the Court.[11] In support of this assertion, the Explanations cite a judgment from the early 2000s, which provided, in line with established case law, that "restrictions may be imposed on the exercise of fundamental rights…provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights."[12]

It was conceivable, therefore, that the post-Lisbon Treaty approach to fundamental rights review would represent continuity with the past. As was discussed in earlier chapters, the requirement that Community/Union legal acts not constitute disproportionate and intolerable

[8] Sara Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' (2012) 49 Common Market Law Review 1565, 1565–1568.
[9] For a discussion of this issue see Xavier Groussot and Thor Petursson, 'The EU Charter of Fundamental Rights Five Years on: The Emergence of a New Constitutional Framework?' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument : Five Years Old and Growing* (Hart Publishing 2015) 147–149.
[10] Article 52(1) CFR.
[11] Explanations Relating to the Charter of Fundamental Rights, [2007] OJ C 303/17, 16.
[12] *Case C-292/97, Kjell Karlsson and Others,* ECLI:EU:C:2000:202, para 45.

interferences impairing the substance of the right in question operated as a very weak standard of review.[13] Moreover, in applying this standard, the Court typically engaged in light-touch, tersely reasoned review of measures that restricted or somehow interfered with fundamental rights. In a number of cases, the Court swiftly concluded that such restrictions were proportionate *provided* they did not infringe the essence or substance of the right in question.[14] The result, which was criticised in the literature, was low intensity review of legal acts that allegedly restricted fundamental rights.

On the other hand, some argued that the structure and substance of the Charter's provisions, coupled with its elevation to the same legal status as the EU Treaties, could (and should) result in more rigorous fundamental rights review by the Court than hitherto.[15] For example, the obligation to "respect the essence of those rights and freedoms" contained in Article 52(1) CFR was said to be capable of being interpreted in such a way as to subject EU legal acts to more meaningful scrutiny. Commenting upon the Lisbon Treaty reforms, Craig urged the Court to abandon its traditional approach (restrictions were proportionate and lawful *provided* they did not infringe the essence of the right) and instead interpret Article 52(1) CFR to mean that "any limitation must respect the essence of the right, and that even if it does it will still only be lawful if proportionate, necessary, and in the general interest."[16]

Additionally, scholars called on the Court to strengthen fundamental rights protection in the post-Lisbon era by engaging in more intensive proportionality review of EU legal acts that encroached upon rights protected by the Charter. As Weiß has argued, "the standards of proportionality determine the effective level of human rights protection. The higher the scrutiny a court applies to proportionality assessment when reviewing acts of public power against human rights, the more meaningful proportionality requirements become as effective

[13] See Chapter 3, Section 6
[14] Paul Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (Oxford University Press 2010) 224.
[15] Wolfgang Weiß, 'The EU Human Rights Regime Post Lisbon: Turning the CJEU into a Human Rights Court?' in Sonia Morano-Foadi and Lucy Vickers (eds), *Fundamental Rights in the EU: A Matter of Two Courts* (Hart Publishing 2015) 71; Damian Chalmers, 'Judicial Authority and the Constitutional Treaty' (2005) 3 International Journal of Constitutional Law 448, 459.
[16] Craig (n 14) 224.

restraints to public power."[17] On the issue of standards and intensities of review, Advocate General Bobek has recently stated there are "two broad constitutional arguments that support the need for a more searching review of measures of EU institutions."[18] First, the aforementioned elevation of the Charter to binding primary law status had "brought fundamental rights review of EU acts to the fore."[19] Second, in light of the EU's failed accession to the European Convention on Human Rights (ECHR)[20], the lack of "external" fundamental rights review of EU legal acts means that the task of reviewing the output of the EU institutions falls exclusively to the Court of Justice.[21] "In discharging that mandate, the high level of protection aimed at by the Charter entails the necessity of carrying out a full and efficient internal review of EU law and of the acts of EU institutions."[22]

4.) Early Signs of a Shift in Approach

The first indication of how the CJEU would conduct fundamental rights review of EU legislation in the post-Lisbon era came in *Volker und Markus Schecke*. The claimants in the case had been in receipt of financial aid from EU funds administered under the auspices of the Common Agricultural Policy (CAP). Under the applicable Council Regulation, Member States were to ensure the annual publication of the names of beneficiaries of the funds and the amounts received per beneficiary. Further details on the types of information to be contained in such publications were provided by a Commission Regulation, including the municipality where the beneficiary resided or was registered and the postal code identifying the municipality. Furthermore, the Regulation stipulated that such information was to be made available on a single website per member state so that the names of beneficiaries, municipality, amount of award etc. could be accessed via a search tool.[23]

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[17] Weiß (n 15) 71.
[18] *Opinion of Advocate General Bobek, Case C-134/15 Lidl GmbH & Co KG v Freistaat Sachsen,* ECLI:EU:C:2016:169, para 43.
[19] ibid para 43.
[20] *Opinion 2/13 of the Court of Justice, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:2014:2454 2.
[21] *Opinion of Advocate General Bobek, Case C-134/15 Lidl GmbH & Co. KG v Freistaat Sachsen,* (n 18) para 43.
[22] ibid para 44.
[23] For an overview see *Joined Cases C-92/09 and C-93/09, Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen,* ECLI:EU:C:2010:662 paras 14-25.

The case therefore concerned a challenge to two EU legal acts of general application (Council Regulation and Commission Regulation) that did not constitute legislative acts adopted in accordance with a legislative procedure.[24] Nonetheless, both for the reasons set out above in the introduction, and the impact that the judgment has had upon subsequent case law and academic commentary, the reasoning of the CJEU in Schecke merits consideration at this juncture.

a.) Volker und Markus Schecke

According to the CJEU, the Council and Commission Regulations interfered with the right to respect of private life (Article 7 CFR) and the closely related right to the protection of personal data (Article 8(1) CFR) of those in receipt of financial aid and who had had their personal details made publicly available.[25] However, the rights contained in Article 7 and 8 CFR were not absolute and must be examined in light of their social function.[26] This meant that the abovementioned limitation clause contained in Article 52(1) CFR was applicable, with any restriction of the rights enshrined in Articles 7 and 8 CFR having to be provided for by law, respect the essence of those rights and, subject to the principle of proportionality, be necessary and genuinely meet objectives of general interest recognised by the EU.[27]

In conducing this examination, the Court found that the infringements of Articles 7 and 8 CFR were provided by law and pursued an objective of general interest recognized by the EU. The publication of the information sought to "[enhance] transparency regarding the use of Community funds in the [CAP] and [improve] the sound financial management of these funds, in particular by reinforcing public control of the money used."[28] When viewed in light of the EU Treaties' provisions on transparency, the aim of increasing the transparency of the use of CAP funds was held to pursue an objective of general interest recognised by the EU.[29] The

[24] Article 289(3) TFEU.
[25] *Joined Cases C-92/09 and C-93/09, Schecke* (n 23) paras 47, 58, 64.
[26] ibid para 48.
[27] ibid paras 64-65.
[28] *Joined Cases C-92/09 Volker und Markus Schecke* (n 2) para 66 and 67.
[29] *Joined Cases C-92/09 and C-93/09, Schecke* (n 23) paras 68-71, citing Articles 1 and 10 TEU and Article 15 TFEU,.

Regulations at issue were also appropriate for achieving this legitimate aim, since publishing the names of beneficiaries and amounts received increased transparency and thus increased public control over the use of public funds.[30]

However, when it came to the necessity of the Regulations, the applicants contended that the legitimate aims of the Regulations could be achieved by means that were less restrictive to their rights, such as publishing anonymised statistics of amounts received by beneficiaries.[31] This led the CJEU to hold that it was necessary to:

> "[D]etermine whether the Council…and the Commission balanced the European Union's interest in guaranteeing the transparency of its acts and ensuring the best use of public funds against the interference with the right of the beneficiaries concerned to respect for their private life in general and to the protection of their personal data in particular.[32]

Then, the Court held for the first time within the context of fundamental rights review of EU legal acts that "derogations and limitations in relation to the protection of personal data must apply only in so far as is *strictly necessary*."[33] It was thus necessary for the EU institutions, before adopting the measures in question, to ascertain whether publication via a single freely consultable website did not go beyond what was necessary for achieving the legitimate aims pursued.[34]

When viewed against this standard, the CJEU found that the Council and the Commission had failed to strike such a balance between the EU's general interest in transparent use of public funds and the fundamental rights protected in Articles 7 and 8 CFR. There was "nothing to show" that when adopting the contested Regulations, the Council and Commission took into consideration methods of publishing the information which would have caused less interference with the rights of the beneficiaries enshrined in Articles 7 and 8 CFR. According to

[30] ibid para 75.
[31] ibid para 73.
[32] ibid para 77.
[33] ibid para 77 (emphasis added).
[34] ibid para 79.

the Court, limiting the publication of names of beneficiaries to the periods in which they received aid, or to the frequency or nature and amount of aid received, would have been less restrictive of the rights in question.[35] Moreover, such limitations would not frustrate the overall objective of providing citizens with accurate information on the administration of funds.[36]

In light of these alternatives, the EU institutions "ought thus to have examined, in the course of striking a proper balance between the various interests involved, whether publication by name limited in the manner indicated…above would have been sufficient to achieve the objectives of the European Union legislation at issue in the main proceedings."[37] It followed that the EU legislature had failed to properly balance the objectives of the EU legal acts against the rights enshrined in Articles 7 and 8 CFR, thus breaching the principle of proportionality.[38]

b.) Evaluation

The judgment in *Volker und Markus Schecke* represents "a more procedural approach" to reviewing the proportionality of EU legal acts that restrict fundamental rights, reflecting "a newer trend discernible in the Court's proportionality control."[39] According to Beijer, the Court annulled the contested Regulations due to the quality (or lack thereof) of the decision-making process.[40]

Rather than conducting its own balancing exercise of the rights and interests involved, the CJEU identified measures that could have achieved the same objective whilst having a less restrictive impact upon the rights in question. It then found that the EU legislature had not given sufficient consideration to these less restrictive alternatives during the legislative process; meaning that the balance between rights and objectives in the general interest had not been sufficiently

[35] ibid paras 81-82.
[36] ibid para 83.
[37] ibid para 83.
[38] ibid para 86.
[39] Weiß (n 15) 76.
[40] Malu Beijer, 'Procedural Fundamental Rights Review by the Court of Justice of the European Union' in Eva Brems and Janneke Gerards (eds), *Procedural Review in European Fundamental Rights Cases* (Cambridge University Press 2017) 177; Alberto Alemanno, 'The Emergence of the Evidence-Based Judicial Reflex: A Response to Bar-Siman-Tov's Semiprocedural Review' (2013) 1 The Theory and Practice of Legislation 327, 335.

considered prior to enacting the policy choice into law.[41] It was this failure to demonstrate the consideration of alternatives as part of the overall balancing exercise between rights and objectives, rather than the merits of the balance ultimately struck itself, that was decisive for the Court.[42]

Notably, the CJEU made no direct reference to the lack of an Impact Assessment or any other type of evidence when concluding that there was "nothing to show" that the EU institutions had considered less restrictive policy options during the legislative process. Nonetheless, it is clear that the inability of the EU legislature to produce evidence demonstrating how fundamental rights were sufficiently considered prior to enacting the policy into law had a profound impact upon the Court's decision to annul the contested legal acts.[43]

A contrario, it can reasonably be concluded that if the EU legislature had demonstrated with reference to aspects of the legislative process (e.g. Impact Assessment, amendments to the proposal following deliberations, preparatory reports etc.) that: (i) it had considered alternative approaches to data publication that were less restrictive of Charter rights; and (ii) on balance, had concluded that these less restrictive measures were nevertheless unable to effectively achieve the EU objectives of transparency in public spending, the Court would have been much more reluctant to interfere with the outcome of the political process.[44]

This also seems to be the view of the Commission. In an internal document providing operational guidance on taking Fundamental Rights into account in Impact Assessments, the Commission notes that the judgment in Schecke "requires EU institutions to prove — in the light of the fundamental rights protected by the Charter — that they have carefully considered different policy options and have chosen the most proportionate response to a given

[41] Admittedly, by identifying policy options that are capable of achieving the overall objective whilst being less restrictive to the rights in question, the Court is making a substantive assessment, see Beijer (n 40) 198.
[42] Alemanno (n 40) 335.
[43] Mark Dawson, *The Governance of EU Fundamental Rights* (Cambridge University Press 2017) 75; Alemanno (n 40) 335–336.
[44] For a similar view see Vasiliki Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart Publishing 2015) 61.

problem."[45] Consequently, a proper assessment of any impact that proposed legislation will have upon fundamental rights in the preparatory phases of new legislation will "not only contribute to finding the most appropriate solution to a given problem, but will also strengthen the defence of EU legislation against legal challenges before the European Court of Justice."[46]

The judgment of the CJEU in Schecke, coupled with the response of the Commission, provides the foundation for an increasingly process-oriented approach to fundamental rights review of EU legislation in the post-Lisbon Treaty era. Much like the trend identified in Chapter 7 in relation to federalism cases, the default position of the Court is one of deference to the outcome of the EU political process whenever an accommodation is made between objectives of general interest and (non-absolute) fundamental rights. Rather than second guessing the merits of the balance struck by the EU legislature by engaging in robust proportionality review, the CJEU opts instead to examine whether the EU institutions considered all relevant facts and circumstances when attempting to strike such a balance. This is achieved by examining the legislative process - drawing once again open preparatory documents, expert studies, policy proposals and even the public deliberations of the institutions – in order to ascertain whether the EU legislature sufficiently considered the fundamental rights implications of its proposed actions before enacting them into law.[47]

5.) Provided by Law and Respecting the Essence of Rights

The next major development to be considered in this regard relates to the obligation in Article 52(1) CFR that EU legal acts which limit fundamental rights respect the "essence" of those rights.[48] As was noted above, the pre-Lisbon Treaty jurisprudence of the Court contained many

[45] Commission Staff Working Paper, Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC (2011) 567 4.
[46] ibid 5.
[47] *Case C-101/12, Schaible* (n 3); *Case C-356/12, Glatzel* (n 3).
[48] Although Article 52(1) CFR first requires that any limitation on the exercise of the rights and freedoms in the Charter must be "provided for by law", this condition has played a very minor role when it comes to fundamental rights review of EU legislation. In virtually all cases, the CJEU has been able to point to a Regulation, Directive or Decision of the EU institutions which has had an impact upon Charter rights, thus satisfying the "provided by law" requirement. It shall therefore not be considered further here. Steve Peers and Sacha Prechal, 'Scope and Interpretation of Rights and Principles' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (2014) 1470–1474.

examples of the Court concluding that restrictions upon fundamental rights were proportionate *provided* they did not impair the substance of the right in question.

a.) Schrems

Despite limited case law on this point, the landmark judgment in *Schrems* suggests a considerable shift in the Court's reasoning with regards to this "essence of rights" condition.[49] Whereas the proportionality principle plays a role in determining whether EU legislation that interferes with fundamental rights may nevertheless, on balance, be justified, the CJEU held in *Schrems* that interferences with the essence of fundamental rights cannot be justified under any circumstances. This means that where EU legislation infringes the essence of fundamental rights contained in the Charter, it will be annulled on that basis alone. There will be no need to review whether the EU legislature stuck an appropriate balance between fundamental rights and EU objectives in the general interest.

In *Schrems*, the CJEU annulled a Commission Decision that determined that the United States' (US) Safe Harbour Privacy Principles guaranteed an adequate level of fundamental rights protection when data is transferred from the EU to organisations established in US.[50]

According to an EU Directive on the processing and free movement of personal data, Member States (whose national authorities are responsible for processing data in accordance with EU law) may only transfer such data to third countries where that third country ensures an adequate level of protection of fundamental rights."[51] Under the same Directive, the Commission was entitled to find that third countries ensured an adequate level of protection of personal data where, on the basis of domestic law and international agreements that third country had entered into (particularly with the EU), the private lives and basic rights of individuals were protected.[52] By recognising that the United States Safe Harbour Principles

[49] *Case C-362/14, Maximillian Schrems v Data Protection Commissioner,* ECLI:EU:C:2015:650.
[50] ibid.
[51] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281, p. 31–50, Article 25(1).
[52] ibid Article 25(6).

ensured an adequate level of protection for the transfer of data from the EU to organisations established in the US, the Commission Decision meant that national authorities should allow data transfers to the US (subject to certain exceptions).[53]

Following well-publicised revelations that US companies (who claimed to abide by the Safe Harbour Principles) were passing personal data to the US National Security Agency (NSA), Schrems argued that the US did not ensure adequate protection of his personal data held in its territory. Consequently, the relevant national authorities (Ireland) should have prevented his data from being transferred the United States. Moreover, the Commission Decision finding that the US did ensure adequate protection should be annulled for infringing the right to the protection of personal data and private life, enshrined in Articles 7 and 8 CFR respectively.[54]

b.) Compromising the Essence of Fundamental Rights

In reviewing the legality of the Commission Decision in light of Articles 7 and 8 CFR, the CJEU held that a third country (US) must ensure, by reason of its domestic law or international commitments, a level of protection of fundamental rights that is essentially equivalent to that guaranteed within the EU.[55] In this regard, the US Safe Harbour Principles constituted a system of self-certification that applied only to US companies handling personal data from the EU and did not apply to US authorities.[56] Moreover, US law could override the Safe Harbour Principles for reasons of national security or public interest, meaning that US companies were required to disregard the Principles and comply with US laws mandating that personal data be disclosed for reasons of national security etc.[57] US authorities thus possessed a wide-sweeping power to access personal data transferred from the EU to the US and to process it in ways which were incompatible with the purposes for which it was initially transferred.[58] This general derogation

[53] Commission Decision 2000/520/EC of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce (notified under document number C(2000) 2441), [2000] OJ L 215/7, Recital 2 and Article 3.
[54] *Case C-362/14, Schrems* (n 49) paras 26-36, 67.
[55] ibid paras 73-74.
[56] ibid para 82.
[57] ibid paras 84-86.
[58] ibid para 90.

from the Principles enabled interference with the fundamental rights of the persons whose personal data is transferred from the EU to the US.[59]

Turning to the Commission Decision itself, the CJEU found that it contained insufficient information on the measures through which the US ensured adequate protection of fundamental rights. There were no findings on how the US limited interferences with fundamental rights by national authorities and no references to how the US system provided effective legal protection against interferences with rights. Existing procedures were either limited in scope or applicable only to US companies' compliance with the Safe Harbour Principles. They were not applicable to the US authorities themselves.[60]

According to the Court, interferences with the rights to privacy and protection of personal data guaranteed by Articles 7 and 8 CFR must lay down "clear and precise rules governing the scope and application of a measure and imposing minimum safeguards, so that the persons whose personal data is concerned have sufficient guarantees enabling their data to be effectively protected against the risk of abuse and against any unlawful access and use of that data."[61]

In the present case, however, the US system authorized, on a general basis, the storage of all personal data of persons whose data had been transferred from the EU to the US without differentiation, limitation or exception. There were also no objective criteria determining limits of the access given to public authorities or its subsequent use.[62] This led the CJEU to conclude that "legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the *essence* of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter"[63]

Similarly, legislation not providing any possibility for an individual to pursue legal remedies relating to interferences with his or her personal data, coupled with the lack of effective review

[59] ibid para 87.
[60] ibid paras 83, 88-89.
[61] ibid para 91.
[62] ibid para 93.
[63] ibid para 94 (emphasis added).

procedures of the activities of US authorities, "does not respect the *essence* of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter."[64]

c.) Preventing the Justification of Blatant Rights Infringements

Notably, in reaching this conclusion the CJEU did not engage in any form of proportionality review of the Commission Decision (or indeed the derogations from the Safe Harbour Principles in the US) to determine whether interferences with the rights protected by Articles 7 and 8 CFR could be justified. Instead, it found that such wide-sweeping powers of interference with personal data, coupled with a complete lack of safeguards and review mechanisms, meant that the *essence* of Articles 7, 8 and 47 CFR had been compromised, and the Commission Decision was annulled on that basis.

Even though the Court did not expand on the meaning or scope of the "essence" concept, its reasoning strongly suggests that entirely depriving an individual of the protection given by the fundamental right to effective judicial protection (Article 47 CFR) constituted an interference with the essence of this right.[65] This is because the right holder is offered no protection, since she does not have any remedies whatsoever at her disposal with which to seek protection of her rights.[66] This is further supported by the CJEU's finding in Schrems that, in light of Article 47 CFR, the "very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law."[67] "In a democratic society based on rule of law, members of society should not be left entirely without remedies against acts which have a legal effect on them."[68] Similarly, the CJEU found an interference with the essence of fundamental rights because data subjects (people whose personal data is collected, held or processed) were "completely stripped of their privacy since any of their electronic

[64] ibid para 95 (emphasis added).
[65] Outwith the context of fundamental rights review of EU legislation, see *Case C-216/18 PPU, LM* ECLI:EU:C:2018:586.
[66] Maja Brkan, 'The Concept of Essence of Fundamental Rights in the EU Legal Order: Peeling the Onion to Its Core' (2018) 14 European Constitutional Law Review 332, 353.
[67] *Case C-362/14, Schrems* (n 49) para 95.
[68] Brkan (n 66) 353.

communications could be read by public officials, leaving them no space to keep even the most private of information."[69]

Overall, therefore, blatant violations of fundamental rights by the EU institutions in circumstances where the right holder has *no legal means at all* of challenging interferences with their rights will constitute interferences with the *essence* of Charter-based rights. In such (extraordinary) circumstances, there is no scope for such interferences to be justified through proportionality balancing with reference to objectives in the general interest.[70] Furthermore, there is no need for the CJEU to have recourse to the legislative process (as it did in Schecke) to ascertain whether the EU institutions considered all relevant facts and circumstances when balancing different rights and interests. The substantive outcomes of the political process will not enjoy deference from the reviewing Court. Where EU legislation infringes the essence of fundamental rights contained in the Charter, it will be annulled on that basis alone. This suggests a considerably more robust approach to fundamental rights review in the post-Lisbon Treaty era.

6.) Variable Intensity Review in Fundamental Rights Cases

Findings by the CJEU that EU legal acts interfere with the essence of fundamental rights protected by the Charter have been rare. To date, Schrems remains the only case where an EU legal act has been annulled on this basis alone. In the vast majority of cases, the Court finds that there has been no interference with the essence of rights, but that the right in question has been restricted to a certain extent by an EU legal act. The key issue to resolved in these circumstances is whether such restrictions may be justified in accordance with the remainder of Article 52(1) CFR i.e. the proportionality principle.

a.) Digital Rights Ireland

[69] ibid.
[70] ibid 364.

At this stage, the contemporary jurisprudence of the Court evinces a finely-calibrated, flexible and variable intensity approach to reviewing whether EU legislation has disproportionately interfered with fundamental rights enshrined in the Charter.[71]

This is clearly illustrated by the Court's landmark judgment in Digital Rights Ireland, where the EU Data Retention Directive was annulled for disproportionately interfering with the rights to private life and the protection of personal data (Articles 7 and 8 CFR respectively).[72] The Directive in question obliged telephone communication service providers to store users' data relating to their private life and communications for a minimum of six months and a maximum of two years. Moreover, this data could then be accessed by competent national authorities for the purposes of crime investigation and prevention. Finally, all such data could be retained and used without the subscriber or registered user's consent or knowledge.[73]

In striking down the Directive as unconstitutional, the Court found that the scope and content of the type of data to be retained, and the extensive powers of national authorities to access and process such data, constituted "wide-ranging" and "particularly serious" interferences with Articles 7 and 8 CFR.[74] However, this interference did not affect the essence of those rights, since the Directive did not permit the acquisition of knowledge of the content of the electronic communications per se.[75] Accordingly, the Directive was in principle capable of being justified in light of the principle of proportionality, provided it pursued a legitimate objective, was appropriate and did not go beyond what was necessary to achieve its objectives.[76] Then, for the first time in its jurisprudence, the CJEU held that:

> "With regard to judicial review of compliance with those conditions, where interferences with fundamental rights are at issue, *the extent of the EU legislature's*

[71] For a recent endorsement of this point from a member of the Court see *Opinion of Advocate General Bobek, Case C-134/15 Lidl GmbH & Co. KG v Freistaat Sachsen,* (n 18) para 41.
[72] *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 1).
[73] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks [2006] OJ L 105, p. 54.
[74] *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 1) paras 32-37.
[75] ibid paras 39-40.
[76] ibid para 45.

> *discretion may prove to be limited*, depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference and the object pursued by the interference."[77]

The CJEU further stated that the extent and seriousness of the interference with the rights protected by Articles 7 and 8 CFR meant that "the EU *legislature's discretion is reduced*, with the result that review of that discretion should be *strict*."[78] This novel line of reasoning in the CJEU's jurisprudence represents a marked shift in the intensity of fundamental rights review of EU legislation. [79] To recall, according to established, pre-Lisbon Treaty case law, the EU legislature must be allowed a "wide discretion" whenever it is called upon to make choices of a political, economic or social nature and required to undertake complex assessments and evaluations. As a result, proportionality review was restricted to considering whether contested legislation was "manifestly disproportionate" in relation to the objectives pursued.[80] Moreover, in the vast majority of cases, the CJEU subjected acts of general application to "low-intensity" review, often provided very limited reasoning for its (inevitable) findings that the contested act was valid.

In contrast, in *Digital Rights Ireland*, the CJEU indicated for the first time not only that the discretion of the EU legislature could be reduced in cases of alleged infringements of fundamental rights, but also that the standard of proportionality review would be intensified as a result. Rather than deferring to the outcomes of the political process and engaging in low-intensity review, the judgment of the Court confirmed that it would engage in "high intensity" proportionality review of the EU legislation whenever it resulted in serious interferences with fundamental rights. As AG Bobek recently put it, recent judgments highlight that

[77] ibid para 47 (emphasis added).
[78] ibid para 48 (emphasis added).
[79] Thomas Von Danwitz, 'Rule of Law in the Recent Jurisprudence of the ECJ, The' (2013) 37 Fordham International Law Journal 1311, 1330–1333.
[80] *Case C-491/01, The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd (BAT)* ECLI:EU:C:2002:741 para 123.

proportionality review "can be carried out with varying degrees of strictness, thus varying the amount of deference given to the legislator."[81]

This variable approach to both the scope of discretion afforded to the EU legislature and the intensity of proportionality review in fundamental rights cases has been confirmed in subsequent case law. For example, in *Sky Österreich* the Court held when reviewing EU legislation in light of the freedom to conduct a business (Article 16 CFR) that that right was not absolute, but must be viewed in light of its social function. Based on the wording of Article 16 CFR, the freedom to conduct a business could be limited in a number of different ways by the EU legislature in order to pursue objectives in the general interest.[82] Notably, the Court then proclaimed that "[t]hat circumstance is reflected, inter alia, in the way in which Article 52(1) of the Charter requires the principle of proportionality to be implemented."[83]

One possible way of interpreting this line of jurisprudence is that different types or intensities of proportionality review should be adopted by the Court depending on the nature of the rights in question.[84] In other words, EU legal acts interfering with the right to privacy or the protection of personal data should be subject to more searching review by the CJEU (Articles 7 and 8 CFR) than interferences with the freedom to conduct a business or the right to property (Articles 16 and 17 CFR). Commenting upon this possibility (whilst noting the ambiguities in the CJEU's reasoning), Peers et al. state that "if the Court believes that different types of proportionality test should apply where different charter rights are involved (as it expressly stated in *Sky),* it should explain its reasoning and the implications of such a distinction further, and must ensure that it applies this distinction consistently."[85]

The problem with this approach, however, is that neither the Charter in general, nor Article 52(1) CFR in particular, distinguish between Charter rights or mandate varying intensities of

[81] *Opinion of Advocate General Bobek, Case C-134/15 Lidl GmbH & Co. KG v Freistaat Sachsen,* (n 18) para 41; see also *Opinion of Advocate General Kokott, Case C-358/14, Poland v Parliament and Council,* (n 2) para 148 at fn 84.
[82] *Case C-283/11, Sky Österreich GmbH v Österreichischer Rundfunk* ECLI:EU:C:2013:28 paras 45-46.
[83] ibid para 47; *Case C-547/14, Philip Morris Brands SARL and Others v Secretary of State for Health,* ECLI:EU:C:2016:325, paras 153-155.
[84] Peers and Prechal (n 48) 1484.
[85] ibid 1485.

review on the basis of the nature of the right.[86] "[I]it is worth noting that there is no hierarchy of qualified rights under the Charter. Given that all qualified rights stand on an equal footing, conflicts between them must be solved by striking the right balance."[87]

When viewed in light of the case law as a whole, it is submitted that the better view is that the intensity of proportionality review conducted by the CJEU depends upon the seriousness of the interference with a fundamental right. Whenever EU legal acts "seriously" interfere with fundamental rights protected by the Charter, the EU legislature's discretion will be reduced and proportionality review will be "strict". On this view, the nature of the right (right to privacy, right to protection of personal data, freedom to conduct a business, right to property, right to equality before the law etc.) is irrelevant. Serious interferences will result in the CJEU utilising the proportionality principle in order to determine whether the legislation in question is "strictly necessary for the purpose of attaining the objective pursued."[88] Conversely, whenever EU legal acts interfere with Charter rights to a negligible or very limited extent (i.e. not meeting the threshold of "seriousness"), the EU legislature will be afforded a wider margin of discretion and proportionality review will be conducted in a less intensive fashion.[89]

This much is made clear when one considers that in post-Lisbon cases like *Sky Österreich*[90], *Schwarz*[91] and *Rzecznik Praw Obywatelskich (RPO)*[92], the Court did *not* find that there had been a serious restriction of the fundamental rights engaged in those disputes (the right to freely conduct a business, to privacy and to equal treatment respectively). Consequently, the scope of discretion afforded to the EU legislature in these cases was not explicitly restricted and the Court did not deploy the high intensity, strictly necessary standard of review that it had in *Digital Rights Ireland*.[93] Similarly, in a number of cases where EU legislation has placed minimal

[86] The exception being absolute rights such as the right not to be tortured, subject to inhuman and degrading treatment or enslaved. See Articles 1, 4, 5 and 52(3) CFR.
[87] Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 European Constitutional Law Review 375, 392–393.
[88] *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 1) para 62.
[89] *Case C-12/11, Denise McDonagh v Ryanair Ltd,* ECLI:EU:C:2013:43; *Case C-544/10, Deutsches Weintor eG v Land Rheinland-Pfalz,* ECLI:EU:C:2012:526.
[90] *Case C-283/11, Sky Österreich* (n 82) para94.
[91] *Case C-291/12, Michael Schwarz v Stadt Bochum,* ECLI:EU:C:2013:670 paras 31-53.
[92] *Case C-390/15, Rzecznik Praw Obywatelskich (RPO) and others* ECLI:EU:C:2017:174 paras 52-72.
[93] *Case C-283/11, Sky Österreich* (n 82) para 50; *Case C-291/12, Michael Schwarz v Stadt Bochum,* (n 91) para 40.

restrictions upon fundamental rights, the CJEU has continued to afford the EU legislature a wide margin of discretion and adopted its traditional, manifestly disproportionate standard of review.[94]

b.) Serious Interferences with Fundamental Rights and High-Intensity Review

These developments necessarily require one to consider how the CJEU determines whether restrictions upon fundamental rights meet the threshold of being "particularly serious" and, where they do, how EU legislation is then reviewed in light of the principle of proportionality?

Returning to the judgment in *Digital Rights Ireland* helps to resolve some of these questions. Having held that the discretion of the EU legislature would be reduced and the intensity of proportionality review enhanced, the CJEU found that the data retention Directive pursued objectives of general EU interest; namely, to contribute to the fight against serious crime, international terrorism and, ultimately, to public security.[95]

Whilst this was of the "utmost importance in order to ensure public security…such an objective of general interest, however fundamental it may be, does not, in itself, justify a retention measure such as that established by Directive 2006/24 being considered to be necessary for the purpose of that fight."[96] Building upon its findings in *Schecke*, the CJEU noted that, when viewed in light of the right to private life, the protection of personal data requires derogations and limitations to that right to apply insofar as they are strictly necessary.[97]

In reviewing whether this was the case, the CJEU engaged in close scrutiny of the substance of the Directive, noting that the rules on retention covered *all* means of electronic communication of *all* subscribers or registered users of electronic communications networks. This meant that the Directive potentially allowed for interference with the rights of the *entire* European population, since the data of persons with no connection to organized or serious crime could be

[94] *Case C-157/14, Société Neptune Distribution v Ministre de l'Économie et des Finances,* ECLI:EU:C:2015:823 para 76 and case law cited therein.
[95] *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 1) paras 41-44.
[96] ibid para 51.
[97] ibid paras 52-53.

retained by relevant national authorities without exception.[98] There were also no meaningful limits in the Directive to regulate the access to, and subsequent use of, personal data by national authorities. Finally, the rule that all data must be retained for a minimum of 6 months and a maximum of 24 months was not based on any objective criteria and failed to distinguish between different types or uses of personal data.[99]

As a result, the Directive did not set down clear and precise rules governing the extent of the interference with rights contained in Articles 7 and 8 CFR. The Directive led to wide-ranging and particularly serious interference with fundamental rights. Moreover, such interference was not precisely circumscribed by provisions aimed at ensuring that it was actually limited to what was "strictly necessary."[100]

c.) Restrictions on the Right to Liberty

A similar approach was recently taken in the *J.N* case, where an EU Directive allowed Member State authorities to detain third country nationals who applied for international protection in order to protect national security or public order.[101] These powers of detention were challenged on the grounds that they interfered with Article 6 CFR, which provides that everyone has the right to liberty and security of person.[102]

In the Courts view, detaining applicants for reasons of national security did indeed place a limit upon the right to liberty. However, the relevant provisions of the Directive did not interfere with the essence of that right, since the Member States were only empowered to detain applicants on the basis of his/her individual conduct, under exceptional circumstances and subject to a number of conditions laid down in the Directive itself.[103]

[98] ibid para 56.
[99] ibid paras 58-64.
[100] ibid para 65.
[101] Article 8(3), Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180, p. 96–116.
[102] Article 6 CFR.
[103] *Case C-601/15 PPU, J N v Staatssecretaris voor Veiligheid en Justitie,* ECLI:EU:C:2016:84 para 52.

Accordingly, the CJEU moved to examine whether the restrictions imposed by the Directive could be justified in accordance with the principle of proportionality.[104] In so doing, it swiftly concluded that the Directive's aims of protecting national security and public order constituted an objective of general interest to the EU, and that the powers of detention provided therein were appropriate for achieving this aim.[105] Turning to whether such powers of detention were necessary, the CJEU cited *Digital Rights Ireland* when emphasising that "in view of the importance of the right to liberty enshrined in Article 6 of the Charter and the gravity of the interference with that right which detention represents, limitations on the exercise of the right must apply only in so far as is strictly necessary."[106]

In applying this heightened degree of proportionality review to the relevant provisions of the Directive, the Court found that the powers of detention were subject to a series of conditions which created a strictly circumscribed legal framework. Not only were the grounds justifying detention exhaustively set down in the Directive, but such detention was explicitly restricted to situations where it proved necessary on the basis of an individual assessment of each case, and only if less coercive measures could not be applied effectively.[107] Applicants were to be detained for as short a period as possible and a number of legal and procedural safeguards had to be observed throughout, including providing in writing the reasons of fact and law justifying the detention and setting up judicial review mechanisms to appraise the legality of decisions to detain.[108] Finally the Directive was found to be in conformity with international guidelines and recommendations on detention as it pertained to applications for asylum and international protection.[109] As a result, the provisions allowing for the detention of applicants was justified as being strictly necessary to pursue the objectives of national security and public order.[110]

d.) Towards Coherence in Constitutional Review of EU Legislation

[104] ibid paras 49-50.
[105] ibid paras 53, 55.
[106] ibid para 56; See also *Case C-18/16, K v Staatssecretaris van Veiligheid en Justitie,* ECLI:EU:C:2017:680 para 40.
[107] *Case C-601/15, J. N.* (n 103) paras 57-61.
[108] ibid para 62.
[109] ibid para 63.
[110] ibid paras 67, 82.

When considered alongside *Digital Rights Ireland*, the recent judgments in *J.N* and *K* confirm that whenever EU legal acts lead to serious interferences with fundamental rights contained in the Charter, the EU legislature's discretion will be reduced and proportionality review will be strict. In terms of what constitutes a "serious" interference with fundamental rights, this will largely depend upon the facts of each individual case. Nonetheless, these examples (albeit limited in number) provide some guidance. It is clear that empowering authorities to deprive liberty or to have widespread and largely unchecked access to personal data would meet this threshold. Whilst further case law is needed to clarify this point, it seems axiomatic that such restrictions are of a considerably greater magnitude than, say, limiting the freedom to conduct a business by prohibiting the advertising of electronic cigarettes in certain media.[111]

Crucially, in these cases of serious interference, the Court has not to date examined the EU legislative process in any detail. There has been no consideration of whether the EU legislature considered less restrictive alternatives during the legislative process. Nor does the CJEU seem particularly interested in whether the EU legislature can demonstrate that it took all relevant facts and circumstances into account when adopting the legislation in question. Instead, the Court engages in strict or "high-intensity" review of the substance of the contested EU legal act to ascertain whether it is suitable for attaining its stated objective and does not go beyond what is strictly necessary to achieve it. In so doing, the CJEU places much emphasis on the existence of objective limits, safeguards and review mechanisms within the contested EU legal act, rather on whether measures less restrictive of the right in question were available or considered by the legislature.[112]

A degree of doctrinal coherence is thus beginning to emerge across the CJEU's constitutional review jurisprudence. When it comes to serious restrictions of fundamental rights, clear violations of the EU's federalism principles or incursions into aspects of national identity (Article

[111] *Case C-477/14, Pillbox 38 (UK) Ltd v The Secretary of State for Health,* ECLI:EU:C:2016:324, paras 109-118.
[112] *Case C-601/15, J. N.* (n 103) paras 56-67; *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 1) paras 56-69.

4(2) TEU), the ordinary rule of deference to the discretionary policy choices of the EU legislature is replaced by strict, merits-based scrutiny of EU legislation.[113]

In other words, the default rule in contemporary federalism and fundamental rights cases of not second-guessing the merits of the legislature's policy choices seems to be displaced by intensive, substantive review of legislation. In cases of serious interference, the Court is less willing to simply check that the EU legislature has "done its work properly" throughout the legislative process by considering alternatives that are less restrictive to the rights or principles in question.[114] Instead, the Court stands ready to closely examine whether the substance of EU legislation is appropriate and contains sufficient limits, safeguards and review mechanisms to satisfy the high hurdle of being "strictly necessary" to pursue objectives of general interest to the EU.

In all other cases where contested EU legislation restricts or somehow interferes with fundamental rights or the EU's federalism principles, the Court appears to be adopting an increasingly process-oriented approach to review. Despite some inconsistencies in the jurisprudence, the overall trend depicted in Chapters 7 and 8 has been one of the CJEU making increased reference to the legislative process and evidence base upon which EU legislation was enacted in such cases.

7.) <u>What Role for Process-Oriented Review in Fundamental Rights Cases?</u>

That being said, the CJEU was evidently reluctant in the abovementioned *J.N* and *K* cases to engage in a similarly robust, merits-based review of the overall balance struck between the pursuit of national security objectives and the protection of fundamental rights (proportionality *stricto sensu*). The same intensification of substantive review at the suitability and necessity stages of the proportionality analysis described above was not replicated at the third step in the enquiry. Instead, the CJEU concluded swiftly without any meaningful degree of scrutiny that the EU legislature had struck a proportionate balance between the right to liberty and the

[113] *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland* (n 1); *Opinion of Advocate General Kokott, Case C-358/14, Poland v Parliament and Council,* (n 2) para 148.
[114] K Lenaerts, 'The European Court of Justice and Process-Oriented Review' (2012) 31 Yearbook of European Law 3, 7.

protection of national security and public order.[115] This leads to some uncertainty over whether the CJEU's novel stance on reducing the scope of discretion and engaging in strict proportionality review will be consistently applied across all three parts of the proportionality test.

a.) The Problem with High Intensity, Stricto Sensu Review

In this regard, the third, stricto sensu stage in the proportionality enquiry has proved the most controversial in the literature, since it typically involves "a balancing of the benefits gained by the public and the harm caused to the constitutional right."[116] The test "compares the positive effect of realizing the law's proper purpose with the negative effect of limiting a constitutional right. This comparison is of a value-laden nature. It is meant to determine whether the relation between the benefit and the harm is proper."[117] For these reasons, proportionality stricto sensu has raised concerns about the judiciary encroaching upon the legislature's prerogative to identify, accommodate and balance competing rights and interests in sensitive policy fields.[118]

Given that the contested legislation in *J.N* and *K* sought to strike a balance between national security/public order objectives and the fundamental right to liberty, it is perhaps unsurprising that the CJEU was extremely cautious in reviewing the merits of the balance struck by the EU legislature here. There are certainly good reasons based upon the separation of powers, democratic legitimacy and sensitivity to the policy issues involved for judicial deference in such cases.[119]

Nonetheless, sensitivity to these issues need not result in the sort of low-intensity, cursory review of the sort performed in *J.N* and *N*. As AG Bobek has recently contended, proportionality

[115] *Case C-601/15, J. N.* (n 103) paras 68-70; *Case C-18/16, K. v Staatssecretaris van Veiligheid en Justitie,* (n 106) paras 47-49.
[116] Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2011) 340; Tor-Inge Harbo, *The Function of Proportionality Analysis in European Law* (Hotei Publishing 2015) 36–41.
[117] Barak (n 116) 343 (footnoted omitted).
[118] Jud Mathews, 'Proportionality Review in Administrative Law' in Susan Rose-Ackerman, Peter L Lindseth and Blake Emerson (eds), *Comparative Administrative Law* (Second edition, Edward Elgar Publishing 2017) 407, 415.
[119] *Opinion of Advocate General Kokott, Case C-558/07, The Queen, on the application of SPCM SA, CH Erbslöh KG, Lake Chemicals and Minerals Ltd and Hercules Inc v Secretary of State for the Environment, Food and Rural Affairs* ECLI:EU:C:2009:142 paras 72-78.

review of EU legislation that encroaches upon fundamental rights "ought to include all the three stages."[120] In his view, the fact that the EU legislature is typically entitled to a wide margin of discretion when enacting policy choices into law does not necessarily mean that proportionality review should be restricted to only considering the suitability and necessity of the contested EU legal act.[121] Instead, a full, three-step approach to proportionality review should be conducted in every case, with the key variable being the intensity of review across all three components i.e. suitability, necessity and proportionality *stricto sensu.*[122]

This would mean that in every case where the EU legislature enjoys a wide discretion, review by the CJEU should be "limited to ascertaining whether the measure is not *manifestly* inappropriate for attaining the objectives pursued; whether it does not go *manifestly* beyond what is necessary to attain them; or whether it does not entail *manifestly* disproportionate disadvantages with regard to such objectives."[123] By the same logic, one would expect that in situations where interferences with fundamental rights are serious and the EU legislature's discretion is reduced, the Court would similarly intensify all three stages of its enquiry. Review would therefore seek to establish whether the measure is *strictly* appropriate for attaining the objectives pursued; is *strictly* necessary to attain them and is *strictly* proportionate in light of the disadvantages caused in pursuing such objectives.

The great problem with taking such an intensive, merits-based approach to the third step in the proportionality test, however, was already identified above: it could result in unwarranted judicial interference with the legislature's responsibility for policymaking. By engaging in strict scrutiny of the overall balance struck between general objectives and non-absolute fundamental rights, the CJEU would in effect be conducting a novel rebalancing of these issues for itself. This would be particularly problematic in the post-Lisbon Treaty era where EU legislative acts adopted in accordance with a legislative procedure are underpinned by the principle of representative democracy.[124]

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[120] *Opinion of Advocate General Bobek, Case C-134/15 Lidl GmbH & Co. KG v Freistaat Sachsen,* (n 18) para 41.
[121] For a similar argument see Paul Craig, *EU Administrative Law* (Oxford University Press 2012) 601–609.
[122] *Opinion of Advocate General Bobek, Case C-134/15 Lidl GmbH & Co. KG v Freistaat Sachsen,* (n 18) para 41.
[123] ibid para 42 (emphasis original).
[124] Article 10 TEU; Article 289 TFEU.

b.) Towards a Process-Oriented Solution

It is submitted that the adoption of a process-oriented approach to the third, *stricto sensu* stage of proportionality review provides a solution here. Recalling the abovementioned judgment in *Schecke*, the CJEU opted in that case to focus upon the legislative process to ascertain whether the EU legislature had actively considered all relevant facts and circumstances when striking a balance between general objectives and fundamental rights.

In other words, the Court did not conduct a novel rebalancing of the rights and interests at stake for itself. At the same time, though, the CJEU did not simply conclude that the overall balance struck by the legislature was proportionate without subjecting this to any degree of scrutiny at all. Instead, by adopting a process-oriented approach to review, the CJEU found that the EU legislature had not taken the care to consider all relevant facts and circumstances (including policy options that were less restrictive upon fundamental rights) when enacting the contested legislation. The legislature thus unable to demonstrate that it had "properly balanced" the competing rights and interests at stake when adopting the contested Regulations.[125]

Applying this approach to serious interferences with fundamental rights, the Court could subject the contested legislation to high-intensity, strict scrutiny at the suitability and necessity stages, whilst taking a process-oriented approach at the third step in the enquiry. This would strike the appropriate balance between ensuring that such legislation was strictly necessary to achieve the objectives in question whilst preventing the Court from overstepping the boundaries of its judicial function by engaging in a novel, rebalancing of the rights and interests at stake. At the same time, it would subject the choices of the EU legislature to more demanding stricto sensu scrutiny than the extremely light touch approach taken hitherto in *J.N* and *K.*

[125] *Joined Cases C-92/09 and C-93/09, Schecke* (n 23) paras 76-86.

Taking such a process-oriented approach at the stricto sensu stage is already supported by (some) post-Lisbon Treaty case law.[126] A good example here is *Schaible*, where the claimants challenged an EU Regulation obliging keepers of livestock to identify individual animals and keep up to date, electronic records of their animals.[127] The Regulation was enacted in order to reform the previously existing system of animal identification and registration following an outbreak of foot and mouth disease. In the applicant's view, the new, more stringent rules on identification and record keeping were excessive and constituted a disproportionate interference with the right to freely pursue a business (in this case breeding animals for commercial purposes) as protected under Article 16 CFR.[128]

The Court began by finding the Regulations' rules to be appropriate for pursuing the legitimate objectives of health protection, controlling epizootic diseases and the welfare of animals.[129] Moving to the necessity of the Regulation, the CJEU repeated its classic position that the EU legislature must be allowed a wide margin of discretion in light of the political, economic and social choices it was called upon to take in the agricultural sector. The standard of proportionality review would therefore be reduced to examining only whether the EU legislature had manifestly exceeded the bounds of its discretion.[130]

However, in a direct reference to its post-Lisbon Treaty federalism jurisprudence discussed in Chapter 7, the Court stated that the EU legislature "must base its choice on objective criteria and, in assessing the burdens associated with various possible measures, it must examine whether the objectives pursued by the measure chosen are such as to justify even substantial negative consequences for certain economic operators."[131]

In reviewing whether the EU legislature had discharged this obligation effectively, the Court turned to the legislative process and evidence base upon which the contested legislation was

[126] For an example of the CJEU engaging in a rather detailed consideration of the merits of the balance struck by the EU legislature see *Case C-283/11, Sky Österreich* (n 82).
[127] *Case C-101/12, Schaible* (n 3); See also *Case C-356/12, Glatzel* (n 3).
[128] *Case C-101/12, Schaible* (n 3) paras 22-23.
[129] ibid paras 30-42.
[130] ibid paras 47-48.
[131] ibid para 49 (citing to that effect Vodafone paragraph 53). .

enacted. In so doing, it found, on the basis of specific reports, consultations and scientific studies that the Commission took into account when proposing the Regulation, that the need for new rules in this area was supported by overwhelming evidence. Furthermore, based on the recommendations put forward in these reports, the EU legislature was entitled to take the view that the strict system of identification and registration enacted was necessary to achieve the overall aims of the legislation.[132]

Finally, when it came to the overall balance struck between EU objectives of general interest and the fundamental right to conduct a business (proportionality stricto sensu), the Court once again turned to the legislative process. Regarding the allegedly excessive nature of the financial burdens placed on farmers, the Court noted that there was "nothing in the documents before the Court that calls into question the contention of the Council and of the Commission that the financial aspects of the new system…were widely discussed during the legislative process and that the costs and advantages of that system were weighed up."[133] It was also clear from a Commission report to the Council that the EU legislature had taken the decision to phase the new Regulation in over a period of time in light of initial start-up costs calculated by the EU Joint Research Centre.[134] Lastly, the EU legislature had sought to mitigate the costs to farmers by allowing them access to financial aid from EU funds. The availability of such funds was "an important factor that [the EU legislature] took into account in its decision-making process."[135] Ultimately, therefore, the EU legislature had demonstrated that it duly considered the financial burden that farmers would bear as a result of the new system and weighed the various interests involved when trying to strike a fair balance between them.[136]

Admittedly, the legislation under review in *Schaible* did not constitute a serious interference with the right to freely conduct a business. Nonetheless, when considered alongside the Court's

[132] ibid paras 52-59.
[133] ibid para 62.
[134] ibid para 65.
[135] ibid para 67.
[136] ibid para 68; For a similarly process-oriented approach to proportionality stricto sensu review in fundamental rights cases see *Case C-356/12, Glatzel* (n 3) paras 55-73.

reasoning in cases like *Schecke*[137] and *Glatzel*[138], it is evident that a process-oriented approach to stricto sensu proportionality review would be possible in such circumstances. Rather than engaging in close judicial scrutiny of the merits of the balance struck by the EU legislature, the Court focused its examination on whether the EU legislature had taken all relevant facts and circumstances into account when taking its decision. This allowed the CJEU to avoid overstepping the boundaries of acceptable judicial practice by strictly reviewing the merits of the balance struck between competing rights and objectives of general interest. As Lenaerts puts it, the CJEU is "more respectful of the prerogatives of the political institutions of the EU if it rules that, when adopting the contested act, those institutions failed to take into consideration all the relevant interests at stake, than if it questions their policy choices by reference to its own view of the issues involved."[139]

8.) Conclusion

Chapter 8 has considered the post-Lisbon Treaty jurisprudence of the CJEU when reviewing EU legislation against fundamental rights enshrined in the Charter of Fundamental Rights. Whilst the sample size of cases remains relatively small, it was contended that the contemporary jurisprudence reveals a finely calibrated, variable intensity approach to fundamental rights review. The CJEU has indicated that the discretion afforded to the EU legislature and subsequent intensity of constitutional review will vary according to the severity of the interference with the right(s) in question.

In a marked departure from its pre-Lisbon Treaty position, the Court has come to demand that EU legislation respect the essence of fundamental rights and has struck down legislation where it fails to do so. Furthermore, in cases of serious interference with fundamental rights, the default position of judicial deference to the substantive outcomes of the political process has been moderated. Following the landmark judgment in *Digital Rights Ireland*, the Court will

[137] *Joined Cases C-92/09 and C-93/09, Schecke* (n 23).
[138] *Case C-356/12, Glatzel* (n 3).
[139] Lenaerts (n 114) 15.

reduce the discretion available to the EU legislature in such circumstances and subsequently engage in high intensity review of the substance of the contested legislation.

The result of these developments is that a degree of doctrinal coherence is beginning to emerge across the Court's post-Lisbon jurisprudence regarding constitutional review of EU legislation. In both federalism and fundamental rights cases, the Court will strictly scrutinise the substance of EU legal acts that: (i) place serious restrictions on fundamental rights; (ii) blatantly infringe the EU's federalism principles enshrined in Article 5 TEU; or (iii) encroach upon the national identity of the Member States.

Beyond these rather exceptional instances of serious interference, the Court has adopted a process-oriented approach to fundamental rights review in a number of post-Lisbon Treaty cases. In much the same way as process-oriented review has been deployed in federalism disputes discussed in Chapter 7, the Court has indicated that the EU legislature will ordinarily be entitled to considerable deference in fundamental rights cases. The CJEU refrains from second-guessing the merits of discretionary policy choices by engaging in intensive review of the balance struck by the EU legislature between general policy objectives and Charter-based fundamental rights. Instead, the Court examines whether, in reaching particular outcomes, the EU legislature has done its work properly and taken all relevant facts, circumstances and interests at stake into account when legislating.[140]

[140] ibid 3–4, 7, 15.

Conclusion

The Constitutional Court of a More Mature EU Legal Order

This thesis has analysed the changing role of the Court of Justice of the European Union over time from the perspective of its task of reviewing the legality of measures of EU law. Despite much being written on the CJEU and its seminal contribution to the development of European integration, surprisingly little attention has been paid to the ways in which the Court conducts constitutional review of legislation. Whereas the assertion that the CJEU has gradually assumed a number of functions analogous to national constitutional courts is widely accepted, a key part of its constitutional role has not yet been fully explored. In particular, there has yet to be any systematic consideration of how the CJEU's task of reviewing the constitutionality of EU legislation has shifted over time and, more broadly, what this tells us about the contemporary role of the CJEU.

1.) The Emergence of a Distinct System of Constitutional Review of EU Legislation

In addressing these gaps in the literature, the first major claim made by the present study is that the Court's assumption of powers to conduct constitutional review of EU legislation has stemmed from a series of changes to the legal and political order of the EU over time.

When viewed in comparative perspective, national courts entrusted with reviewing the constitutionality of legislation typically engage in two distinct tasks. The first is to resolve boundary disputes between different levels of government in legal orders that divide power along federal or other lines. The second is to adjudicate upon alleged infringements of fundamental rights by those wielding public power.[1]

It is clear that the drafters of the original ECSC and EEC Treaties did not initially intend for the CJEU to perform tasks of this nature within the Community legal order. Instead, the Court's powers of judicial review were founded upon the principles of French administrative law, which limited its ability to scrutinise the factual determinations and discretionary policy choices of the Community institutions. This restriction of the Court's power was deliberate

[1] Mark Tushnet, 'Judicial Review of Legislation' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press 2005).

and stemmed from the fear that a powerful European court could frustrate the aims of furthering European integration through law by engaging in robust judicial scrutiny of the legality of Community measures.

The consequence was that the CJEU was initially conceived of as being akin to national administrative courts whose principal task was to review the legality of executive-type measures enacted by the Community's law-making institutions (primarily the Commission and Council). It was certainly not viewed as playing a role analogous to powerful national constitutional and supreme courts in national legal systems.[2] Not only was there no constitutionally entrenched bill of fundamental rights in the EEC Treaty, but the original system of judicial review was not directed towards addressing the sorts of division of competences issues that are typically dealt with by national courts engaged in constitutional review.

Gradually, the system of judicial review in the Community/Union began to break free of its restrictive, administrative law foundations. By focusing upon a series of changes to the twin concepts of constitutionalism and legislation, it was contended that: (i) creative CJEU jurisprudence pertaining to general principles of law; and (ii) successive rounds of Treaty amendment, led to the gradual emergence of a veritable system of constitutional review of EU legislation.

Of particular importance in this regard was the addition of the principles of conferral, subsidiarity and proportionality to the EU legal order via what is now Article 5 TEU. By curtailing the existence and exercise of EU legislative competences, these principles aimed at upholding the EU's federal order of competences.[3] Moreover, they empowered the CJEU to review EU legislation for compliance with novel, constitutionally entrenched limits upon legislative power. The addition of these federalism principles was then complemented by the elevation of the Charter of Fundamental Rights to the same legal status as the EU Treaties by the Treaty of Lisbon.[4]

[2] Anne Boerger-De Smedt, 'Negotiating the Foundations of European Law, 1950–57: The Legal History of the Treaties of Paris and Rome' (2012) 21 Contemporary European History 339.
[3] Armin Von Bogdandy and Jürgen Bast, 'The Federal Order of Competences' in Armin Von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2009).
[4] Article 6(3) TEU.

Alongside these developments in EU constitutionalism, there have also been a number of substantial amendments to: (i) the procedures and institutions involved in the adoption of EU legislation; (ii) the sources of democratic legitimacy underpinning EU legislation; and (iii) the hierarchy of norms within the EU legal order. Most significant in this regard was the shift from unanimity to qualified majority voting in the Council and the empowerment of the European Parliament within the EU legislative process.[5]

Following the entry into force of the Lisbon Treaty, EU legislation is now formally defined for the first time as all EU legal acts that are adopted in accordance with a designated legislative procedure. Under the Ordinary Legislative Procedure, EU legislation is now enacted via a process that involves a proposal from the Commission and the joint adoption by the European Parliament and Council.[6] Moreover, EU legislation adopted in this way is now explicitly founded upon the principle of representative democracy, with the European Parliament and Council representing the interests of European citizens and the Member States respectively.[7]

When taken together, these reforms to the twin concepts of constitutionalism and legislation have transformed the CJEU's powers to review the legality of EU legal acts. Today, unlike any other period in its history, the CJEU is tasked with reviewing the validity of EU legislation against a series of constitutionally entrenched federalism and fundamental rights principles.

2.) **Shifts in the Methodology and Intensity of Constitutional Review**

In addition to tracing these changes to the system of constitutional review and the concept of legislation, the second major claim of this thesis is that the methodology and intensity of constitutional review have also shifted over the years.

In advancing this claim, a comprehensive, chronological analysis of the Court's federalism and fundamental rights jurisprudence was provided. In so doing, it was argued that the Court consistently adopted a light-touch, tersely reasoned approach to constitutional review throughout much of its history. In numerous cases, the Community/Union legislature was

[5] See generally Alexander Türk, *The Concept of Legislation in European Community Law: A Comparative Perspective* (Kluwer Law International 2006).
[6] Article 289(3) TFEU.
[7] Article 10(1) and 10(2) TEU.

afforded a wide margin of discretion and the Court adopted a very deferential standard of constitutional review. In both federalism and fundamental rights cases, the CJEU did not engage in any meaningful degree of scrutiny of contested measures of EU law; often concluding within a few short paragraphs that such measures were valid. Whilst considerations pertaining to the separation of powers, institutional capacity and expertise partly explained the prevalence of light-touch review, it was further contended that the dynamics of the Community law-making process exerted an influence here.

Throughout the early decades of European integration, the legislative process in the Community was dominated by unanimity voting in the Council. This meant that legislative output depended almost entirely upon the ability of national ministers to reach agreement with one another. It also considerably restricted the number of challenges to the validity of Community legal acts before the CJEU. With limited input from the European Parliament and strict standing requirements being placed upon individuals seeking to challenge the legality of acts of general application, Community legislation was rarely challenged before the Court. Political consensus in the Council served to shield the majority of European legal acts from judicial challenge.[8] Furthermore, prior to the Maastricht Treaty of 1993, the EU legal order lacked many of the constitutionally entrenched limits upon the existence and exercise of legislative power that one typically finds in national constitutional orders. In summarising this state of affairs, the pre-Maastricht Treaty period was described as an era of "low-intensity constitutionalism" in the Community.[9]

This body of case law was then contrasted with the contemporary, post-Lisbon Treaty jurisprudence of the Court. It was argued that a series of significant shifts in the way in which the CJEU now conducts constitutional review of EU legislation may be detected.

In cases of serious interference with fundamental rights or other core constitutional principles, the substantive outcomes of the EU political process are no longer entitled to considerable judicial deference. The CJEU has declared, for the first time in its history, that in certain circumstances the discretion of the EU legislature will be reduced. As a

[8] *Opinion of Advocate General Poiares Maduro, Case C-58/08, The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform,* ECLI:EU:C:2009:596, para 1.
[9] Miguel Poiares Maduro, 'The Importance of Being Called a Constitution: Constitutional Authority and the Authority of Constitutionalism' (2005) 3 International Journal of Constitutional Law 332.

consequence, the Court will engage in "high-intensity review" or "strict scrutiny" of the substance of contested EU legislation in order to determine whether restrictions upon such rights and principles were justified.[10]

Beyond these cases of serious interference, the Court increasingly adopts a process-oriented approach to constitutional review. Greater attention is now paid to the legislative process and evidence base upon which EU legislation was enacted, with the Court consistently making use of procedural obligations stemming from the EU Treaties and non-binding Better Regulation initiatives.[11] In so doing, the Court scrutinises whether the EU legislature has considered all relevant facts and circumstances when reaching its decisions.[12]

By adopting such a process-oriented approach to constitutional review, the CJEU indicates to the EU institutions that the political process on the European level is primarily responsible for ensuring that the EU's federalism and fundamental rights principles are respected. The Court then typically defers to the substantive outcomes of that political process. It opts not to second-guess the merits of legislative choices by engaging in high-intensity review of EU legislation. Instead, the CJEU's objective is to ensure that the institutions involved in the EU legislative process operate in a manner that is responsive to pertinent federalism and fundamental rights issues. In so doing, the focus moves towards "improving the decision-making process of the EU institutions, rather than on second-guessing their substantive findings."[13]

3.) **Reappraising the Role of the Court of Justice**

The final contribution of the present thesis is to consider the contemporary role of the CJEU in light of these recent changes to the methodology and intensity of constitutional review. It will be recalled that scholars have often identified three historical strands in the Court's jurisprudence, each of which reveals something about the CJEU's changing role over time.[14]

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[10] *Joined Cases C-293/12 and C-594/12, Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and others,* ECLI:EU:C:2014:238.
[11] Protocol No.2 on the Application of the Principles of Subsidiarity and Proportionality.
[12] K Lenaerts, 'The European Court of Justice and Process-Oriented Review' (2012) 31 Yearbook of European Law 3.
[13] ibid 15.
[14] Julio Baquero Cruz, 'The Changing Constitutional Role of the European Court of Justice' (2006) 34 International Journal of Legal Information 223; Joseph HH Weiler, 'The Transformation of Europe' [1991] Yale Law Journal 2403.

During the first, "foundational" period in the Community, the CJEU "constitutionalized" the EEC Treaty via the doctrines of direct effect, supremacy, implied powers and fundamental rights.[15] This period of constitutionalisation was followed by a second epoch in which the Court sought to overcome legislative inertia on the European level by providing judicial solutions to problems that were meant to be addressed by the Communities' law-making institutions.[16] The landmark development during this period was the judicial creation of a principle of mutual recognition in the internal market.[17]

In response to this body of case law, many criticised the Court for engaging in unwarranted judicial activism, understood in the sense of illegitimately departing from the text and plain meaning of the Treaties.[18] In addition, the Court was cited as having played a pro-integrationist role during these two periods, first by laying the foundations for the community legal order and then driving the European integration process forward through creative Treaty interpretation.[19]

Then, with the legislative process on the European level gathering momentum, the role of the Court is said to have changed once again, as it moved on to a new, third era. According to Lenaerts, following the entry into force of the Maastricht Treaty, the CJEU came to be less assertive in driving the European integration process forward. Instead, it came to view its role primarily as one of "upholding the 'checks and balances' built into the EU constitutional legal order of States and peoples, including the protection of fundamental rights."[20]

Whilst the claim that the CJEU came to assume greater constitutional responsibilities around the time of the Maastricht Treaty is widely accepted in the literature, this thesis has argued that not much actually changed with regards to the Court's approach to conducting constitutional review of EU legislation. Absent a few notable exceptions (e.g. Tobacco

[15] Weiler (n 14) 2410–2431.
[16] Koen Lenaerts, 'How the ECJ Thinks: A Study on Judicial Legitimacy' (2013) 36 Fordham International Law Journal 1302, 1308.
[17] *Case C-120/78 Rewe-Zentral AG v Bundesrnonopolverwaltung fur Branntwein (Cassis de Dijon),* ECLI:EU:C:1979:42.
[18] Patrick Neil, *The European Court of Justice: A Case Study in Judicial Activism* (European Policy Forum/Frankfurter Institut 1995); Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (M Nijhoff ; Distributors, for the US and Canada, Kluwer Academic Publishers 1986).
[19] Karen J Alter and Sophie Meunier-Aitsahalia, 'Judicial Politics in the European Community: European Integration and the Pathbreaking Cassis de Dijon Decision' (1994) 26 Comparative Political Studies 535.
[20] Lenaerts (n 16) 1309.

Advertising One) the Court largely failed to subject EU legislation to any meaningful degree of judicial scrutiny on federalism or fundamental rights grounds in the period between the Maastricht and Lisbon Treaties.[21] Despite further constitutionalising the system of judicial review by adding novel, judicially enforceable limits upon EU legislative power, low intensity review persisted. Consequently, the EU legislature remained under a limited burden to justify the constitutionality of its actions before the Court.

This state of affairs was compared to the Court's consistent practice of subjecting Member State laws and practices to strict judicial scrutiny whenever they contradicted the fundamental economic freedoms of the internal market. Unlike its established position vis-à-vis EU legislation, the Court frequently considered whether there were any less restrictive measures available when reviewing national laws that impeded the EU Treaties' provisions on free movement. For some, this double standard of review (i.e. low intensity review of EU legislation, robust review of national measures) revealed a continuing bias in favour of furthering European integration in the Court's case law.[22] Some even went so far as to suggest that the Court was continuing to engage in judicial activism (albeit of a slightly different kind) by failing to give meaningful effect to the Maastricht Treaty's newly added constitutional principles that sought to place limits upon EU legislative power.[23]

4.) **The Constitutional Court of a More Mature EU Legal Order**

Having demonstrated that the Court's post-Lisbon case law represents a significant departure from past practice, it is submitted that those accounts that continue to charge the CJEU with behaving in an activist or pro-integrationist fashion require further consideration. In particular, claims that the Court operates in accordance with its own logic and pursues an agenda that is somewhat divorced from the constitutional framework of the EU Treaties may require reappraisal.[24] At the very least, future studies on the Court must now account for recent trends in the practice of constitutional review of EU legislation –

[21] *Case C-380/03, Germany v European Parliament and Council* ECLI:EU:C:2006:772.
[22] Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal 158, 172.
[23] Gabriél A Moens and John Trone, 'The Principle Of Subsidiarity in EU Judicial And Legislative Practice: Panacea Or Placebo?' (2015) 41 Journal of Legislation 65, 80–85.
[24] For a recent treatment of these issues see Thomas Horsley, *The Court of Justice of the European Union as an Institutional Actor: Judicial Lawmaking and Its Limits* (Cambridge University Press 2018).

something which much of the existing literature on the CJEU and its contribution to European integration over time has not yet done.

In offering an alternative perspective on the contemporary role of the CJEU, it is submitted that the abovementioned shifts in the constitutional review jurisprudence of the Court have not come about in isolation. Instead, they have arisen in response to wider changes to the EU's legal and political order over the past decade.

In this regard, both the Lisbon Treaty reforms and the rise in Better Regulation initiatives have placed the EU legislature under an increased number of procedural obligations to consult widely, consider alternative policy options and accompany all legislative action with statements as to their compliance with the EU's core constitutional rights and principles. By utilising these tools as a means of scrutinising the legislative process and evidence base of EU legislation when determining its constitutionality, the turn towards process-oriented review comes in response to an increased degree of "proceduralisation" of the EU legislative process in recent years.[25]

Similarly, the move towards high-intensity review in cases of serious infringements of fundamental rights is wholly consistent with the elevation of the Charter to the apex of the EU constitutional order. Moreover, the Court's recent willingness to modulate the intensity of constitutional review in light of the nature and seriousness of rights infringements is directly linked to changes in the subject matter of litigation in the post-Lisbon era. Unlike the technical, economically oriented regulation that formed the subject matter of many past disputes, the modern-day CJEU is increasingly called upon to review the constitutionality of EU legislation dealing with highly sensitive, politically charged issues.[26] This is most evident in cases where the Court has engaged in high intensity review of EU legislation that allows national authorities to detain third country nationals who apply for international protection in order to protect national security or public order.[27]

[25] Alberto Alemanno, 'The Emergence of the Evidence-Based Judicial Reflex: A Response to Bar-Siman-Tov's Semiprocedural Review' (2013) 1 The Theory and Practice of Legislation 327.
[26] R Daniel Kelemen, 'The Court of Justice of the European Union in the Twenty-First Century' (2016) 79 Law & Contemporary Problems 117, 119.
[27] *Case C-601/15 PPU, J N v Staatssecretaris voor Veiligheid en Justitie,* ECLI:EU:C:2016:84.

Consequently, by developing a finely-tuned, variable intensity approach to constitutional review, recent developments demonstrate a Court that is responsive to the wider legal and political context in which it now operates. Whereas the Court has long been criticised for failing to subject EU legislation to meaningful judicial scrutiny, recent case law establishes that it now takes its responsibility for constitutional review more seriously. In so doing, the CJEU has come to demand more by way of justification from the EU legislature in order to justify the constitutionality of its actions in areas where the EU's federal order of competences and fundamental rights are at stake. As a result, it has finally come to operate as a veritable Constitutional Court within a more mature EU legal order.

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