The Federal Elements of the European Union

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A. General Aspects on the Federal Answer to the Iusinternationalist Model

The characters of International Public Law with which both the European Communities and the European Union are invested – treaty nature of the founding treaties, reform mechanism, lack of a *Kompetenz-Kompetenz*, maintenance of the situation of the States as *Herren der Verträge*, etc. – have been lavishly studied. In this context, the notion of supranationality stands out as the most appropriate conceptualization to qualify the international *sui generis* organisations, the EC, the EAEC, the ECSC and eventually, the EU, as we are considering it.

Besides, the complementary presence of a series of relevant elements of constitutional nature which, without placing the Union in any way in the course to a State, not even an *in fieri* State, distinguishes this international organisation from the classical model, has also been lavishly studied. In a nutshell, we find an anchorage in International Public Law with a spill over of elements of constitutional nature.[1] Let us just remember as an example of the current institutional balance the democratic legitimacy which, in spite of its limitations, makes possible the participation of the citizens in the European political power and certain legal legitimacy. This legal legitimacy, besides shaping the Union as a "Community of Law" – the *Rechtsstaatlichkeit* –, ensures the protection of the fundamental rights or the existence of a Court of Justice as a Constitutional jurisdiction.

It is however unavoidable to rely on a third dimension to complete in a proper way the analysis of the legal nature of the Community: the federal method. In fact, in our view, the federal method contributes an unquestionable influence on the new European legal system. Furthermore, as *Delpérée* explains, *"le fédéralisme est au coeur - ou devrait être - de toute réflexion sur l'Europe"*, *"la référence fédéraliste s'impose dans toute réflexion sur l'Europe"*[2], in order to understand its historical composition

1 As *Weiler* points out, "in these structural terms, the Community resembles much more, is much more, a constitutional legal order than an international legal order"; *Weiler*, The Constitution of Europe, 1999, at 9.

as well as to study its current state of development and, probably, to discern its future.[3] We believe, in the same way as *Mangas* when she observes that *"la sustancia de la que se nutre este Tratado es federal - una suerte de «federalismo internacional»."* However, in our view, we are not "jacobins in disguise" who "adore the symbolism in the word 'federalism' which obviates the need to talk of a state"[4].

We do not believe at all that the conceptual effort lacks interest,[5] but the discussion amongst the postures of iusinternationalist and federalist has hardened in fact in such a way that, as *Tizzano* points out, it focuses particularly on theoretical aspects, ignoring the points of exchange of both theories and, in the end, contributes very little to the resolution of the particular problems.[6] The European reality is new, different, complex and peculiar, and thus, its organisation model will also share this nature.

Therefore, in our view, it is not enough, at least as for the legal analysis inspiring this work, to verify in abstract terms – as difficult to refute as insufficient to support before those who disagree – the pertinence of the federal method to justify the supposedly evident "federal vocation" underlying "the increasingly more close union of the European peoples." Especially when the "founding fathers" renounced in the draft of the Treaty of Maastricht in the last minute – at the time, it is already known the open reluctance of the UK, which (erroneously) associates this term with political centralism – to include explicitly this "federal vocation" in the first Article of the TEU. The claims, generic in excess ("federal vocation", "federal substance", "federal model", "half-way along the path to federalism", etc.), must be completed with a legal analysis to study the Community system, particularly, as for the jurisprudence of the Court of Justice, to find out "at the foot of the norm" which particular elements are debtors to the federal method and why. This task, however, will not lack difficulty, particularly due to the lack of a single model

2 *Delpérée*, Le fédéralisme en Europe, 2000, p. 3.

3 See *Sidjanski*, L'avenir fédéraliste de l'Europe, 1992.

4 This is his position on the "monolithic approach" carried out, in his view, by "the so-called European Federalists"; *Weiler*, European Models: Policy, People and System, in Craig/Harlow (eds.), Lawmaking in the European Union, 1998, p. 3 (9-10); see also *Weiler*, Federalism and Constitutionalism: Europe's Sonderweg, www.jeanmonnetprogram.org/papers/00/001001.html (access date: 7.12.2001), ("one of the great fallacies in the art of 'federation building' as in nation building, is to confuse the juridical presupposition of a constitutional demos with political and social reality"). There are also other authors who have considered from the very beginning that the basis to speak of a federal inspiration are very weak; *Ganshof van der Meersch*, L'ordre juridique des Communautés européennes et le droit international, RCADI 1975, (148), at 3 ("Les Communautés européennes: État fédéral ou préfédéral?").

5 *Ipsen*, Europäisches Gemeinschaftsrecht, 1972, p. 184: Besides being particularly critical on the mere consideration of the issue of the legal nature of the Communities, considered that trying to analyse the Community phenomenon from the federal point of view is as inefficient as trying to do it from the view of Public International Law;

6 *Tizzano*, The Competencies of the Community, in EC Commission (ed): Thirty Years of Community Law, 1983, at 45 (67).

of federalism (B.). Therefore, once the federal substance of the European integration phenomenon has been outlined (C.), it will be attempted to analyze particularly the typical federal elements of the European legal system (D.), especially those federal elements within its institutional (D.I.), legal (D.II.), competential (D.III.) and monetary (D.IV.) systems. And all this will be done trying to take into account the modifications introduced by the new Treaty of Nice, particularly as for the institutional field.

B. The Problems Arising from the Lack of a Single Model of Federalism

Amongst others, the conceptual ground problems, which poses the delimitation of the federalism and many of its aspects, are well-known. Let us remember the fact that when US lawmakers changed in the preamble the expression "Confederation and perpetual Union" for "form a more perfect Union" they were not aware of the fact that they were changing from the confederalism to the federalism nor that they were assuming a particular model, but just taking over the deficiencies of the Articles of Confederation[7], basically, the lack of competencies to govern interstate trade. In an identical parallelism, the founding Treaties of the European Communities, as any national Constitution, do not set up any model, but they structure the European Communities so that they can respond to the requirements of the reality they govern.

Therefore, it might be advisable to remember from the beginning, the lack of an univocal federal model, and not only from the point of view of the Political Theory – the first precedents go back to 1603 in the works of *Althusius*[8] or even earlier[9] – but especially, as for our concern, from the legal dimension. The notion of *Bundesstaatlichkeit*[10], despite its semantic identity, does not have the same legal

7 The Article 3 of the Articles of the Confederation of 1776 (ratified in 1778 by the majority of the previous colonies, in 1779 by Delaware and in 1791 by Maryland) sets up: "The said States hereby severally enter into *a firm league of friendship with each other*, for they common defence, the security of their Liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon thorium, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever". On the contrary, the preamble of the Constitution of 1787 already sets up: "We, the People of the United States, in order *to form a more perfect Union*, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America". Underlined by the author.

8 In 1603 he published his work Politica methodice digesta.

9 Some authors, in the middle of the 19th century, considered the federalism as an ancient principle (*Urprinzip)*; see *Bluntschli*, Geschichte des schweizerischen Bundesrechtes von den ersten ewigen Bünden bis auf die Gegenwart, 1846, I, at 550.

meaning in the *Grundgesetz* (art. 20) than in the Austrian Constitution (art. 2), nor the term Federation in the US Constitution implies the same as the term Federal Commonwealth in the Australian Constitution (preamble) and the term *Bund* in the Swiss Constitution (art. 1) is not the same as Federation in the current Russian Constitution (art. 1.1). In effect, the notion of federalism can only be treated within the framework of the particular historical experience of the legal system and the political context where it is developed. And the same can be said on the elements of federal nature identified within the European scope considered in the following section.

However, there are links shared by all of them. In fact, there are elements common to all the systems considered as federal systems. In the beginning of the 20th century, *Triepel* contrasted the centrifugal forces, predominant in the federalism *(föderalistische Strebungen)*, to the centripetal ones, usual in the States of centralist kind *(unitaristische Strebungen)*[11], although he considered a constant fight between both forces, also called integrating and disintegrating forces, as unavoidable elements to qualify the *Bundesstaatlichkeit*.[12] Afterwards, in the thirties, the US federalist doctrine, breaking with the notion of dual federalism which had dominated the previous century, developed the notion of co-operative federalism[13], which was not completely accepted by the German doctrine until the sixties,[14] although it is widely accepted nowadays under the acceptance of the *bundesstaatliche Kooperation*[15] and has been incorporated to virtually all the federal systems, particularly in

10 A detailed and recent study on this principle has been carried out by *Sarcevic*, Das Bundesstaatsprinzip: eine staatsrechtlichen Untersuchung der Bundesstaalichkeit, 2000. Although the terms *Föderalismus* and *Bundesstaatlichkeit* are frequently linked, the doctrine establishes a conceptual difference between the former, as a political category, and the latter, considered as a legal-state category where different entities converge with a state nature; see *Geyerle*, Föderalismus, in Fs. Porsch, 1923, at 128; *Kimminich*, Der Bundesstaat, in Isensee/Kirchhof (eds.): Handbuch des Staatsrechts der Bundesrepublik Deutschland, 1995, vol. 1, § 26.

11 *Triepel*, Unitarismus und Föderalismus im Deutschen Reiche, 1907, at 8. For further information see *Grewe*, Antinomien des Föderalismus, 1948.

12 *Triepel*, Die Reichsaufsicht, 1917, at 3.

13 See *Strong*, Co-operative Federalism, Iowa Law Review 1937-38, at 459; *Warne*, The Drainage Basin Studies: Co-operative Federalism in Practice", Iowa Law Review 1937-38, at 565.

14 It seems that the term co-operative federalism was used for the first time in 1964 in the periodical session held by the Constitutional Law professors by *Lerche*, Föderalismus als nationales Ordnungsprinzip, VVDStRL 1964, at 66 (70). From amongst the subsequent doctrinal contributions not it German, refer to *Domenice*, Fédéralisme coopératif, 1969.

15 *Grewe-Leymarie*, Le fédéralisme coopératif en R.F.A., 1981; *Hesse*, Aspekte des kooperativen Föderalismus in der Bundesrepublik, Fs. Gebhard Müller, 1970, at 141; *Frowein*, Integration and the Federal Experience in Germany and Switzerland, in Cappeletti/Seccombe/Weiler (eds.): Integration Trough Law: Europe and the American Federal Experience, 1986, vol. 1, book. 1, at 573 (587-589 [Integration Trough Co-operation]; *Kewenig*, Kooperativer Föderalismus und bundesstaatliche Ordnung, AöR 1968, at 433; *Kisker*, Kooperation im Bundesstaat: Eine Untersuchung zum kooperativen Föderalismus in der Bundesrepublik Deutschland, 1971.

Austria[16], Switzerland[17], Canada[18] and Australia[19]. Within the European framework, the failed Herman report on the Constitution of the European Union proclaimed itself a defender of a decentralised co-operative federal model.[20]

Nevertheless, the result is that the federal model is neither single nor univocal. However, and with all the reservations, the federalism has come across two well-known archetypal historical expressions, that of Philadelphia and that of Bonn. Both models constitute the general framework where it is possible to point out the influences which directly or indirectly receives the Community from these federal models.[21]

C. The Federal Substance of the European Integration

The use of the federal notions to host the phenomenon of the Community integration is as old as the founding treaties themselves.[22] However, although a case could be made for names such as *Adenauer*, *de Gasperi*, *Hallstein*, *Monet*, *Spinelli* or *Spaak* as defenders of one or the other form of the federalist ideology, it is not less true that their real profiles were diffuse in excess.[23]

16 *Ermacora*, Österreichischer Föderalismus: Vom patrimonialen zum kooperativen Bundesstaat, 1986.

17 *Dominice*, Fédéralisme coopératif, Referate und Mitteilungen des Schweizerischen Juristenvereins 1969, at 743; *Häfelin*, Der kooperative Föderalismus in der Schweiz, Referate und Mitteilungen des Schweizerischen Juristenvereins 1969, at 549.

18 *Cohen*, The Search for a Viable Federalism, Manitoba Law Journal 1969, at 1 (10-11).

19 *Sawer*, Co-operative Federalism and Responsible Government in Australia, The Fourth Alfred Deakin Lecture, (September 16 1970), Sidney, 1970; *Sawer*, Australian Federalism in the Courts, Carlton, 1970, at 142-143.

20 Report on the Constitution of the European Union, EP Documents 1994/0064 A3, in particular point B.IV.

21 On the elements shared by any form of federalism, see, for all of them, *Bothe*, Die Kompetenzenstruktur des modernen Bundesstaates in rechtsvergleichender Sicht, 1977, at 10; *Bothe*, Art. 20, in Kommentar zum Grundgesetz für die Bundesrepublik Deutschland, section 18. The same view is defended by *Blanke*, Föderalismus und Integrationsgewalt – Die Bundesrepublik Deutschland, Spanien, Italien und Belgien als dezentralisierte Staaten in der EG, 1991, at 361.

22 See *Cardis*, Fédéralisme et intégration européenne, 1964; *Cansacchi*, Les éléments fédéraux de la CEE, in: Mélanges Gidel, 1961, at 101; *Iglesias Buhigues*, La nature juridique du droit communautaire, CDE 1968, at 501 (520-523); *Sidjanski*, Les organisations européennes sont-elles fédératives?, in Fédération nº 141, at 636.

23 Amongst all the works of these authors, it might be sensible to highlight, as an expression of the federal idea, but also of the large lack of conceptual determination underlying, the work written once the first results of the European project could be seen by *Spinelli*, The European Adventure: Tasks for the Enlarged Community, 1972.

The federal model offers, without any doubt, guidelines particularly applicable to the phenomenon of the Community integration.[24] *Jacqué*, from an analysis with a federalist bias, considers that the recourse to the federal experience to clarify the queries linked to the Community as for the distribution of competencies, the institutional norms or the legal system is natural reaction.[25] Even *Hartley* admits that the Community institutions "each contain both inter-governmental and federal elements".[26] Thus, the abundance of studies which, taking the constitutional jurisprudence of the Court of Justice as a starting point, set up a certain parallelism with the US[27] or the German[28] federal models, and even with the Canadian[29] is not surprising.

Other authors defend the existence of a peculiar federalism *(Besonderheit des Föderalismus)*[30] and even there are scholars who consider that the European Union has already reached a real federal status[31] or who even consider the legal situation of the Communities as the archetypal situation of a federal State.[32]

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24 For the analysis of the historical process of Community decanting, the federal method has been widely used. See, for an example, *Burguess*, Federalism and European Union, 1989. This study is aimed at proving the fundamental continuity of the federal ideas, as well as their effects on the political evolution of the Communities. Therefore it focuses particularly on the period 1972-1987. *Künhard* uses a similar method with the additional advantage that the period under review goes from the creation of the Communities to the TEU, and he even devotes the last chapter to a future prospective task; see *Künhard*, Europäische Union und föderale Idee, 1993. It also needs to be highlighted that he tries to minimize the value of the federalism as an absolute value and highlights the risks implied in the translation of the federal model to the whole continent (at 137 in fine).

25 *Jacqué*, Cours général de droit communautaire, RCADI 1990 (vol. 1), book 1, at 237 (265).

26 *Hartley*, The Foundations of European Community Law, 4th ed., 1998, at 9; see also *Hartley*, Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community, AJCL 1986, at 229.

27 *Capelleti/Seccombe/Weiler*, Integration Through Law. Europea and the American Federal Experience, 1986; *Lenaerts*, Le juge et la Constitution aux États Unis d'Amérique et dans l'ordre juridique européen, 1988 (this is an extended edition translated into French from the original text in Dutch, Constitutie en rechter. De rechtspraak van het Amerikaanse Opperste Gerechtshof, het Europese Hof van Justitie en het Europese Hof voor de Rechten van de Mens, 1983); *Sandalow/Stein*, Courts and Free Markets. Perspectives from the United States and Europe, 1982.

28 *Blanke*, (fn. 22), at 370-387; *Zuleeg*, Die föderativen Grundsätze der Europäischen Union, NJW 2000, p. 2846.

29 See *Edward/Lane*, European Union and the Canadian Experience, YEL 1985, at 1; *Strain*, Integration, Federalism and Cohesion in the European Community: Lessons from Canada, Policy Research Series, Paper No. 16, Dublin 1993, in particular at 80-84.

30 *Everling* considers that the federal principle is an essential element for the Community Constitution, although it has not been set in a definitive way yet; see *Everling*, Zur föderalen Struktur der Europäischen Gemeinschaft, in Fs. für Karl Doehring, 1989, at 179 (197). See also *Rudolf*, Bundesstaat und Völkerrecht, AVR 27, 1989, at 1; *Merten*, Föderalismus und Europäische Gemeinschaft unter besonderer Berücksichtigung von Umwelt und Gesundheit, Kultur und Bildung, 1990; *Blanke*, (fn. 22).

31 *Badura*, Die "Kunst der föderalen Form": Der Bundesstaat in Europa und die Europäische Föderation, in Festschrift Lerche, 1993, at 370 (381).

32 *Cansacchi*, (fn. 22), at 101.

Nevertheless, within this doctrinal trend we find positions as different as the notion of the Community as an incomplete federal State *(unvollendeter Bundesstaat)*[33], as a federal system *(bündisches System)*[34], as a European Federation[35], as a structural principle[36], as a goal to attain[37] or as a way to solve the crisis and the problems which the Community regularly has to face.[38] But, in our view, identifying *in concreto* the elements of the Community system which can be considered of federalist nature might be more important than getting lost in doctrinal dispersions.

D. Determination of Typically Federal Elements

I. The Institutional System: Balance between Centripetal and Centrifugal Forces

1. Legislative Bodies

a) The Bicameral Structure: The Council and its Role as a Community Senate or Bundesrat

To balance the relationships between the Federation and the States, all federal systems grant some degree of participation to the States as for the generation of the federal will.[39] The most common way to let the States participate is through a

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33 *Hallstein*, Der unvollendete Bundesstaat: europäische Erfahrungen und Erkentnisse, 1969. An identical terminology can be found in *Bothe*, who chooses since it the phenomenon of Community integration enjoys characters to those of the federalism (fn. 21) at 33.

34 *Oeter*, Souveränität und Demokratie als Probleme in der "Verfassungsentwicklung" der Europäischen Union, ZAöfRV 1995, p. 659.

35 *Zuleeg*, (fn. 28) p. 2851.

36 *Laufen/Fischer*, Föderalismus als Strukturprinzip für die Europäische Union: Strategien für die Union, 1996.

37 A good example of this posture can be found in *Sidjanski*, (fn. 3). *Giscard d'Estaing* has shared a similar view. The author contrasts the notions *l'Europe-espace*, represented by the decision to extend the Community under *l'Europe-puissance*, whose existence, besides a powerful integration, requires a performance, according to the nature of the competencies executed, under the federal model or by a intergovernmental procedure ratified in a vote. Nevertheless, it might be necessary, according to the author, to grant an institutional structure linked to the national structures as federal States and defined with accuracy and rigor enough to prevail with constitutional power over the States aiming at it; *d'Estaing*, Manifeste pour une nouvelle Europe fédérative, RAE 1995, at 19 (21).

38 *Burrows/Denton/Edwards*, Federal solutions to European Issues, 1978; *Kinsky*, Föderalismus: ein Weg aus der Europakrise, 1986, at 118-124, where even solutions to overcome, under the federal model, not only the Community crisis, but also the social and the crisis of the notion of regionalism are proposed.

39 The very first doctrine already includes this feature within the Theory of Federal States as a structural element of the federalism, see for instance *Jellinek*, Allgemeine Staatslehre, 3rd ed., 1914, at 780-781;

bicameral parliamentary system, whose second chamber represents the interests of the States themselves.[40] Its concrete configuration is varies a lot depending on each model: an equal number of representatives for each State, as in the US (art. I sect. 3 y Amendment XIV sect. 2)[41], in Switzerland the *Ständerat* (art. 80), Australia (sect. 7 Commonwealth of Australia Constitution) or Canada (sect. 22 British North America Act) or a different number according to the population of each State as in the German *Bundesrat* (art. 51-II *Grundgesetz*)[42], chosen by universal suffrage, as in the US since 1913 (Amendment XVII), Australia (sect. 7 Commonwealth of Australia Constitution Act) or Switzerland, appointed by the regional Parliaments, as in Austria (art. 35) and in the US until 1913 or composed of members of the Government of each *Land* as in Germany (art. 57-I *Grundgesetz*). Besides, the relationship between both chambers itself is different in each case.

In the European Community, there also exists a system which is similar to the bicameral one.[43] The legislative power is shared, in fact, by the European Parliament and the Council. The European Parliament "which shall consist of representatives of the peoples of the States brought together in the Community" (art. 189 EC) with a number of representatives which varies according to the dimensions of each Member States (art. 190.2 EC), and the Council, a quasi-territorial chamber composed of representatives of the national Governments of each Member State (art. 203 EC),[44] very similar to the German *Bundesrat*.

The European Parliament, in turn, has extended its competencies and has become a true chamber with its own parliament attributions (i.e. participation in the generation of Community "legislation", control of the Community executive and participation in the elaboration of the budget). Indeed, even after the Treaty of Nice

Usteri, Theorie des Bundesstaates: ein Beitrag zur allgemeinen Staatslehre, 1954, in particular at 284 et seq.

40 *Marcic*, Die Stellung der Zweiten Kammer in den modernen Bundesstaaten, Juristische Blätter 1962, at 139; *Marriot*, Second Chambers. An Introductive Study in Political Science, 1910; *Valette*, Le sénat dans les démocraties modernes, Revue politique et parlamentaire 1966, at 21.

41 *Löwenstein*, Verfassungsrecht und Verfassungspraxis der Vereinigten Staaten, 1959, at 205 et seq.; see also *Riker*, Federalism-Origin, Operation, Significance, 1964, in particular at 87 et seq; *Bothe*, (fn. 21) at 86-87.

42 Each *Land* has at least three votes in the *Bundesrat* (Bremen, Hamburg, Mecklenburg-Vorpommern and Saarland), although the *Länder* with more than two million inhabitants, have four (Berlin, Brandenburg, Hessen, Rheinland-Pfalz, Sachsen, Sachsen-Anhalt, Schleswig-Holstein and Thüringen). The *Länder* with more than six million inhabitants have five representatives (currently, no *Land* meets this requirement) and those with more than seven million have six (Baden-Württemberg, Bayern, Niedersachsen and Nordrhein-Westfalen).

43 See *Oeter*, Europäische Integration als Konstitutionalisierungsprozess, ZAöRV 1999, at 901 (906-907); see also *Dehousse*, European Architecture after Amsterdam: Parliamentary System or Regulatory Structure?, CMLRev 1998, at 595 (624).

44 In favour of this assimilation of the Council and the *Bundesratsprinzip*, from the times of the ECSC, see *Ophüls*, Zur ideengeschichtlichen Herkunft der Gemeinschaftsverfassung, in Festschrift für Walter Hallstein, 1966, at 387 (397-398). Obviously, the parallelism is qualified to some extent within the EC Treaty in cases where the Council has to adopt its decisions unanimously.

the European Parliament should reinforce even more its position in particular capital fields in the Union, such as the mechanism to review the Treaties (art. 48 EU) of the European Community, the determination of the guidelines of the Common Agricultural Policy (art. 37 EC), the tax harmonization (art. 93 EC), the eventual extension of the scope of the trade policy shared by the services and the copyright (art. 133.5 EC), the decisions on the own resource system (art. 269) or the extremely important clause of art. 308 EC.

b) The Legislative Procedures

On the legislative level, there are as well material parallelisms. If we compare unemotionally the co-decision procedure (art. 251 EC) to the legislative procedures of the Federal Republic of Germany, one can note that they are much more similar than they apparently seem to be. Both follow the same philosophy, i.e. avoiding that in particular material fields a law might be enacted – a regulation, a directive or a decision foreseen in art. 249 EC – that lacks the support of both chambers. As for its particular articulation, in the German system, in fact, the laws are enacted by the chamber representing the people, the *Bundestag* (art. 77-I *Grundgesetz*). On the contrary the territorial chamber, the *Bundesrat*, enjoys very important legislative powers in a series of procedures which, by the way, are not clear or easy. Let us remember that all the laws must pass the *Bundesrat* before their definitive enactment.[45] Some laws (called *Zustimmungsgesetze*) must particularly be backed by the *Bundesrat*, whereas some others (called *Einspruchsgesetze*) can only be contested or opposed.

In this sense, the Treaty of Nice has extended the co-decision procedure to matters such as the adoption of measures to fight against the discrimination (art. 13 EC), certain measures relative to visas, asylum and immigration (art. 67.5 EC), support measures for the industry (art. 157.3 EC), actions to encourage the economic and social cohesion outside the Structural Funds (art. 159 *in fine* EC) or the regulations governing political parties on the European level and in particular the rules regarding their funding (art. 191 EC). In a similar fashion, the European Parliament has acquired a privileged *ius standi* – in the same way as the States, the Commission and the Council – in the action for annulment (art. 230 EC) and the possibility of requesting the Court of Justice to give an opinion on the compatibility with the provisions of the Treaty of an international agreement (art. 300.6 EC).

The parallelism between the federal model and the Community system is, therefore, more than evident. And it could be even more evident in the future if any of the relevant projects which advocate the full implementation of a bicameral system of federal kind where the legislative power would be shared in equal terms by the chamber representing the "peoples of the Union", i.e., the European Parlia-

45 BVerfGE 28, 66 (79).

ment, and the chamber representing the Member States, namely, the Council,[46] is admitted *de lege ferenda*.

2. The Federal Government: The Commission in its Role as Incipient Community Executive

The Commission might probably be the Community institution which is the most difficult to compare to its federal equivalent: the government. The governmental function within the Community scope is shared by the European Council, the Council and the Commission itself. However, its role has evolved and the Commission has developed a position close to a government in nature.

Originally, the Commission was more closely linked to the Secretariat proper to any international organisation than to a federal kind of government; it was appointed by common consent by the Governments of the Member States, but was not at all responsible before the Parliament and did not enjoy any executive competency but by delegation and under the strict control of the Council. However, this archetypal institution of the Community has been consolidated within the Community framework with considerable competencies of its own, especially on the field of the Competition Law – sometimes with even own legislative competencies.[47]

The Council, in turn, must delegate to the Commission, although this can be done under modalities of control exerted with the comitology; and, as *Oeter* wisely points out, even the phenomenon of the comitology can be found in the federal model. Frequently, it goes unnoted that a lot of executive norms of the (German) federal government require the endorsement of the *Bundesrat* to be enforced and the latter itself creates a number of "speciality guilds" which carry out "co-ordination" tasks with the federal government.[48]

And as for the responsibility before the European Parliament, after the reforms introduced by the Treaty of Amsterdam, which grant, on the one hand, to the European Parliament the power to approve the persons proposed to act as President of the Commission by Governments of the Member States by common consent (art. 214.2 EC) and, on the other hand, reinforces the figure of the Commission's President by granting to him/her the power to provide with polit-

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46 See i.e *Weidenfeld*, Europa '96: Reformprogramm für die Europäische Union, 1994, in particular at 32-41 ("Demokratie und Legitimation") and at 34 ("Ausbau zum Zwei-Kammer-System").

47 The most relevant example is provided in the article 86.3 E.C, according to which, the Commission could pass Directives or Decisions to safeguard the proper application of the dispositions relative to public undertakings and undertakings to which Member States grant special or exclusive rights.

48 *Oeter*, (fn. 43), at 909; see also *Antoni*, Zustimmungsvorbehalte des Bundesrates zu Rechtsetzungsakten des Bundes – Die Zustimmungsbedürftigkeit von Rechtsverordnungen und allgemeinen Verwaltungsvorschriften, AöR 1989, at 221.

ical guidelines the behaviour of the Commission (art. 219 EC), these powers added to those already existing from the Treaty of Maastricht, basically the votes of censure (art. 201 EC) and investiture (art. 214 *in fine* EC), the Commission is placed very close to the image of an parliamentary legitimated executive body.[49] Besides, concerning its participation in the decision processes, particularly in the co-decision process, the Commission is not only restricted to its material monopoly of proposal (art. 211 EC).[50]

The Treaty of Nice, in turn, reinforces even more the political dimension of the Commission, particularly that of its President, who "shall decide on its internal organisation in order to ensure its acts consistently, efficiently and on the basis of collegiality" (future art. 217.1 TCE) and "shall appoint Vice-Presidents from among its Members" and structure the distribution of responsibilities incumbent upon the Commission (future art. 217. 2 and 3 TCE). Moreover, the Treaty of Nice formally includes in the Treaties the current political commitment of the Members of the Commission to resign if the President so requests.[51]

On the other hand, when the number of Member States exceeds 27, the Commission will not anymore be composed of a Commissioner for each Member State. Although the Treaty of Nice leaves the specific determination to a future – unanimous – decision of the Council, it establishes in fact that the rotary system of the Commissioners will be based on the principle of equality.[52]

Suggestions also abound – as the one presented in May 1998 by *Jacques Delors* – to reinforce even more the political profile of the President of the Commission by choosing the candidate who is on the top of the lists presented by the political parties to the elections to the EP[53] – a kind of "presidential" Commission. Therefore, it might be sensible to imply *de lege ferenda* an independent "Community gov-

49 See also *Oeter*, (fn. 43), at 909.

50 As we will see, according to the ruling passed by the Commission with regard to the amendments proposed by the Parliament to the common position of the Council, the latter might accept them by qualified majority if the ruling is positive, but it must accept it by majority if the ruling is negative (art. 251.3 E.C.). The Commission might then prevent the Council from modifying by qualified majority the common position adopted on the proposal of the Commission, making it pass an unanimous ruling.

51 This is not at the sole discretion of the President, since the Treaty of Nice conditions this fact to a prior approval of the College.

52 Protocol on the Enlargement of the European Union, art. 4.

53 Agence Europe, Documents, dated 27.5.1998, at 1-5. The aim of the proposal is to invite to "politicise the European debate", reinforce the dimension and the legitimacy of the president of the Commission before the EP. The proposal itself is that each European political party designs a candidate for the Commission and declares that if he/she wins, that is to say, if a majority group is created within the EP, it agrees to vote (of confidence) to a Commission chaired by this candidate (at 3, section 5). With this new procedure, according to *Jacques Delors* absolutely compatible with the current Community Law, it could be possible to integrate a series of pieces disconnected until the present time: election of the candidates, campaign of the political parties, individual vote, decision of the Council, sanction by the EP (at 4, section. 14).

ernment" jointly appointed by both of the two chambers in this bicameral parliamentary system, namely the Council as the territorial representation of the States and the European Parliament as the democratic representation of the peoples, and politically controlled by the latter. In reality there is no great distance between those who are in favour of an independant "Community government" such as described and their critics and the democratic advance would be visible and constitute a milestone for those who still criticize continuously the "huge" power of the Community as an "eurocracy". However, those who have chaired the Commission in the last years, after *Jacques Delors* left office, did not reach to cover in a useful manner this distance with determination.

3. The Jurisdictional Control: The Court of Justice as Guarantor of Stability and Community Coherence

All federal systems also rely on judicial instances to solve the conflicts which might arise. The particular solution ranges between the US model, decentralised (the control is vested on all the Courts of the Federation), incidental (judges rule *ad casum* in order to apply a law to a particular case) and *a posteriori* (the control is only exerted as for laws already in force); and the European model of centralised control (exerted by a single and specialised Court), abstract (judges can control the law out of any particular case) and *a priori* (there is a control prior to the moment when a law comes into effect).

In the European system, the institutional controversies, with a similar scope compared to the federal one, but with different procedural mechanisms, are solved basically through the action for annulment (art. 230 EC) and to a lesser extent through the action for failure to act (art. 232 EC). The differences between the superior entity – the Community – and the inferior entities – the Member States – are solved through the enforcement procedures (art. 226 EC) and in addition, through the action of annulment and the action for failure to act "of the downward order" when a normative act passed by a Community institution is questioned, *v.gr.* by lack of sufficient competence, by the States or in spite of having the competence and the obligation to pass this act, for instance, when it clearly fails within the scope of a unique Community competence, in case of non-acceptance.

The Treaty of Nice has also reinforced this constitutional and federal dimension through a deepened renewal of the Court of Justice,[54] basically by the creation of jurisdictional panels (future art. 220 and 225 *bis*) or the broadening of the competencies of the Court of First Instance (future art. 225 EC). The Treaty of Nice ultimately reinforces the role, both constitutional and federal, of the Court of Justice.

54 Future articles 220-245 EC and Protocol on the Statute of the Court of Justice.

Actually, within the Community framework, the federal dimension of the Court of Justice can be considered not only from this merely formal perspective. In fact, the Court of Justice can also be considered from a material perspective, as *Eric Stein* pointed out in his celebrated article published in the American Journal in 1981: "the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe".[55] Precisely, the Court of Justice itself has devised, more than the rest of the institutions and, in our view, more than the States themselves, in its patient jurisprudence, the elements of federal nature which fill the Communities and which are analysed in this chapter.

II. The Legal System: Some Basic Federal Principles

1. The Principle of Federal Loyalty: the Loyal Co-operation

The federalism is also characterised by the subjection of its territorial entities to a non-written principle, namely, the federal loyalty *(Bundestreue, fidelité fédérale)* which, in spite of some existing doctrinal precedents commenting the German Constitution of 1871, particularly *Triepel* and *Smend*, or to a lower extent, in the Swiss Law,[56] has basically been created and modelled by the German *Bundesverfassungsgericht*.[57] This principle, inherent to the essence of the federal principle itself – *Bundesstaatlichkeit* – (art. 20 *Grundgesetz*) is derived from the earliest jurispru-

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55 *Stein*, Lawyers, Judges, and the Making of a Transnational Constitution, AJIL 1981, at 1 (1).

56 In 1876 *Bluntschli*, a liberal-conservative political and a celebrated jurist, included in his main work of the Theory of the Modern State the need of a loyal and faithful behaviour of the several entities of the composed States, although he did not characterised it in this way *Bundestreue*; see *Bluntschli*, Lehre vom Modernen Staat, Dritter Teil, 1876, at 402. However, this was an individual case within the doctrine, since the rest of the authors did not mention the principle; see as an example of the standard work in that time: *Kaiser*, Schweizerisches Staatsrecht, 1858. In the forties, there were authors who already mentioned explicitly this principle; see *Fleiner/Leiner/Giacometti*, Schweizerisches Bundesstaatsrecht, 1949, in particular at 144. The most modern doctrine considered it as a principle inherent to the Swiss federal system; see *Kölz*, Bundestreue als Verfassungsprinzip, in: Schweizerisches Zentralblatt für Staats- und Gemeindeverwaltung 1980, at 145 (148-155), with a huge number of bibliographical references from the Swiss doctrince; *Widmer*, Normkonkurrenz und Kompetenzkonkurrenz im schweizerischen Bundesstaatsrecht, 1966.

57 The main contributions to this matter could be summarised as follows: *Bauer*, Die Bundestreue: Zugleich ein Beitrag zur Dogmatik des Bundesstaatsrechts und zur Rechtsverhältnislehre, 1992; *Bayer*, Die Bundestreue, 1961; *Messerschmidt*, Der Grundsatz der Bundestreue und die Gemeinden, Die Verwaltung 1990, at 425; *Schmidt*, Der Bundesstaat und das Verfassungsprinzip der Bundestreue, Würzburg University (doctoral thesis), 1967.
The contributions made by some of the main general works on German Constitutional Law should also be highlighted; see *Blanke*, (fn. 21) at 41-42; *Jarass/Pieroth*, Grundgesetz für die Bundesrepublik Deutschland, 5rd Ed., 2000, at 466-468; *Rudolf*, Kooperation im Bundesstat, in Isensee/Kirchhof (eds): Handbuch des Staatsrecht der Bundesrepublik Deutschland, vol. 4, 1990, p. 169; *Sachs*, in Sachs (ed.), Grundgesetz-Kommentar, 2nd ed., 1999, at 764-766; *Schnapp*, Art. 20, in von Münch/Kunig et al: Grundgesetzkommentar, vol. 1, 4th ed., 1992, at 1039 (1043); *Stein/Frank*, Staatsrecht, 17th ed., 2000, at 107-109; *Stern*, Das Staatsrecht der Bundesrepublik Deutschland, vol. 1, 2nd ed., 1984, at 699.

dence of the German *Bundesverfassungsgericht* [58] as a requirement of a loyal behaviour in the relationships amongst the different territorial entities which compose the Federation and has been raised to the category of fundamental rights.[59] Its importance is, according to the doctrine, capital[60] and its function is "linking more closely the different parts of the federal State, *Bund* and *Länder*, under a common constitutional system"[61] to ultimately ensure a coherent existence and an efficient performance of the federal system. In order to achieve it, the Federal Constitutional Court of Germany relies on a normative content with a double direction from which, out of the duties set in the *Grundgesetz*, creates real supplementary duties which modify and limit rights and obligations already existing in the relationships of the Federation towards the *Länder* and *vice versa*.[62]

The duties implied from this principle are both obligations of duty and obligations of abstention.[63] Some examples of the latter could be *v.gr.* the prohibition on the exercise of the own competencies in an abusive way,[64] the prohibition of going against the own acts or the prohibition on the measures *tu quoque* (that is to say, the exclusion of the principle of reciprocity).[65] Expressions of the "duties to do" derived from the *Bundestreue* are, amongst others, the obligation to provide information and mutual co-operation[66] or to keep a cordial style in the negotiations developed between both entities.[67] Therefore, as an example, note that if in some negotiations with the *Länder* the Federation treats intentionally any of them

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58 Already in the first volume of jurisprudence there is a case stating that "the entities involved in the federal constitutional State must, under the federal essence itself, collaborate and contribute to the consolidation and safeguard of all of them"; BVerfGE 1, 299 (315), (translated by the author).

59 See i.e. BVerfGE 3, 52 (57); 6, 309 (361); 92, 203 (234).

60 See for all of them *von Wahlendorf*, Une notion capitale du droit constitutionnel allemand: la 'Bundestreue' (fidelité fédérale), RDP 1979, at 769. However, there are critical voices which from a clearly minority position criticise this principle. *Hesse* does it openly and considers that its formulation is too vague and imprecise, he thinks it is based on historical conditions (those of the Constitution of 1871) which, in some way, fit those of the *Grundgesetz*; and believes that the conflicts of competencies on which these principles are based, are mere disputes between different political positions rather than competencies inherent to the federal State, and therefore, no loyalty or faithfulness can be reclaimed where the political confrontation natural in democratic systems prevails; see *Hesse*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20th ed., 1995, at 116 et seq.; A good number of authors, accepting the authority and the necessity of this principle, warn that it is perhaps used in excess and it could therefore lose efficacy; see *Ehmke*, VVDStRL 1963, at 73.; *Lerche*, Stil, Methode, Ansicht: Polemische Bemerkungen zum Methodenproblem, BVBl 1961, at 6 (698).

61 BVerfGE 8, 122 (140).

62 BVerGE 13, 54 (75-76); 21, 312 (326); 42, 103 (117).

63 BVerfGE 1, 299 (315-316).

64 BVerfGE 14, 197 (215); 81, 310 (337).

65 BVerGE 8, 122, (140).

66 BVerfGE 43, 291 (348-349); 61, 149 (205); 73, 118 (197).

67 BVerfGE 12, 205 (255); 86, 184 (211-212).

in a discriminatory way[68] or enters outrageously within the competence scope of the *Länder*,[69] the action could be declared unconstitutional or inapplicable.

The *Länder* themselves infringe as well the principle of loyalty if they use outrageously their competencies[70] or if, for instance, they intentionally carry out particular negotiations with the Federation towards failure or even if they do not control properly the behaviour of the local entities in acts against the federal competency.[71]

This principle also governs the horizontal relationships amongst the *Länder*, particularly as for the financial obligations of the *Länder* more financially sound compared to the rest.

Finally, most closely linked to our work, under this non-written principle of federal loyalty, but which can go to court, the Federation and the *Länder*, as well as the latter in their relationships amongst them, are legally obliged to exercise their respective competencies in a loyal way, taking into account and respecting the common interest and the own safeguard of the same system.

The Community system, in turn, has expressly incorporated this same principle to the Treaty and to the Community jurisprudence, in line with the German Constitutional jurisdiction, thus consolidating it as a core arrangement for the determination of the relationships between the Community and the Member States. Indeed, article 10 EC announces, perhaps too generally, that "the Member States will adopt all the general and particular measures appropriate to ensure the fulfilment of the obligations arising from the present Treaty or resulting from the acts of the institutions of the Community" and "will facilitate the latter the fulfilment of its mission". And in a second paragraph, it is added that "the Member States will refrain from taking any measure which might put at risk the achievement of the goals of the present Treaty"[72].

From this principle[73] and, above all, from the interpretation carried out by the ECJ, a clear federal nature can be claimed[74] which prevents reconducting it towards the principles of *pacta sunt servanda* and even less towards the principle of

68 BVerfGE 12, 205 (255).

69 BVerfGE 34, 9 (20).

70 BVerfGE 4, 115 (140).

71 BVerfGE 8, 122 (141).

72 Article 192 Euratom has a formulation identical to that of the article 10 EC. Article 86 ECSC, however, includes a more detailed and wider description of the duties which parts paricularly away from the rest, but with an identical philosophy.

73 A comprehensive study can be found in *Blanquet*, L'article 5 du Traité CEE: Recherche sur les obligations de fidelité des États membres de la Communauté, 1994.

74 See, for all of them, *Due*, Article 5 du traité CEE: une disposition de caractère fédéral, en Collected Courses of the Academy of European Law, 1992, vol. II/1, at 15.

bona fide.[75] Moreover, the principle of Community loyalty developed by the ECJ surpasses the provisions of article 10 EC. This provision "is the expression of the more general rule imposing on Member States and the Community instituttions mutual duties of genuine cooperation and assistance",[76] "as embodied in particular in article 5 of the Treaty".[77] Therefore the present article 10 EC is only one part, but certainly a fundamental part, of the principle of Community loyalty itself [78]. According to *von Bogdandy*, there is an unquestionable process of case-law creation *(richterliche Rechtsfortbildung*), based on article 10 EC to ensure the functional powers of the Community and its legal system.[79]

However, article 10 EC implies *prima facie* that duties arise only for the Member States. It only establishes the obligation to fulfil properly the primary and the secundary Law by the States, an obligation of diligence – to facilitate the fulfilment of the Community's mission – and an obligation to refrain themselves, so that the States shall omit all the measures which might put at risk the achievement of the goals of the Treaty. There is no doubt, that this is as well the dimension most developed by the ECJ, which demands, i.e. a duty to inform to the Commission,[80] a proper articulation of the national legislative[81] and administrative[82] procedures

75 *Dauses*, Quelques réflexions sur la signification et la portée de l'article 5 du traité CEE, in Bieber/Ress: Die Dynamik des Europäischen Gemeinschaftsrechts – The Dynamics of EC-Law, 1987, at 229 (*"[L'article 5] s'est métamorphosé en un droit institutionnel fondamental proprement communautaire"*); *Constantinesco*, L'article 5 CEE, de la bonne foi à la loyalité communautaire", in Liber amicorum P. Pescatore, 1987, at 97. The author expresses the same idea in the comment on this precept included in *Constantinesco/Kovar/Jacqué/Simon*, Traité instituant la CEE-Commentaire article par article, 1992, at 55 (55-56).

76 ECJ, Case 44/84 *Hurd* [1986] ECR 29, para. 38.

77 ECJ, Case 230/81 *Luxemburg v. European Parliament* [1983] ECR 255, para. 37.

78 Some authors prefer, however, to talk about community loyalty (*Gemeinschaftstreue*) to highlight its link with the German *Bundestreue*; see *Bleckmann*, Artikel 5 EWG-Vertrag und die Gemeinschaftstreue, DVBl 1976, at 483 (486-487); *Solner*, Artikel 5 EWG-Vertrag in der Rechtsprechung des Europäischen Gerichtshofes, 1985, at 10-26; *Zuleeg*, Art. 5, in von der Groeben/Thiesing/Ehlermann (eds.), Kommentar zum EWG-Vertrag, 4th ed., 1991, vol. 1, at 136-152, (138). Other authors consider more in line with the jurisprudence of the Court of Justice to talk of loyal co-operation; see *von Bogdandy*, Art. 5, in Grabitz/Hilf (eds.), Kommentar zur Europäischen Union, 1994, vol. 1, sect. 6. The Court of Justice has sometimes implied from article 10 a principle of solidarity which as far as its contents is concerned does not differ from the notion of federal loyalty; ECJ, Case 6 and 11/69 *Commission v. France* [1969] ECR 523, at 540; ECJ, Case 39/72 *Commission v. Italy* [1973] ECR 101. This equivalent usage is highlighted in the doctrine by *Bleckmann*, Die Rechtsprechung des Europäischen Gerichtshofes zur Gemeinschaftstreue, RIW 1981, at 653.

79 *von Bogdandy*, Rechtsfortbildung mit Artikel 5 EG-Vertrag, in Fs. für Eberhart Grabitz, 1995, at 17 (25).

80 ECJ, Case 272/86 *Commission v. Greece* [1988] ECR 4875 para. 31 and 32.

81 ECJ, Case 273/82 *Commission v. Italy* [1983] ECR 3075, para. 6.

82 ECJ, Case 30/72 *Commission v. Italy* [1973] ECR 161, para. 11. The Court of Justice also implies a duty of the States to articulate their administrative procedures so that the rights the Community Law grants to the individuals can be efficiently applied, see ECJ, Case 33/76 *REWE v. Landwirtschaftskammer des Saarlande*s [1976] ECR 1989, para. 5.

to fulfil the Community duties, the obligation of the national authorities to act in Community issues without any discrimination and with the same diligence used for the national issues,[83] the obligation to adopt co-ordination measures when different national instances are going to be implied,[84] the prohibition on the adoption of measures which might put at risk the efficiency of any common market organisation[85] or the system of funds of the Community,[86] the obligation to take into account the interests of the Community in the exercise of the national competencies in foreign issues[87] and a long list of obligations amongst which is included the obligation of the jurisdictional bodies to provide the potential defendants with the legal protection derived from the direct effect of the provisions of the Community Law.[88]

However, although the Community jurisprudence on this issue is still a little confused and rambling, in our view, in line with the federal scope, it is inherent to the principle of co-operation itself that it must be mutual and, therefore, the same applies to the double direction. On the occasion of a recourse lodged by Luxembourg against the European Parliament on institutional sites, the ECJ established that as for this principle, there existed a "rule imposing on Member States and the Community institutions mutual duties of sincere cooperation".[89] It ruled the same concerning the statutes of the European schools (loyal and reciprocal co-operation between the States and the Communities).[90] Since then, the Court has ratified the existence of reciprocal duties amongst the Member States and the Community institutions[91] and established on several occasions particular obligations of support of the Commission to the Member States in case the latter have queries or difficulties to implement their Community duties,[92] particularly as for

83 ECJ, Case 119 and 126/79 *Lippische Hauptgenossenschaft v. Bundesanstalt für Landwirtschafiliche Marktordnung* [1980] ECR 1863, para. 8.

84 ECJ, Case 51-54/71 *International Fruit Company* [1971] ECR 1107, para. 3; ECJ, Case 30/70 *Scheer* [1970] ECR 1197, para. 10-11.

85 ECJ, Case 31/74 *Galli* [1975] ECR 47, at 63-64; ECJ, Case 5/79 *Buys* [1979] ECR 3203, para. 18.

86 ECJ, Case 44/84 *Hurd*, (fn. 76).

87 ECJ, Case 22/79 *Commission v. Council (AETR)*, cit., para. 87.

88 Within the different sentences which link the direct effect with the article 10 EC those dated 10.07.1980, ECJ, Case 811/79 *Ariete* [1980] ECR 2545, para. 12; ECJ, Case 826/79 *Mireco* [1980] ECR 2559, para. 13; ECJ, Case C-213/89 *Factortame* [1990] ECR I-2433, para. 19; ECJ, Case C-430/93 and C-431/93 *Jeroen van Schindel v. Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705, para. 14; ECJ, Case C-46/93 and C-48/93 *Brasserie Pecheur SA and Factortame III* [1996] ECR I-1029, para. 39.

89 ECJ, Case 230/81 *Luxemburg v. European Parliament* [1983] ECR 255, para. 37.

90 ECJ, Case 44/84 *Hurd*, (fn. 76) para. 38.

91 See ECJ, Case C-2/88 *Zwartveld* [1990] ECR I-3365, paras 17 and 18; ECJ, Case C-234/89 *Delimitis* [1991] ECR I-935, para. 53; and ECJ, Case C-36/97 and 37/97 [l998] ECR I-6324, paras 30 to 32.

92 ECJ, Case 52/84 *Commission v. Belgium* [1986] ECR 89, para. 16; ECJ, Case 94/87 *Commission v. Germany* [1989] ECR 175, at 192. The loyal behaviour is a logical presumption of the State against the Commission, expressed in the accurate and timely information on the difficulties and the pro-

the application of Competence Law, both of the articles 81 and 82 EC, and of norms on aids granted by States. It has also been observed the obligation of mutual co-operation and work amongst the States and the Community institutions in order to overcome the difficulties.[93] This bilateral nature of the duties derived from the principle of loyal co-operation is particularly important as for the exercise of shared competencies.[94] Therefore, the Community institutions, under the principle of loyal co-operation, must also consider the capital interests of the Member States in its acts.

We also believe that this principle, besides, in the vertical relationships between the Community and the States, becomes efficient in the horizontal relationships, both in those amongst the Member States themselves, when they can affect the Community Law, and in the relationships amongst the Community institutions themselves. As for the horizontal relationships amongst the Member States, as far as aspects affecting the Community competencies are concerned, it seems particularly evident,[95] that there exists the obligation to communicate and transfer information amongst them[96] and, above all, the obligation to adopt measures to ensure the proper fulfilment of the Community's obligations.[97] Since we are in a system whose characteristics bring it closer to the federal one, it could be claimed from the principle of co-operation a certain degree of loyalty in the exercise of their own competencies by the Member States. If the acts of a particular State, due to the consequences, can affect in any way another State, the former should be obliged, under the principle of co-operation, to act in a loyal way in issues falling within its own competencies.

On the other hand, concerning the interinstitutional relationships, the ECJ derived from the principle of federal loyalty the existence of certain legal obligations of the Community institutions in their horizontal relationships. In the first place, the jurisprudence ruled on budget matters that "the operation of the budget procedure, as envisaged in the financial arrangements of the Treaty, is based essentially on interinstitutional dialogue". "Within the framework of this dialogue, the same reciprocal duties of co-operation which, as the Court has recognised, govern

posal of eventual solutions to get over those difficulties; see ECJ, Case 217/88 *Commission v. Germany* [1990] ECR I-2879, para. 33. See also ECJ, Case 325/85 *Ireland v. Commission* [1987] ECR 5041, para. 17.

93 ECJ, Case 32/79 *Commission v. UK* [1980] ECR 2403, para. 45-46.

94 Opinion 1/94, *WTO* [1994] ECR I-5267, para. 108; ECJ, Case C-349/93 *Commission v. Italy* [1995] ECR I-343, para. 13.

95 The Court of Justice has established, for instance, the duty to inform to the authorities of the State if in any moment it alters the common practices for the control of the imports of wine from Italy; ECJ, Case 42/82 *Commission v. France* [1983] ECR 1013, para. 36.

96 ECJ, Case C-251/89 *Athanasopoulos* [l989] ECR I-2797, para. 57.

97 For instance, with regard to the recognition of diplomas amongst the States, see ECJ, Case C-251/89, (fn. 96), para. 57.

the relationships amongst the Member States and the Community institutions prevail".[98] Afterwards, the existence of legal interinstituional obligations within the normative framework was set up. Thus, in a judgement in 1995, driven by the endorsement of an act of the Council, in an emergency situation, without the mandatory report of the Parliament, "the Court has held that inter-institutional dialogue, on which the consultation procedure in particular is based, is subject to the same mutual duties of sincere cooperation as those which govern relations between Member States and the Community institutions"[99].

2. The Principle of Financial Solidarity: the Incipient Economic and Social Cohesion within the EC

Another typically federal element, although not present in the US case, is the existence of mechanisms of financial solidarity amongst the different entities which compose the Federation. In this way, the *Länder* most financially sound must provide economical assistance to the weakest ones,[100] as one expression of the principle of balance and financial compensation *(Finanzausgleich)* as a federal solidarity value amongst the different *Länder*, which originally arises from the obligations derived from the federal loyalty principle in its dimension of the horizontal relationships amongst the *Länder*. They are also obliged, under the federal loyalty principle, to pay particular attention to the state norms developed by a *Land* in the exercise of its own competencies but which, due to its consequences, have a trans-border nature and might affect other *Länder* within the Federation.[101]

In the case of the Community, the Structural Funds (art. 159 EC) and the Cohesion Fund (art. 161 EC) would have a similar mission, even though its global financial amount, although relevant, is far from those existing in federal States such as Germany.

Nevertheless, the idea – which, in our view, is not probable – that in the future, starting from what is today the first expression of the method of integration for a *positive intervention* in the market, a real legal obligation of the financially soundest Member States to contribute to the economic and social development of the weakest States could be implied, so that a higher level of balance and cohesion can be reached, cannot be rejected. In this case, it would represent an important step of the Community towards a federal model.

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98 ECJ, Case 204/86 *Greece v. Council* [1988] ECR 5354, para. 16. Underlined by the author.

99 ECJ, Case C-65/93 *European Parliament v. Council* [1995] ECR I- 643, para. 23; ECJ, Case 204/86, (fn. 98), para. 16.

100 BVerfGE 1, 131.

101 BVerfGE 4, 140.

3. The Principle of Federal Surveillance: the "Custody of the Treaties"

All federal systems include different surveillance mechanisms as for the enforcement of the Federal Law and concerning these mechanisms the German system is the widest and most developed.[102] The federal surveillance, in contrast to the extraordinary scope of the German Constitutions of 1871 and 1919 and the generous original conception of *Triepel*,[103] assumes the existence of a federal law[104] such that where there is no federal law there will not be any control of the local entities either.[105] The Fundamental Law of Bonn articulates, indeed, a particular system of federal surveillance (*Bundesaufsicht*) which ensures the proper implementation of the federal laws (art. 84 and 85 *Grundgesetz*[106]). In case of disagreement between the federal government which identifies the infringement *(Mängelrüge)* and the *Land* involved, it is always possible to turn to the Federal Constitutional Court *(Bundesverfassungsgericht)*.

In the Community system, there is no doubt that the power granted on the Commission *ex ante*, as guarantor of the Treaties, to safeguard the application and fulfilment of the norms elaborated by the Community (art. 211 EC) shows an important parallelism with the federal principle in question. It is especially admissible when we face Community norms which involve a normative development by the Member States to deploy their effects, basically the Directives. If the Commission considers that a State has not fulfilled properly its transposition duties, besides being capable of demanding information, once the observations presented by the State involved are heard, will issue *ex post* a motivated report identifying the infringement of the Community Law. If the State corrects the failure, the incident is closed. But if it remains, the Commission, just in the same way as the federal States, can turn to the ECJ (art. 226 EC).

A material difference between the Community system and the federal one – i.e. the German system – is that in the latter there have been very few cases where the

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102 The US Constitution does not foresee any *ad hoc* federal surveillance instruments, but encompasses, as we will see in the next section, cases of federal coercion, implying a certain degree of previous surveillance. Furthermore, some acts of States require the previous authorisation of the Congress (art. I sect. 10), also implying some surveillance or induced control.

103 *Triepel*, Die Reichaufsicht, 1917, at 102-123 ("*das Wesen der Beaufsichtigung*").

104 The only exception can be found in the article 108-III *Grundgesetz*, which established that "when the financial authorities of the *Länder* manage taxes total or partially aimed at the Federation, they shall act by delegation of it". For these taxes, the article 105-II foresees a concurrent competence between the Federation and the *Länder*, so that also the laws of the *Länder* can be subject to *Bundesauftragsverwaltung*.

105 BVerfGE 8, 122 (137, *keine Kommunalaufsicht*).

106 *Ditmann,* Art. 85, in Sachs (ed.): Grundgesetz-Kommentar, 2rd ed., 1999, at 764; *Jaras/Pieroth*, (fn. 58), at 877; *Tschentscher*, Bundesaufsicht in der Bundesauftragsverwaltung, 1992; *Haun*, Die Bundesaufsicht in Bundesauftragsangelegenheiten, 1972; *Stern*, (fn. 57), vol. 2, at 814; *Vogel*, Selbstständige Bundesaufsicht nach dem Grundgesetz, besonders bei der Anwendung europäischen Rechts, Fs. Stern 1997, at 819.

Federation has been obliged to use the powers derived from the principal of federal surveillance,[107] whereas in the Community system, it is more often the case.[108]

Besides the task of surveillance *strictu sensu*, what could be considered the development of federal laws, in this case, the Community Directives, play a surveillance role outside any recourse before the ECJ. As for the co-ordination of the economic policies of the Member States, in order to contribute to the fulfilment of the Community objectives (art. 98 EC), the Council will adopt by qualified majority a recommendation setting general guidelines (art. 99.2 *in fine* EC) and will carry out a task of multilateral surveillance (art. 99.3 EC) in order to identify eventual infringements. In case of infringement, in turn, it could formulate, on the basis of a recommendation issued by the Commission, the necessary recommendations (art. 99.4 EC). If the failure remains, the adoption of coercive measures is not foreseen, although the Council might publish the recommendations issued, with the political effect this could have for the State in breach, especially regarding the public opinion.

Regarding the obligation of the Member States to avoid excessive deficits (art. 104.1 EC), the Commission shall oversee the observance of the budgetary discipline and, from the proportional criteria between deficit and cumulated public debt on the GDP, shall issue the corresponding report, on which the Council shall decide, by qualified majority, whether a State has an excessive deficit or not (art. 104.6 EC). In this case, the Council shall send to the State involved recommendations in order to put an end to the situation including a deadline (art. 104.7 EC). If the State does not follow these recommendations, the Council has, as well as for the deviations from the co-ordination of the economic policies, the possibility of disclosing the recommendations. But, in this case, the ECJ goes much further and allows even the new design of the policy of loans of the European Investment Bank, to request a deposit without accrued interest and even to impose "fines of an appropriate magnitude" in extremely serious cases and after a series of attempts of harmonic solution, i.e. recommendations, issue of a warning as for the persistence in the failure, persistence in the failure to comply with the warning, (art. 104.11 EC).

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107 *Ossenbühl*, Föderalismus nach 40 Jahren Grundgesetz, DVBl 1989, at 1230 (1233); *Steinberg*, Bundesaufsicht, Länderhoheit und Atomgesetz, 1990. See BVerfGE 81, 310; 84, 25.

108 Let us remember that, under article 226 EC, 91 recourses were lodged in 1996, 119 in 1997, 116 in 1998, 161 in 1999 and 157 in 2000.

4. The Principle of Primacy of the Federal Law: the Prevalence of the Community Law

The principle of primacy of the Federal Law is a principle inherent to all federal Constitutions. The US Constitution declares in the so-called supremacy clause that the Constitution and the federal legislation, as well as the Treaties subscribed by it, are "supreme law of the Land". The Article 4-II of the current Russian Constitution states that "both the federal Constitution and the federal laws prevail in the whole territory of the Russian Federation". The Australian Constitution expressly foresees that "when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid" (sect. 109 Commonwealth of Australia Constitution Act).

In Germany, the Federal Constitutional Court clearly ruled in 1974 that the principle of article 31 *Grundgesetz*, according to which, "the Federal Law prevails over the laws of the States" (*Bundesrecht bricht Landesrecht*), is a fundamental presupposition required by the federal principle itself.[109] The principle of primacy of the Federal Law applies irrespectively of the level of the state norm, even the State Constitution itself.[110] The legal consequence is very simple: nullity and barrier effect. To be more precise, the Federal Law in force will annul any conflicting State Law already in force and, for the future, norms of State Law incompatible with the Federal Law could not come into effect.[111] In our view, the jurisprudence of the Federal Constitutional Court does not point out clearly the legal consequences, particularly regarding the so-called "barrier effect"[112].

In the Community system, the principle of primacy is not expressly included in the founding Treaties, but it has been the ECJ which, since the case *Costa/E.N.E.L.* has consolidated it through a jurisprudence which in essence does not differ much from that elaborated in Germany by the Federal Constitutional Court. Also in the Community Law, primacy is a fundamental presupposition required, in this case, by "the specific original nature of the Community system"[113] since "the obligations assumed in the founding Treaty of the Community could not be unconditional, but only eventual if they could be questioned by future legal acts of the subscribers".[114] The *Simmenthal* judgement ruled conversely, "it will as good as

109 BVerfGE 36, 342 (365, *Grundsatznorm*, *fundamentale Grundgesetzbestimmung*).

110 See, *Pietzcker*, Zuständigkeitsordnung und Kollisionsrecht im Bundesstaat, in Isensee/Kirchhof, (fn. 10) at 705.

111 *Jarass/Pieroth*, (fn. 57), at 606; *März*, Bundesrecht bricht Landesrecht, 1989; *Sachs*, Die Landesverfassung im Rahmen der bundesstatlichen Rechts- und Verfassungsordnung, Thüringer Verwaltungsblätter 1993, p. 121; *Wiederin*, Bundesrecht und Landesrecht, 1995.

112 BVerfGE 36, 343 (365).

113 ECJ, Case 6/64 *Costa/E.N.E.L.* [1964] ECR 1158, in particular at 1160.

114 Ibidem, at 1159.

denying [...] the effective character of the commitments unconditional and irrevocably assumed by the Member States under the Treaty, and will question the grounds themselves of the Community".[115] In summary, as professor *Mangas Martín* points out: "primacy is an absolute characteristic and a condition for the existence of the Communities themselves", because "if the Community system would have to give way to constitutional, legislative or national administrative norms, the Community Law could not exist"[116].

The principle of primacy also includes the Community system, in the same way as the federal, as a mandatory norm, irrespectively of its level, therefore, it does not distinguish between Original Law[117] and Derived Law[118] and also encompasses the international agreements of the Community.[119] The principle of primacy acts, as the federal system, irrespectively of the level of the state norm,[120] whether it is prior or subsequent[121] and whether it is a state, regional or local norm,[122] and the same applies also to the Constitution itself.[123]

All in all, the Community system includes this principle and sets it as the bastion of the Community Law. And, in any event, it could be put on equal footing with the typical principles of the International Public Law.

5. The Principle of Federal Coercion: Sanctions, Fines and other Community Mechanism of Coercion

The federal systems have also developed a coercive instrument *ultima ratio* to ensure the safeguard of the federal principle. In the US, the Constitution establishes clearly the eventual use of military forces "to execute the laws of the Union"

115 ECJ, Case 106/77 *Simmenthal* [1978] ECR 629, para. 18; ECJ, Case 6/64 *Costa/E.N.E.L.*, (fn. 113), at 1160.

116 *Mangas Martín*, Las relaciones entre el Derecho Comunitario y el Derecho interno de los Estados miembros a la luz de la jurisprudencia del Tribunal de Justicia, in Rodríguez Iglesias/Liñán Nogueras (eds): El Derecho Comunitario Europeo y su aplicación judicial, 1993, at 55 (88); *Pescatore*, L'ordre juridique des Communautés européennes, 1975, at 227 ("*condition essentielle*").

117 ECJ, Case 6/64 *Costa/E.N.E.L.*, (fn. 113).

118 Within the abundant jurisprudence on the matter, the following could be highlighted. ECJ, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125; ECJ, Case 43/71 *Politi* [1971] ECR 1039.

119 ECJ, Case 38/75 *Nederlandse Spoorwegen* [1975] ECR 1439; ECJ, Case 267 a 269/81 *SAMI* [1983] at 801.

120 See as an example ECJ, Case 6/64 *Costa/E.N.E.L.*, (fn. 113) p. 1160 (the Law derived from the Treaty could not be legally objected by any internal text).

121 ECJ, Case. 43/71, *Politi* (fn. 118), para. 9 *in fine*; ECJ, Case 106/77 *Simmenthal*, (fn. 115), para. 7.

122 ECJ, Case 103/88 *Fratelli Constanzo* [1989] ECR 186, para. 30 (the duties observed [...] are imposed on all he authorities of the Member States) and 31 (even those which are not included within the central Administration, i.e. municipalities).

123 ECJ, Case 11/70 *Internationale Handelsgessellschaft* (fn. 118), at 1135; ECJ, Case 48/71 *Commissionv Italy* [1972] ECR 529; ECJ, Case 44/79 *Hauer* [1979], ECR 3727, para. 14.

(art. I, sect. 8 clause 15), and which was done for instance in 1957 to make the State of Arkansas apply the laws on racial segregation.[124] Besides, the Canadian Constitution theoretically allows the federal Government, embodied in the *Governor-in-Council*, to repeal in some extreme circumstances the laws of the states *(disallowance*, sects. 56 and 90 of the British North America Act). However, the doctrine considers that this is an obsolete principle.[125] In the Australian system, although the Constitution does not foresees anything in this respect, the Supreme Court has ruled that the Federation, within the framework of its legislative competencies, can adopt the legislative measures necessary to enforce properly the federal duties of the States.[126]

In the German federal system, if a *Land* fails to fulfil its federal duties derived from the Constitution or another federal law, provided that the *Bundesrat* grants its authorisation, it might be possible to adopt the measures necessary to force the *Land* involved to re-establish the federal legality by a federal coercive way (art. 37 *Grundgesetz*). Although, a case where it would have been necessary to apply this principle has not occurred yet,[127] both the doctrine[128] and the jurisprudence[129] have outlined the grounds of this principle by systematising it under the conceptual category of federal coercion *(Bundeszwang),* separating it from the faculty of federal surveillance *strictu sensu (Bundesaufsicht)*, which, in some extreme circumstances, might as well lead to coercion.[130] Above all, it must be highlighted that this conception corresponds to that of a body of constitutional protection and not to that of a way of imposing the federal will.[131] Federal duties only mean those affecting the relationships between the Federation and the *Länder*. It also stands out that the failure to fulfil the rulings of the Federal Constitutional Court[132] or the provisions of International Public Law[133] also implies a failure to comply with the federal duties.

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124 See *Corwin/Small/Jayson*, The Constitution of the United States: Analysis and Interpretation, 1964, at 535-536.

125 *Beck*, The Shaping of Canadian Federalism: Central Authority or Provincial Right?, 1971, at 146 et seq; *Wilson*, Disallowance: The Threat to Western Canada, in Saskatchewan Law Review 1974-75, at 156 (160-162).

126 *Bothe*, (fn. 21) at 136, with particular references to the jurisprudence in fn. 34 and 35.

127 *Degenhart*, Staatsrecht I, 16th ed., 2000, at 70.

128 *Erbguth*, in Sachs (ed.), (fn. 57), at 1099; *Ipsen*, Staatsrecht I, 12th ed., 2000, at 171-173.

129 There are two rulings of the Federal Constitutional Court which have considered the issue secondarily in their *obiter dicta*: BVerfGE 3, 52 (57); 7, 367 (372).

130 See *Haas*, Die Bundesaufsicht und der Bundeszwang (Dissertation), 1955; *Schäfer*, Bundesaufsicht und Bundeszwang, AöR 1952/53 at 1.

131 BVerfGE 13, 79.

132 See § 31 of the Federal Constitutional Court Law *(Bundesverfassungsgerichtsgesetz).*

133 *Blanke*, (fn. 21), at 48.

The measures adopted are subject to the margin of appreciation of the federal Government, which is not obliged to resort previously to the Constitutional Court to verify the failure,[134] but that requires the support of the *Bundesrat*.

The Community system, obviously, does not have general mechanisms of coercion admissible beyond the recourses to the ECJ and even those lead, indeed, to a sentence of failure to comply with mere declarative effects (art. 226 EC). *Strictu sensu* there does not exist any mechanism of coercion of the Union against the States. There do not exist even general mechanisms of coercion. Europol cannot be considered in any way as an expression of it. It is not designed to be an institution nor a Community body and it never allows the Council to use it in a coercive way in the typical federal (or state) sense (art. 30.2c TUE). Nevertheless, after a careful reading of the Treaties, it can be identified that certain particular instruments of coercion do exist.

In the first place, the second item of the article 228 EC, introduced by the Treaty of Maastricht, foresees the possibility of the ECJ to verify in a second ruling, by request of the Commission, the failure to comply with the previous judgement where a particular infringement of the Community Law was declared. In this case, the ECJ can impose – the possibility of lodging a recourse for the failure to comply with another judgement is not new since the case of the Italian vinegar[135] – the payment of a lump sum or a coercive fine to be paid by the Member State charged with coercive force[136] (art. 244 as regards the article 256 EC)[137].

In the second place, since the came into effect of the Treaty of Amsterdam, the article 7 TUE foresees an extreme sanction mechanism for the States which commit a serious and repeated failure to comply with the fundamental rights which might lead to a Council agreement which will include the suspension of the rights derived from the Treaty for this State, including the rights to vote the Government representative of this State in the Council. The Treaty of Nice, in turn, has improved the mechanism to overcome the deficiencies highlighted by the unfortunate "Austrian case". Thus, note the "clear risk of a serious breach" of the principles of freedom, democracy and respect for the human rights and not the "breach" itself of these human rights.[138]

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134 BVerfGE 7, 367 (372).

135 ECJ, Case 281/83 *Commission v. Italy* [1985] ECR 3397, para. 15. See ECJ, Case 193/80 *Commission v. Italy* [1981] ECR 3019.

136 ECJ, Case C-387/97, *Commission v. Grece* (4 July 2000).

137 See *Diez-Hochleitner*, Le traité de Maastricht et l'inexécution des arrêts de la Cour de justice par les États membres, RMUE 1994, at 111-159. This author, although considering that art. 228.2 represents a step forward to secure the proper application of the Community Law by the Member States, considers that it lacks audacity and is reluctant on issues such as the possibility of altering the function of the Court of Justice, the nature of the sanction itself or the wide margin of application given to the Commission.

Furthermore, within the Community strict scope, disregarding the weak formulation of art. 99 EC on the supervision of the economic policies of the Member States, we have seen in the previous section that in case of long-standing deficit which the Council considers excessive according to the parameters supplied by the EC and the corresponding protocol, it is possible, amongst other measures, to impose fines, which are definitely a clear coercive expression. The same applies, for instance, to the possibility of imposing sanctions – via financial recourses – within the framework of the Common Agricultural Policy in the common organisations of agricultural markets or their incipient expression on environmental issues.

III. The System of Competencies: on the Issues of the Catalogue, the "Kompetenz-Kompetenz" and the Subsidiarity Principle

The distribution of competencies, as *Kelsen* points out, is "the political core of the federalist idea".[139] The most peculiar characteristic of federal systems is the existence of different levels of political decision, in other words, the design of a system where some legislative competencies are charged to the superior entity (or Federation) whereas others are charged to the inferior entities (States, *Länder [...]*). Virtually all federal Constitutions encompass a catalogue listing the competencies charged to the Federation, i.e. in the article I of the US Constitution, the articles 73 and 74 of the German *Grundgesetz*, or the Sections 51 and 52 of the Australian Constitution. As *Frowein* points out, the more recent the Constitution is, the more detailed is its catalogue of competencies.[140] Amongst these competency issues are – disregarding the date when the Constitution came into effect – typically included competencies concerning foreign relations, defence, nationality, duty and monetary systems, foreign trade relations, imposition of some taxes, copyright and industrial property rights, as well as a certain extent of police co-operation, without prejudice the fact that each State retains some peculiarities in their lists of competencies. The rest of the competencies, by virtue of the so-called residual clause inherent to the notion of the enumerated powers, belong to the States. Thus, it exists a presumption of competencies in favour of the inferior entities, (*Länder*, States [...]).

This basic scheme does not exist in the EC. The Treaties do not include any catalogue of competencies nor a regulation of the issue as matters, in line with the typical federal way, but as goals to achieve and functions to fulfil. As *Vlad Constan-*

138 The Council shall act by a majority of four-fifths of its members (not by unanimity) after obtaining the assent of the European Parliament.

139 Quoted in *Delpérée*, (fn. 2), at 4.

140 *Frowein*, Konkurrierende Zuständigkeiten und Subsidiarität: Zur Kompetenzverteilung in bündnischen Systemen, in Fs. für Peter Lerche, 1993, at 401 (401 *in fine*).

tinesco points out, the introduction of a general clause of distribution of competencies might have been too rigid for the securing of the Community objectives,[141] especially since the functionalist method of Community integration is dynamic and observes a progressive extension of the framework of competencies.

On this matter, it is particularly relevant the fact that in 2004 a new Intergovernmental Conference will be held in order to handle in particular the distribution of competencies between the Community and the Member States. This Conference will be obliged, amongst other things, to consider in depth the constitutional and federal elements of European Law, including the role to be played by the regions (or *Länder*) with their own legislative competencies.

However, it is clear that under the principle of express granting of competencies (art. 5.1 EC), the presumption of competencies favours the inferior entities. The competencies are presumed to the States unless the Treaty grants them to the Community. And there can never be considered, not even in the light of the article 308, the existence of a *Kompetenz-Kompetenz* in favour of the EC. The Community is not the entity with a general power to determine the distribution itself of the competencies. It only enjoys the powers expressly transferred by the States for the securing of the objectives giving rise to the former.

The second dimension of the federal system of competencies is the differentiation between exclusive and concurrent competencies.[142] The Community Law also assumes implicitly by way of article 5 EC the typical federal differentiation so that, even via aims and objectives – and not via a catalogue or list –, once the Community nature of the competency has been established, this can be exclusive or shared.[143] If it is an exclusive Community competency, only the Community can – and is obliged – to act[144] and will do it with recourse to all the means and excluding any legislative intervention of the Member States. If, on the contrary, it is a non-exclusive competency, that is to say, a competency shared – or, in turn, a complementary competency[145] – by the Community and the Member States, from

141 *Constantinesco*, Compétences et pouvoirs dans les Communautés européennes, 1974, at 89-90.

142 See *Martín y Pérez de Nanclares*, El sistema de competencias de la Comunidad Europea, 1997, at 163-206.

143 In a restricted sense, see, as an example, the recent and extensive work by *Swaine*, Subsidiarity and Self-Interest: Federalism at the European Court of Justice, Harvard International Law Journal 2000, at 1 (71-74 as for what he calls "the narrow view").

144 The Court of Justice has ruled in this line on issues clearly exclusive such as the common trade policy; ECJ, opinion 1/75, [1975] ECR 1355, in particular at 1363-1364; ECJ, Case 41/76 *Donckerwolcke* [1976] ECR 1932, in particular at 1937; ECJ, opinion 1/78, [1978] ECR 2151, in particular at 2910. And also the competency on fishing matters; ECJ, Case 804/79 *Commission v. UK* [1981] ECR 1045, para. 17-23.

145 On this category of competencies, see *Bribosia*, Subsidiarité et repartition des compétences entre la Communauté et ses États membres", en RMUE 1992, at 165 (183); *Martín y Pérez de Nanclares*, (fn. 142), at 209-213.

the moment the TUE comes into force, the principle of subsidiarity, through its criteria of efficacy, necessity and supranationality will determine the entity competent to exercise the shared competency involved. This principle also has a clear federal origin, namely the German model (underlying the articles 73 and 74 *Grundgesetz)* and the US one.[146] In this respect, it is essential to take into account that the subsidiarity principle only governs the exercise of these shared competencies and not at all their distribution[147].

IV. The Monetary System: the "Single Currency" as an Agglutinating Force

The existence of a single currency is *strictu sensu* not a peculiar element to federalism. Obviously, also non-federal States have their own currencies. But they do act as an agglutinating force in those historical processes by which different independent States follow the federal way to give themselves, whether before or little after the new federal State is created, their own currency.[148]

In the same way, within the Community scope, the existence of a Monetary and Economic Union – in particular, the introduction of a single currency – acts, in our view, as an outstanding centripetal force which, together with the institutional, juridical and competence elements beforementioned cover the phenomenon of European integration in tune with the federal system.

E. Final Considerations: towards a New Way of Federalism

Nobody can deny that, disregarding the importance granted to the doctrinal posture taken, there exist within the European scope some elements with a clear federal inspiration, including the institutional competencial and monetary systems.

Indeed, this is still an international *sui generis* organisation under a permanent stress between its intergovernmental and integrational poles. But the scope and

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146 *Heckly/Oberkampf*, La subsidiarité à l'américaine: quels enseignements pour l'Europe?, 1994; *Isensee*, Subsidiaritätsprinzip und Verfassungsrecht, 1968, at 35 et seq.
This claim is not, however, pacific. There are some authors who, on the contrary, consider that this principle is new to the Federal Law of North America; in this sense; see *Bermann*, Taking Subsidiarity Seriously: Federalism in the European Community and the United States, Columbia Law Review 1994, at 351 (403).

147 *Bribosia*, (fn. 145), at 178-179; *Martens de Wilmars*, Le principe de subsidiarité au service d'une Communauté à la dimension des problèmes de notre temps, RMUE 1992, at 189 (196-197). *Stauffenberg/Langenfeld*, Maastricht – ein Forschritt für Europa?, ZRP 1992, at 252 (255).

148 See *Bohley*, Europäische Einheit, föderatives Prinzip und Währungsunion: Wurde in Maastricht der richtige Weg beschritten?, Aus Politik und Zeitgeschichte 1993 (B-1/93), at 34.

width of its constitutional and federal particularities overflow the traditional conceptual categories.

Within the iusinternationalist scope, the concept of supranationality might probably still be the one which explains best the preservation, even if with some relevant legal changes, of substantial international elements which are part of the genetic code of the Community: incorporation by an international treaty, position of the States as *Herren der Verträge* or constituent power of the Community, the European competencies derived from the will of the States, a certain degree of dependency of the States as for the effectiveness of the legislative, administrative and judicial actions of the Community, etc. Bundling these aspects together, some differences compared to other international organisations, such as the primacy and the direct efficacy of its rules, the atypical competencies of the Commission and the Court of Justice, the decisions taken by qualified majority within the Council or the reinforced legal position of the private individuals are apparent.

And from a second point of view, although there is no doctrinal agreement on the scope and its terminology varies a lot (federal model, federal method etc.), it seems that, nevertheless, there is a large agreement on the concept of federalism as a conceptual category essentially including the basic federal elements previously seen in this work. In this sense, the same view presented by authors such as *von Bogdandy* with regard to a supranational federalism[149] might be adopted.[150] And in this sense, the Union might be considered a supranational Federation.

This concept of supranational Federation would link the postulates of supranational and federalism[151] to embrace the necessary analytical categories to explain the iusinternational, constitutional and federal elements of the peculiar European *"OPNI (objet politique non identifié)"*. It has also the advantage of being one of the (possible) conceptual supports on which the future legal and political development of the European integration could rely, either within the framework of the proposal raised by the German Minister *Fischer* in May 2000 at the University von

149 *von Bogdandy*, Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform – Zur Gestalt der EU nach Amsterdam, 1999; *von Bogdandy*, The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty, The Columbia Journal of European Law 2000, at 27.

150 Cf. critical *Busse*, Kritische Stellung zur Einordnung der Europäischen Union als supranationale Föderation, EuR 2000, p. 686; in his opinion *"ist somit festzustellen, dass zu einem der von von Bogdandy vorgeschlagene Begriff der supranationalen Föderation weder in sich stimmig noch in systematischer Hinsicht notwendig ist"* (p. 689 *in fine*).

151 In fact, the attempts to combine the concepts of supranationality and federalism are not new. See i.e. *Hay*, Federalism and Supranational Organizations, 1966; *Hay* starts his analysis of the nature of the EEC from the sophisticated and customary classification in conceptual categories (p. 17-78), develops the concept of functional federalism to apply on the Community (p. 79-101), by proving the federal nature of the Court of Justice (p. 102-151) and also considers the relationship between European Law and National Law having a federal nature (p. 152-202).

Humbolt in Berlin – probably pragmatic and even provocative to reactivate the "drowsy" debate at that time on the European issue[152] – or any other.

Their mutual complementarily and necessity are evident. As *Laffan* points out, "federalist principles are part and parcel of the debates on institution building and on the appropriate policy scope of supranational institutions".[153] The neutrality (even coldness) of the concept of supranationality itself, with a clear technocratic nuance, without any significant legal tradition to support it and clearly insufficient to explain normative and political aspects such as the democratic element, are offset against the weight of the deep-rooted concept of federalism. And this concept, excessive on its own to legally capture the European reality and inadequate to be politically accepted by some Member States, removes through the supranational counterbalance any link or "State temptation" (present or future).

Thus, this is an instance of international federalism which, in fact, is not new at all. Remembering that, the Hague Congress in 1949 assumed it as an own principle and even the Herman report on the European Constitution, although under the excessive denotation of co-operative federalism, was a debtor of it.

And the Treaty of Nice follows the same path. The final result of the CIG'2000 is certainly poor and disappointing. It is possible to see it even as a victory of the intergovernalism embodied in the Member States.[154] But basically speaking, even if slightly, at least in its institutional aspects, it follows the federal path.

152 See Agence Europe, dated 13.5.2000, at. 3; also *Riccardi*, in Agence Europe dated 22 and 23.5.2000, at 3.

153 *Laffan*, Integration and Cooperation in Europe, 1992, at 8.

154 See, for instance, *Berrod/Pietri*, Nice ou la victoire des États membres, Europe Juris-Classeur, 2001, at 3.