COMMON MARKET LAW REVIEW

CONTENTS Vol. 52 No. 1 February 2015

Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Common Market Law Review is published bimonthly.
Subscription prices 2015 [Volume 52, 6 issues] including postage and handling:
Print subscription prices: EUR 802/USD 1134/GBP 572
Online subscription prices: EUR 758/USD 1075/GBP 544
This journal is also available online. Online and individual subscription prices are available upon request. Please contact our sales department for further information at +31(0)172 641562 or at sales@kluwerlaw.com.
Periodicals postage paid at Rahway, N.J. USPS no. 663–170.
U.S. Mailing Agent: Mercury Airfreight International Ltd., 365 Blair Road, Avenel, NJ 07001.
Published by Kluwer Law International, P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands

---

Printed on acid-free paper.

COMMON MARKET LAW REVIEW

Managing Editor: Alison McDonnell
Common Market Law Review
Europa Instituut
Steenschuur 25
2311 ES Leiden
The Netherlands
e-mail: a.m.mcdonnell@law.leidenuniv.nl
tel. + 31 71 5277549
fax: + 31 71 5277600

Aims
The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Editorial policy
The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication.

If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

Submission of manuscripts
Manuscripts should be submitted, together with a covering letter, to the Managing Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within three to nine weeks.

Authors may be requested to submit a hard copy of their manuscript, in addition to a digital copy, together with a summary of the contents. Articles should preferably be no longer than 28 pages (approx. 9,000 words). Annotations should be no longer than 10 pages (approx. 3,000 words). The title of an article should begin with a word useful in indexing and information retrieval. Short titles are invited for use as running heads. All notes should be numbered in sequential order, as cited in the text, *Except for the first note, giving the author's affiliation.The author should submit biographical data, including his or her current affiliation.

Further details concerning submission are to be found on the journal's website
http://www.kluwerlawonline.com/productinfo.php?pubcode=COLA

Common Market Law Review **52**: 51–84, 2015.

RESTORING TASKS FROM THE EUROPEAN UNION TO MEMBER STATES: A BUMPY ROAD TO AN UNCLEAR DESTINATION?

ROBERT ZBÍRAL*

Abstract

For a long time, integration was viewed as a one-dimensional deepening process consisting of the transfer of Member States' competences to the EU, while the reverse procedure was treated as non-existent. But although re-nationalization might be considered controversial, it does not have to be destructive for the EU. This was openly accepted by the Lisbon Treaty, which specified conditions for exercising competences and introduced the return of EU competences to the Member States as a viable option. This article concentrates on the partial restoration of tasks (contrary to complete repatriation – i.e. withdrawal from the EU), which might be executed either as repatriation through the revision of primary law or as deactivation through repeal of secondary law. Attention is given not only to theoretical legal framework, but also to past empirical practice. As results indicate, very few restorations have taken place. The text explores obstacles to re-nationalization and suggests potential solutions.

1. Introduction

European integration has been one of the main success stories of the last 60 years. The dominant mind-set throughout this period was to support the deepening of cooperation, which was entrenched in primary law with the famous phrase of "ever closer Union". This one-dimensional notion has been visible also in perhaps the most important subject matter of integration, the division of competences between the EU and its Member States. While libraries were filled with papers analysing the transfer of competences to the EU and exercise of competences by its institutions, the reverse process seemed

* Palacky University, Olomouc, Czech Republic. Support from grant CZ.1.07/2.3.00/30.0004 (Education for Competitiveness Programme) is acknowledged. The text was partly written during my stay as Hugo Grotius Research Scholar at the University of Michigan Law School. I am grateful to Michal Bobek, Daniel Halberstam, Jan Komárek, Panos Koutrakos, Jan Kysela, Jan Malíř and others for theirs comments and to Ian David Bell and Ivana Mrázová for linguistic revisions. The usual disclaimer applies.

to be out of the radar of research (with very few exceptions).[1] This article aims to fill this blank spot and explores whether, and potentially how, the competences currently held or exercised by the EU can be restored to the national level.

The situation in which the EU nowadays finds itself is completely different from when it was founded in 1950s. Membership has grown to 28 States with very diverse economic, social or cultural-historical characteristics, and distinct ensuing interests – this makes any agreement costly. Yet at the same time, the EU has had to tackle ever more serious EU-wide crises. These two diverging vectors stretch EU resources to the limits and question the EU's ability to provide effective solutions in an ever-increasing number of fields. It seems unrealistic under these circumstances to expect that all EU competences will forever remain in Brussels' hands. The integration process is not a pure natural force with a predetermined course.[2] This view might be considered heretical by many supporters of traditional integration logic, but re-nationalization should not be equated with the weakening of integration.[3] Numerous theorists of federalism have noted that, if only due to the changing external and internal conditions and pressures, the allocation of competences in the majority of federations is in constant flux. While transfer of competences to the central level might be a prevalent trend,[4] periods of "ebb" and of "flow" complement each other almost everywhere.[5] Restoration of tasks to the lower levels has been common in all traditional centripetal federations, including the United States (e.g. new federalism movement),[6]

1. To my knowledge, the only one in legal scholarship is rather dated: Obradovic, "Repatriation of powers in the European Community", 34 CML Rev. (1997), 59–88; the political science/European studies field has more interest in the topic, see e.g. Eppler and Scheller (Eds.), *Zur Konzeptionalisierung europäischer Desintegration* (Nomos, 2013).

2. To paraphrase Wilkinson in de Búrca at al (Eds.), *Debating Europe's Justice Deficit: The EU, Swabian Housewives, Rawls, and Ryanair*, EUI Law Working Paper 2013/11, at 7.

3. Witness the change of attitude towards the concept of flexible integration. At first (1990s) it was viewed by many EU law scholars as an (unwelcome) inadvertence that would be overcome after surpassing the momentary obstacles. Yet nowadays flexibility turns from threat to an instrument that should strengthen (if not save!) the integration process, for all see Piris, *The Future of Europe: Towards a Two-Speed EU?* (CUP, 2012), mainly at pp. 106–142.

4. See contributions in Halberstam and Reimann (Eds.), *Federalism and Legal Unification: A Comparative Empirical Investigation of Twenty Systems* (Springer, 2014); Majeed et al (Eds.), *Distribution of Powers and Responsibilities in Federal Countries* (McGill-Queen's University Press, 2006).

5. Also Donahue and Pollack, "Centralization and Its Discontents: The Rhythms of Federalism in the United States and the European Union" in Nicolaides and Howse (Eds.), *The Federal Vision* (OUP, 2001), at pp. 74–80.

6. See contributions in "Symposium: National power and State autonomy: Calibrating the new 'new federalism'", 32 *Indiana Law Review* (1998).

Germany (e.g. amendments to the Basic Law in 2006)[7] or Switzerland (e.g. fiscal reforms in 2004).[8] In relation to the EU, all factors that have been argued to drive integration might degenerate to a point where their logic comes to a halt and reverses: spillover turns into spillback, effective regulation transforms to overregulation, and economies of scale cross their marginal utility.[9] This brief review confirms that both "centralization" and "decentralization" have their merits and there should be a sensible framework for restoring tasks from the centre to the constituent units in all federal(-like) entities.

Demands to restore tasks to Member States have recently become part of the mainstream public debate in the EU. After the British general elections in 2010, the Conservative party demanded immediate repatriation of selected competences from the EU. Because its coalition partner (the Liberal Democrats) opposed, they compromised on performing an audit of EU competences. Its objective was to make a thorough and analytical evaluation of "EU's competences (the power to act in particular areas conferred on it by the EU Treaties), how they are used, and what that means for Britain and our national interest."[10] The audit (finalized in autumn 2014) has led to many reports, and those published so far have not called for any serious changes in the distribution of competences.[11] Notwithstanding the review's results, following David Cameron's wider EU policy, including the promise to hold a referendum on "renegotiated" EU membership, there have been numerous demands for restoring tasks now performed by the EU.[12] Moreover, only inattentive observers of EU politics will dismiss the British efforts as whims of an isolated "awkward partner". As recently as 2013, the Dutch government

7. Gunlicks, "German federalism reform: Part one", 8 GLJ (2008), 111–131.

8. Freiburghaus, "Swiss federalism, fiscal equalization reform and the reallocation of tasks" in Benz and Knüpling (Eds.), *Changing Federal Constitutions* (Barbara Budrich, 2012).

9. For relationship between European integration theories and disintegration, see Genschel and Jachtenfuchs, "Introduction: Beyond market regulation. Analysing the European integration of core State powers" in Genschel and Jachtenfuchs (Eds.), *Beyond the Regulatory Polity? The European Integration of Core State Powers* (OUP, 2014), at pp. 16–19; Webber, "How likely is it that the European Union will disintegrate? A critical analysis of competing theoretical perspectives", 20 *European Journal of International Relations* (2014), Early View.

10. British Government, Review of the balance of competences between the United Kingdom and the European Union, CM 8415, July 2012, at 12.

11. See the text of reports at < www.gov.uk/review-of-the-balance-of-competences>.

12. See the speech of David Cameron, "David Cameron's EU speech – full text", *The Guardian*, 23 January 2013, <www.theguardian.com/politics/2013/jan/23/david-cameron-eu-speech-referendum>; witness also the open calls from many British politicians mentioned in Miller, "Repatriating EU powers to Member States", House of Commons Library Standard Note 2011/ SN/IA/6153, at 2–5.

published a policy document along similar lines.[13] Even one of the most traditional adherents to the deepening of integration, the German Cristian Democratic Union (CDU), confirmed in its manifesto for the 2014 European Parliament elections that the possibility of retrieval of competences (*Rückführung*) must be part of a democratic political union.[14] The considerable strengthening of Eurosceptic political parties in the very same elections will only further fuel this trend. Immediately after the results were released, other politicians such as the French president François Hollande joined the bandwagon of calls for the scaling back of EU competences.[15]

In light of the facts above, the topic deserves more scholarly attention. The main research question of the article asks how the EU legal framework is prepared for restoring tasks to Member States and what procedures can be employed if there is a demand for such development. As re-nationalization[16] can vary in shape, and a stable terminology is lacking, the article first draws a conceptual framework delineating re-nationalization and its different forms (section 2). It seems useful to distinguish between constitutional re-nationalization, consisting of repatriation of EU competences through the revision process of the primary law (section 3), and deactivation of EU secondary acts through the standard legislative processes (section 4). Given the exploratory nature of the text, description prevails with the emphasis on interpretation of EU primary law. Whenever possible, the doctrinal analysis is corroborated by empirical examples. While a formal legal framework regulates both procedures, the decision-making rules in particular have a significant practical dimension that limits the applicability of the re-nationalization concept. I offer solutions to moderate the obstacles (section 5). Section 6 concludes.

It must finally be emphasized that my approach concentrates mainly on the interpretation and meaning of relevant legal provisions, the case law of the Court of Justice, and potential practical impediments to implementing re-nationalization. I believe that integration cannot move only in one direction, and the Member States and EU institutions should be willing to accommodate the reverse process at a general level, as argued in the closing

13. E.g. Dutch Government, "Testing European legislation for subsidiarity and proportionality – Dutch list of points of options", 21 June 2013, <www.government.nl/files/documents-and-publications/notes/2013/06/21/testing-european-legislation-for-subsidiarity-and-proportionality-dutch-list-of-points-for-action/eindrapportage-definitief.pdf>; commented in Emerson, "The Dutch wish-list for a lighter regulatory touch from the EU", *CEPS Commentary*, 1 July 2013.

14. CDU Deutschlands, "Gemeinsam erfolgreich in Europa", 5 April 2014, at 8. <www.cdu.de/sites/default/files/media/140405-beschluss-gemeinsam-erfolgreich-in-europa.pdf>.

15. Editorial, "Bucked off", 31 May 2014, *The Economist*, at 8.

16. Terminology used in the text is explained in section 2 *infra*.

part of this article. Yet I abstain from discussing the normative pros and cons of re-nationalization, whether it is currently desirable and, if the answer is positive, how many tasks and which ones should be restored. Any opinions in that direction will be purely subjective and are to be ultimately resolved in the realm of politics rather than in scholarly journals.[17]

2. Restoring tasks (competences) to Member States: Definition and conceptual framework

Numerous articles and books deal with division, allocation or exercise of competences between the EU and its members. Yet the term "competence" itself remains fuzzy. I leave aside the heated debates on its meaning in legal theory[18] or the somewhat confusing power/competence terminology in the EU law doctrine.[19] Not even the Lisbon Treaty incarnation of EU primary law defines the term competence.[20] Does it relate to the whole field of competences, where the EU has a power to intervene (e.g. agriculture according to Art. 4(2)(b) TFEU together with Art. 38 TFEU),[21] or only to concrete EU measures within that field (e.g. the support for milk production according to Regulation 1234/2007)? The cited Review of the Balance of Competences conflates the two, and proclaims: "Competence is about everything deriving from EU law that affects what happens in the UK."[22] Although not factually wrong, it is a very wide meaning which clouds some important distinctions. This article distinguishes between EU competence based on primary law (legal basis, area of competences) and exercise of EU competence through secondary law (concrete measures). If there is a need to generalize for both categories, the term "EU tasks" is employed.

For this text, re-nationalization (restoration of tasks) is conceptualized as a process in which the competences previously transferred or exercised by the

17. Witness the rather unconvincing results of applying scientific knowledge on "proper" division of competences in the EU, Alesina et al, "What does the European Union do?", 123 *Public Choice* (2005), 275–319.

18. See the summary in Conway, "Conflicts of competence norms in EU law and the legal reasoning of the ECJ", 11 GLJ (2010), 966–1005, at 974–975.

19. Mayer, *The Debate on European Powers and Competencies: Seeing Trees but not the Forest?,* WHI Paper 2003/18, at 3–4; the Lisbon Treaty seems to distinguish between vertical division of competences among the EU and States (compétences, Zuständigkeiten, e.g. Art. 5 TEU) and horizontal division of powers among EU institutions (attributions, Befugnisse, e.g. Art. 13(2) TEU), I deal only with the former.

20. Generally also see the contributions in Azoulai (Ed.), *The Question of Competence in the European Union* (OUP, 2014), namely those by Beaud and Tusseau.

21. Also known as a legal basis, in EU parlance.

22. British Government 2012, op. cit. *supra* note 10, at 13.

EU are restored to Member States. In other words, it means that the EU loses either the basis for its intervention or stops intervening although it formally retains its competence. Thus, there are in principle two options as to how to achieve that objective. The first has a constitutional dimension and occurs when a part of or the entire legal basis is removed from primary law (reallocated to Member States). I call this possibility repatriation (retrieval) of competence.[23] The second option has a legislative dimension and occurs when the EU stops exercising its competence. In this case the competence itself is not returned to the Member States. The EU retains the right to intervene, but decides not to for the time being. I call that situation deactivation (of competence).

The framework is further complicated as re-nationalization does not have to apply equally to all Member States. Taking this factor into account, the following combinations are conceivable:

1. *Repatriation of all competences to the Member States*. States regain all competences previously transferred to the EU. It effectively means a withdrawal from the organization. While the Lisbon Treaty grants the right of unilateral withdrawal for the first time (Art. 50 TEU), I deliberately leave this situation outside the scope of the article.[24] The EU is dissolved if complete repatriation is demanded by all Member States.[25]

2 a) *Repatriation of one or a few (but not all) competences to all Member States*. The EU loses a competence when a legal basis is taken out of the Treaties altogether, or is narrowed or otherwise restricted. Such a competence returns to the national level because competences not conferred upon the EU in the Treaties remain with the Member States (Art. 4(1) TEU).

b) *Repatriation of one or few (but not all) competences to one (several) Member State(s)*. The Member State will negotiate an amendment to EU primary law excluding the effects of EU competence in its national

23. Because all EU competences had originally belonged to the Member States which transferred them to supranational level (see the principle of conferral in Art. 4(1) TEU), words like repatriation and retrieval illustrate the covered situation more accurately than for example devolution (described usually as a process when powers natively held by the centre are voluntarily conferred on the lower levels).

24. See in detail Hofmeister, "Should I stay or should I go? A critical analysis of the rights to withdraw from the EU", 16 ELJ (2010), 589–603; Lazowski, "Withdrawal from the European Union and alternatives to Membership", 37 EL Rev. (2012), 523–540. Art. 50 TEU is far from satisfactory: for proposals how to better structure EU withdrawal clause see Zbíral, "Searching for an optimal withdrawal clause for the European Union" in Niedobitek and Zemánek (Eds.), *The Constitutional Treaty – A Critical Appraisal* (Duncker & Humblot, 2007), at pp. 320–328.

25. Dissolution is analysed by Götting, *Die Beendigung der Mitgliedschaft in der Europäischen Union* (Nomos, 2000), at 59–105.

jurisdiction. It will be most likely carried out by a protocol to the Treaties.

3. a) *Deactivation of a specific competence to all Member States.* The competence (measure) in question will cease to be exercised by the EU and the Member States will regain the power to regulate the issue at hand. This might be done by a repeal of (or amendment to) a secondary legislative act on which the measure is based, with no other successive or related EU legislation controlling the measure.

b) *Deactivation of concrete competence to one (several) Member State(s)*. The EU continues to regulate the measure in question but its activities cease to apply to the Member State that demanded the de-activation. Such deactivation will be carried out by provisions (exceptions) contained in the relevant secondary legislation.[26]

The distinction between options "a" and "b" within dyads 2 and 3 is considerable. The latter *de facto* represents geographical rather than the substantive retreat of EU law. But the Treaties do not provide for any specific provisions regulating repatriation or deactivation for limited number of States. Thus the prescribed rules and procedures (not results) will be the same and the text further discusses re-nationalization only as a unitary matter (option "a").[27] It also reflects my (probably futile) normative belief that re-nationalization should be applied to all Member States and not just individual ones. The latter leads to the fragmentation of EU law and has other practical difficulties.

One can assume that any re-nationalization will have to comply with the requirements of EU law, namely the prohibition of unilateral actions. Primary law (with the exception of Art. 50 TEU) does not allow unilateral repatriation. The Court uncompromisingly rejected such attempts.[28] Unilateral deactivation seems more acceptable at first sight. The Treaties guarantee to Member States in several provisions an opportunity to adjust for specific circumstances. Traditionally, reservations exist in the areas of public order, security, or public health (e.g. Art. 45(3) TFEU). These factors, however, (1) could not justify a permanent derogation, (2) must be interpreted restrictively, and (3) are applicable only to some EU competences.[29]

26. A similar end-result can be achieved by deactivation followed by enhanced cooperation that will reactivate the same competence only for some Member States. While feasible, this option seems overly complicated compared to "3b".

27. Of course, with necessary precaution all arguments are applicable to limited versions of repatriation (option "b") as well.

28. Case 7/71, *Commission* v. *France,* EU:C:1971:121, para 20.

29. E.g. Case C-285/98, *Tanja Kreil* v. *Germany*, EU:C:2000:2, para 16 and decisions cited there.

Moreover, the Court generally forbids Member States from withdrawing unilaterally from obligations they previously accepted,[30] even if this was a reaction to the breach of rules by other States or EU Institutions.[31] The opposing view represents well-known case law of several constitutional courts which reserves the right to review EU actions under *ultra vires* or constitutional identity doctrines. If we assess the German or Czech constitutional courts' decisions, they indicate that both unilateral retrieval and deactivation are imaginable. Yet, at the same time, national courts determine very strict conditions for the application of the cited doctrines. One can expect they will be used only in truly exceptional scenarios.[32]

The abovementioned delineation of the research topic intentionally excludes a reversal of the Court of Justice's decisions. Without going into details, the Court is not entitled to "create" new EU competences from nothing (it lacks competence-competence), but it could develop or even extend the existing competences of the EU through the interpretation of either primary or secondary law.[33] This has been done regularly by the judges in Luxembourg. Despite the general acceptance of the Court's case law, there have been many occasions when Member States were not pleased with some decisions. In those situations several strategies exist how to react. The most extreme is an attempt to reverse the decision.[34] Indeed, the Member States tried just that in the *Barber* Protocol,[35] *Grogan* Protocol,[36] and with reaction to

30. Case 128/78, *Commission* v. *United Kingdom*, EU:C:1979:32, para 12.

31. Case C-11/95, *Commission* v. *Belgium,* EU:C:1996:316, paras. 36–37 and older decisions cited there.

32. For the approach of the Bundesverfassungsgericht, see Payandeh, "Constitutional review of EU Law after Honeywell: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice", 48 CML Rev. (2011), 9–38. The sole exception contradicting the scheme was the decision of the Czech Constitutional Court proclaiming a decision of the Court of Justice *ultra vires* (*Slovenské důchody XVII* [2012] Pl. ÚS 5/12). However, it might be considered as only an unfortunate misstep caused primarily by rivalry in the Czech judicial system rather than an attempt to re-nationalize EU measures, see in detail Zbíral, "A Legal revolution or negligible episode? The Court of Justice decision proclaimed ultra vires", 49 CML Rev. (2012), 1475–1492; the Czech Government and involved national courts subsequently moderated their extreme positions and found an EU-compatible solution, Bobek, "Landtová, Holubec, and the problem of an uncooperative Court: Implications for the preliminary rulings procedure", 10 EuConst. (2014) 54–89, 63–71.

33. In detail e.g. debate of Schilling with Weiler and Haltern in 37 Harv. Int'l L.J. (1996).

34. For review of the strategies and empirical experience Garrett et al., "The European Court of Justice, National governments, and legal integration in the European Union", 52 IO (1998), 149–176; Arnull, "Me and my shadow: The European Court of Justice and the disintegration of European Union law", 31 *Fordham International Law Journal* (2007), 1174–1211.

35. Currently Protocol (No. 33) concerning Art. 157 of the Treaty on the Functioning of the European Union [2010] O.J. C 83/319; for general background Hervey, "Legal issues

the *Kalanke* decision.[37] Yet, while the revision of the Treaties was used, it is problematic to conceptualize these cases as repatriation. They had a very narrow scope, no legal basis was "removed" from primary law, and the factual impact on the EU was also negligible. However, the main reason why this article does not include "re-nationalization" of the Court of Justice's activities is their specific character (case law as a source or exercise of competence). Last but not least, contrary to repatriation and deactivation conceptualized above, there is no Treaty provision for reversing the Court's decisions.

The conceptual framework of this article demands a reverse process and does not cover instruments preventing EU occupation or its exercise of a certain competence. Treaties contain dozens of so called "negative competences" that explicitly limit EU actions, either in an entire field (e.g. Art. 344 TFEU), or a part thereof (e.g. Art. 153(4) TFEU).[38] Similarly widespread and even more notorious are individual opt-outs in the EU primary[39] and secondary law.[40] All these safeguards are future-oriented and aimed at maintaining the existing status quo (at least for some States). Sometimes the complex reality of the EU system makes the distinction shady, as in the case of Article 10(5) of Protocol 36 to the Lisbon Treaty.[41] It gave the United Kingdom the right to decide to no longer participate in all police and criminal justice measures it had previously accepted. While the right as such was guaranteed for the future as a (possible) opt-out, its exercise will result in the deactivation of certain EU competences with respect to the United Kingdom (option "3b" within my definition).

The restoration of tasks must also be distinguished from reverse delegation. In these cases, the EU, acting within a conferred competence, gives the national institutions the power to regulate selected issues according to their (often limited) discretion. For actors subjected to the measures there may be no visible difference from purely national regulations. However, the Member States' actions are formally based on and under the control of EU law, and national administrations exercise the role of EU agents.[42] The delineation here

concerning the Barber Protocol" in O'Keeffe and Twomey (Eds.), *Legal Issues of the Maastricht Treaty* (Chancery Law, 1994).

36. Currently Protocol (no. 35) on Art. 40(3)(3) of the Constitution of Ireland, O.J. 2010, C 83/321; for background Curtin, "The constitutional Structure of the Union: A Europe of bits and pieces", 30 CML Rev. (1993), 17–69, at 47–49.

37. Member States rejected the ECJ's prohibition of positive discrimination of women in adding para 4 to Art. 141 (nowadays Art. 157 TFEU) and with the Declaration (No. 28) on Art. 119(4) of the Treaty establishing the European Community, O.J. 1997, C 340/256.

38. See also Mayer, op. cit. *supra* at 19, at 7–10.

39. Cf. the numerous protocols to the Treaties.

40. E.g. Art. 22 of Dir. 2003/88, O.J. 2003, L 299/9.

41. O.J. 2010, C 83/322.

42. Case 239/86, *Ireland* v. *Commission*, EU:C:1987:554, para 13.

is quite ambiguous, because the EU legislation might give back real decision-making powers to the Members States. Shall we then distinguish reverse delegation from decentralization (which allows more discretion to the States)? Do we have to speak only of decentralization or delegation, no matter how much the EU retreats, if the space given to the Member States is still provided by the EU legislation? Under such an understanding, the term deactivation would be reserved for complete vacation of the subject matter covered by a measure by the EU (repeal). While I subscribe to the latter view, I acknowledge that the boundaries in this respect are very thin. In some cases the terminological distinction between delegation, decentralization and deactivation is only a reflection of personal taste.

Last but not least, the relationship between the concept of re-nationalization and the principles of subsidiarity and proportionality must be explored. These principles – as laid down in the Treaties – do not guide the division of competences between the Member States and the EU in primary law and thus cannot serve as an impetus for repatriation.[43] Both principles are fully applicable in the case when the EU decides to exercise its competences in the sphere of shared competences. The review is currently performed by EU institutions and national parliaments only before the secondary act exercising the competence is adopted.[44] Yet, the criteria of subsidiarity and proportionality should be met continuously, and not just at the initial moment. If such an approach is implemented and future review confirms a breach of the principles because, for example, the conditions leading to the adoption of the original act change, deactivation of that act, or its part, should be a natural response.[45]

3. The retrieval of competences through revisions of primary law

Changes to primary law have been the key episodes of EU life, to a certain extent analogous to amendments to national constitutions. The majoritarian view of the experts acknowledges the right to revise freely the Treaties according to the common will of Member States. To quote Bruno de Witte: "There is no proof that the Member States ever accepted any material

43. This thesis is not universally accepted, but in my view clearly proceeds from the Treaties and logic of both principles; see also the historical background in Obradovic, op. cit. *supra* note 1, at 76–79.

44. Or by the ECJ *ex post* in a case where a breach of either principle is invoked in proceedings.

45. Expressly admitted in Declaration No. 18 annexed to the Final Act of the Intergovernmental Conference, O.J. 2010, C 83/344.

limitations of their power to amend Treaties".[46] Repatriation of competences should not be an exception. Still, it is impossible to recall an example where an amendment to the Treaties would have explicitly repatriated an entire competence (legal basis) that the previous version of primary law had reserved for the EU (or Community).[47] This does not mean that repatriation was not considered. As a reaction to the unsuccessful Danish referendum on the Maastricht Treaty in 1992, Jacques Delors sent the representatives of the Member States a secret memorandum recommending retrieving EU competences in fields which were viewed as problematic by the public and concentrating on the further deepening in the remaining sectors. The proposal nonetheless faced fierce opposition in the European Parliament and was silently abandoned.[48] The Laeken Declaration in 2001 also asked to adapt the division of competences between the EU and its Member States to the new challenges, including "restoring tasks to the Member States", a phrase used in the title of this article.[49] Yet, first, it is not clear if the drafters meant repatriation or deactivation, and, secondly, neither option was seriously discussed during the preparation of the Constitutional Treaty anyway.

There was one case when legal basis was restrictively narrowed. Article 128 EEC (Treaty of Rome) set as an objective to delineate the general principles of pursuing common policy in the field of vocational training. The Maastricht Treaty left out the label "common" and added that the policy "should support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organization of vocational training" (currently Art. 166(1) TFEU). It is obvious that the initial legal basis endorsed creation of a single vocational training system. The competence disappeared after 1993 and aspirations of the EU were lowered. In practice the amendment was more a tidying-up exercise, making the legal basis more precise, and did not set back the real EU action in the field.[50]

How is the present primary law prepared for retrieval? For a long time, the Treaties provided basically for only one procedure how to amend them. Since the Lisbon Treaty entered into force, two variants are included in Article 48

46. Cf. de Witte, "Treaty revision in the European Union: Constitutional change through international law", 35 *Netherlands Yearbook of International Law* (2004), 51–84, at 57; some writers argue that amendments may not decrease the protection of human rights or democracy, e.g. Curti Gialdino, "Some reflections on the acquis communautaire", 32 CML Rev. (1995), 1089–1121, at 1109–1114.

47. Similarly Gensel and Jachtenfuchs, op. cit. *supra* note 9, at 16.

48. Obradovic, op. cit. *supra* note 1, at 76–77.

49. European Council, Presidency Conclusions – Laeken, SN 300/1/01 REV 1, at 21.

50. See West, "The Evolution of European Union Policies on Vocational Education and Training", LLAKES Research Paper 2012/34, at 7–10.

TEU: the ordinary and the simplified procedure (para 1).[51] The ordinary procedure foresees an Intergovernmental Conference and organization of a Convention. This latter step might be skipped if the changes are minimal and the majority of both the European Council and the European Parliament agree to the exception (para 3). The simplified procedure does not require a Convention or an Intergovernmental Conference. The decision-making is conferred on the European Council (para 6). Under both alternatives the final agreement must be ratified/approved by all Member States in accordance with their constitutional provisions.[52]

The two options have much in common. Primarily, there is a key role for the Member States. Each Member State disposes of a veto power that might be invoked in two stages: first, by the government during negotiations on the intergovernmental conference or in the European Council, and, secondly by their parliaments or citizens (if a referendum is held) during the ratification of the revised treaty.[53] The Commission and the European Parliament participate in both procedures. However, their role is limited to proposing or consulting, and the potential success of supranational institutions is conditional upon the consent of the Member States. Compared to the ordinary revision the simplified one does not secure a smoother compromise, but is organizationally simpler and probably less time-consuming. One could sum up that revision of the Treaties has a very rigid character. The changes of founding documents of many international organizations are easier.[54]

After clarification of the procedural issues I shall concentrate on how the provisions are applicable to the retrieval of competences. The Lisbon Treaty

51. Strictly speaking, the revision of the Treaties might be achieved also through the passerelle clause (Art. 48(7) TEU), but this only concerns decision-making rules. Also parts of the Treaties that could be amended by the qualified majority in the Council do not cover changes to EU competences, see the list in Piris, *The Lisbon Treaty: A Legal and Political Analysis* (CUP, 2010), at pp. 106–107.

52. For exhaustive analysis of the procedures, see Peers, "The Future of EU Treaty Amendments", 31 YEL (2012), 17–111.

53. Each procedure in Art. 48 TEU offers different avenues for Member States on how to accept it domestically: The ordinary one demands "ratification . . . in accordance with the respective constitutional requirements", the simplified procedure "approval . . . in accordance with the respective constitutional requirements". Although formally in both cases one should speak of ratification, the intention probably was to lower the domestic thresholds for simplified revision. Experience with ratification of Art. 136 TEU amendment (pursued by simplified revision) proved that while some Member States indeed used less demanding procedures (e.g. no referendum in Ireland), others proceeded similarly to ordinary revision (for example in the Czech Republic, despite an invitation from the Constitutional Court not to use constitutional majority in the parliament), see overview in Novak, "Article 136 TFEU, ESM, Fiscal Stability Treaty: Ratification requirements and present situation in the Member States", European Parliament Directorate General for Internal Policies, 2 July 2013.

54. For examples and discussion, Schermers and Blokker, *International Institutional Law* (Martinus Nijhoff, 2011), at pp. 734–755.

has brought a significant innovation in this respect. The previous version of Article 48 TEU (Nice) spoke about the Treaty changes only generally, without defining the substantive content of the term. Modified Article 48(2) TEU, which describes the ordinary revision procedure, explicitly states that proposals for the amendments "may, inter alia, serve either to increase or to reduce the competences conferred on the Union in the Treaties." While the provision operates with the "proposals for the amendment", Declaration No. 18 annexed to the Final Act of the Intergovernmental Conference uses the same proclamation in relation to the rights of Member States' representatives at the Intergovernmental Conference.[55] It is not clear if the divergence between the TEU and Declaration is a legislative omission or an intention, asking the Member States not to be afraid of retrieval not only in the phase of proposals, but in the final stages of negotiations as well. The latter explanation seems more plausible. Declaration No. 18 might even be intended as leverage against supranational institutions, which are excluded from the Intergovernmental Conference (see section 5).

Another debatable point is whether simplified revision may also be used for repatriation of competences. This procedure is limited solely to changes related to Part three of the TFEU (internal policies and actions of the EU)[56] and may not increase the competences of the EU. Contrary to ordinary revision, Article 46(6) TEU does not contain any hint of "reduction of competences", moreover Declaration No. 18 explicitly associates repatriation of competences merely with the ordinary revision. On the other hand, Article 48(6) TEU is applicable to "all or part of the provisions" of Part three of TFEU. Repatriation does not breach the condition of EU competences extension, it is formally exactly the opposite. A logical interpretation therefore indicates that repatriation is possible also within the simplified revision procedure if it is limited to Part three of TFEU and there is no extension of competences in other parts of the same revision. However, one must take into account the link between Parts one and three of the TFEU, as the former contains a list of competence categories in Articles 3 to 6 TFEU. For example, if the Member States decide to remove the whole Article 194 TFEU (energy), it should be accompanied by the removal of energy from the category of shared competences (Art. (4)(2)(i) TFEU) and the ordinary revision procedure has to be activated. If the removal concerns only part of Article 194(1)(c) TFEU (e.g. promotion of renewable energy), simplified revision will suffice.

A new phrasing on the possibility of reducing EU competences through amendment of the Treaties relates to the so-called "two-way flexibility". This

55. O.J. 2010, C 83/344.

56. A simplified amendment thus could not be used for example for the adoption or the amendment of protocols to the Treaties.

concept was not part of the Constitutional Treaty and was proposed at the 2007 Intergovernmental Conference by representatives of the Czech Republic.[57] In brief, the idea formally embodies the notion that the transfer of competences might proceed not only from the Member States to the EU, but in the opposite direction as well. Formally, two-way flexibility is expressed in the above-mentioned Article 48 TEU and Declaration No. 18, and affects both repatriation and deactivation (see section 4 below). One of the members of the Czech delegation to the intergovernmental conference, Lenka Pítrová, acknowledges that even in the past the Member States as Masters of the Treaties were theoretically allowed to repatriate competences from primary law, but points out that since the beginning of integration the dominant ideology virtually excluded this option. She therefore considers the change a "paradigmatic shift", opening the way for a "subsidiary, flexible and less central" EU.[58] Experts who are not that emotionally connected with the novelty usually regard the formulation as harmless, if somewhat superfluous, because it stipulates "what was always true".[59] Reflecting empirical evidence from the beginning of the section, both views have merits: While there were no constraints on repatriation in the past, it was simply not on the agenda and the two-way flexibility delivers at least a symbolic value.

A difficult question arises as to what will happen in practice after any competence is removed from the Treaties. The answer depends primarily on what provision is concerned, whether it is a part of or the entire legal basis, and on other numerous conditions. Generally, if the provision in question had direct effect and guaranteed rights to individuals, these will no longer be provided by the EU, and could not be invoked as such. More complicated is the fate of secondary legislation based on the removed provision. As the EU shall act only within the limits of conferred competences, all those acts should become invalid *ex nunc*.[60] This will very likely lead to a period of considerable legal uncertainty because even if the legal basis should be always clearly identified in the secondary act on which it is based,[61] it is not inconceivable that some acts pursue indissociable objectives and are founded on various

57. See the background of 2007 negotiations in Phinnemore, *The Treaty of Lisbon: Origins and Negotiation* (Palgrave, 2013), at pp. 148–174.

58. Pítrová, "Ke koncepci oboustranné flexibility" [About the concept of two-way flexibility], 8 *Právní zpravodaj* (2007), 6–8, at 6–7; yet subsidiarity in a narrow sense is not a principle that plays a role in repatriation (see section 2).

59. Barrett, "Creation's Final Laws: The Impact of the Treaty of Lisbon on the 'Final Provisions' of Earlier Treaties", 28 YEL (2008) 3–46, at 11.

60. Any efforts to enforce secondary legislation based on retrieved legal basis will be ultra vires. For the fate of national implementing legislation see *infra* section 4.

61. E.g. Case C-370/07, *Commission* v. *Council,* EU:C:2009:590, paras. 38–62.

legal basis.[62] Moreover, acts adopted on one legal basis may be amended by legislation based on another legal basis.[63] The legal conundrum on what remains valid and what not would have to be disentangled by the Court of Justice through actions for annulment or preliminary reference procedures. Another, more favourable option is to reach an agreement among institutions and formally repeal all derived secondary legislation before the repatriation enters into force.[64] However, given the different interests of supranational institutions (see section 5 below) and experience with fierce disputes on legal bases, only an optimist would expect an all-encompassing consensual agreement.

The reference to the question of legal bases of a certain act can be exploited as a link to the wider issue related to repatriation. Even if a whole legal base is removed from the Treaty, it does not automatically signify unrestricted freedom of the Member States to regulate the field in question without EU interference. In some cases, another legal basis will step in directly. For example, there is little doubt that even if Article 166 TFEU (vocational training) is removed completely, it is possible to pursue the same objectives through Article 165 TFEU (education). In yet more numerous instances the retrieved competence might be "compensated" by a more general legal basis, namely Article 114 TFEU, the limits of which the Court of Justice has never been able to delineate clearly.[65] Finally, if there is no close or more remote substitute, it is important to note that even in the case of competences held exclusively by the Member States (also called reserved or retained competences), the influence of EU law has not vanished. The Court of Justice consistently claims that "whilst it is established that EU law does not detract from the power of the Member States to [here comes the retained competence] . . . the fact nevertheless remains that, when exercising that power, Member States must comply with EU law".[66] In all their actions, including retained competences, the Member States are bound to respect the basic principles of EU integration, namely the individual rights tied to EU citizenship, freedoms of movement, or the principle of non-discrimination.[67] Put differently, while the allocation of retained competence to the Member

62. Case C-300/89, *Commission* v. *Council,* EU:C:1991:244, paras. 46–47.

63. Case C-187/93, *Parliament* v. *Council*, EU:C:1994:265, para 28.

64. Historically there has always been a sufficient timeframe between agreement on the Treaty's amendment and its successful ratification.

65. See review in Wyatt, "Community competence to regulate the Internal Market" in Dougan and Currie (Eds.), *50 Years of European Treaties* (Hart, 2009).

66. Case C-490/09, *Commission* v. *Luxembourg,* EU:C:2011:34, para 32 for social security systems, a similar position has been expressed, e.g. in relation to direct taxation, personal status or education.

67. For the broad scope of the latter see e.g. Case C-555/07, *Kücükdeveci,* EU:C:2010:21.

State is not questioned, its exercise is reviewed through the optics of EU law.[68] The Lisbon Treaty tried to counterbalance this "ring-fencing"[69] of national competences by a duty of the EU to respect national identities and essential State functions of its members. Nevertheless, these concepts are still developing and are in any case determined by the Court of Justice.[70]

While the repatriation of competences through an amendment to primary law was implicitly always available, the Lisbon Treaty for the first time expressly conceded the option. The process will however face significant difficulties. First, the agreement and ratification for both the ordinary and simplified revision procedure is notoriously demanding. Secondly, given the interconnection of acquis, we must expect problems in determining the scope of repatriation, namely the (in)validity of secondary legislation based on the competence in question. Lastly, by being members of the EU, States have to accept that there is nothing like a "complete retrieval." Compliance with selected principles of EU law is required even under the repatriated competences.

4. Deactivation of competences exercised by the EU

Legal bases in primary law give the EU power to intervene in numerous fields by adopting secondary legislation. The exercise of EU competences is governed by general rules which are notably summarized in the Lisbon Treaty. For the first time the Treaty divided EU competences into three categories: 1) exclusive, 2) shared, and 3) complementary (supporting).[71] The solution tried to formalize a situation that implicitly stemmed from the Court of Justice's case law. The division is far from perfect and faced critique by some experts.[72] However, this is a secondary issue for the purposes of this text. Also, my analysis concentrates only on the internal competences of the EU. The external

68. In detail Lenaerts, "Federalism and the rule of law: Perspectives from the European Court of Justice", 33 *Fordham Journal of International Law* (2009), 1338–1387; Azoulai, "The 'retained powers' formula in the case law of the European Court of Justice: EU law as total law?", 4 *European Journal of Legal Studies* (2011), 192–219; Boucon, "EU law and retained powers of Member States" in Azoulai (Ed.), op. cit. *supra* note 20.

69. Azoulai, op. cit. *supra* note 20, at p. 195.

70. In detail, including the evolving case law, Blanke, "Article 4 [The relations between the EU and the Member States]" in Blanke and Mangiameli (Eds.), *The Treaty on European Union (TEU)* (Springer, 2013), at pp. 189–231.

71. This article does not specifically discuss EU competences located outside the three main categories: coordination of economic, employment and social policies (Art. 5 TFEU) is not dealt with, nor Common Foreign and Security Policy.

72. E.g. Schütze, "Lisbon and the federal order of competence: A prospective analysis", 33 EL Rev. (2008), 709–722.

dimension of EU competences poses a distinct set of issues compared to internal ones.[73] Finally, while the activities of the EU can be pursued by diverse means, such as non-legislative acts (e.g. Art. 31 or 329 TFEU), delegated acts (Art. 290 TFEU), or implementing acts (Art. 291 TFEU), I link deactivation only to the legislative acts in the meaning of Article 289(3) TFEU.[74]

4.1. *Deactivation in the categories of exclusive and supporting competences*

In the case of EU exclusive competences (Art. 3 TFEU) the deactivation causes no effect at all. In the 1970s the Accession Treaty with the United Kingdom envisaged the adoption of an act determining conditions of marine resource conservation under the common fisheries policy within six years after the accession. But due to the British veto the act was not adopted by the Council. The unwilling United Kingdom announced adoption of its own measure to address the issue in question. The Court of Justice declared the fisheries policy an exclusive competence of the Community and concluded "that the transfer to the Community of powers in this matter being total and definitive, such a failure to act could not in any case restore to the Member States the power and freedom to act unilaterally in this field".[75] In the category of exclusive competences, even after the repeal of a measure, the action of the Member States continues to be blocked by primary law and nobody but the EU has the right to seize the vacated space (see implicitly also Art. 2(1) TFEU). The only disputed fact could be the scope of the exclusive competence. In the past, there were cases when the EU institutions disagreed whether a secondary act is properly based only on an exclusive competence legal basis, or if it also requires an additional shared competence legal basis.[76]

The category of EU supporting competences (Art. 6 TFEU) will also be irrelevant to the concept of deactivation. Any EU activities in this category are

73. Cremona, "Defining competence in EU external relations: Lessons from the Treaty reform process" in Dashwood and Maresceau (Eds.), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (Cambridge University Press, 2008). Apart from specific rules of the exercise of external competences as such, deactivation of (withdrawal from) international treaties is not comparable to the deactivation of legislation.

74. Unlike non-legislative instruments, legislative acts have to comply with special procedures and conditions and have specific consequences, for background, see Türk, "Lawmaking after Lisbon" in Biondi et al. (Eds.), *EU Law After Lisbon* (OUP, 2012).

75. Case 804/79, *Commission* v. *United Kingdom,* EU:C:1981:93, para 20; for the facts behind the judgment and its impact, see Weiler, "Alternatives to withdrawal from and International Organization: The case of the European Economic Community", 20 *Israel Law Review* (1985), 282–298, at 290–294.

76. E.g. Case C-411/06, *Commission* v. *Parliament and Council,* EU:C:2009:518.

only complementary to the actions of Member States. They do not supersede their competence and there is a prohibition on harmonization (Art. 2(5) TFEU). As the Member States continue to regulate the pertinent fields at their will and independently from the EU, the deactivation of an EU measure will not affect the situation at the national level. The model is of course not so clear-cut in practice and one must take into account the residual competence discussion in section 3. An EU action might affect the category of supporting competences through a wide interpretation of Article 114 TFEU[77] or through the general fabric of EU law guarded by the Court of Justice.[78] Disputes on links of certain measures to other categories will therefore be possible and deactivation might then have a non-symbolic value. If this is the case, the arguments related to the category of shared competences are applicable.

4.2. *Deactivation in the category of shared competences*

The majority of competences allocated between the EU and the Member States fall in the category of shared competences. This is also a default category, and the list in Article 4(2) TFEU is only indicative (Art. 4(1) TFEU). The following rules govern the category under Article 2(2) TFEU:

> "When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence."

On the face of it the provision speaks clearly: while both levels are endowed with the same competence, they cannot exercise it concurrently. If the EU awakens, the Member States retire. If the EU retreats, the Member States may re-join. The scheme thus resembles a zero-sum game. But if we look beyond the obvious, what exactly is the "bounty" in this game? How is the game played?

The game begins with an adoption of an EU secondary act based on the appropriate legal basis (competence). The act determines the scope of the EU

77. Here even with harmonizing impact, see Case C-58/08,*Vodafone,* EU:C:2010:321.

78. The case law of the ECJ sometimes ultimately led to the adoption of secondary legislation based on a very extensive interpretation of the supporting competences legal bases, for examples see Prechal et al., "The principle of attributed powers and the scope of EU law" in Besselink et al. (Eds.), *The Eclipse of the Legality Principle in the European Union* (Wolters Kluwer, 2011), at pp. 235–236.

measure. It could range from a negligible impact on a given field to an elaborate regulation occupying virtually the whole field. Acts are either directly applicable or must be transposed by the Member States. There are in principle three possibilities for how an act can pre-empt national institutions in regulating the field in question (starting with the most restrictive): 1) Field pre-emption: The EU measure precludes Member States from any national action in a given field. 2) Obstacle pre-emption: The EU measure precludes Member States from any national action jeopardizing EU activities in a given field. 3) Rule pre-emption: The EU measure precludes Member States from adopting measures conflicting with the EU measure.[79] The Court of Justice has struggled with drawing any clear lines in this matter since the outset of integration, and one can find endorsement of all three options in its case law. The Court interprets scope, objectives, context, and other aspects of each measure. While there are certain clues (e.g. total harmonization leads to a stricter pre-emption than minimal harmonization), the resulting situation must be evaluated on a case-by-case basis.[80]

The more aggressive the pre-emption effect of a competence which the EU exercises, the more complicated is its deactivation, because the Member States had to vacate all national measures related to the issue (or a considerable part thereof). In an effort to mitigate the threat, representatives at the 2007 Intergovernmental Conference attached Protocol No. 25 on the Exercise of Shared Competence to the Lisbon Treaty. The Protocol states that "when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area".[81] This provision, however, serves more as an interpretation tool in borderline cases than as a ban on field pre-emption. The scope of an EU measure remains the driving factor, and EU institutions could still adopt an act (or series of acts) that will occupy the whole field of a shared competence.

The EU has two options on how to proceed when it decides "to cease exercising its competence". In both of them, the starting point is the secondary law act regulating the measure. The first possibility is to amend the act and expressly state that the relevant activity might from now on be pursued by

79. In detail, Schütze, "Supremacy without pre-emption? The very slowly emergent doctrine of community pre-emption", 43 CML Rev. (2006), 1023–1048.

80. For detailed background including the case law see Schütze, *From Dual to Cooperative Federalism* (OUP, 2009), at pp. 190–240; to make things more ambiguous, the ECJ actually does not use the term pre-emption and some scholars do not consider the concept especially helpful in the EU framework, e.g. Timmermans, "ECJ Doctrines on Competences" in Azoulai, op. cit. *supra* note 20, at pp. 159–160.

81. Sole article of Protocol (No. 25) on exercise of Shared Competence, O.J. 2010, C 83/307.

Member States. Here we enter the already discussed ambiguous area of the distinction between a reverse delegation, decentralization and deactivation, because the discretion of the national level remains based on the EU act. The second choice is to repeal the secondary act on which the EU measure is based. This leads to a proper retreat of the EU, revocation of any kind of pre-emption tied to the act, and the opening of the "elements governed by the Union act in question" to regulation by the Member States.[82] A repeal more fittingly corresponds to the wording of Article 2(2) TFEU. Additionally, the above cited Declaration No. 18 confirms preference for the second option. The EU decision to cease to exercise its competence "arises when the relevant EU institutions decide to repeal a legislative act".[83] If a whole act A is to be repealed, it can be done by the adoption of act B, the only objective of which is to cease the validity of act A, or by the adoption of act C, which has a different content, but also (impliedly or openly) terminates the validity of act A. However, deactivation does not have to be achieved only by the repeal of a whole act as Declaration No. 18 indicates, but also by an amendment to an act from which the relevant provision backing EU action is removed.[84]

Not all repeals of EU legislation imply deactivation. In the vast majority of cases the EU secondary acts are repealed by the adoption of new acts that continue (often more thoroughly) to regulate the measure, or there remains other legislation directly influencing the vacated space. Under these circumstances, the EU obviously does not cease to exercise its competence but only changes the way it intervenes. Secondly, even if there is no direct successor or substitute to the repealed act (provision), one has to expect that the deep structure of the acquis, together with the wider principles of EU law based in primary law and the Court of Justice case law (see section 3 above), will continue to limit the Member States' actions. The exact scope of the competence that the Member States "shall again exercise" after deactivation will have to be evaluated from case to case, with interpretation by the Court of Justice should there be a need.

Last but not least, there is the question of domestic legislation implementing EU secondary law.[85] Here the situation is in my view different

82. The first option (positive creation of space for Member States) is to be preferred in cases when Member States have to be safeguarded from the influence of other EU measures, the second is sufficient when the "breathing space" of States is secured after the retreat of the EU.

83. O.J. 2010, C 83/344.

84. The controlling element is the scope of EU activity in question (measure) compared to the scope of the EU act (see above the discussion on pre-emption).

85. Other acts than directives might also demand adaptation of national legal order (for regulations e.g. Case C-403/98, *Azienda Agricola,* EU:C:2001:6, para 26), in the Czech Republic directives are the source of only about 60 % of EU induced national laws (dataset is on file with author).

from the case of repatriation discussed in the previous section. Even if the domestic legislation was adopted as a reaction to an EU impulse, the Member States are not subjected to any principle of "conferral" from the EU and they have wide discretion in implementation.[86] Therefore the repeal of an EU impulse should not lead to an automatic invalidation of national implementing acts. It is up to a Member State if it repeals them, adopts different national regulation, or even continues to use the EU induced one as its own.

The EU treaties do not contain any distinct provisions for repealing secondary legislation. The repeal must follow the same procedure as the adoption of the original act.[87] For the majority of legal bases it currently means the standard legislative procedure (co-decision, Art. 294 TFEU) but special legislative procedures are far from extinct.[88] In many instances, the necessity of unanimity in the Council persists.[89] Because the repeal is a mirror process of the adoption, the disputes on a legal basis shall be minimized.[90] The Commission plays the role of gatekeeper in the process as it holds the monopoly on legislative initiative.[91] The Council and the European Parliament can only request the Commission to consider submitting a legislative proposal (Arts. 225, 241 TFEU). Reflecting this fact, on the insistence of the Czech delegation the Lisbon Intergovernmental Conference added the following sentences to Declaration No. 18: "The Council may, at the

86. See Prechal, *Directives in EU Law* (OUP, 2005), at pp. 73–87.

87. Repeal of an act through the legislative process is not the only option. The annulment by the ECJ has the same effect within direct actions or the preliminary ruling procedure. If the ECJ annuls an EU measure in the sphere of shared competences that was previously exercised by Member States and there is no other EU legislation to "fall back on", national level regains the space. In practice, the ECJ's impact on deactivation is and will remain limited. While the ECJ has invalidated secondary legislative acts in the past, this was predominantly for breaches of formal rules (e.g. wrong legal basis) that were subsequently quickly addressed by EU institutions and the measure was adopted anew (usually moreover within the often awarded period postponing the execution of the ECJ's judgment). In light of that, Member States have no willingness to reclaim the exercise of competence, also van Ooik, "The European Court of Justice and the division of competences in the European Union" in Obradovic and Lavranos (Eds.), *Interface between EU Law and International Law* (Europa Law Publishing, 2007), at pp. 22–24. Perhaps closest to real deactivation was a recent decision in Case C-293/12, *Digital Rights Ireland*, EU:C:2014:238, which annulled Dir. 2006/24 with *ex tunc* effect. Yet this case is an example of a situation when the EU law immediately stepped in again, because the opened space was filled by the earlier directive on data protection, Dir. 2002/58.

88. For classification of all legal bases into procedures Chalmers et al., *European Union Law* (Cambridge University Press, 2010), at pp.137–141.

89. For an overview of these special legal bases, see Piris, op. cit. *supra* note 51, at pp. 376–378, 386–394.

90. But they are not excluded, e.g. if the repeal concerns only part of legislative act and some institutions deem the amendment to fall under a different legal basis than the act as a whole.

91. With the exception of judicial cooperation in criminal matters and police coordination where it shares the right with (at least) a quarter of Member States.

initiative of one or several of its members (representatives of Member States) and in accordance with Article 241 of the Treaty on the Functioning of the European Union, request the Commission to submit proposals for repealing a legislative act. The Conference welcomes the Commission's declaration that it will devote particular attention to these requests".[92] A closer inspection unfortunately reveals this provision's expendability. The text expresses conditionality of all steps: the initiative may be started by a single State, but its representative must persuade at least the simple majority in the Council (similarly to Art. 241 TFEU). Even if this endeavour succeeds, the Commission is not required to submit the proposal for repeal. The last sentence might serve as a master example of how to bind oneself to nothing.[93]

Any empirical analysis of deactivation in the past is complicated by the vastness of the acquis and the possible differences in the scope of repeal. It is simply impossible to collect systematic information on whether provision X in regulation Z was removed without replacement by provision Y in regulation Z (or W).[94] One can extract two noticeable cases from scholarship that might qualify as deactivation.

The first one was the development of the Common Agricultural Policy. This policy was traditionally almost completely occupied by EU action. However, since the beginning of 1990s reforms were introduced aiming to move from subsidies of production to subsidies of producers. The move was intended to leave more margin for the Member States. Indeed the process was implemented and as the new regime allowed national discretion in certain areas, some experts described it as a return of the exercise of competences to the States.[95] While I do not contradict this view, the question is how much the EU has given up. Although considerably higher limits to EU exercise of competences in agricultural policy are possible and probably desirable,[96] it remains one of the most regulated EU policies even after the latest round of reforms. Any discretion of the Member States is constrained by a dense web of rules and constant monitoring by the Commission.[97]

92. O.J. 2010, C 83/345.

93. Regular observer of EU politics Peter Ludlow considered the sentence "entirely superfluous", cf Phinnemore, op. cit. *supra* note 57, at p. 172.

94. None of the EU institutions collects such data, not even for internal use. Interview with an expert from the Legal Service of the Council (19 Nov. 2012).

95. With detailed description of the process Schütze, op. cit. *supra* note 80, at pp. 230–237; also Obradovic, op. cit. *supra* note 1, at 66–67.

96. E.g. Niemi and Kola, "Renationalization of the common agricultural policy: Mission impossible?", 8 *International Food and Agribusiness Management Review* (2005), 23–41, at 27–37.

97. Evaluation in Mahé, "Do the proposals for the CAP after 2013 herald a major reform?", Notre Europe Policy Paper no. 53/2012.

The second example was the reform of EU antitrust policy adopted by Regulation 1/2003, which deferred reviews of certain actions from the Commission to national competition authorities. Selected authors considered the development an example of what I define as deactivation.[98] In practice, however, the situation is very similar to the agricultural policy. Without going into details, the national level did gain certain discretion, but the whole system operates under the control of the Commission and a common set of rules.[99] The changes were driven by the unsustainability of the previous regime rather than by an effort to empower the Member States.

The message to take away from both cases is clear: if they can represent deactivation at all, then only in its very narrow version. While the discussion in section 2 confirmed that terminology might be misleading, it has been no coincidence that the Commission has incessantly claimed that the aim of the reform of the Common Agricultural Policy is its "decentralization", not "re-nationalization."[100] Exactly the same expression was used by experts in relation to Regulation 1/2003.[101]

The attitude to deactivation can be assessed also in a wider perspective. At the beginning of the new millennium, the Commission initiated the Better Regulation Programme in order to simplify and modernize the acquis. Part of the programme was a repeal of several hundred acts that were deemed outdated or did not meet their original purpose. However, only "very few acts" were repealed according to the progress review published in 2004.[102] More important than the quantitative results is the aim of the Commission's strategy. It views the repeals only as the instrument of removing irrelevant or obsolete legislation from the acquis, not as the instrument to limit the exercise of competences by the EU. The Commission openly admitted in one of its

98. E.g. Jones, "The second devolution of European Competition law: The political economy of antitrust enforcement under a more economic approach" in Schmidtchen et al. (Eds.), *The More Economic Approach to European Competition Law* (Mohr Siebeck, 2007).

99. See review in Wils, "Ten years of Regulation 1/2003: A retrospective", 4 JECL & Pract. (2013), 293–301.

100. See already in "Agenda 2000: For a stronger and wider union", COM(97)2000 final, at 28; recently "Why do we need a Common Agricultural Policy?", Discussion paper by DG Agriculture and Rural Development, December 2009, at 5–6.

101. Büthe, "The Politics of competition and institutional change in European Union: The First Fifty Years" in Meunier and McNamara (Eds.), *Making History: European Integration and Institutional Change at Fifty* (OUP, 2007), at p. 188.

102. "The Implementation of the framework action, updating and simplifying the Community Acquis", COM(2004)432 final, at 5. It is true that since then dozens of other legislative acts have been repealed (see e.g. Reg. 1229/2011, O.J. 2011, L 326/18), on the other hand it must be noted that the majority of acts repealed so far have belonged to the category of delegated legislation.

documents that a "better regulation is however not de-regulation".[103] The Better Regulation Programme has been recently transformed to the Regulatory Fitness and Performance Programme (REFIT). The goal of the repeals however remains the same and does not indicate any move to link them with deactivation, as offered in Article 2(2) TFEU.[104]

The fate of the Pre-packaging Directive might corroborate the deceptive character of repeals of EU acts. In the 1970s, legislation was adopted that determined quantities of products in packages for goods circulating on the common market (not for goods sold only nationally). There was a full harmonization even for national markets for selected types of goods (spirits, wine).[105] 30 years later the Commission considered such measures obsolete and proposed to lift restrictions on the quantities of packaging (the fully harmonized goods were to remain regulated).[106] The outcome of the negotiations in principle reflected the Commission's proposal and the harmonizing acts from 1970s were repealed. But apart from that, the provision in the repealing act also precluded the Member States from any subsequent regulation on quantities of products in pre-packed goods.[107] Under the logic of Article 2(2) TFEU it meant that the EU retreated from exercising the competence, but at the same time banned the States from entering the opened space.[108]

5. Restoring tasks to the Member States: A way forward … or not?

Re-nationalization is a process fully subject to the conditions of EU law. The Lisbon Treaty for the first time contains explicit provisions providing for both constitutional (repatriation) and legislative (deactivation) re-nationalization.

103. Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment, COM(2005)535 final, at 3.

104. Regulatory fitness and performance (REFIT): Results and next steps- annex, COM(2013)685 final, esp. at 8–10.

105. In practice it meant that for example wine could be sold only in packages of certain content (0,2; 0,75; 1 litre and so on).

106. See Proposals for a directive of the European Parliament and of the Council laying down rules on nominal quantities for pre-packed products, repealing Council Directives 75/106/EEC and 80/232/EEC, and amending Council Directive 76/211/EEC, COM(2004)708 final, at 2–5; it has to be added that the Commission's move was partly forced by the ECJ's decision in Case C-3/99, *Cidrerie Ruwet*, EU:C:2000:560.

107. Art. 2(1), Dir. 2007/45, O.J. 2007, L 247/17.

108. Proper deactivation would leave it up to the States whether they wish to adopt national rules. Of course, even under these circumstances the deactivation will not be completely free of EU law influence and national rules on quantities of product in pre-packed goods will have to apply only in internal situations (a situation known as acceptable reverse discrimination, see Case C-14/00, *Commission* v. *Italy,* EU:C:2003:22, para 72).

Nonetheless, the availability of the formal legal framework does not have to automatically convert to its use. This section analyses the practical dimension of the implementation of re-nationalization. First, substantive distinctions between the two procedures are covered. Second, the obstacles related to decision-making issues are discussed, including the potential solutions minimizing those obstacles.

5.1. *Practical distinctions between repatriation and deactivation*

Despite the formal distinction between the two procedures, the same goals will in practice often be possible to reach by both deactivation and repatriation. The effort to develop any sensible blueprint on what procedure fits better and in what situation is complicated by the lack of data. The pleas for re-nationalization are usually too general ("scale back EU action", "less EU regulation" etc.). David Cameron's article in the *Daily Telegraph* from March 2014 came closest to presenting an identifiable list of demands by a politician.[109] Yet, even then only a few of the approximately ten mentioned issues could qualify as requests for re-nationalization. As the subsequent analyses of demands confirmed, the solution could be provided by changes to secondary legislation[110] or an amendment to the Treaties.[111]

Generally the main advantage of deactivation is its flexibility. "Constitutionally" the competence remains shared and the EU activities could efficiently ebb and flow in adaptation to external and internal circumstances and actual preferences of all actors.[112] If there is no demand or need for EU action, the whole field could reopen for measures at the national level. This elasticity is, however, also the main drawback of deactivation. Its symbolic impact is much more limited than in the case of repatriation. It would still be

109. Cameron, "The EU is not working and we will change it", *Daily Telegraph*, 14 March 2014, <www.telegraph.co.uk/news/newstopics/eureferendum/10700644/David-Cameron-the-EU-is-not-working-and-we-will-change-it.html>. Very specific proposals of re-nationalization were in the past formulated outside political circles, see e.g. the text prepared by leading agricultural economists in "A Common Agricultural Policy for European Public Goods", 2009, <www.reformthecaeu/posts/declaration-on-cap-reform>.

110. As argued by Piris in Parker, "Legal loopholes for David Cameron on EU treaty, says top lawyer", *Financial Times*, 5 May 2014 (text of Piris' analysis available at <im.ft-static.com/content/images/4bd43874-d474-11e3-bf4e-00144feabdc0.pdf>).

111. In the form of a decision of the Heads of Government later attached as a protocol, see Peers, "The Pro-European case for a renegotiation of and referendum on the UK's membership of the EU", *EU Law Analysis*, 28 May 2014, <eulawanalysis.blogspot.co.uk/2014/05/the-pro-european-case-for-renegotiation.html>.

112. As projected mainly by the promoters of the theory of fiscal federalism, see the review of sources in Geys, and Konrad, "Federalism and optimal allocation across levels of government" in Enderlein et al. (Eds.), *Handbook on Multi-level Governance* (Edward Elgar, 2010).

up to EU institutions only whether they decide to intervene anew. Many stakeholders might view it as an insufficient safeguard against a future EU competence creep. Contrary to that, an amendment to the Treaty would provide a more "definitive" answer, is usually closely reviewed and debated in public discourse of the Member States, and thus has a stronger "marketable" value.[113] The choice between deactivation and repatriation will be obviously predetermined in specific situations. For example, any return of tasks in the category of exclusive competences is achievable only by the primary law amendment process. For minor issues regulated by secondary law, on the other hand, the repeal procedure would be more fitting. Last but not least, as discussed above, the expected ECJ interpretation of the re-nationalization in question *vis-à-vis* other EU norms and principles will have to be taken into account in each case.[114] Due to the Court's well-observed approach, repatriation will be a safer option to achieve the desired effect in ambiguous cases.[115]

5.2. *Re-nationalization and the stifling impact of decision-making procedures*

Decision-making procedures form a key component of the re-nationalization process. The starting point for the following considerations is a (rather uncontroversial) acceptance of the rational (public) choice principles. They are quite straightforward: The aim of all subjects (actors) is to maximize their utility and if they face several options, they will choose a solution which is at the given situation (and with the given amount of information) most favourable to them.[116] Thus if all actors agree on a certain decision under the

113. The flexibility distinction however in practice does not have to hold in all cases. E.g. the amendment to Protocol 36 temporarily adapting the composition of the European Parliament became effective in 2011 after "only" 17 months ratification with little debate on the national level. Compared to that, the average length of legislative negotiation process under co-decision between 2004 and 2009 was 21 months (European Parliament, "Activity Report 1 May 2004 to 13 July 2009", PE427.162, 2009, at 13). On the other hand, the shortest legislative process on a co-decision dossier lasted less than two months, which would be impossible to achieve in the case of repatriation.

114. Meaning the ECJ's attitude towards the new situation after deactivation (legal bases disputes, influence of other primary or secondary law etc.).

115. Even if we exclude the common accusations from pro-integrative reasoning, the ECJ's respect of the will of the legislature has been criticized, see e.g. Dawson, "Constitutional Dialogue between Courts and Legislatures in the European Union: Prospects and Limits" 19 EPL (2013), 369–396; surprisingly Dawson did not mention the decision in Case C-402/07, *Sturgeon,* EU:C:2009:716, which proved that the ECJ does not shy away from contradicting the clear intention of the legislature, even if the intention does not contradict primary law.

116. In more detail Scully, "Rational institutionalism and liberal intergovernmentalism" in Cini and Bourne (Eds.), *European Union Studies* (Palgrave, 2006), at pp. 20–22.

rule of unanimity, its outcome would be very likely close to the "Pareto optimality" when all actors are better off than in the case of a non-agreement (the status quo).[117] But a closer inspection reveals that not all (non)decisions are the same. The critical factor is the consequences of the non-agreement. Unanimity on the international stage assumes that if the decision is not adopted, each actor will resolve the issue on her own. However, this is possible only before the creation of a common system, when each actor dissatisfied with the outcome of negotiations could veto the agreement or decide not to participate. The situation reverses if there is already a functioning common system of activities transferred to the international level: If no agreement is reached, the status quo leads to the persistence of the current common policy, not to the return to original individual solutions.

If we apply the propositions to the EU, the result is apparent. Once any competence is transferred to, or exercised by, the EU, it is possible to reverse that situation only with the consent of a required (high) majority of actors. This might lead to the direct opposite of the Pareto optimality in the long term. The ensuing policy is preserved and does not have to conform to the actual demands or interests of the majority of actors. The logical reaction of the most aggrieved subjects would be to abandon their obligations, but this is *de facto* impossible in the EU.[118] The described situation is well known as a joint-decision trap. Integration turns into frustration, but disintegration is precluded.[119] Moreover, as re-nationalization will usually lead to more uncertainty compared to the preservation of the status quo, the conviction about the benefits of repatriation or deactivation must be correspondingly higher. Therefore, are both processes factually unattainable?

Despite the innovations of the Lisbon Treaty, the primary law amendment process remains very rigid in both the standard and the simplified revision procedure (see section 3 above). As recent experiences proved, complex changes to the Treaty were difficult to achieve, yet surprisingly not impossible.[120] Researchers analysing in detail the negotiations of the last revision processes and preferences of governments explain that an agreement

117. See the classic Buchanan and Tullock, *The Calculus of Consent* (Liberty Fund, 1999, originally in 1958).

118. Art. 50 TEU providing only an extreme and improbable outlet.

119. The theory of joint-decision trap was firstly explored in detail by Scharpf, "The Joint-decision Trap: Lessons from German Federalism and European Integration", 66 *Public Administration* (1988) 239–278, at 257–265, since the release of the article the situation in the EU has developed and some principles of the theory have been altered, but the basic outlines remain unaltered, see Scharpf, "The JDT model: Context and extensions!" in Falkner (Ed.), *The EU's Decision Traps: Comparing Policies* (OUP, 2011).

120. To put that in perspective, the mathematical probability of reaching a unanimous agreement with 28 actors is 0.00000037 % (at only one level, not including the second ratification round!).

is conceivable. Using the instruments of issue linkages or concessions to countries preferring the status quo, the decision making basically changes from the formal unanimity to a qualified majority. Consensus is achieved even if the positions of the Member States seemed initially irreconcilable.[121]

Because any concrete proposals for repatriation are unavailable at the moment and it makes no sense to estimate preferences of the Member States, I can only offer speculative generalizations about the success of repatriation. An amendment consisting solely of repatriation might be structurally relatively uncomplicated in scope and detail. If it obtains support from all Member States, its adoption should not pose any problems, partly also due to the easier ratification requirements.[122] Unfortunately, under the likely case of some governments opposing repatriation, the negotiations will end in deadlock, as there is little issue linkage to be offered. Here stands the advantage of a broader revision that offers opportunities to counterbalance repatriation with concessions elsewhere in the amendments (e.g. transfer of competences to the EU in other fields). But this kind of all-out negotiations opens a Pandora box of demands. Even with a successful agreement at the intergovernmental conference, the challenging ratification process will be triggered. For the foreseeable future many governments will try to avoid this scenario at all costs.

Deactivation of course does not require ratification. The necessary majority in the Council is determined by the applicable legislative procedure (see section 4). In most cases qualified majority will suffice. The threshold for adoption is thus lowered to approximately 70 percent of the votes, although consensus is commonly preferred to outvoting minorities.[123] In order to reach an agreement, the Member States' representatives utilize similar instruments to those used in revisions of the Treaties. Dissenters often give up their resistance even under unanimity, not to speak about the "shadow of the vote" under a qualified majority.[124] The problem is that issue linkage or logrolling

121. See in detail contributions in Finke et al., *Reforming the European Union: Realizing the Impossible* (Princeton University Press, 2012).

122. There is no transfer of competences to the EU, so national constitutional rules may provide lower parliamentary majorities or exclude referenda (see the discussion in section 3).

123. Heisenberg, "The institution of consensus in the European Union: Formal versus informal decision-making in the Council", 44 *European Journal of Political Research* (2005), 65–90.

124. See also the view of practitioners in Westlake and Galloway, *The Council of the European Union* (John Harper, 2004), at pp. 256–276; in Dashwood's cynical (but knowledgeable) words there "are all kinds of ways of bribing or coercing delegations in a minority of one or a two on matter to which the unanimity applies", Dashwood, "The limits of European Community powers", 21 EL Rev. (1996), 113–128, at 124.

usually apply within an agreement (dossier) and not across them.[125] Therefore, in the case of proposals for repeal, it might be difficult to reconcile preferences of those supporting deactivation with promoters of the status quo as there is little space for a middle ground ("either/ or" situation).

In my opinion, an even more serious obstacle to deactivation is the involvement of supranational institutions. While it is true that a retreat of the EU does not have to be beneficial to all Member States, at least it is subsequently up to them how they occupy the vacated space. For the Commission and the European Parliament, the deactivation signifies a complete loss of influence over the measure in question. No wonder that the Commission has had such a suspicious attitude to the repeals and proposed them only in case of unimportant and obsolete acts or if the subsequent regulation of the Member States was precluded.[126] The position of the European Parliament has been even more negative. Its members expressed strongly rejecting views on all three deactivation-like examples cited in section 4.[127]

Given the high thresholds required for the adoption of decisions in the EU and the preference for the status quo, any attempts at re-nationalization face significant hurdles. Yet, the formal decision-making framework places no limits on instruments and arguments used in persuading others. The result of any negotiations is only a question of resources (or concessions) invested by supporters into overcoming the opposition. Tridimas rightly notices that it nowadays falls primarily on the Member States to guard the boundaries of EU competences.[128] Even though revision procedures of the Treaties seem in this respect better equipped for restoring tasks to the States, they provide either little space for compromise or require complicated deals with risky ratification processes. Deactivation, on the other hand, has to surmount

125. McKibben and Western, "Levels of linkage: Across-agreement versus within-agreement explanations of consensus formation among States", 58 *International Studies Quarterly* (2014) 44–54.

126. Apart from empirical evidence, cf. Section 4, see the open admission in Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment, COM(2005)535 final, at 6.

127. European Parliament, Report on the proposal for a Council regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, A5-0229/2001, at 21–22 (antitrust policy reform); European Parliament, Report on the proposal for a directive of the European Parliament and of the Council laying down rules on nominal quantities for pre-packed products, A6-0412/2005, at 22–23 (repeal of pre-packed directive, the co-decision process lasted almost three years); European Parliament, The CAP towards 2020: Meeting the food, natural resources and territorial challenges of the future, Resolution 2011/2051(INI), point L (latest reform of the Common Agricultural Policy).

128. Tridimas, "Competence after Lisbon: The elusive search for bright lines" in Ashiagbor et al (Eds.), *The European Union after the Treaty of Lisbon* (Cambridge University Press, 2012), at p. 73.

resistance by supranational institutions. The Commission might be easier to convince because the Member States exercise at least an indirect influence on its composition and functioning. Indeed, Jean-Claude Juncker, the new President of the Commission, promised in his programme to offer a solution to Cameron's demands expressed in the press[129] and showed a sympathetic attitude towards a "smaller" EU, listing Better Regulation among its priorities and naming former Dutch foreign minister Frans Timmermans as the first vice-president responsible for this.[130] The European Parliament poses a more formidable impediment. Due to its independent legitimacy base, the States have almost zero leverage in the Parliament. Its members might take deactivation as "an issue of principle". Again, one could counter-argue that the relationship between the European Parliament and the Council is basically conciliatory and compromise is pushed for whenever possible.[131] The question remains, however, whether the State(s) promoting deactivation will be willing (or able) to bear the price.

5.3. *More frequent deactivation: Mission possible?*

Structural obstacles make implementation of re-nationalization difficult, which has been confirmed by the limited empirical evidence of the process in the past. This situation invites a review of possible innovations leading to a higher flexibility in the system. Any changes expediting repatriation are off the table, since the rigid "international law" revision of the Treaties appears sacrosanct. That leaves us with deactivation. The first potential option is to decrease the threshold for repealing legislation in the Council. For example, if the adoption of an act exercising EU competence required unanimity, qualified majority will suffice for its repeal (or simple majority in the case of a qualified majority). This arrangement could compensate for the (often inefficient) preference of the status quo and make the validity of an act dependent on continuing support of the required majority of the Member States, contributing to observance of subsidiarity and proportionality. Lower thresholds will make the formation of a common position in the Council easier and empower it during bargaining with the European Parliament. While lower majorities for the repeal of secondary legislation were proposed by experts in

129. Cameron, in the *Daily Telegraph*, cited *supra* note 109. Juncker, "My Priorities", not dated, <juncker.eeu/my-priorities>.

130. For Timmerman's views on the matter see Timmermans, "Monnet's Europe needs reform to fit the 21st century", *Financial Times*, 14 Nov. 2013.

131. Kardasheva, "Package deals in EU legislative politics", 57 *American Journal of Political Science* (2013), 858–874.

the past,[132] they have never been seriously considered at intergovernmental conferences.[133]

Alternative solutions target the position of supranational institutions. It is worth considering whether the Commission's promise in Declaration No. 18 to "devote particular attention" to requests of the repeal of an act from the Council should be transformed into an obligation if there is a necessary majority (be it qualified majority or unanimity) of the Member States requesting the repeal. This was in fact demanded by the Czech delegation at the Lisbon Intergovernmental Conference as part of a two-way flexibility concept. Ultimately the proposal was rejected due to opposition from the Commission's Legal Service.[134] The current veto of the European Parliament over (almost all) deactivation can be weakened as well. For example, if no compromise is found even during conciliation, the Council will have the chance to pursue the repeal by unanimity.[135]

There is no space to discuss the legitimacy of such arrangements and their impact on the EU legal order. In light of both the specific features of deactivation as compared to "activation" and the requirement of unanimity for overcoming the European Parliament's veto (or forcing the Commission to make a proposal), the interests of all actors will be in my view adequately protected and the options will be triggered only in exceptional circumstances. One important drawback of all analysed proposals is that in the maze of the acquis, it will be in many instances problematic to distinguish whether the proposal only (or predominantly) repeals, and thus qualifies for special conditions, or if it falls within the "standard" legislative procedures. However, the key weakness of presented solutions, even if one overcomes the substantive controversy, is that their execution is conditioned on the risky amendment of the Treaties.

Avenues do, however, exist for facilitating deactivation even under the current wording of primary law. Perhaps the most promising one is a more frequent use of sunset and review clauses. A sunset clause is a provision incorporated into an act that provides that the act becomes invalid after a given period of time unless the legislature agrees to prolong its effect. A review

132. Vibert, *A core agenda for the Inter-Governmental Conference (IGC)* (European Policy Forum, 1995), at 35; also Art. 29(1) of the so-called Freiburg proposal for EU constitution contained in "Freiburg Draft of a European Constitutional Treaty", CONV 495/03, at 14.

133. But see the proposal by the Working Group V at the Convention, recommending that acts adopted unanimously under the flexibility clause (nowadays Art. 352 TFEU) can be repealed by a qualified majority ("Final report of Working Group V", CONV 375/1/102 REV 1, at 16–17). The idea was not accepted by the Convention.

134. Pítrová, op. cit. *supra* note 58, at 6–7. Obviously the position of the Legal Service had to be supported by some Member States as well.

135. Similarly to former cooperation legislative procedure.

clause is a less strict measure. It demands only an evaluation of the effectiveness and impact of the act. Both instruments have been quite frequently applied in countries like the United States, Switzerland, Germany, or Australia.[136] Sunset clauses are usually considered tools against the obsolescence of the legal order and against expanding regulation, or instruments for adoption of legislation to address temporary problems and to promote deliberations in the parliament.[137] Keeping the legislation in effect requires an active consent of legislature, so sunset clauses will also assure in the EU framework that the exercise of competence by the EU continues to have wide support of actors and therefore likely remains effective and meets the conditions of subsidiarity and proportionality. Admittedly, sunsets (or review) clauses suffer from several disadvantages and definitely should not be applied to all legislation.[138] More widespread application of sunset clauses within the EU framework was first recommended by the Manderkern Group exploring options for improving EU legislation.[139] Although the Commission stated in 2003 that the "review or sunset clauses will be proposed in new legal acts wherever appropriate",[140] the data from Eurlex confirm that this promise has not been transformed into reality.[141]

6. Concluding remarks

As in many times in its history, the EU stands at a crossroads. Also as a result of the euro crisis and the efforts to mitigate ensuing economic and financial problems, the EU seems to have been intruding more and more into matters that traditionally formed the core of the Member States' competences. This development has serious repercussions. The EU measures undermine a State's autonomy and prevent national polities from being responsive to interests of

136. Jantz and Veit, *Sunset Legislation and Better Regulation: Empirical Evidence from Four Countries* (Bertelsmann Stiftung, 2010).

137. For a good review of the history of sunset clauses, use and impact see Gersen, "Temporary legislation", 74 *University of Chicago Law Review* (2007), 247–298.

138. Sunsets create uncertainty in legal orders, crowd out the agenda of future legislatures and increase the influence of interest groups, see in detail Kysar, "Lasting legislation", 159 *University of Pennsylvania Law Review* (2011), 1007–1068.

139. Mandelkern Group, "Mandelkern Group on Better Regulation: Final Report", 13 Nov. 2001, at 18.

140. "Updating and simplifying the Community acquis", COM(2003)71 final, at 19.

141. It is fair to acknowledge that even if there were review clauses in selected EU legislative acts, the outcomes were not always encouraging. The prime example is the Working Time Directive (2003/88), which presumed a review in its provisions. Yet despite all efforts, two rounds of initiated reviews failed because of a lack of consensus among the involved parties. See the documents at <ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=205>.

the citizens and from competing for popular loyalty.[142] At the same time, the public give more critical attention to EU activities and the attitude to the integration process is changing from "permissive consensus to constraining dissensus".[143] Further expansion of such a trend might endanger the future existence of the EU. Defenders of the "ever closer Union" often suggest answering the threat by calling for another round of deepening integration.[144] This may be a viable solution in some areas. However, I subscribe to the views of Jacques Delors during the Maastricht Treaty ratification (when the public sentiment towards Europe was comparably adverse) and think that the time might have come for the EU to consider to do less but better, and to withdraw from certain fields.

This article explored how well the EU legal framework is prepared for re-nationalization. While there were no limits on re-nationalization in the past, the introduction of the two-way flexibility concept in the Lisbon Treaty provides for the first time expressly both for repatriation of competences by revision of the Treaties and for deactivation of competences by the repeal of secondary legislation in the category of shared competences. However, empirical evidence shows that there has been little experience with either option. Hence, any efforts to implement re-nationalization will likely suffer at the beginning from considerable legal uncertainties.

The main advantages of repatriation are its symbolic value and the full control of decision-making process by the Member States. The negatives are represented by low flexibility and the "Pandora box of demands" effect. One can expect the procedure to be used only on exceptional and limited occasions. Deactivation better personifies the cooperative and flexible nature of the exercise of competences in the EU and can answer the majority of re-nationalization demands. The main obstacle in its application is the obligatory active involvement of supranational institutions. Because any proposals to structurally weaken the position of the Commission and the European Parliament in repealing EU secondary legislation are likely to fail, more frequent incorporation of sunset and review clauses into EU secondary acts might provide at least a partial solution.

In the end, any activation of legal provisions providing for re-nationalization becomes a domain of politics. The Member States advocating restoring tasks from the EU will have to allocate significant

142. Similarly comments by Davies in de Búrca et al., op. cit. *supra* note 2, at pp. 6–7.

143. Hooghe and Marks, "A postfunctionalist theory of European integration: From permissive consensus to constraining dissensus", 39 *British Journal of Political Science* (2008), 1–23.

144. Witness the title of an experts' study recently commissioned by the European Parliament: Besselink et al., *National Constitutional Avenues for Further EU Integration* (European Parliament, 2014).

political capital towards achieving this goal (by means of strategic bargaining). The second necessity is to provide sound and rational arguments in order to uproot the prevalent "one step back is the beginning of the end" mind-set and the belief that any national regulation must be automatically harmful for the EU and the freedoms of movement (method of arguing).[145] If other federations have emerged strengthened from restoring tasks from central to lower levels in the past, there is no reason for the EU to be scared of taking the same path.

145. For dichotomy between bargaining and arguing Risse, "Let's argue! Communicative action in world politics", 54 IO (2000), 1–39.

COMMON MARKET LAW REVIEW

Subscription information
Online subscription prices for 2015 (Volume 52, 6 issues) are: EUR 758/USD 1075/ GBP 544. Print subscription prices for 2015 (Volume 52, 6 issues):
EUR 802/USD 1134/GBP 572
Personal subscription prices at a substantially reduced rate are available upon request. Please contact our sales department for further information at +31 172641562 or at sales@kluwerlaw.com.

Payments can be made by bank draft, personal cheque, international money order, or UNESCO coupons.

Subscription orders should be sent to:

Kluwer Law International
c/o Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
e-mail: sales@kluwerlaw.com

All requests for further information and specimen copies should be addressed to:

Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands
fax: +31 172641515

or to any subscription agent

For Marketing Opportunities please contact marketing@kluwerlaw.com

Please visit the Common Market Law Review homepage at http://www.kluwerlawonline.com for up-to-date information, tables of contents and to view a FREE online sample copy.

Microfilm and Microfiche editions of this journal are available from University Microfilms International, 300 North Zeeb Road, Ann Arbor, MI 48106, USA.

The Common Market Law Review is indexed/abstracted in Current Contents/Social & Behavioral Sciences; Current Legal Sociology; Data Juridica; European Access; European Legal Journals Index; IBZ-CD-ROM: IBZ-Online; IBZ-lnternational Bibliography of Periodical literature on the Humanities and Social Sciences; Index to Foreign Legal Periodicals; International Political Science Abstracts; The ISI Alerting Services; Legal Journals Index; RAVE; Social Sciences Citation Index; Social Scisearch.