

# NATIONAL EMERGENCY POWERS AND EXCLUSIVE COMMUNITY COMPETENCES – A CRACK IN THE DAM?

Chiara Zilioli<sup>1</sup>

## ABSTRACT

*Alla metà degli anni cinquanta sei Stati europei decisero di impegnarsi insieme in una sfida senza precedenti: rafforzare i loro legami a tal punto da prevenire guerre future. Vincolandosi al raggiungimento di un medesimo obiettivo, ovvero la realizzazione di una unione sempre più stretta tra popoli e mercati europei, istituirono una Comunità che fin dalle sue origini si differenziò da altre entità sovranazionali per la sua capacità di elaborare le proprie politiche in modo autonomo attraverso l'adozione, da parte delle sue istituzioni, di norme direttamente applicabili ai cittadini.*

*Con l'adesione, altri Stati accettarono in seguito di limitare la sovranità nazionale trasferendo alla Comunità e alle sue istituzioni alcuni dei propri poteri, fino al punto di rinunciare totalmente al potere decisionale in campi specifici per i quali la Comunità gode di competenze esclusive. Di fatto, con l'ingresso della Comunità nella terza fase dell'unione monetaria, la maggior parte dei suoi Stati membri ha trasferito irrevocabilmente alla Banca centrale europea la competenza in materia di politica monetaria.*

*Dopo l'attacco alle torri gemelle del World Trade Center, mentre gli Stati occidentali riesaminavano gli strumenti, anche giuridici, atti a far fronte ad attacchi terroristici, il governo finlandese modificò la propria legislazione autorizzando, in situazioni di emergenza e previa adozione di un decreto presidenziale, l'introduzione di misure in conflitto con il diritto comunitario e con l'esercizio della politica monetaria unica. Secondo il governo finlandese, l'articolo 297 del trattato consentirebbe agli Stati membri, in situazioni di emergenza, di adottare unilateralmente misure contrastanti col diritto comunitario e persino di "avocare" competenze precedentemente trasferite alla Comunità. L'obiettivo di questo capitolo è di analizzare "il contenuto e l'obiettivo" dell'articolo 297 del trattato per valutare se effettivamente attribuisca agli Stati membri, in situazioni di emergenza, una completa discrezionalità sulle misure da adottare, persino quando tali misure comportino l'esercizio della competenza monetaria esclusiva, trasferita irrevocabilmente dagli Stati che hanno adottato l'euro alla Banca centrale europea. Se così fosse, sarebbe possibile agli Stati membri distruggere in pochi giorni e unilateralmente anni di costruzione della "casa comune".*

*Dopo aver esaminato la necessità di uniforme applicazione del diritto comunitario in tutti gli Stati membri (con la conseguente impossibilità per gli Stati di optare unicamente a favore di alcune politiche) e la possibilità di denuncia unilaterale del trattato di Roma, questo capitolo analizza la funzione dell'articolo 297, clausola derogatoria e non norma che riserva una sovranità nazionale, e le condizioni secondo le quali è permesso invocarne l'applicazione.*

1 I would like to thank Florence Feyerbacher for her support in the research for the preparation of this article.

*Emerge chiaramente dall'analisi che non è possibile dare all' articolo 297 una interpretazione confliggente sia con l'obiettivo primario della Comunità, ossia una unione sempre più stretta fra i suoi Stati membri, che con l'evoluzione dell'intero diritto comunitario verso una maggiore integrazione. Dal punto di vista giuridico, l'articolo 297 non consente agli Stati di recuperare competenze che erano state trasferite alla Comunità affinché siano esercitate su un piano sovranazionale in nome dei cittadini europei. Inoltre, nello stato attuale dello sviluppo comunitario le situazioni di emergenza e gli attacchi terroristici non possono più essere affrontati unilateralmente. È pertanto necessario uno sforzo comune teso ad affinare gli strumenti comunitari di reazione per poter affrontare le sfide del ventunesimo secolo con strumenti adeguati.*

## I INTRODUCTION

When the twin towers of the World Trade Center fell on 11 September 2001, a new era began for the western world and for international law. As terrorist acts have come to be considered acts of war<sup>2</sup>, preventive strikes have been claimed in the US national security strategy to be legitimate means of self-defence<sup>3</sup>. At the same time, all western States, feeling under threat, have reconsidered their emergency legislation and the powers and procedures available to face cases of serious terrorist attack. Most governments have also examined the possible impact of such attacks on financial markets, although this was not a problem on September 11: international cooperation among central banks proved to be very effective in preventing and solving temporary liquidity shortages and in maintaining the stability of the global financial system<sup>4</sup>.

The amendments proposed in 2002 by the Finnish government to the existing national emergency powers legislation, increasing the government's capacity to regulate the financial markets, has to be seen in this context, as the individual attempt of a State to react to these events. However, since Finland is a Member State of the European Union, the adoption in 2003 of this new legislation raises concerns as to whether, within the Union, individual (re)action is still effective and legally possible, as it may conflict with the Treaty establishing the European Community (the Treaty).

Taking this recent case as the starting-point, this article aims to analyse the scope of Article 297 of the Treaty to answer the question of whether or not it constitutes the legal basis allowing the Member States to take back, unilaterally, the competences attributed to the European Community (the Community) by the Treaty. After discussing the (ir)reversibility of the transfer of competences to the Community and the possibility of and limits to withdrawing from the Community, the article analyses the conditions for invoking the application of Article 297 of the Treaty and the procedural and substantive requirements it imposes on the Member States. The article concludes that Article 297 does not give the Member States a reserve of sovereignty and that there is no legal "crack in the dam" through which the competences of the Community can flow back to a Member State.

2 Cassese, "Terrorism is Also Disrupting Some Crucial Legal Categories of International Law", EJIL 2001 (12), at 996/7: "Practically all states ... have come to assimilate a terrorist attack by a terrorist organization to an armed aggression by a state ... Thus, aiding and abetting international terrorism is equated with an 'armed attack' for the purpose of legitimizing the use of force in self-defence." Contra, Bothe in Graf Vitzthum (Eds) *Voelkerrecht*, 2. Ed., No 15, p. 611, No 11: "Ein weiteres wesentliches Element der Bestimmung des Inhalts des Gewaltverbots besteht darin, dass es sich um Gewalt in den internationalen Beziehungen, d. h. zwischen Staaten handeln muss. ... Die Duldung oder Foerderung terroristischer Aktivitaeten ist deshalb nicht ohne weiteres der eigenen Gewaltausuebung des Staates gleichzuachten."

3 Cf. Bothe, "Terrorism and the Legality of Pre-emptive Force", 14 *European Journal of International Law* (2003) No 2, 227-240, at 236 and 239: "the legal reasoning developed in the national Security Strategy may also be understood as an advocacy *de lege ferenda* ... a change in the law to the effect of opening up broader possibilities for anticipatory self-defence is not desirable."

4 Cf. ECB opinion of 31 October 2002 (CON/2002/27), No 9, [www.ecb.int/ecb/legal/pdf/EN\\_CON\\_2002\\_27\\_f\\_sign.pdf](http://www.ecb.int/ecb/legal/pdf/EN_CON_2002_27_f_sign.pdf), second paragraph.

## II THE AMENDMENTS TO THE FINNISH EMERGENCY POWERS ACT

In the summer of 2002, the Finnish government proposed to the parliament that the *Valmiuslaki 1080/1991* (Emergency Powers Act of 1991, or, “the Act”) be amended in order “to secure the livelihood of the population and the national economy, to maintain legal order and constitutional and human rights, and to safeguard the territorial integrity and independence of Finland in emergency conditions”<sup>5</sup>. In the Statement of Reasons supporting the proposal, the Finnish legislator argued that the emergency powers as currently embodied in the Emergency Powers Act were insufficient with regard to financial market regulation in emergency situations; that the competencies listed in Section 12 of the Act needed to be amended and a new Section 12a introduced; and that the new powers could be exercised by decrees, enabling the Finnish government also to impose measures on the Finnish national central bank (Suomen Pankki) or on other Finnish public authorities.

The exercise of these emergency powers requires the cumulative fulfilment of three conditions: (a) an emergency situation which the authorities cannot control through the exercise of their regular powers;<sup>6</sup> (b) the adoption of a decree by the President of the Republic recognising the situation and authorising the use of (some of the) powers as provided for in the Emergency Powers Act<sup>7</sup> and (c) the use by the government only of those powers necessary to achieve the aim of the Act (proportionality principle)<sup>8</sup>. The proposed Act confers important new competencies upon the government in the event of an emergency, many of which overlap or interfere with monetary policy competencies<sup>9</sup>.

According to Section 10 of the Act, its scope of application shall be limited in accordance with the restriction of the scope of national law foreseen in international agreements binding Finland. Therefore, to justify the compatibility of these legislative changes with the Treaty, the Finnish government invoked Articles 58 and 297 of the Treaty, claiming that the latter in particular would allow exceptions from all Treaty rules, and Article 14.4 of the Statute of the European System of Central Banks and of the European Central

5 Chapter 1, Section 1(1) Emergency Powers Act, unofficial translation of the Finnish Ministry of Justice.

6 Chapter 1, Section 1(2) of the Emergency Powers Act contains an exhaustive list of situations that would constitute “emergency conditions”. Such situations would be: (i) armed attack against Finland, as well as war or the aftermath of war; (ii) serious violation of the territorial integrity of Finland or a threat of war against the country; (iii) war or a threat of war between foreign countries or a serious international crisis constituting a threat of war, requiring immediate action to increase Finland’s defences ...; (iv) a serious threat to the livelihood of the population or to the foundations of the national economy brought about by ... serious disruption of international trade; and (v) a catastrophe, “provided the authorities cannot control the situation with regular powers” (unofficial translation of the Finnish Ministry of Justice).

7 Chapter 2, Section 3(1) and 3(2).

8 Chapter 3, Section 8: “The government shall be authorised to use only those emergency powers that are indispensable for the achievement of the purpose of this Act. The emergency powers shall be used and implemented only in ways that are indispensable for the achievement of the purpose of this Act.” (unofficial translation of the Finnish Ministry of Justice).

9 The new competencies would empower the government to prohibit or impose conditions on the export and import of means of payment; oblige persons resident in Finland to repatriate different currencies, securities or bonds allocated abroad; regulate the interest rates applicable in the Finnish financial market; prohibit or restrict issuance and trade of securities; regulate and restrict lending and deposit-taking activities as well as payment transfers and payment systems; suspend or restrict the functioning of clearing and settlement systems; and lay down provisions concerning the accounting and financial statements of credit institutions (Sections 12 and 12(a) of the Act).

Bank (the Statute)<sup>10</sup>, which, it was claimed, would authorise the government to assign national tasks to the national central bank.

In accordance with Article 105 (4) of the Treaty and Council Decision 98/415/EC<sup>11</sup>, the Finnish Ministry of Finance consulted the European Central Bank (ECB) on the draft Act. In its Opinion, the ECB concluded that “the proposal affects some very core principles of Community law”.<sup>12</sup> In particular, some of the new competences assigned to the government conflict with the rules on free movement of capital, while others conflict with the exercise of monetary policy and therefore interfere with an exclusive Community competence. The ECB stated that, in the framework of the Community monetary policy, it is first and foremost the task of the competent authority (the Eurosystem) to react to and remedy the consequences of an emergency situation; a unilateral and national approach to what would necessarily be a common problem would be bound to be inappropriate in practice and legally vitiated. Moreover, the ECB criticised the reference to Article 14.4 of the Statute as the legal basis for the attribution of certain tasks to the Finnish national central bank – as this Article, the application of which in any case requires the agreement of the Governing Council, only refers to the non-Eurosystem activities that a national central bank can be asked to perform by its government, and not to the performance of Eurosystem functions. It should be mentioned that, even though most Member States have specific provisions for legislation in the event of an emergency<sup>13</sup>, the Finnish legislation is the only case in which powers are foreseen that clearly conflict with the rules of the Treaty.

On 13 June 2003 the Finnish parliament adopted the proposed amendments despite the objections of the ECB<sup>14</sup>. However, on 17 December 2003 the Finnish Ministry of Justice set up a committee to evaluate the need for an overall reform of the Act and to “make the Emergency Powers Act fully compliant with the Constitution, consistent and up-to-date”. On 17 May 2004 the committee issued an interim report<sup>15</sup> which focused on matters of Finnish constitutional law; in addition, the report acknowledged that the emergency situations enumerated in the Act were more extensive than the cases foreseen by Article 297.

At the end of 2004 the Commission asked the Under-Secretary of State in the Ministry of Finance, Martti Hetemäki, to consider, in the framework of the work of the committee, various aspects of the Act which appear to be problematic from the perspective of Community law.

10 According to Article 14.4 of the Statute: “National central banks may perform functions other than those specified in this Statute unless the Governing Council finds, by a majority of two thirds of the votes cast, that these interfere with the objectives and tasks of the ESCB. Such functions shall be performed on the responsibility and liability of national central banks and shall not be regarded as being part of the functions of the ESCB.”

11 Council Decision 98/415/EC of 29 June 1998 on the Consultation of the European Central Bank by national authorities regarding draft legislative provisions, OJ L 189, 3.7.1998, p. 42.

12 ECB opinion, cit., fn. 4, No 14.

13 In one specific case, the Dutch *Noodwet financieel verkeer* (Emergency Act for Financial Services) of 25 May 1978, as amended, foresees the adoption of emergency legislation to regulate the financial markets by the Minister of Finance, subject to a Royal Decree ascertaining the status of emergency. However, this legislation pre-existed the Maastricht Treaty and therefore has to be interpreted in a way consistent with the principles of Community law as they stand after the adoption of the Maastricht Treaty (ECB opinion, cit., fn. 4, n.13)

14 An English language translation of the Emergency Powers Act, as amended by the Act of 18 July 2003 (date of entry into force), Statute No 696/2003 amending the Emergency Powers Act, can be found at [www.finlex.fi/fi/laki/kaannokset/1991/en19911080.pdf](http://www.finlex.fi/fi/laki/kaannokset/1991/en19911080.pdf).

15 The Interim Report can be found at [www.om.fi/25607.htm](http://www.om.fi/25607.htm).

The mandate of this committee has recently been extended until 30.09.2005. A proposal for amendment of the Act is said to be under preparation, but no information about its contents has been made public. If amendments to the Emergency Powers Act are proposed, the Finnish Constitution states that they will have to be agreed by two parliaments. This means that any amendment to the Act could enter into force, at the earliest, in 2007.

### III FIRST QUESTION: IS THE TRANSFER OF COMPETENCES TO THE COMMUNITY IRREVERSIBLE?

With the ratification of the Treaty of Rome, the Member States agreed to assign the Community a number of powers. Through a gradual transfer, the competences of the Community have increased over time and have come to include actions in different fields and of different depth (exclusive, shared and concurrent competences). However, the Treaty (except in the case of Monetary Union<sup>16</sup>) does not specify whether this process is an irreversible one<sup>17</sup>. Given this situation and the steadily evolving European integration process, the question has been raised as to whether Member States may unilaterally take back certain specific powers they have conferred on the Community or, in an extreme case, withdraw from the latter.

#### a) The national constitutions

Before examining the Treaty itself, it is useful to look at the national constitutions of the Member States. As the competences conferred by the Treaty on the European Community were previously exercised by the Member States which agreed to the transfer, provision needed to be made in each constitution allowing for such transfer.

Looking at the wording of such provisions, one finds a wide variety of definitions. There is the *temporary devolution* of attributions of the State (Article 49bis of the Luxembourg Constitution), where the temporal limitation clearly underlines the possibility of the State to withdraw at any time. There is the *joint exercise, with the other Member States, of certain competences* (Article 88-1 of the French Constitution; Article 7.6 of the Portuguese Constitution), which seems to lean towards an intergovernmental approach and supports the idea of a State maintaining full control of its sovereignty<sup>18</sup>. There is the *limitation of sovereignty* (Article 11 of the Italian Constitution; Paragraph 15 of the Preamble of the French Constitution), which is clearly unilateral and, it seems,

16 European Council of Madrid, Presidency Conclusions of 16.12.1995, [http://ue.eu.int/ueDocs/cms\\_Data/docs/pressData/en/ec/032a0001.htm](http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/032a0001.htm) (point 1.3.4); compare also the wording of Article 88.1 “exercer en commun” and of Article 88.2 “transfert” of the French Constitution.

17 Obradovic, “Repatriation of Powers in the European Community”, 34 CMLR (1997), pp. 59-88.

18 “La souveraineté internationale consiste en effet précisément dans le pouvoir de conclure des traités ayant pour objet de transférer ou de partager des compétences ... un État est souverain si la liste des compétences qu’il continue d’exercer ne dépend que de lui même”, Troper, “L’Europe politique et la souveraineté, des États”, lecture given in the context of the symposium organised by the Centre Marc Bloch and the Institut Water Hallstein of the Humboldt-Universität in Berlin on “L’avenir de l’Union européenne: pour un bilan critique de la Convention européenne”, 7-8 November 2003, p. 6.

discretionary. There is the *attribution of the exercise of State competences* (Article 93 of the Spanish Constitution; Article 34 of the Belgian Constitution), where assigning only *the exercise* of the competences to the Community (and presumably keeping the competences themselves for the State) implies the possibility to withdraw. There is the *transfer* of competences (Article 23 (1) of the German Constitution; Article 9 (2) of the Austrian Constitution; only for monetary policy and the free movement of persons, Article 88-2 of the French Constitution), the provision which goes furthest and seems to imply an irrevocable transfer and a permanent loss for the future of such powers in the Community's favour.

At first sight, it could be concluded that most Member States never really intended to permanently transfer their competences to the Community. However, this conclusion can be challenged on two grounds. First, the national constitutional provisions deal in general with the power of the State to conclude an international treaty: the special nature of the Treaty is, not reflected in these constitutional provisions<sup>19</sup>. Second, since the signing of the Treaty, there has been, with the participation of the Member States, a progressive process of integration which binds them now in a different way. In this context, it is interesting to note that there has been a development in the French Constitution: Article 88-2 talks of the "transfer of competences", and not anymore of the joint exercise of competences, in the case of Monetary Union. The question is whether this further concession is a reflection of the higher integration achieved and a sign of development towards the transfer of competences to the Community, or whether it is only determined by the specificity of the subject, Monetary Union, which requires an irrevocable transfer of competences<sup>20</sup>.

#### **b) Withdrawal from a specific Community policy**

In the past, the question has been raised of whether it would be possible for a Member State not to join<sup>21</sup>, or to unilaterally withdraw from, individual Community policies<sup>22</sup>. On the second question, the European Court of Justice has stated very clearly in its case law that there may be no reservations of Member States in their membership of the Communities and that Member States

19 In some cases however, as in the Article 93 of the Spanish Constitution, the article was specifically drafted for the entry of the country into the European Community.

20 Cf. Obradovic, cit. fn. 17, p. 62.

21 In two cases Member States have been allowed not to join a Community policy. First, the Protocol on Social Policy was adopted to overcome the disagreement of the United Kingdom: the other 11 Member States wishing to continue along the path laid down in the 1989 Social Charter adopted among themselves an agreement additional to the provision of the Treaty. The United Kingdom subsequently joined the agreement and its provisions became part of the Treaty. Second, the Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland and the Protocol on certain provisions relating to Denmark were adopted to allow these two Member States to opt out of Stage Three of Economic and Monetary Union while allowing the Community and the other Member States to move into that phase. This is the most extreme example of differentiated integration in Community law, cf. Zilioli, "The Constitution for Europe and its impact on the Governance of the Euro", in Torres, Verdun, Zimmermann (eds.), *Governing EMU*, in print, Nomos. The obligation of new Member States to join the Community in its present state of development, the obligation to accept and introduce in their legislation the whole of Community law, without exceptions (*acquis communautaire*) are also based on the principles of equality of Member States before Community law and Community solidarity, analysed below.

22 During the preparations for the IGC on Economic and Monetary Union in 1990, the question was also raised as to whether a third country could join Monetary Union without joining the Community, and was answered in the negative, cf. Zilioli/Selmayr, *The Law of the European Central Bank*, Oxford and Portland, Oregon 2001, 10.

cannot apply provisions of secondary Community law in an incomplete or selective manner as that would lead to the undermining of Community solidarity<sup>23</sup>. The Court has emphasised that there is an “equilibrium between the advantages and obligations flowing from [a Member State’s] adherence to the Community”<sup>24</sup>. The selective or incomplete application of Community law constitutes a unilateral break of the obligation to respect the Community’s rules, leading to a disturbance in the equilibrium of advantages and obligations and thereby endangering the equality of Member States before Community law. “This failure in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the very root of the Community legal order”<sup>25</sup>. In another case<sup>26</sup>, the Court similarly concluded that “the complexity of certain situations in a State cannot alter the legal nature of a Community provision ..., and this is particularly the case considering that the Community rule must have the same binding force in all Member States.” Finally, as already mentioned, the Court has stated the irreversibility of the transfer of powers to the Community.<sup>27</sup>

Experience confirms that withdrawal from a single Community policy has never been seriously considered. In the only case of withdrawal from the Community of (a portion of the territory of) a Member State, the case of Greenland, even though the problem was only related to the fisheries policy, Greenland withdrew from the Community as a whole<sup>28</sup>. In the case of the 1975 British referendum, the question was on whether or not to withdraw from the European Communities, not from one of its policies. Finally, the possibility explicitly provided for by the Constitution for Europe is to withdraw from the European Union; it is clear that exit from a sole policy is not foreseen<sup>29</sup>.

It is therefore clear that, once certain powers have been conferred on the Community and certain rules have been adopted, there cannot be cherry-picking in Community law and there is a clear obligation on all Member States to abide by the totality of Community law.

In the specific case of monetary policy, this prohibition to withdraw has been stated more explicitly<sup>30</sup>: it is commonly agreed that it is not possible for Member States to take back the monetary competences assigned to the Community by the Maastricht Treaty they have ratified. There are at least two reasons why in this case the irrevocability of the transfer of competences has been stated explicitly. First, differentiated integration implies increased flexibility but also a risk of legal uncertainty; in this situation it is necessary to ensure that the

23 Case 128/78, *Commission v United Kingdom* [1979] ECR 419, judgment of 7 February 1979, paragraph 9.

24 Case 128/78, cit., fn. 23, para. 12.

25 *Commission ./. United Kingdom*, para. 12.

26 Case 13/68, *Salgoil v Italian Ministry of Foreign Trade* [1968] ECR 453, judgment of 19 December 1968, p. 462.

27 See below, text related to fn. 40.

28 OJ L 29, 01.02.1985, p.1.

29 Cf. Smits, *The European Constitution and EMU: an Appraisal*, 42 CMLR 2005, 425-463, at 464; Zilioli, cit. fn. 21.

30 Cf. *Conclusions of the European Council of Madrid*, cit., fn.16 and Protocol (No 10) on the transition to the third stage of economic and monetary union, in which the irreversible character of the Community’s movement to the third stage of economic and monetary union has been declared. Cf. also Obradovic, cit., fn. 17, p.61.

movement from the different stages of integration is in one direction only. Second, as monetary policy cannot be efficiently performed unless the decision-making power is fully centralised<sup>31</sup>, it was always clear<sup>32</sup> that monetary policy can only be an exclusive Community competence<sup>33</sup>. Conceptually, it is even more difficult to imagine the exit of a Member State from an exclusive competence of the Community; this is another reason why the irrevocability of the transfer of competences has been explicitly addressed.

Different from the case of withdrawal is the case where a special differentiated regime has been agreed beforehand, as in the case of the exemption from Stage Three of Economic and Monetary Union foreseen by the UK and Danish Protocols. Even in a situation of differentiated integration, for those who have no exemption there is no possibility to withdraw from the Community policy.

### c) Unilateral withdrawal from the Treaty

If it is not possible to unilaterally take back some competences that have been assigned to the Community, is there another way for a Member State to show its disagreement and detach itself from a policy it no longer shares? The question is whether total (unilateral) withdrawal from the Union is possible.

Until the entering into force of the Constitution for Europe<sup>34</sup>, there will be no provision for the withdrawal of a Member State from the Treaty. The absence of any such provision has led a part of the doctrine<sup>35</sup> to the conclusion that Member States may not unilaterally withdraw from the Community<sup>36</sup>.

According to international law, the non-inclusion of a clause regarding the denunciation of or withdrawal from an international treaty may not in all cases be understood as granting indefinite duration<sup>37</sup>. If “it is established that the

31 Cf. Zilioli/Selmayr, cit. fn. 22, 55.

32 Cf. Zilioli, cit. fn. 21.

33 This has now been confirmed in Article I-13 (1) c) of the Constitution, which, if submitted, has a declaratory nature.

34 Article I-60 of the Treaty establishing a Constitution for Europe reads: “Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union ...”.

35 Arndt, *Europarecht*, 3. ed., p. 64. For other voices sharing the view that Member States cannot unilaterally withdraw, see also: Giegerich, *Europäische Verfassung und deutsche Verfassung im transnationalen Konstitutionalisierungsprozess*, Berlin 2003, 613 ff; Hilf, “Kommentar zu Artikel 240”, point 5, in von der Groeben/Thiesing/Ehlermann (eds.), *EU-/EGV Kommentar*, 5th edition, Baden-Baden 1997; Ipsen, *Europäisches Gemeinschaftsrecht*, Tübingen 1972, p. 99 and 211; Schwarze, *The Role of the European Court of Justice in the Interpretation of Uniform Law among the Member States of the European Communities*, Baden-Baden 1988, p. 11. In the same direction, Tomuschat, “Wer hat höhere Hoheitsgewalt?”; 8 Humboldt Forum Recht 1997.

36 However, the EC Treaty does not remain entirely silent about the duration of the Treaty. According to Article 312, “th[e] Treaty is concluded for an unlimited period.” Article 51 of the Treaty on the European Union contains identical wording (the Treaty establishing the European Coal and Steel Community differed in this respect, as it was concluded for a period of 50 years, cf. Article 97 of the ECSC Treaty). The expression “unlimited period” refers to the temporal dimension and may as such not be read as granting “indissolubility”. The same conclusion is reached via an analysis of historical backgrounds in: Roettinger, “Kommentar zu Artikel 240”, No. 1, in: Lenz (ed.), *EG-Vertrag Kommentar*, 1st ed. (1994).

37 According to Article 56 of the Vienna Convention on the Law of Treaties, “a treaty which contains no provisions regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal”, [www.un.org/law/ilc/texts/treaties.htm](http://www.un.org/law/ilc/texts/treaties.htm)

parties intended to admit the possibility of denunciation or withdrawal; or a right of denunciation or withdrawal may be implied by the nature of the treaty”<sup>38</sup>, then withdrawal is possible. Accordingly, whether Member States may withdraw from the Community depends on the question of whether they intended to admit this possibility and/or whether it is implied by the nature of the Treaty. Looking at the Preamble of the Treaty, which states that the Treaty serves as a basis for creating “an ever closer union”, as well as at the ever increasing integration and cooperation process already sought by the fathers of the Treaty and at the ever evolving character of the Community, this part of the doctrine concludes that the nature of the Treaty does not imply a right to withdraw. These scholars have found support in the case law of the European Court of Justice. Already in its early days, the Court clarified that the Treaty is “more than an agreement which merely creates mutual obligations between the contracting states. ... It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. ... the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals”<sup>39</sup>. At the time, no clear position was taken on the question of whether the Member States could do away with the limitation of sovereignty they had agreed to. More recently, however, the Court has clarified its position and has explicitly stated that the transfer of powers is definitive and irreversible: “powers thus conferred could not ... be withdrawn from the Community, nor could the objectives with which such powers are concerned be restored to the field of authority of the Member States alone”<sup>40</sup>.

On the basis of this case law of the Court of Justice, several scholars<sup>41</sup> have identified the peculiarity of Community law and the way in which it differs from international law. While in international law the States always remain the masters of the treaties they conclude, the peculiarity of the Treaty is that the Member States have committed themselves to an irreversible project and have irrevocably transferred, i.e. lost forever, some of their competences to the Community.

A very different position has been taken by some national courts, which have stated that, as the Treaty is nothing other than an international law treaty, by an equal and contrary instrument the States can change their agreement, in some

38 Article 56, para. 1 *a)* and *b)* of the Vienna Convention, cit. fn. 37.

39 Case 26/62, *Van Gend & Loos* [1963] ECR I judgement of 5 February 1963, at 12.

40 Case 7/71, *Commission v France* [1971] ECR 1003, 1018. Similarly, cf. Case 804/79, *Commission v United Kingdom* [1981] ECR 1045, 1073; and Case 24/83, *Wolfgang Gewiese and Manfred Mehlich v Colin Scott Mackenzie*, [1984] ECR 817, 833.

41 Cf. Barents, *The Autonomy of Community Law*, 2004, pp. 307-308: “the status of a Member State constitutes an exclusive matter of Community law [which is also] demonstrated in particular by the case law on the division of competences laid down in the Treaty. This division is irreversible in the sense that as long as Community law does not provide otherwise, the competences of the institutions continue to exist. ... Member States are not allowed to act unilaterally but are obliged to act in the interest of the Community. ... The division of competences between the Member States and the institutions is exclusively based on the Treaty, which precludes Member States from unilaterally changing the scope of Community law or invoking the existence of a ‘domaine réservé’ ... for not fulfilling their obligations. ... More generally, the case law has made clear that the status of Member State under Community law involves a prohibition of unilateral action”.

cases even concluding that unilateral withdrawal is also possible<sup>42</sup>. While the latter conclusion is not shared by all scholars in the field<sup>43</sup>, some agree that a consensual exit from the Treaty through an international law agreement is possible<sup>44</sup>.

The inclusion in the text of the Constitution for Europe of Article I-60<sup>45</sup>, explicitly allowing for the withdrawal of a Member State from the EU, now makes clear that the intention of the drafters is to permit, under certain conditions and following certain procedures, such withdrawal. As the foreseen procedure requires negotiations of the modalities for exit, one wonders, however, whether it will still be legitimate to talk of “unilateral” exit. Looking at the question of the transfer of competences, it can be argued that the need for a negotiated procedure arises not only from practical necessity – the complexity of “excluding” a State from the internal market – but also from the very reason that the Community would need to transfer back (the State itself not being in a position to repatriate) the powers and competences previously conferred upon the Community<sup>46</sup>. In this respect, it should be underlined that the withdrawal agreement would be negotiated by the Union (and not by the Member States, as the accession treaties are) and the withdrawing Member State. Not even Article I-60 of the Constitution can, therefore, provide a definitive answer to the question of the irrevocability of the transfer of competences.

42 The possibility of unilateral withdrawal was the conclusion in the *Factortame* judgement of the House of Lords, *Factortame v Secretary of State for Transport (No 2)* [1991], 1 AC 603, 659, where it was stated that the Parliament, when adopting the European Communities Act, did not lose the competence to repeal that act in the future, even in a purely unilateral way. It is not clear whether the same conclusion was reached in the Maastricht decision, see below. Cf. Hailbronner, “The European Union from the perspective of the German Constitutional Court” (1994), *German Yearbook of International Law*, pp. 93-112, 103. Cf. the *Maastrichter Urteil of the Bundesverfassungsgerichtshof* (Federal Constitutional Court of Germany) (for the English text, see CMLR 1994, p.57), where the Court stated in para. 55 of the judgement that the state could withdraw from the Community by an international law act. On this case, among many interesting articles, cf. Weiler, “Demos, Telos und die Maastricht-Entscheidung des Bundesverfassungsgerichts”, [www.jeanmonnetprogram.org/papers/95/9507ind.html](http://www.jeanmonnetprogram.org/papers/95/9507ind.html); Smits, “A Single Currency for Europe and the Karlsruhe Court” (1994) *LIEI*, pp. 115-133, 124; Hirsch, *Europäischer Gerichtshof und Bundesverfassungsgericht - Kooperation oder Konfrontation?*, 38 *NJW* (1996) 2457-2466. It is clear that political motivations have played a substantial role in the decisions of the national courts: it is very difficult for the judges of the supreme court of a state to recognise the hierarchical superiority of the ECJ, and it is very difficult for a national parliament to recognise that the European Parliament is as democratically legitimate as itself and that many, but no longer all, competences remain with the national parliament, as some have been transferred to the Community. Obradovic, cit., fn. 17, p. 72, considers these national judicial decisions tools for the repatriation of powers.

43 According to the Vienna Convention, unilateral exit from a treaty is possible only under very special circumstances. Cf. Article 56 (in principle, no possibility for unilateral denunciation) and Articles 60 to 62, especially 62, *rebus sic stantibus* (which contain the extraordinary circumstances in which a unilateral denunciation is possible) of the Vienna Convention, cit., fn. 37. For arguments against unilateral withdrawal, see Herdegen, “Maastricht and the German Constitutional Court: constitutional constraints for an ‘ever closer union’”, 31 *CMLR* 235-245, 242; Diez Picazo, “Les pièges de la souveraineté”, in Dehousse (ed.), *Une constitution pour l’Europe?*, Presses de Sciences Po 2002, 39, 59. Contra, de Witte, “The Process of Ratification of the Constitutional Treaty and the Crisis Option: A Legal Perspective”, *EUI Working Paper LAW No 2004/16*, 1-19, 16, who mentions the fact that when in 1975 the British government called a referendum on whether the United Kingdom should remain in the EC, none of the other Member States lodged a formal protest.

44 Puttler, “Sind die Mitgliedstaaten noch ‘Herren’ der EU? - Stellung und Einfluss der Mitgliedstaaten nach dem Entwurf des Verfassungsvertrages der Regierungskonferenz”, 39 *Europarecht* (2004), pp. 669-690, 676; Folz, “Austritt und Ausschluss aus der Europäischen Union”, in Ginther (ed.), *Völker- und Europarecht*, Vienna 2001, 145, 154; Troper, cit., fn. 18.

45 Cit., fn. 34.

46 As a counterargument it could be argued that in case no agreement can be reached, the unilateral withdrawal is effective as from two years after the notification to the European Council of the intention of the Member State to withdraw, Article I-60 (3).

#### **d) Conclusions: withdrawal from Monetary Union is not possible**

The Finnish Emergency Powers Act foresees that, in certain cases of serious emergency, the government can introduce obstacles to the free movement of capital and can assign certain powers, which according to the Treaty belong to the ECB, to the Finnish national central bank (Suomen Pankki) and to other national authorities, thereby (temporarily) separating Finland from the Monetary Union of the Community.

The question of whether the Treaty allows Member States to unilaterally exit from Monetary Union has thus been examined. There is agreement in the doctrine and in the case law on the impossibility of unilaterally withdrawing from a specific Community policy. In particular, it is clear that the movement of the Community into Monetary Union is irreversible and that there can therefore be no “repatriation” of competences. On the other hand, there is no agreement as to whether unilateral withdrawal from the whole of the Treaty is possible as (i) the Treaty does not contain an explicit clause to this effect, (ii) the wording of the national constitutions is diverse and not clear and (iii) the question of whether the nature of the Treaty allows for a withdrawal is answered in different ways by the scholars, the European Court of Justice and the national courts. Once the Constitution enters into force, its Article I-60 will clarify the situation and allow withdrawal, subject to a procedure requiring negotiations involving the European Council, the Commission and the Parliament and, if the withdrawing Member State has adopted the euro, certainly also the ECB<sup>47</sup>.

#### **IV SECOND QUESTION: DOES THE EXCEPTION OF ARTICLE 297 OF THE TREATY ALLOW MEMBER STATES TO UNILATERALLY “SUSPEND” THE TRANSFER OF POWERS TO THE COMMUNITY?**

As the Emergency Powers Act does not envisage a withdrawal from the Community, but only a future, conditional and (probably) temporary national exercise of Community powers, the question is whether the legal basis that has been invoked – Article 297 – grants Member States these powers. First, the function of Article 297 and the question of whether it grants, by its nature, a “reserve of sovereignty”, or is rather a hedge clause, will be examined. Thereafter, the conditions for the applicability of Article 297 will be analysed to clarify whether allowing the Member States under certain circumstances to introduce legislation creating obstacles to the free movement of capital and the internal market also allows the Member States to adopt legislation in an area of exclusive Community competence. In substance, the question is whether Article 297 is the crack in the dam through which the monetary policy competences irrevocably attributed by the Treaty to the Community can, under certain conditions, flow back to the Member States.

<sup>47</sup> Cf. Opinion of the ECB of 19 September 2003 at the request of the Council of the European Union on the draft Treaty establishing a Constitution for Europe (CON/2003/20), OJ C 229/7 of 25.9.2003.

### a) Is Article 297 still necessary?

Article 297 is one of the original articles of the Treaty of Rome (at the time, Article 224). Its main function when it was adopted was to create a link between the (at the time) completely national external politics<sup>48</sup> of the Member States and the Community objective to achieve a common market. While admitting that Member States, in some extremely serious situations, have the right to take emergency measures that might have an impact on the common market, the Article nevertheless prescribes a consultation procedure to prevent such negative effects.

When in 1991 the IGC on political union started to discuss the “Common External Policy”, which would later become the second pillar of the European Union, the Common Foreign and Security Policy (CFSP), the question was raised as to whether it still made sense to allow Member States to adopt individual measures to react to external threats, which would by definition concern the whole European Union, and whether it would not be more appropriate to delete such an anachronistic provision and rely on the reaction of the European Union<sup>49</sup>. Today, with the adoption of the CFSP, the objectives of which conflict with the adoption in emergency situations of unilateral measures by the Member States, this question is even more topical. It is questionable whether this Article still maintains a function in today’s European Union, particularly if, as in the case of the Finnish Act, the measures to be individually adopted by the Member State are bound by definition, in a single Monetary Union, to cause further disruption to the market rather than stabilising it.

### b) “Reserve of sovereignty” or exceptional derogating clause?

It has been argued, in particular by Member States<sup>50</sup>, that Article 297 of the Treaty grants them a “reserve of sovereignty”<sup>51</sup> or that, under certain circumstances, it is a tool for the repatriation of competences from the Community to a Member State<sup>52</sup>. However, such a reading is supported neither by the wording of Article 297<sup>53</sup>, nor by the history or nature of the Communities<sup>54</sup>. In fact, the historical and legal development of the Community until the establishment of European Union, which provided for a CFSP<sup>55</sup>, clearly indicates another, more restrictive, reading.

48 Article 297 also talks of “serious internal disturbances affecting the maintenance of law and order”; this aspect relates to internal security. On this aspect, see below, chapter IV c) 1).

49 The deletion was proposed by the Commission, cf. CONF-UP 1788/91 of 15 April 1991, p. 23.

50 The German and British governments took this position in some cases at the ECJ: cf. Case 15/69, *Württembergische Milchverwertung-Südmilch-AG v Salvatore Ugliola* [1969] ECR 363; C-273/97, *Angel Maria Sirdar v The Army Board and Secretary of State for Defence*, [1999] ECR I-7403, 7415; C-285/98, *Tanja Kreil v Bundesrepublik Deutschland*, [2000] ECR I-69. See also Ehlermann, *Communautés européennes et sanctions économiques internationales – une réponse à J. Verhaeven*, *Revue Belge Droit International* 1984-1985, no. 1, pp. 96-112; *contra*, Koutrakos, “Is Article 297 EC a ‘Reserve of Sovereignty’?”, 37 *CMLR* (2000), 1339-1362 at 1342.

51 This is challenged by Koutrakos, *cit.*, fn. 50.

52 Obradovic, *cit.*, fn. 17, makes the point that it is not clear whether the process of gradual transfer to the Community of Member States’ powers is irreversible or not, with one exception: Monetary Union, p. 61.

53 See below, chapter IV c).

54 Cf. Koutrakos, *cit.*, fn. 50, p. 1342; Gilsdorf, “Les réserves de sécurité du traité CEE, à la lumière du traité sur l’Union européenne”, 374 *Rev. Marché commun et de l’Union européenne* (janv.1994) 17-25, especially fn. 3 and 4 at p. 18.

55 Mentioned above, chapter IV a).

Article 297 is one of the five articles<sup>56</sup> that provide for derogation from the rules of the Treaty. It is settled case law that Member States can derogate from the obligations imposed on them by the provisions of the European treaties only on the conditions laid down in the treaties themselves<sup>57</sup>. All articles of the Treaty allowing derogation are of an exceptional nature and only apply in clearly defined cases<sup>58</sup>, while the derogating measures must be proportionate<sup>59</sup>, i.e. have the least impact on the market<sup>60</sup>.

Therefore, Article 297 has to be interpreted in a restrictive manner. Although Article 297 attaches particular importance to the interests of Member States, “it must be observed that [it] deal[s] with exceptional cases which are clearly defined and which do not lend themselves to any wide interpretation”<sup>61</sup>.

As the special cases listed in Article 297 deal with the issue of public security, it is interesting to examine the position taken by the ECJ on the exceptions allowed in this field. First, the Court stated that “[i]t is not possible to infer from those articles that there is inherent in the Treaty a general exception excluding from the scope of Community law all measures taken for reasons of public security”<sup>62</sup>. Second, even in the case of the CFSP, where what in substance remains a national competence is coordinated, the European Court of Justice has clearly stated that “Member States have retained their competence in the field of foreign and security policy, [but that these] powers retained ... must be exercised in a manner consistent with Community law. ... Consequently, while it is for Member States to adopt measures of foreign and security policy in the exercise of their national competence, those measures must nevertheless respect the provisions adopted by the Community in the field of the common commercial policy. ... It follows from the foregoing that, even where measures have been adopted in the exercise of national competence in matters of foreign and security policy, they must respect the Community rules adopted under the common commercial policy”<sup>63</sup>. Therefore, even in an area which falls within the competence of the Member States the latter have nevertheless to ensure the respect of measures adopted to achieve the objectives of an exclusive Community competence. In areas which are within the Community competence, as it is the case for Article 297, the conditions under which a State can (temporarily) unilaterally deviate from Treaty provisions must be very stringent and

56 Articles 30, 39, 46, 296 and 297 of the Treaty.

57 Joined Cases 6 and 11/69, *Commission v French Republic*, ECR [1969], 523; Case C-285/98, cit., fn. 50, para. 16; cf. also Nicolaysen, *Europarecht I – Die Europäische Integrationsverfassung*, 2nd ed. (2002), p. 108.

58 Case 222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*, [1986] ECR 1651, judgment of 15 May 1986, para. 26; Case C-414/97 *Commission v Spain*, [1999] ECR I-5585, judgment of 16 September 1999, para. 21; Case C-285/98, cit., fn. 50, para. 16.

59 The ECJ has stated, in respect of Article 30, that “the purpose of this Article is not to reserve certain matters to the exclusive jurisdiction of the Member States; it merely allows national legislation to derogate from the principle of free movement of goods to the extent to which this is and remains justified in order to achieve the objectives set out there”, *Steiner/Woods*, EC Law, 7th ed. (2000), p. 172, referring to Case 153/78 *Commission v Germany*, [1979] ECR 2555. Cf. also Case 222/84, cit., fn. 58, para. 38; Case C-285/98, cit., fn. 50, para. 23.

60 In addition, it has been argued that where there is a Community measure covering the specific subject, a Member State cannot rely on the derogation provided by the Treaty itself: cf. *Steiner/Woods*, cit. fn. 59, p. 191.

61 Case C-13/68 *Salgoil v Italian Ministry of Foreign Trade*, [1968] ECR 453.

62 Case C-285/98, cit., fn. 50, para. 16; Case C-273/97 cit., fn. 50, para. 16.

63 Case C-124/95 *Centro-Com*, [1997] ECR I-81 para. 24, 25, 27, 30.

exhaustively described. Finally, concerning the limits of the legal review, the Court has stated that “depending on the circumstances, national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State”<sup>64</sup>. However, the Court may question whether the measures taken in exercise of this discretion actually have the purpose of guaranteeing public security and whether they are appropriate and necessary to achieve that aim<sup>65</sup>.

It is clear that the aim of Article 297 is not to enable Member States, in areas touching the very core of their sovereignty, freedom to act by taking any measure they consider appropriate without any regard for the procedures established in the Treaty. On the contrary, as pointed out by Koutrakos, Article 297 “is focused on the consultation between the Member States rather than the measures ‘which a Member State may be called upon to take’”<sup>66</sup>. While a certain discretion with regard to the measures to be taken remains to the Member State, respect of the foreseen procedures is of the essence, precisely because this Article contains a “*wholly* exceptional clause”<sup>67</sup> which allows derogation, not from one aspect of the common market (as Article 30 of the Treaty does), but from the rules of the common market in general<sup>68</sup>. According to Article 297, unilateral measures of Member States are, as a rule, prohibited; the protection of national interest can only take place according to the rules of Community law and the procedure foreseen for this purpose<sup>69</sup>.

It appears therefore that Article 297 of the Treaty cannot be understood as a reserve of sovereignty, but rather as a hedge clause (“Schutzklausel”)<sup>70</sup>.

This is confirmed by the very content and aim of Article 297, which is, as mentioned above, to establish a procedure for consultation and cooperation to prevent negative impacts on the internal market from unilateral action. This consultation should precede, or when this is impossible immediately follow<sup>71</sup>, the adoption of the national measure. Two further steps, aiming at guaranteeing that Article 297 is used in a restrictive way, are built into the following Article 298. First, in the event of the measure, despite the consultation and cooperation, having negative effects on the internal market, the Commission shall take action with the Member State to adjust the national violating provisions to the Treaty. Second, the question can be submitted directly to the ECJ, without the preliminary stages foreseen in Articles 226 and 227, both by the Commission and by other Member States. These further guarantees that Article 297 be strictly

64 Case C-285/98, cit., fn. 50, para. 24.

65 Case C-285/98, cit., fn. 50, para. 25.

66 Koutrakos, cit., fn. 50, p. 1340.

67 Opinion of Advocate General Jacobs in Case C-120/94, *Commission v Greece*, [1996] ECR I-1513 (emphasis in the original); cf. also Case 222/84, cit. infra, fn. 58.

68 Opinion of Advocate General Jacobs in Case C-120/94, cit. fn. 67.

69 Cf. Nicolaysen, *Europarecht I – Die Europäische Integrationsverfassung*, 2nd ed. (2002), p. 108.

70 Gilsdorfer/Brandtner, “Vorbem. zu den Artikeln 296 bis 298 EG”, No 3-5, Bardenhewer-Rating/Grill/Jakob/Woelker, *EG- und EU-Kommentar*, 6th ed. (2004), p. 1534.

71 Cf. the well-known *Caroline* formula, pleaded by the United States in 1841: “necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation”, State Secretary Webster, British and Foreign State Papers, 29 (1840-1841), at 1129, 1138.

interpreted and not abused support the interpretation that its objective is not to maintain a reserve of sovereignty for the Member States in the exceptional cases foreseen, but to limit their possibility to act unilaterally even under these exceptional circumstances.

### c) **Conditions for invoking Article 297**

#### ***1 – Serious internal disturbances affecting the maintenance of law and order***

According to Article 297, a Member State might be called upon to take certain measures in the event of “serious internal disturbances affecting the maintenance of law and order”. This must be “a breakdown of public order on a scale much vaster than the type of civil unrest which might justify recourse to Article 36 ... a situation verging on a total collapse of internal security”<sup>72</sup>. Where the notion “public security” refers to both a Member State’s internal security and its external security<sup>73</sup>, as in Articles 30, 39 and 46 of the Treaty, the notion “serious internal disturbances affecting the maintenance of law and order” must be interpreted in a much narrower manner, in order not to endanger the “wholly exceptional nature” of Article 297. Neither a general strike nor violent demonstrations by agricultural workers<sup>74</sup> nor purely economic reasons<sup>75</sup> can suffice for a State to have recourse to this exceptional Article. Isolated terrorist attacks, environmental catastrophes or temporary supply crises also cannot provide justification for recourse to this Article<sup>76</sup>.

#### ***2 – War and serious international tension constituting a threat of war***

The concepts of “war” and “threat of war” are not reflected in the UN Charter or the Resolutions of the UN General Assembly, where reference is made instead to “aggression”<sup>77</sup>. The first interesting question is whether or not acts of terrorism can be assimilated to a “threat of war” for the purpose of applying Article 297. While experts are divided on the issue<sup>78</sup>, Article 3 of the Council Common

72 Opinion of Advocate General Jacobs, cit. fn. 67, para. 47

73 Case C-367/89 *Richardt and “Les Accessoires Scientifiques”*, [1991] ECR I-4621, para. 22; Case C-83/94 *Leifer and Others*, [1995] ECR I-3231, para. 26; Case C-285/98, cit., fn. 50, para. 17; Case C-273/97, cit., fn. 50, para. 17.

74 Case C-265/95, *Commission v France*, ECR 1997, I-6959, para. 54-58.

75 Case C-367/98, *Commission v Portugal*, [2002] ECR I-4809, para. 52: “it is settled case law that economic grounds can never serve as justification for obstacles prohibited by the Treaty”.

76 Cf. Karpenstein, “Artikel 297 EGV”, in Schwarze (ed.), *EU-Kommentar*, Nomos 2000, 2344.

77 The UN Charter does not use the expression “war”, but refers to “threats and breaches to international peace and security”, “aggression”, “international disputes”, “local disputes”, “threats and use of force”. The UN General Assembly Resolution 3314 (XXIX) defines “Aggression” as “the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition. ...

Any of the following acts ... qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation however temporary, resulting from such invasion or attack, or any annexation ...

(b) Bombardment ...

(c) The blockade of the ports or coasts ...

(d) An attack by the armed forces of a State ...

(e) The use of armed forces

(f) The action of a State in allowing its territory ... to be used by that other State for perpetrating an act of aggression against a third State

The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries.”

78 Cf. Cassese, cit. fn. 2, p. 996-997: “practically all States ... have come to assimilate a terrorist attack by a terrorist organisation to an armed aggression by a State... Thus, aiding and abetting international terrorism is equated with an “armed attack” for the purpose of legitimizing the use of force in self-defence”. Contra, Bothe, “Terrorism...”, cit. fn. 2.

Position on the application of specific measures to combat terrorism<sup>79</sup> defines a “terrorist act” as “an intentional act which... may seriously damage a country...as defined as an offence under national law where committed with the aim of ... (iii) seriously destabilising or destroying the fundamental, political, constitutional, economic or social structures of a country...”<sup>80</sup>.

The second interesting question is who is responsible for evaluating the existence of a sufficiently serious threat. Advocate General Jacobs has clarified<sup>81</sup> that it is for the Member State concerned to evaluate whether international tensions can be qualified as a threat of war; “the scope and the intensity of the review that can be exercised by the Court is severely limited ... by the absence of any appropriate legal criteria capable of judicial application”<sup>82</sup>. Therefore, it can be argued that it is for the concerned State to decide whether significant and destabilising terrorist acts are to be considered as a threat of war.

### ***3 – Obligations accepted for the purpose of maintaining peace and international security***

Even in the case of this specific condition, it could be argued that Article 297 is anachronistic. The international obligations which could have an impact on the common market are mostly military obligations. With the development of the CFSP, and given that all Member States are members of the UN and most are members of NATO, a joint reaction and joint obligations are much more probable than individual ones. In any event, it is difficult to imagine that these international obligations might be so different among Member States as to impose the creation of barriers between them, given the fact that they are under an obligation to coordinate their actions on these issues.

### ***4 – Is “preventive” legislation allowed?***

Even if one of the three objective above-mentioned conditions were to be satisfied, another question to be raised in the case of the Finnish Act is whether a Member State can invoke Article 297 to enact legislation to deal with a future potential emergency situation.

The wording of Article 297 does not support an interpretation including such a preventive element, as it uses the expression “in the event of”. The exceptional nature of Article 297 therefore excludes the possibility of adopting

79 Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/931/CFSP), OJ L 344/93 of 28.12.2001.

80 Even if terrorism is not considered to be an act of war, it appears from this definition that, in some extreme situations, it could constitute a case of serious internal disturbances affecting the maintenance of law and order.

81 Agreeing with the decision of the German courts, as referred by Advocate General Jacobs, cit. fn. 67, I-1527, point 51.

82 Cf. Opinion of Advocate General Jacobs, case C-120/94, cit. fn. 67, para. 50-51. When evaluating public security, the Court has always granted a certain discretion to the Member States: “depending on the circumstances, national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State”, case C-273/97, cit., fn. 50, para. 27; Case C-83/94, cit., fn. 73, para. 35; Case C-285/98, cit., fn. 50, para. 24. Also regarding the exercise of derogation powers pursuant to Article 120 of the Treaty, the Court has held that “in the event of urgency and when a decision of the Council is not forthcoming immediately, Article [120] allows, as a precaution, unilateral action by a Member State and leaves this latter to decide the circumstances which render such action necessary”, Joined Cases 6 and 11/69, cit., fn. 57, para. 28.

“precautionary” or “preventive” legislation in the absence of the necessary conditions<sup>83</sup>.

It could be argued that the Finnish Act did not imply the adoption of preventive legislation but only of an enabling clause, on the basis of which, if and when the necessary conditions came into existence, emergency legislation could be adopted. However, the ECJ has clearly stated that Member States have a duty to eliminate from their legal system any legislation which is in conflict with the Treaty even when it is not applied, to foster transparency and certainty of law<sup>84</sup>. In this case, either the limits and conditions (including procedural) of the enabling law would coincide with what is foreseen in Article 297, and its only function would be to determine which organ is competent according to national law to issue the emergency legislation, or the limits and conditions would differ (and be broader), in which case the national provision would violate the Treaty since, as mentioned above, Article 297 must be interpreted in a restrictive way. In this latter case, the Finnish government would be under an obligation to eliminate the inconsistency with the Treaty even though no concrete emergency measure violating the Treaty has yet been adopted.

## V CONCLUSION

The analysis has shown that, according to the Treaty, Member States can only adopt provisions which conflict with those of the Treaty and create obstacles to the four freedoms when specifically allowed by a Treaty provision, strictly within its limits and following the required procedure. It has also been demonstrated that Member States cannot take back competences transferred to the Community, particularly in the case of the competences related to the Community monetary policy<sup>85</sup>, where the Treaty explicitly states that the move is irrevocable, unless Member States withdraw from the Community as a whole (and even in this case they have to negotiate their exit and cannot withdraw unilaterally). Finally, the analysis of Article 297 has shown that the objective of the Article is not to maintain a reserve of sovereignty for the Member States, but rather to establish conditions and specific procedures for the individual reactions of Member States to such extremely exceptional situations.

If one of the events listed in Article 297 occurs, the Member State concerned is allowed, after consultation with the other Member States, to take the measures within its competence that least affect the common market, if Community

83 The case law of the Court also indicates that unilateral action by a Member State in the event of urgency can “only [be] temporary pending an examination of their validity”, Joined Cases 6 and 11/69, cit., fn. 57, para. 29.

84 Cf. Case 159/78, *Commission v Italy*, [1979] ECR 3247, where the Court stated that keeping in force in the national legislation provisions that conflict with the Treaty, even though they are not applied as the Treaty rules prevail, constitutes a violation of the Treaty obligations because it creates ambiguity and uncertainty for the citizens as to which is the applicable law. In the same direction, Case 169/85, *Commission v Italy*, complete and Zilioli “Recenti sviluppi sul contrasto tra norme nazionali e disposizioni comunitarie”, in *XXVI Diritto Comunitario e Scambi Internazionali* 1987, 105-113. The present case is similar: the legislation at stake is not applicable as a necessary condition has not yet materialised, but it is in force and in the legal system and it conflicts with the Treaty.

85 Article 105 talks of the Community monetary policy, even though such policy is effective only in the participating Member States.

institutions are unable to act. It is not possible on this basis to “repatriate” exclusive Community competences instead. The Finnish government hence cannot invoke Article 297 of the Treaty for the amendment of its Emergency Powers Act, as the Act suffers from both procedural and substantive defects.

It can be concluded therefore that there is no fissure in the Treaty through which the competences transferred to the Community can flow back to the Member States. If the Treaty is respected, in particular in fields of exclusive Community competence, the States do not have any residual power to adopt provisions that conflict with the Treaty.