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Division of competences and regulatory powers between the EU and the Member States

REPORT OF THE NETHERLANDS

Rapporteurs: T. van den Brink and L.A.J. Senden (Utrecht University, RENFORCE)

*To this report have also contributed: J. van den Brink, C. van Dam, H. van Eijken, M. Fierstra, Th. Nauta, P.-J. Kuijper, M. Park and R. Widdershoven**

1 The division of competences between the European Union and its Member States

1.1 Principle of conferral and scope of European Union law

1.1.1 The perception of the principle of conferral

I-1. *Does the formulation of the principle of conferral at Article 5 (2) TEU correspond to the classic formulation of the principle in public international law in your language?*

I-2. *Has the expression of the principle of conferral introduced in Article 5 (1) TEU by the Treaty of Lisbon been the subject of commentaries in your country?*

In the Netherlands, the debate has centered more broadly on the way in which the Treaty of Lisbon regulates Union powers and not so much on the principle of conferral. The Dutch Explanatory Memorandum of the approval act of the Treaty of Lisbon thus deals at great length with this issue, but it does not discuss in-depth the way in which the principle of conferral is framed in the Treaties, nor has the Dutch government put in a specific request to the jurists-linguists to adapt the Dutch formulation of Article 5(1) and (2) TEU. The Dutch version speaks of the '*beginsel van bevoegdheidstoedeling*', which in legal doctrine is generally also referred to as the '*attributiebeginsel*' (principle of attributed powers),[1] but also as the '*beginsel van beperkte bevoegdheden'* (principle of

* Ton van den Brink is Associate professor of EU law, Utrecht University
Linda Senden is Professor of EU law, Utrecht University

Jacobine van den Brink is Assistent professor Administrative law, Leiden University
Claartje van Dam is Ph.D. candidate at Leiden University
Hanneke van Eijken is Assistent professor of EU law, Utrecht University
Marc Fierstra is Justice at the Hoge Raad
Th. Nauta is policy advisor at the Ministry for Foreign Affairs
P.-J. Kuijper is Professor Law of International Organizations, University of Amsterdam
Meehea Park is Ph.D. candidate at Leiden University
Rob Widdershoven in professor of European Administrative Law, Utrecht University

[1] See W.T. Eijsbouts, J.H. Jans, A. Prechal and L.A.J. Senden, *Europees recht. Algemeen deel*, Europa Law Publishing 2015, pp. 17-18; R. Barents and L.J. Brinkhorst, *Grondlijnen van Europees recht*, Kluwer, 2012; W.G. Werner and R.A. Wessel, *Internationaal en Europees recht. Een verkenning van grondslagen en kenmerken sinds het Verdrag van Lissabon*, Europa Law Publishing, 2011, p. 117; P.J.G. Kapteyn, A.A.M. McDonnell, K.J.M. Mortelmans, C.W.A. Timmermans, *The Law of the European Union and the European Communities*, Kluwer Law International, fourth revised edition, 2008, pp. 138-139.

limited powers) or '*beginsel van de specifieke bevoegdheidsattributie*' (principle of the specific attribution of powers).[2] The latter formulation is also the one that is commonly used in the Dutch context of public international law,[3] even though the International Court of Justice refers to this in terms of the principle of speciality.[4]

It has partly been the advice of the Council of State on the proposed approval act of the Treaty of Lisbon that generated more attention for the division of powers. The Council put particular emphasis on the need to explain in more depth whether the Treaty of Lisbon reflects a better balance between, on the one hand, the desire to delineate more precisely the Union powers and, on the other hand, the increased need for maintaining such flexibility that will allow for further development of the Union.[5] According to the government, the end result as contained in the Treaty of Lisbon justifies the conclusion that the intensity and scope of Union powers have been clarified and more clearly delineated, and have also been provided with a stronger parliamentary control.[6] It has thus ensured both a clarification and refinement of the division of powers between the EU and the Member States, making explicit that the EU has only those powers that the Member States have conferred upon it.[7] The Government Memorandum also refers to Declaration 18 concerning the delimitation of competences, which was supported by the Dutch government.[8] The use of the term 'clarification' implies that the Dutch government does not consider the establishment of the principle of conferral in Article 5 as a novum.

Importantly, the government also underscored that it considered such delineation and clarification necessary with a view to the prevention of a process of creeping competences of the Union. In doing so, the boundaries of competences have been more expressly determined than before, while still maintaining flexibility. Yet, the government also stressed that flexibility has its limits and that this may not lead to creeping Union competences. Therefore it needs to be tied to strong conditions, guaranteeing that a shift in competences always relies on a political choice with full involvement of the national political institutions.[9]

I-3. *Has the jurisprudence developed a doctrine of ultra vires concerning the exercise of the competences of the European Union?*

The Dutch constitutional control system of – the exercise of - Union competences is limited for the following reasons. First of all, in the Netherlands the status of international law in the domestic legal order is subject to a moderate monist system, meaning that it has always been rather open towards accepting international law. In particular, Articles 93 and 94 of the Dutch Constitution stipulate that self-executing provisions of treaties and decisions of international organizations have binding force after their publication and that national statutory provisions will not be applied when they are contrary to such self-executing provisions. At no point in time has it been considered necessary to introduce a

[2] F. Amtenbrink and A. Vedder, *Recht van de Europese Unie*, BJu, 2015, p. 135.
[3] See e.g. Werner and Wessel 2011, *op.cit*., fn 1, p. 20; A. Nollkaemper, Kern van het internationaal publiekrecht, 3rd edition, 2007, pp. 133-134 and R.H. van Ooik, *De keuze der rechtsgrondslag voor besluiten van de Europese Unie*, Europese Monografieen, Kluwer, 63, 1999, p. 22.
[4] Advice ICJ of 8 July 1996 to the WHO, Legality of the Use by a State of Nuclear Weapons in Armed Conflict. ICJ Rep. 1996, para. 25.
[5] Advice Council of State W01.08.0004/I/K, 15 February 2008.
[6] TK, vergaderjaar 2007-2008, 31 384 (R 1850), nr. 4, p. 8.
[7] TK, vergaderjaar 2007-2008, 31 384 (R 1850), nr. 3, pp. 14-16.
[8] This Declaration underscores that powers that have not been conferred upon the EU by the Treaties, remain with the Member States. TK, vergaderjaar 2007-2008, 31 384 (R 1850), nr. 3, p. 16.
[9] TK, vergaderjaar 2007-2008, 31 384 (R 1850), nr. 3, p. 14.

specific Europe-clause in the Constitution, accounting specifically for the transfer of powers and sovereignty to the EU. Even more so, there is no reference at all to the protection of sovereignty in the Dutch Constitution.[10] Articles 93 and 94 are thus also the main constitutional provisions regarding EU law. Given that the Netherlands does not have a constitutional court, there is also no specific institution charged with the task to assess the constitutionality of the transfer of powers to the EU. [11] As a result, the doctrines of supremacy and direct effect have not raised serious constitutional issues in the Netherlands (see also question III-4). While in the past, Dutch courts did sometimes refer to Article 94 for the recognition of direct effect of an EU law provision,[12] this has become very rare. The Dutch Council of State reasoned that the principle of supremacy as developed by the CJEU also applies to provisions that are not self-executing, therewith implying that acceptance of supremacy cannot be founded on the Dutch Constitution.[13] The Dutch Supreme Court even explicitly stated that an EU-regulation is directly applicable not by virtue of Articles 93 and 94 but on the basis of the EC-Treaty (now TFEU) itself.[14]

A second reason why a strong tradition of *ultra vires* control is lacking, is that the Dutch Constitution lacks any substantive criteria to shape and/or to limit EU-membership. The Dutch Constitution makes no reference at all to EU membership, but – more importantly in this context – it contains very few substantive norms that might be applied as substantive limitations on EU membership.[15] As a result of this constitutional framework, no doctrine of *ultra vires* concerning the exercise of EU competences has developed in Dutch jurisprudence, comparable to for instance that of the German BundesVerfassungsgericht, and therefore this topic hardly attracts attention in Dutch legal scholarship.[16] Besselink *et al* have concluded in a recent, comparative study for the European Parliament that – as a result of this "thin" constitution, "there are few if any unsurmountable obstacles to further integration in the Netherlands constitution."[17] An exception may be Article 105 of the Constitution that allocates budgetary power to the parliament and government jointly. The growing powers of EU institutions in the framework of EU economic governance may be difficult to reconcile with this provision.[18]

As will appear from other parts of this report, the discussion on the Union's – exercise of – competences is in the Netherlands as such very much confined to the political arena. This implies that

[10] The rapporteurs of this national rapport have argued that the lack of a reference to national sovereignty in the constitution creates an obstacle for formulating the national position vis-à-vis EU membership: T. van den Brink and L.A.J. Senden, 'De Europese Unie en nationale soevereiniteit: wel degelijk verenigbare grootheden', *Ars Aequi* (2013), pp. 355-370.
[11] The lack of constitutional judicial review is regularly under discussion, most recently as a result of the 'Voorstel van rijkswet' by MP Taverne which has been discussed by the House of Representatives in Spring 2015. For more information: http://www.tweedekamer.nl/vergaderingen/commissievergaderingen/details?id=2014A00168, last accessed on 2 November, 2015.
[12] See e.g. Council of State AGRvS, 6 September 1990, ECLI:NL:RVS:1990:AN1590 (*GMU*).
[13] Cf also Council of State, ABRvS, 7 July 1995, ECLI:NL:RVS:1995:AN5284 (*Metten*).
[14] Dutch *Hoge Raad*, 2 November 2004, ECLI:NL:HR:2004:AR1797.
[15] A. van den Brink and L. Hancher, Versterken van de legitimiteit van de EU: de rol van waarborgen', *NJB* 2007, p. 2276. Van den Brink and Hancher argued that the constitution should be strengthened in this regard.
[16] But see e.g. J.M.J. Rijn van Alkema, J. de Uzman (red.) *Soevereiniteit of pluralisme? Nederland en Europa na het Lissabon-Urteil*. Nijmegen: Wolf Legal Publishers, 2011 and more specifically in this volume, A. Cuyvers, 'Een soeverein hof bewaakt de soevereine staat om het soevereine volk te behoeden voor een soeverein Europa: Het Lisbon Urteil als these en antithese voor de verhouding van Nederland tot de EU', pp. 49-93.
[17] See L. Besselink, M. Claes, S. Imamovic, J.H. Reestman, 'National constitutional avenues for further EU integration', *PE* 493.046, at p. 170. See also this report for a further detailed account of not only the Dutch constitutional system, but also that of 11 other Member States.
[18] M. Diamant and M. van Emmerik, 'Parlementaire budgetrecht onder vuur?' *NJB* 2011, 1535.

considerations on the boundaries of EU competences are mainly of a political nature and less geared towards determining the actual legal and constitutional limits thereof. Within parliament, it is mostly in the context of the subsidiarity assessment, that the issue of whether a certain EU proposal is within the legal scope of EU powers may attract some attention (see I-7). The government does make an assessment based on competence, subsidiarity and proportionality (see II-2).

I-4. *In the legal literature and in the declarations of politicians of your country, are there criticisms of the European Union concerning a violation of the division of competences?*

In the Netherlands, the legal literature seems to be more critical of the case law of the CJEU, while the political discourse is more focused on the Union legislator's possible violations of attributed competences. Various scholars have thus commented that the Court's case law contributes to an extension of Union competences, amounts to competence creep or reflects judicial activism.[19] In recent years, the Court's ruling in the Mangold case has attracted most criticism for this reason. More in general, the CJEUs approach to the limitation of powers on the basis of the Tobacco Advertisement ruling has been criticized, especially for downplaying the relevance of the *objectives* of EU legislation and for leaving in fact a high level of discretion to the EU legislature.[20]

The political debate in the Netherlands on the way in which the EU exercises its powers has also certainly become more polarized, ever since the rejection of the Constitutional Treaty for Europe by referendum in 2005. This debate has been fuelled in particular by a number of publicists, amongst which in particular Thierry Baudet.[21] He has also been one of the founders of the EU Citizens' Forum (*EU Burger forum*), in the wake of the speech David Cameron gave in 2013 and promising UK citizens a referendum on EU-membership. The Burgerforum has issued criticism on the creeping competences of the EU and having gathered about 65.000 signatures of Dutch citizens it put forward a citizens' petition in parliament, requesting for a referendum in case of new transfer of powers to the EU. Examples that have been mentioned in this regard are the TTIP agreement, banking union and budget control, immigration and defence policy and the establishment of a European public prosecutor.[22] Some MPs voice similar criticism on creeping competences, referring to the same examples.[23]

The Minister of Foreign Affairs (then Frans Timmermans) rejected the request, because in his view it was not clear what was meant by 'creeping competences'. This led two MPs (Omtzigt and Segers) to submit a motion, requesting a report by the Council of State on the meaning of creeping competences and whether this has been the case as well as the provision of additional democratic guarantees in the case of new transfers of powers to the EU. The Council of State issued this report on 17 July 2014,

[19] See e.g. S. Prechal, 'Competence Creep and General Principles of Law', *Review of European Administrative Law* 1, 2010; L. Besselink, F. Pennings and A. Prechal, *The Eclipse of the Legality Principle in the European Union*, Kluwer Law International 2011; and H. De Waele, *Rechterlijk activisme en het Hof van Justitie*, Boom Juridische Uitgevers 2009.

[20] T. van den Brink, 'De begrenzing van de Europese Unie als een gedeelde constitutionele opdracht', *SEW* juni 2014, nr. 6, 99.

[21] In 2012 his PhD, obtained at Leiden University, was published by Uitgeverij Prometheus under the title of 'De aanval op de natiestaat' ('The attack on the nation-state'), in which he argued that supranationalist institutions like the EU constitute an attack on the nation-state and are fundamentally irreconciliable with the democratic state based on the rule of law.

[22] See http://politiek.tpo.nl/2015/02/23/eindelijk-kamerdebat-de-sluipende-bevoegdheidsoverdracht-naar-eu/, last accessed on 2 November 2015.

[23] See e.g. http://harryvanbommel.sp.nl/weblog/2015/06/05/stop-sluipende-machtsoverdracht-naar-eu/, last accessed on 2 November 2015.

concluding that 'in practice, in using conferred powers, or in the interpretation of EU-Treaty provisions, insights or applications may be at issue that were not foreseen at the time of conferral. This may concern an unexpected interpretation in the light of new developments, or actions to prevent or combat a (potential) crisis. In that sense, the perception that powers are 'creepingly' conferred is not incomprehensible' [our translation].[24] On June 4, 2015 a parliamentary debate was held on this report and the MEPs motion, discussing in fact not only the role of the EU legislator in this regard but also that of the ECJ. The current Minister of Foreign Affairs (Koenders) clearly rejected the use of the term creeping competences and also that the ECJ would be guilty of this.[25]

In the meantime, a new law has come into force enabling a citizen-initiated, consultative referendum as from 1 July 2015 onwards, requiring the submission of at least 300.000 signatures within a period of 6 weeks after its admission. An organization called 'GeenPeil', in cooperation with the aforementioned Burgerforum, initiated immediately a campaign for such a referendum regarding the association agreement between the EU and Ukraine and managed to gather 427.939 signatures. An appeal that a citizen initiated against the referendum, contesting the validity of the signatures, was rejected by the Council of State on 26 October because of lack of personal interest.[26] The referendum will thus take place during the Dutch Presidency of the EU (6 April 2016).

Another important initiative has been taken, regarding the introduction of a reinforced parliamentary majority requirement for situations that involve a new transfer of national powers to the EU. This initiative has been tabled already about a decade ago by MP Van der Staaij, but only very recently a majority in the second chamber of the parliament has expressed to be in favour of this.[27] Yet, there is still a long parliamentary road to go before this may become reality, as such an introduction requires not only a majority in the Senate but also a second reading given that it requires an amendment of the constitution. In second reading, there will then also be the requirement of a two-third majority in both chambers of parliament to be fulfilled.

I-5. ***Is the distinction between the fields of competences of the European Union and the scope of application of EU law understood and explained in the scientific literature and in the practice in your country?***

Dutch scholarship certainly shows awareness of the distinction between competences of the European Union and the scope of application of EU law, both in a general, didactic manner when explaining the system of competences of the EU and in relation to specific jurisprudence. In particular, there is recognition that also in cases or areas in which the EU has not been given competences, national authorities have to take account of EU law and of the conditions/restrictions this may impose for

[24] See https://www.raadvanstate.nl/adviezen/samenvattingen/tekst-samenvatting.html?id=257, last accessed on October 28, 2015. Cf also the Advice of the Advisory Council on International Affairs, Public support for the EU. Building trust, Advice no. 88, 2014, p. 52, available at: http://aiv-advies.nl/download/0497fab2-be1f-4f21-a8e8-d172910e6aa1.pdf

[25] Report of this meeting of 6 August 2015: http://www.tweedekamer.nl/vergaderingen/commissievergaderingen/details?id=2015A00795, last accessed on 2 November 2015.

[26] http://www.nrc.nl/nieuws/2015/10/26/geenpeil-referendum-over-oekraine-kan-doorgaan, last accessed 28 October, 2015.

[27] See *e.g.*http://fd.nl/economie-politiek/1117926/vvd-schaart-zich-achter-eurokritische-grondwetswijziging, 8 September 2015, last accessed on 28 October, 2015.

instance in exercising national legislative competences.[28] Eijsbouts *et al* express this as follows: "The 'scope of application of the Treaties' is, just like the scope/sphere of competences of the Union, a factor that limits the action of the Union, but then especially as regards the Court of Justice of the EU. The 'scope of application' is broader than the scope of competences. The latter determines in particular the right of the political institutions to take measures. The 'scope of application' affects all areas in which the Union has gained some authority; within that scope its prohibitions apply and the Court's jurisdiction to test national measures against Union law."[29] [our translation] This regards in particular the area of the internal market, where it is acknowledged that also when there is no binding legislative competence for the EU to act, e.g. concerning public health and education, internal market rules may impose restrictions as to how Member States may deal with such policy issues.[30] Van Eijken has explained the distinction in the following way: "The difference between the scope of the Treaty and the competence of the Union to act seems to be related to the intensity with which Union law interferes with national law. […] As such, whereas Union competences give the floor to the Union to 'do things', whenever a situation or (part of an) area comes within the ambit of Union law, the Member States are still allowed to 'do things', but only within the limits of Union law."[31] Prechal, De Vries and Eijken have fleshed out in more detail the distinction and relationship between the principle of attributed powers and the doctrine of the scope of Union law, considering also how competence creep may occur in relation to both.[32]

The question of the scope - of application - of EU law has gained a lot of academic attention with regard to Article 51(1) of the Charter of Fundamental Rights and the Court's ruling in the *Åkerberg Fransson* case.[33] Dutch scholars have understood this ruling as the Court adopting a wide interpretation thereof, following its settled case law, leading first of all to the conclusion that the scope of the Charter is identical to that of general principles as fundamental rights and of other general principles.[34] A second important conclusion that has been drawn from the Court's (also subsequent) case law, is that a Member State is considered to act within the scope of Union law and has to respect the Charter, "if, in the case at hand, there is *another EU law provision* than the provision of the Charter relied upon." In addition, it is observed that it is required that the Union has actually used its competence to regulate and that in doing so it has imposed obligations upon the Member States that are applicable to the national situation.[35] Three categories of national measures have next been distinguished that fall within the scope of the Union law and hence under the protection of the Charter:

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[28] See e.g. J.S. van den Oosterkamp, 'De aandacht in Nederland in 2011 voor de vervlechting van de Nederlandse rechtsorde met de Europese rechtsorde', *SEW* nr. 4, 2012, p. 142, citing also the annual Report of the Council of State in this regard.
[29] Eijsbouts *et al* 2015, *op. cit.*, fn 1, p. 28.
[30] Eijsbouts *et al* 2015, *op. cit*., fn 1, pp. 18-19.
[31] H. van Eijken, *EU Citizenship & the Constitutionalisation of the European Union*, Europa Law Publishing 2015, p. 62.
[32] S. Prechal, S. De Vries and H. Van Eijken, 'The Principle of Attributed Powers and the 'Scope of EU Law', in: Besselink, Pennings and Prechal 2011, *op.cit*., fn 18, pp. 213-247.
[33] See for instance M.J. Morijn, A. Pahladsingh and H. Palm, 'Vijf jaar bindend Handvest van de Grondrechten: wat heeft het de rechtzoekende opgeleverd?', *NtER* 2015-4, pp. 123-132; M.A. Fierstra, 'Åkerberg Fransson: ruim toepassingsgebied van Handvest op handelingen van lidstaten', *NtER* 2013-6, pp. 197-205, C. Janssens and E. Nordin, case note Åkerberg Fransson in *SEW* 2013, nr. 9, p. 395 and J.A.E. Vervaele, J.A.E., 'The Application of the EU Charter of Fundamental Rights (CFR) and its Ne bis in idem Principle in the Member States of the EU', *Review of European Administrative Law*, 6 (1), 2013, pp. 113-134.
[34] J.H. Jans, S. Prechal and R.J.G.M. Widdershoven (eds.), *Europeanisation of Public Law*, Europa Law Publishing, 2015, second edition, p. 149, with reference to J.H. Reestman and L. Besselink, Editorial after Akerberg Fransson and Melloni, *European Constitutional Law Review*, 2013, p. 170.
[35] Jans *et al* 2015, *ibid.,* p. 150.

(i) implementation of Union law measures; (ii) derogations from EU law;[36] (iii) national enforcement of Union law. As regards the latter, it is considered that Åkerberg Fransson has not clarified whether this is within the scope of Union law, where the Union law in question does not contain the enforcement requirements mentioned.[37]

Regarding legal practice, it must be recalled that as a consequence of the constitutional system as described already under question I.1, the Dutch legal system is very open towards international and European standards of civil rights. Dutch courts are thus used to apply ECHR norms already for decades. In the same sense, the EU Charter is nowadays applied in Dutch case law. In general, Dutch courts do examine the question whether the situation at stake falls within the scope of application of the Charter in the light of the Explanations to the Charter, certainly the highest courts. But in some cases Dutch lower courts have applied the EU Charter without such an assessment and applied it voluntarily, even when there was no actual or obvious connection with EU law present.[38] The case law is, however, not coherent on this point, as other judgments do imply an actual assessment.[39]

1.2 Principles that apply to the division and to the exercise of competences

1.2.1 Perception and application of the principle of subsidiarity

I-6. ***Is the principle of subsidiarity invoked in your country as a principle to be applied to the division of competences between the EU and its Member States by legal scholarship, by politicians or by the jurisprudence?***

Court cases

In Dutch case law, the principle of subsidiarity has played no role of any significance. There have been no cases in which Dutch courts have challenged the legality of EU legal acts on the basis of a violation of the subsidiarity principle. Preliminary references to the ECJ have never included questions on possible violations of the subsidiarity principle either.

Politics

The subsidiarity principle features more prominently in political debates. First of all, the Dutch government has been advocating 'a more focused EU' for a number of years now. The Coalition Agreement of 2012 explicitly stated that the relation with the European Union should be based on subsidiarity. The government would request the European Union to explore which policy areas could be returned to the national levels of government and would make its own proposals to that end as well. In line with this strategy, Frans Timmermans – Minister for Foreign Affairs at the time – wrote in the

[36] Jans *et al, ibid.,* identify a possible fourth category, concerning the applicability of Union law in purely internal situations on the basis of national law, as might be inferred from Case C-313/12 *Romeo*, ECLI:EU:C:2013:718

[37] Jans *et al* 2015, *ibid*., pp. 150-154.

[38] Examples of this are: Rechtbank Almelo, 8 July 2010, ECLI:NL:RBALM:2010:BN1369 and Gerechtshof Arnhem, 13 May 2011, ECLI:NL:GHARN:2011:BQ4476.

[39] See e.g. Rechtbank Almelo, 23 June 2011, ECLI:NL:RBALM:2011:BQ9473, acknowledging in fact also that in the judgment referred to in the previous footnote, the rechtbank had overlooked this issue. See on this topic also, M. Claes and J. Gerards, 'FIDE Report The Netherlands' in: J. Laffranque (ed), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* Reports of the XXV FIDE Congress Tallinn, Vol. 1, Tallinn: (FIDE XXV Congress Tallinn 2012, Vol.1, Estonian Lawyers Association 2012), p. 654.

Financial Times that "…*The member states must restore the political balance in the EU, help it regain its focus and make the EU work for Europeans again*."[40] This policy strategy is broader than subsidiarity, but the principle is certainly a substantial part thereof. In the same article the Minister argued that "*if one-third of national parliaments raise subsidiarity objections to a legislative proposal (the yellow card procedure), the commission should not just reconsider, it should use its discretion to take the disputed proposal off the table, turning the yellow card into a red*".

Cabinet policy at the time (2013) included a "Subsidiarity review" which was clearly inspired by the UK Balances of Competences Review. This will, therefore, be further elaborated under II.4 and II.5. The Dutch parliament appointed a special rapporteur on Democratic legitimacy and the role of the Dutch parliament in the European Union. The rapporteur, Liberal MP Leegte, issued a report in May 2014 in which he underlined the potential of the subsidiarity principle and the EWS.[41] First, the existence of the EWS forces the Commission to anticipate the positions of national parliaments. This is beneficial to the quality of EU legislation. Thus, even without - or prior to - a dialogue between the Commission and national parliaments, subsidiarity affects EU legislation in a positive sense. Moreover, the rapporteur sees in the EWS a great potential that may be further explored in the future through a better cooperation between national parliaments. Furthermore, the *Tweede Kamer* expressed in this report its support for introducing a "Green Card", enabling national parliaments to initiate new EU legislation, as well as the amending and repealing thereof. In addition and in the same period of time, the Advisory Board on International Affairs in a report advising the government and the parliament on how to enhance the public support for the EU advocated for a parliamentary assessment not just of subsidiarity, but also proportionality, expediency, legal basis and the rule of law.[42]

Scholarship

In an article on the division of authority between the EU and the Member States, one of the authors of this national report has underlined the relevance of subsidiarity for creating a better balance between Member States' and EU authority.[43] Still, the current system contains a number of flaws. First, the system is based on the assumption that subsidiarity may be separated from other elements of assessment. This has proved to be difficult in practice. Subsidiarity may easily overlap with legal basis and proportionality issues or outright political arguments.[44] A positive development is that subsidiarity tends to be further objectified by both the Commission and national parliaments. However, the criteria that are developed are very different. The Commission develops subsidiarity into a rather technical concept (e.g. by focusing on evidence for the scale and the transnational aspect of the issue), whereas the Member States' parliaments argue that national autonomy and specific national practices, attainments and peculiarities must be considered as well. This mismatch hampers the dialogue between the Commission and national parliaments. A sign thereof is the general discontent among national parliaments on the European Commission's responses to reasoned opinions and opinions in

[40] Financial Times, Monnet's Europe needs reform to fit the 21st century, 14 November 2013.
[41] Tweede Kamer, "Ahead in Europe: On the Role of the Dutch House of Representatives and National Parliaments in the European Union", Available in Dutch at: http://www.tweedekamer.nl/sites/default/files/field_uploads/Voorop%20in%20Europa_rapport_tcm181-238512_0.pdf, last accessed on 2 November, 2015
[42] AIV, Public support for the EU. Building trust, Advice no. 88, 2014, p. 48. Available at: http://aiv-advies.nl/download/0497fab2-be1f-4f21-a8e8-d172910e6aa1.pdf
[43] T. van den Brink, 'De begrenzing van de Europese Unie als een gedeelde constitutionele opdracht', *SEW* juni 2014, nr. 6, 99.
[44] See also. Ph. Kiiver, 'Nationale parlementen en Europese wetgeving: de Staten-Generaal als de Raad van State van Europa', *RegelMaat* 2010, pp. 182-201 and Ph. Kiiver, 'De subsidiariteitstoets: analyse, ervaringen en aanbevelingen', *RegelMaat* 2011, pp. 315-326.

the context of the political dialogue.[45] Lastly, the lack of substantive judicial control was criticized, especially in light of Article 8 of the Subsidiarity and Proportionality Protocol. The general line of argumentation was, however, that these practical issues can and should be solved in order for the subsidiarity mechanisms to function better. The potential of these mechanisms to contribute to the legitimacy of legislation was not questioned. A similar approach was followed by Kester and Van Keulen that viewed the role of the national parliament as positive, but saw possibilities for improvement in the coordination with other parliaments and in a better outreach to society.[46]

Others have been less positive on subsidiarity and the EWS. Steenbergen argued that a legal system based on the principles of subsidiarity and proportionality is difficult to understand for laymen.[47] Chamon has equally been more critical.[48] He concludes that on top of the objections raised prior to the introduction of the EWS, the first two Yellow cards issued by national parliaments have highlighted that the relation between national parliaments and the Commission cannot be qualified as a constructive dialogue, for which both are to blame (with regard to the latter, most notably as a result of the 'poor quality' of reasoned opinions). Meuwese shared the same critique, more in particular on the reasoned opinions on the Proposal for a Regulation on the Right to Strike, which she qualified as amounting to 'vague speculations' only. [49] A research commissioned by the *Tweede Kamer* resulted in a report in 2014[50] in which the effects of the EWS were generally viewed as more positive, especially as part of a broader system of formal and informal mechanisms of national parliamentary involvement in EU decision making. This contrasts, according to the authors, with the critical expectations that many voiced prior to the introduction of the EWS and it may thus be expected that the EWS may be further elaborated and strengthened in the future (p. 31). The report takes a purely procedural approach though, and no conclusions may be derived from it as to the relevance of the subsidiarity principle itself for the division of authority between the EU and the Member States.

Some have argued to extend the possibilities for scrutiny within the EWS to include legal basis and proportionality issues. Van Ooik has argued that especially the inclusion of proportionality issues in the EWS is desirable. He analysed the CJEU's cautious approach to proportionality in relation to EU legislation which contrasts sharply with its much more intrusive proportionality scrutiny of national legislation. In this light, the key issue is how proportionality is addressed in the decision making process.[51]

I-7. ***Has the division of competences generated reasoned opinions in your country in the context of the subsidiarity control procedure?***

The Dutch parliament has increasingly felt the need to be involved in EU decision making. Years before the Treaty of Lisbon entered into force, the two Chambers of Parliament had already set up a mechanism of cooperation between them in order to scrutinize EU proposals. Moreover, since the

[45] COSAC, 22nd Bi-Annual report on EU Practices and Procedures, November 2014, p. 24.
[46] J. Kester and M. van Keulen, 'De Tweede Kamermethode': versterkte parlementaire invloed op Europese besluitvorming', *RegelMaat* 2011, pp. 303-314.
[47] J. Steenbergen, 'Constitutionalisme en de zoektocht naar meer unie in de crisis', *SEW* 2013/40, afl. 3, pp. 96-102.
[48] M. Chamon, 'Eerste toepassingen van de subsidiariteitstoets', *SEW* 2014, p. 100.
[49] A.C.M. Meuwese, 'De eerste gele kaart voor Europa', *RegelMaat* 2012 (27) 5, pp. 319-324.
[50] Ellen Mastenbroek, Pieter Zwaan, Afke Groen (et al.), *Gericht op Europa. Nationale parlementaire controle op Europese besluitvorming na het Verdrag van Lissabon*, available at: http://www.tweedekamer.nl/sites/default/files/atoms/files/gericht_op_europa_bestuurlijk_rapport_2e_druk.pdf last accessed on 2 November 2015.
[51] R.H. van Ooik, 'Evenredigheid in het EU-recht', *RegelMaat* 2013 (28) 3, pp. 166-182.

entry into force of the Treaty of Lisbon, the Dutch parliament disposes of the right to place a scrutiny reserve on EU dossiers, which requires the Dutch government to engage in an intensified dialogue with parliament on the dossier at issue. The Early Warning Mechanism, the Scrutiny Reserve Procedure and – albeit to a lesser extent – the Political Dialogue with the Commission are all used quite actively by the Dutch parliament. It also plays an active role in trying to improve the EWS procedure, i.a. by proposing that the EWS should be broadened to include proportionality and legal basis scrutiny.

Pre-Lisbon

In this context, it may come as no surprise that the Dutch Parliament exercises quite intensive control over EU legislative proposals.[52] One of the first dossiers[53] that was scrutinized intensively was the Human Organs Donation Directive.[54] The two Houses of Parliament questioned the added value of the proposal, given the already existing practices of exchange of human organs and the achievements of the Council of Europe. They requested additional data on the transnational aspects of the issue and also on cultural differences between the Member States. All this would be relevant to assess what would be the most appropriate level to act.

In other cases, the Dutch parliament has gone more explicitly beyond subsidiarity scrutiny. The main concern for the Dutch Parliament in the case of the proposal for the Criminal Enforcement of Intellectual Property Rights Directive was in fact the appropriate legal basis. The proposal was the first legislative initiative that built on the Court of Justice judgment on criminal enforcement of environmental law,[55] parliamentary committees evaluated whether the CJEU's reasoning could also be applied to this proposal. They argued that violations of intellectual property rights must not be considered such serious infringements that harmonized criminal measures would be necessary. It was, they claimed, moreover unclear what the existing lacunas in the legal protection of intellectual property rights were (also in the light of the current civil remedies which had proved to be effective) and whether the risk of a 'race to the bottom' in terms of intellectual property rights protection was imminent.

Scrutiny of the Energy Performance Directive (recast) explicitly included an appraisal of the proportionality principle. Parliamentary committees rejected the proposal not only on subsidiarity grounds (on the arguments that the housing market was not of a cross-border nature and that it should be left to the Member States to decide how and in which sectors they wished to achieve climate policy objectives), but also on proportionality grounds (many aspects of the proposal were considered to be too detailed and the administrative burden to which the proposal would give rise after adoption was considered excessive).

Post-Lisbon

After the entry into force of the Treaty of Lisbon, the Dutch parliament has issued a relatively high number of Reasoned opinions.[56] It must be noted that it is not always clear how to legally qualify

[52] It must be noted that subsidiarity scrutiny is not limited to legislative proposals, but also includes inter alia White books and Green books.

[53] The examples that follow are taken from: T. van den Brink, 'The Substance of Subsidiarity: the Interpretation and Meaning of the Principle after Lisbon' in: Martin Trybus & Luca Rubini (Eds); *The Treaty of Lisbon and the Future of European Law and Policy*. Cheltenham: Edward Elgar Publishing, 2012, pp. 160-177.

[54] Directive 2010/45/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation, OJ L 207/14 of 6 August 2010.

[55] Case C-176/03, Commission v. Council [2005] ECR I-7879.

[56] In 2014 the Dutch parliament issued 2 out of a total of 21 reasoned opinions, in 2013 9 out of 87 reasoned opinions came from the Dutch parliament. The quantitative data are available via the Commission's annual reports on the application of the Principles of Subsidiarity and Proportionality.

complaints or arguments. Obviously, parliaments have an interest to qualify their complaints in terms of subsidiarity complaints: the Commission will not take reasoned opinions into consideration for determining the EWS thresholds if they relate to issues other than subsidiarity.[57] Moreover, it may be difficult to distinguish subsidiarity complaints from other arguments as the distinction is in practice more difficult to draw than in theory. Below, the main issues ensuing from the reasoned opinions issued by the Dutch parliament will be discussed.

Staying close to the essence of subsidiarity: "real" subsidiarity arguments

It is important to note that both Houses of Parliament usually voice 'real' subsidiarity arguments in the context of the EWS, i.e. arguments which directly address the issue whether: the objectives of the proposed action a) cannot be sufficiently achieved by the Member States and b) be better achieved at Union level. Thus, it cannot be argued that Dutch parliamentarians are insufficiently aware of the content of the subsidiarity principle or misunderstand it. It is true, however, that especially the *Tweede Kamer* seeks to expand scrutiny to elements which are not part of the subsidiarity principle *strictu sensu*. Yet, such other elements are often clearly distinguished from subsidiarity arguments.[58] In the following sub-sections such other elements will be elaborated and classified. We will start by elaborating a number of examples of "real" subsidiarity arguments however. This avoids the impression that might otherwise arise that the content of the subsidiarity principle would not matter for the Dutch parliament. Another reason for addressing 'real' subsidiarity arguments is to shed light on how the Dutch Houses of Parliament interpret and shape the subsidiarity principle and, thus, how they consider the principle should affect the relation between the national and EU level of governance.

The first type of subsidiarity argument that the Dutch parliament has regularly put forward is that the existing legal framework suffices. This may relate to national law, EU law and international law. In the case of the EU proposal for a Regulation concerning procedural safeguards for children suspected or accused in criminal proceedings,[59] the House of Representatives argued that the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental rights of the European Union (CFR) and existing European directives such as the directive on the right to access to, and assistance by, a lawyer already offered sufficient safeguards to protect the interests of under-age suspects. Moreover, problems in enforcing these rights should be addressed at the national level, according to the House of Representatives.

Subsidiarity arguments may be grounded on the existence of national differences in practices and circumstances. A case in point is the Reasoned opinion on the proposals for a roadworthiness package. The House of Representatives argued that it would be '*unnecessary and undesirable to grant the European Commission the right to expand the compulsory periodic roadworthiness test to new categories of vehicles, such as caravans, motorcycles, mopeds/scooters, and trailers. These vehicles are used for a wide variety of purposes in the various Member States, including recreation, commuter traffic, and seasonal traffic (as opposed to vehicles that are already under the current PTI-directive, such as cars, trucks, and heavy trailers). Because of these national differences it is much more reasonable to regulate the periodic inspections for these categories at national level than to harmonize them at European level, in order to give more consideration to national circumstances. This is particularly true for two-wheel and three-wheel vehicles. It is also unnecessary to grant the*

[57] See the Commission's response to the reasoned opinions on the proposed Regulation to establish a European Prosecutor's Office.
[58] But see *infra* on the problems.
[59] COM(2013) 822.

European Commission this right on the basis of the argument of cross-border traffic. Mopeds, scooters, and trailers are rarely used for cross-border traffic. Therefore, for these vehicle categories, it is better to regulate periodic roadworthiness tests at national level'.

'Added Value'

Reasoned opinions often include the general complaint that the 'added value' of the proposal has insufficiently been demonstrated.[60] Under this umbrella, various points of concern may be put forward which may relate to subsidiarity, but which may also extend to legal basis and proportionality issues. What is more, reasoned opinions may include arguments which are more difficult to relate to these principles and which concern rather points of political expediency. Complaints are regularly framed as critique on the Commission for not appropriately substantiating that the subsidiarity principle has been complied with. In other words, sufficient information and/or argumentation is lacking in order to be able to properly assess subsidiarity compliance. A good example is the Reasoned opinion on the Regulation on the European Globalisation Adjustment Fund 2014 - 2020[61]. Both Houses were of the opinion '*that the European Commission has not adequately demonstrated that the proposal complies with the principle of subsidiarity. In the view of the Senate and the House, the responsibility for providing support to employees who have been made redundant (or who are threatened with the possibility of that) should lie primarily with the member states.*[62] *The Senate and the House of Representatives are therefore not convinced that the proposal meets the subsidiarity principle. The only argument to be advanced by the European Commission on the basis of Article 175, third paragraph, of the Treaty on the functioning of the European Union - that solidarity cannot be achieved at member state level - is insufficient and has not been properly developed, and is therefore not convincing*'.

In case of the EU proposal for a Regulation concerning procedural safeguards for children suspected or accused in criminal proceedings[63] the House of Representatives '*felt that insufficient arguments have been put forward as to the way in which detailed and far-reaching procedural provisions improve international cooperation and mutual trust and confidence between Member States*'.

Separating subsidiarity from other concerns?

How difficult it is to disentangle subsidiarity from other arguments is demonstrated by the Reasoned opinion of both Chambers of Parliament on the Regulation for providing common rules regarding the temporary reintroduction of border controls at internal borders in exceptional circumstances. On the one hand, the opinion includes arguments which are an expression of subsidiarity, such as the argument that '*Member States have existing procedures to carry out border controls at internal borders and are better able to assess and to decide on the reintroduction of such controls. National authorities are, after all, in the best position to assess the specific local circumstances*'. These arguments are, however, not separated from other arguments which challenge the lack of competence of the EU to regulate the issue, such as the references to articles 72 TFEU and 4 par. 2 TFEU on the basis of which maintenance of law and order and safeguarding internal security remain national competences.

[60] This was already an issue of the pre-Lisbon scrutiny procedures: see T. van den Brink, *op. cit.,* fn 52.
[61] COM (2011) 608.
[62] Other examples include the Reasoned opinion on the EU proposal for a directive establishing a framework for maritime spatial planning and integrated coastal management. The Dutch Parliament contended that "… the European Commission has not adequately demonstrated the added value of European-level obligations in the field of maritime spatial planning and integrated coastal management in comparison to the current coordinated action undertaken between Member states with shared sea or coastal areas."
[63] COM(2013) 822.

The intricate link between the principle of conferred powers and subsidiarity is also demonstrated by the Reasoned opinion on the Proposal for a directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures. The Commission had based the proposal on article 114 TFEU (the general Internal Market legal basis) rather than on article 157 TFEU (Gender equality legal basis). In that light it was argued that a '*distortion of the internal market due to the existence of various national initiatives aiming at gender equality cannot be demonstrated. This might be the case if in some countries the under-represented sex would not have the opportunity to hold senior positions on corporate boards. This is not the case.*' This is, in essence, a subsidiarity argument, but it is strongly related to the legal basis that had been chosen (this subsidiarity argument could not have been made if the Commission would have opted for article 157). Equally, both Houses considered in the case of the proposal for a European Prosecutor's Office that '*Investigation and prosecution regarding fraud is (primarily) the responsibility of national authorities'* which may be seen as an argument related to competences as well (even though in this case a specific legal basis to create the Office exists). In case of the EU proposals for Fourth Railway Package[64] The Senate was of the opinion that '*the above proposals do not comply with the principle of subsidiarity. The responsibility for organizing domestic passenger transport services by rail must remain at the national government level. Member states should be free to choose how and to whom they award passenger transport services contracts on their railway infrastructures*'. Again, it seems that this reasoning relates to the division of competences, rather than to subsidiarity.

Competences issues

Legal basis arguments may thus be implicit, but in some cases the Dutch parliament has explicitly argued the lack of an appropriate legal basis. In the case of the Proposal for a directive establishing a framework for maritime spatial planning and integrated coastal management (COM (2013) 133) it questioned '*the legal basis for the proposal and is of the opinion that powers relating to spatial-planning policy rest with the Member states*'. A competence issue was also raised on the EU Proposal for a Regulation on the right to exercise collective action within the context of the freedom of establishment and the freedom to provide services (the Monti II Regulation).[65] The House of Representatives argued that '*Article 153 (3) of the Treaty on the Functioning of the European Union explicitly excludes the right to strike from the range of topics that can be subject to European legislation to support or complement the activities of the Member States*'. The House of Representatives' Reasoned opinion in case of the EU proposal for a Council Directive concerning a Common Consolidated Corporate Tax Base (CCCTB)[66] paid extensive attention to legal basis issues as well. The argument that '*the European Commission is encroaching indirectly onto the territory of setting taxation rates, a matter that falls under the sovereignty of Member States*' may be viewed as an argument relating to competences. But the House addressed the legal basis from the TFEU directly as well. It was divided, however, on whether article 115 TFEU was appropriate: some groups in parliament agreed that article 115 TFEU would indeed be the appropriate legal basis but they explicitly referred to the fact that this means the Directive must be approved unanimously by the Council. Other groups, however, were of the opinion that the Treaties provided no legal basis for the proposal, and emphasised '*that the sovereignty of the Member States prevails in the matter of direct taxation*'. The House of Representatives' main concerns with regard to the EU proposal for a directive

[64] Regulation concerning the opening of the market for domestic passenger transport services by rail (COM (2013) 28), and the Directive establishing a single European railway area, as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure (COM (2013) 29).
[65] COM 2012 130.
[66] COM 2011 121.

on the activities and supervision of institutions for occupational retirement provision[67] boiled down to competences arguments as well. It considered '*the design, functioning and supervision of pension systems to be primarily national responsibilities and competences*'.

Proportionality issues

Various reasoned opinions included proportionality arguments. The House of Representatives considered that the Proposal for a regulation to reduce the cost of deploying high-speed electronic communications networks[68] would lead to 'unnecessary administrative burdens'. This may be seen as a typical proportionality argument. Moreover, the House doubted whether a regulation would be the proper legislative instrument in this case and contended that the proposal granted '*too little flexibility to member states to continue an existing successful, yet different practice*'. With regard to the EPPO-proposal the House of Representatives considered that '*making optimal use of existing national and European mechanisms provides sufficient facilities for effective combating of fraud with EU-means*'. Most notably, the House put forward that OLAF would be better suited to deal with cases of EU fraud and that improving and strengthening the independence, effectivity and efficiency of OLAF and its cooperation with Member States should have priority over creating a European Prosecutor's Office.

In the case of the EU proposal for a Regulation concerning procedural safeguards for children suspected or accused in criminal proceedings,[69] the House of Representatives argued that '*it is felt that insufficient arguments have been put forward as to the way in which detailed and far-reaching procedural provisions improve international cooperation and mutual trust and confidence between Member States*'. In the case of the proposal for the Common Consolidated Corporate Tax Base, the House of Representatives challenged its effectivity and contended that it would actually have a negative impact on the Gross Domestic Product (GDP) in the EU as a whole as well as on the Netherlands in particular. Moreover, the Representatives were concerned that the CCCTB would not only lead to a fall in the level of investment in the Netherlands, but also to a decrease in taxation revenues in the Netherlands and in other Member States. The expected adverse effects of the proposed legislative act were just as much the cause for the House of Representatives to issue a reasoned opinion on the Proposal for a Seeds Regulation.[70] The Representatives feared that the '*cultivation of rare local crops could be inhibited, which would jeopardise agricultural biodiversity as well as restricting consumer choice. The House also feared a greater financial burden for the sector. Exempting micro-enterprises from registration could encourage companies to 'work the system', for example by dividing businesses into smaller limited companies. This could make it difficult for small, new players to enter the market and reinforce monopolisation by major international companies'*.

Some reasoned opinions contain elements that may be qualified as proportionality '*strictu sensu*' arguments. By way of its Reasoned opinion on the proposals for a roadworthiness package,[71] the House of Representatives argued that the '*European Commission has not sufficiently demonstrated how the possible advantages of (...) supervision by the Commission outweigh the curtailment of the rights of the Member States in this area and the substantial costs and administrative burdens arising from it, among others for authorities and for the users of these vehicles*'.

[67] The IORP II directive, COM (2014) 167.
[68] COM(2013) 147.
[69] COM(2013) 822.
[70] Proposal for a Regulation concerning the production and making available on the market of plant reproductive material COM (2013) 262.
[71] EU proposal for Periodic inspections on roadworthiness of motor vehicles and trailers and repealing of Directive 2009/40/EG (COM (2012) 380), the proposal for amending the Directive on the registration documents for vehicles (COM (2012) 381), and the proposal for a Regulation on the technical roadside inspection of the roadworthiness of commercial vehicles circulating in the EU (COM (2012) 382).

I-8. ***Has the specialist scholarship of your country modified its analyses concerning the exclusive competences and preemption after the entry into force of the Treaty of Lisbon?***

I-9. *The practice in terms of exclusive competences and preemption after the entry into force of the Treaty of Lisbon*

The Explanatory Memorandum of the Dutch act approving the Treaty of Lisbon states that the Member States are not entitled to act in areas that according to article 3 TFEU belong to the exclusive competences of the EU, unless the Member States have been empowered by the EU to act or when they have to take measures to execute EU-acts.[72] According to the Memorandum, Article 3 contains a reaffirmation of provisions from the EU- and EC-Treaties and a codification of the case law of the CJEU concerning the exclusive competence of the EU to conclude treaties.[73] More specifically, it also recognises that the Treaty of Lisbon has brought the whole area of common trade policy within the scope of the Union's exclusive powers, whereas the EC-Treaty made an exception to this regarding treaties that would go beyond the Union's internal powers, such as trade agreements on cultural and audiovisual services as well as educational, social and public health services.[74] In case of shared competences in certain areas, both the EU and the Member States can take legislative action and adopt binding decisions. The Explanatory Memorandum confirms that when the Union has acted, the Member States will not act, unless the Union has stopped exercising its shared competence.[75] From this, one can infer that the government is not of the opinion that a shared competence that has been exercised has turned into an exclusive competence *stricto sensu*. The Memorandum also refers to the Protocol regarding the exercise of shared competences, which states that the Union's exercise of competences only concerns those aspects covered by the Union act and not the whole area that is covered by the shared competence.[76]

Timmermans has addressed the issue of preemption in relation to specifically shared competences and the new Article 2(2) of the TFEU. He is not so sure that this means a mere codification of the Court's case law as has often been said, but states that this provision contains a blocking rule; that is the blocking of the exercise of national competence to the extent that the Union exercises its competence. This can be seen as preemption, national competence being neutralized, frozen as long as the relevant Union rules remain in force.[77] He distinguishes this rule of blocking effect or preemption explicitly from the situation of an exclusive Union competence, where there exists no national competence at all. He considers it "something of a paradox that this rule of pre-emption, which could be considered as a fairly radical application of the primacy principle, has survived the operation of stripping the Treaty texts of their constitutional elements after the failure of the Constitution, whereas the primacy principle itself was removed from the Treaty."[78]

[72] TK, vergaderjaar 2007-2008, 31 384 (R 1850), nr. 3, p. 16.
[73] See in this respect also Case C-114/12, ECLI:EU:C:2014:215, para. 66.
[74] TK, vergaderjaar 2007-2008, 31 384 (R 1850), nr. 3, pp. 18-19.
[75] TK, vergaderjaar 2007-2008, 31 384 (R 1850), nr. 3, p. 19.
[76] TK, *2007-2008*, 31 384 (R 1850), nr. 3, p. 16 en 19.
[77] Ch. Timmermans, ECJ Doctrines on Competences, in: L. Azoulai, *The Question of Competence in the European Union*, OUP, 2014, pp.161-164.
[78] *Ibid.*, p. 162.

But in legal doctrine, the distinction is not always drawn so sharply, in particular because of the effects the exercise of shared competences can have. Eijsbouts *et al* for instance state that shared competences can turn into exclusive ones for the EU, when the EU has introduced certain rules on the basis of such competences and prohibiting or restricting certain action on the part of the Member States.[79] The consequence of an exercised shared competence may as such be *de facto* the same as that of an exclusive competence, making the Member States lose their competence to act, as also Barents and Brinkhorst conclude.[80] This is considered to depend on the extent to which the exercised competence exhausts national competences. In the case of exhaustive regulation by the EU, which occurs in particular in the case of full or maximum harmonisation, a pre-emption effect or *Sperrwirkung* is thus acknowledged.[81] This may for instance concern internal market directives but also common agricultural market regulations or measures adopted in the areas of fisheries and transport. Barents and Brinkhorst also observe that Articles 2(2) and 4 TFEU do not provide clarity on where the border lies of a shared competence and that this concept actually is of little use when the competences as described in the Treaties for specific areas can range from minimum harmonisation to more or less full EU harmonisation. This is considered to present itself in particular in relation to harmonisation directives. They underscore, however, that there remains a fundamental legal difference between exclusive competences and an exhausted shared competence: the former result from the Treaties themselves and can only be changed by Treaty amendment, whereas the latter results from secondary legislation and can also be changed on that level.[82]

The general text books on EU law have not really problematised or criticised the way in which the TFEU has labeled a number of areas as exclusive.

I-10. *The reactions to the Pringle ruling*

In the Netherlands, the effects of the Pringle ruling have not only been analysed in light of its practical and legal consequences, but also of its broader implications for the constitutional order of the EU. It has also been analysed whether the decision may be seen as an example of judicial activism.[83] It has been argued that the ESM amounts to a *de facto* amendment of article 125 TFEU,[84] and that thus, the ESM may be seen as the first step towards a so called 'transfer union'.[85] This is not necessarily seen as a critique on the decision of the CJEU. Barents argues that the decision was both politically inescapable as well as internally consistent as the ESM concerns economic rather than monetary policy. Unsurprisingly, the decision has also been completely in line with the Dutch Government's position.[86] By contrast, PVV leader Geert Wilders has sought to have a national court annul the Act on

[79] Eijsbouts *et al* 2015, *op.cit*, fn 1, p. 22.
[80] Barents and Brinkhorst 2012, *op.cit*, fn 1, pp. 200-201.
[81] Eijsbouts *et al* 2015, *op.cit*, fn 1, p. 125 and Werner and Wessel 2011, *op.cit*., fn 1,p. 108.
[82] Barents and Brinkhorst 2012, *op.cit*., fn 1, pp. 200-201.
[83] A. van den Brink and J.W. van Rossem, 'De zaak Pringle en de eurocrisis: juridische paradoxen en constitutionele perspectieven', *NtEr* 2013, nr. 7. pp. 255-264. Based on a set of criteria, they argue that some elements may indeed be qualified as activist, whereas other elements allow for the decision to be qualified as an example of judicial restraint.
[84] Some have argued, however, that article 125 TFEU allows for multiple interpretations and, thus, also for an interpretation that is compatible with the ESM treaty: J.W. van de Gronden, 'Bestrijding eurocrisis en de EU-begrotingsregels: alleen handhaving van afspraken of ook soevereiniteitsoverdracht?', *SEW* 2013, 9, pp. 354-369.
[85] E.g. R. Barents, 'De constitutionele paradox van het Unierecht', *SEW* 2013 , 7/8, pp. 300-308.
[86] Jaarbericht Procesvertegenwoordiging Hof van Justitie van de EU. Inbreng van de Nederlandse regering 2012, Vergaderjaar 2012-2013, Bijlage bij Kamerstuk 33400-V nr. 118, p. 31.

the ratification of the ESM, an action that failed as the Dutch constitution prohibits constitutional review of statutory legislation (art. 120 Constitution).[87] The lack of such a national constitutional court decision may be seen as a disadvantage following Reestman's line of argumentation that the decisions of constitutional courts in other Member States on the ESM (and on the Stability Treaty) may have had positive effects on the legitimacy thereof.[88]

The broader implications of the decision have been analysed in terms of whether a principle of solidarity is gradually taking shape in EU law and practice.[89] Also the possibility of the Member States to apply intergovernmental methods outside the main treaties has been discussed and criticized.[90] The Dutch Advisory Board on International Affairs, an important advisory body to the government and parliament, considered that the choice for the ESM-Treaty was a deliberate choice of the Member States to avoid the involvement of the Commission and the European Parliament in the decision-making.[91]

However, the most prominent issue in the reactions on *Pringle* regards the democratic deficit of the ESM. The Council of State raised this issue already in its advice on the Proposed Act on the Ratification of the ESM Treaty.[92] It had criticized the limited possibilities of national parliaments to control the functioning of the ESM and stressed that every amendment of the authorised capital stock should be subject to prior approval of national parliaments. However, such national parliamentary control alone would not suffice to ensure democratic legitimacy of the EMU, according to the Council. Thus, 'the current intergovernmental form of the ESM could not be the ultimate destination, but should be seen as a transitional stage in the shaping of economic governance in the European Union'.[93] The necessary democratic arrangements should match the development of economic governance itself. Thus, in addition to increasing the powers of national parliaments, the creation of a special Eurozone parliament should be considered, according to the Council of State. A related, but different, proposal in this regard has been made by De Bruijn. He has advocated the creation of a separate chamber of national parliaments *within* the European Parliament.[94]

Van Rossem and Van den Brink have argued that increasing the role of national parliaments in EMU matters fits within a broader trend of strengthening their role in EU decision making. Yet, -executive-decision making in the EMU differs much from decision making in other policy areas aimed at adopting legislative acts. Thus, existing mechanisms such as the EWM may not be simply transferred to the decision making in e.g. the framework of the European Semester. Moreover, democratic

[87] Rb. 's-Gravenhage, 1 juni 2012, LJN BW724, r.o. 3.3. See also under questions I.1-I.2.
[88] J.H. Reestman, 'Het ESM- en het Stabiliteitsverdrag voor de constitutionele rechters in Estland, Frankrijk en Duitsland', *SEW* 2013, 61, pp. 103 – 113.
[89] V. Borger, How the Debt Crisis Exposes the Development of Solidarity in the Euro Area', *European Constitutional Law Review*, Volume 9, Issue 01, February 2013, pp. 7 – 36 and V. Borger, The ESM and the European Court's Predicament in Pringle' 14 *German Law Journal* 1 (2013), pp. 113-140.
DOI: 10.1017/S1574019612001022, Published online: 19 April 201
[90] Vandenbruwaene argued, however, that the choice for an international treaty was in line with the principle of subsidiarity: W. Vandenbruwaene, Pringle, *SEW* 2013, 3, pp. 127-131.
[91] AIV, Public support for the European Union. Building trust, Advisory report 88, p. 19. Accessible at: http://aiv-advies.nl/download/0497fab2-be1f-4f21-a8e8-d172910e6aa1.pdf, last accessed on 2 November 2015.
[92] Council of State, Advice W06.12.0042/III, Kamerstukken II 2011/12, 33 221, nr. 4.
[93] Council of State, Kamerstukken II 2011/2012, 33 221, nr. 4, p. 4.
[94] Th.J.A.M. de Bruijn, 'De veranderende rol van nationale parlementen in de Europese Unie', *RegelMaat*, 6, pp. 327-338.

legitimacy will increasingly require European arrangements as well and may not rest only on national parliaments.[95]

1.3 Implicit competences

I-11. ***Has the entry into force of the Treaty of Lisbon changed the perception of the doctrine of implicit competences in your country?***

The doctrine of implicit competences is mainly addressed in specialist legal scholarship of Union law. It cannot be inferred from this scholarship that this doctrine would not be considered relevant or applicable anymore, yet there is acknowledgement that the scope of its application has been affected as a result of the Treaty of Lisbon. Kuijper has thus observed that it cannot be denied that the relevance of the implied powers/AETR doctrine has been reduced as a result of the introduction of a broader range of explicit external powers (e.g. as regards the Euro, education, culture, public health, environmental policy and research and development). He deems that this has taken away a certain dynamic in the development of the law of external relations of the EU.[96] Werner and Wessel state that the implied powers doctrine remains relevant, for instance regarding its possible applicability to the common foreign and security policy given that Article 352(4) excludes application of the flexibility clause to this policy area.[97] Amtenbrink and Vedder as well as Barents and Brinkhorst also consider that the doctrine's relevance lies primarily in the area of external relations, but do not discuss any particular implications that would result from the Treaty of Lisbon from this perspective.[98] There is no outspoken positive or negative assessment of the doctrine on the part of these authors, yet Barents and Brinkhorst observing that the very existence of the doctrine reveals the insufficiency of the principle of attributed powers.

At the political level, the Explanatory Memorandum of the Dutch act of approval of the Treaty of Lisbon does not refer to the doctrine of implicit competences (or implied powers) of the EU, but the Centre of Expertise on European Law of the Ministry of Foreign Affairs distinguishes between explicit internal competences and implicit external competences of the EU. [99] Regarding the implicit external competences, it observes that the doctrine as the CJEU developed it in the AETR case and Opinion 1/94 WTO still forms the basis for the external action of the EU, while also referring to Article 216 TFEU which the Treaty of Lisbon introduced. So, both the case law and this provision are seen as providing the legal foundation for the implicit external competences of the EU. No tension or shift between the two is being signalled in this context.

I-12. *What is the position of scholarship in your country with regard to Article 3 para. 2 TFEU?*

Kuijper perceives Article 3(2) TFEU as summarizing the AETR doctrine. Yet, at the same time he has also identified a tension between this provision, which stipulates the exclusive power and conditions of the EU to conclude agreements, and Article 216 TFEU, which stipulates a potential power and

[95] A. van den Brink and JW van Rossem, 'De zaak Pringle en de eurocrisis: juridische paradoxen en constitutionele perspectieven' *NtEr* August 2013, Nr. 7. pp. 255-264.
[96] In Eijsbouts et al, 2015, *op. cit*, fn 1, at p. 251.
[97] Werner and Wessel 2011, *op.cit*., fn 1, p. 107.
[98] Amtenbrink and Vedder 2015, *op.cit*, fn 2, p. 135 and 428, Barents and Brinkhorst 2012, *op.cit*, fn 1, p. 191 and pp. 817-818.
[99] http://www.minbuza.nl/ecer/dossiers/externe-betrekkingen/expliciete-en-impliciete-externe-bevoegdheden.html, last accessed on 2 November 2015.

conditions of the EU to conclude agreements. In his view, the system as contained in these two provisions does not correctly reflect the established case law of the CJEU. But he also concludes that the most recent case law shows continuity of the established case law and the codification by the Treaty of Lisbon not having affected this.[100] Ott and Wessel have qualified the – partial – codification of the AETR doctrine as an ambitious endeavor, the more so given that the doctrine is still evolving and continuously redefined by the CJEU.[101]

Timmermans has drawn specific attention to the relationship between Articles 2(2) and 3(2) TFEU. He states that the latter provision provides for three situations in which external competences become exclusive, which are well-known from inter alia the ERTA case law. As this provision is about exclusivity and not blocking effect, it raises the question whether Article 2(2) could apply at all to the exercise of non-exclusive external competences. According to Timmermans, there should be no doubt about that, but then it must be noted that "only the exercise of internal competences may make a competence exclusive, not the exercise of the external competence itself. The latter may only entail the blocking effect of Article 2(2), which […] is not the same as exclusivity."[102]

I-13. *Is the flexibility clause of Article 352 TFEU considered as an expression of the doctrine of implicit competences?*

The aforementioned Centre of Expertise on European Law of the Ministry of Foreign Affairs does not make a clear-cut distinction between the doctrine of implicit competences and the flexibility clause, as it presents this clause under the heading of implicit external competences.[103] In legal doctrine, however, such a distinction is (traditionally) made. Kapteyn *et a*l thus observe that this clause concerns a new, independent power of action, whereas implied powers can only relate to existing powers of action, supplementing a specific power to act.[104] Eijsbouts *et al* state that the principle of conferral needs to be nuanced in two respects; the first one being the doctrine of implied powers, the second one being the 'goal-oriented' powers on the basis of the flexibility clause of Article 352 TFEU. The purpose of this clause is said to cover the gaps in Union powers when these appear necessary to realise the Union's goals.[105] Barents and Brinkhorst also frame it in this way and identify a range of examples of measures adopted on this legal basis, relating to the area of agriculture, social security, the establishment of certain Union bodies, financial measures for candidate-member countries, measures regarding civil protection and to combat nature disasters. They observe also that with later Treaty amendments, specific powers were provided for such measures.[106]

The use of the (old) Article 235/308 E(E)C has not always gone uncriticised in the Netherlands, a concrete example concerning the establishment of the European Agency for Fundamental Rights on this legal basis. This was heavily criticised by Erik Jurgens, then a member of the Dutch Senate and a former professor of Dutch constitutional law. He argued inter alia that this legal basis did not allow for

[100] *Idem*, at pp. 252-253.
[101] A. Ott and R.A. Wessel, Het Verdrag van Lissabon en de externe betrekkingen van de Europese Unie, in: R.H. van Ooik and R.A. Wessel, *De Europese Unie na het Verdrag van Lissabon*, Kluwer, 2009, p. 179.
[102] Timmermans 2014, *op.cit*, fn 76, p. 163.
[103] http://www.minbuza.nl/ecer/dossiers/externe-betrekkingen/expliciete-en-impliciete-externe-bevoegdheden.html, last accessed on 2 November 2015.
[104] Kapteyn 2008 et al, *op.cit.*, pp. 224-225.
[105] Eijsbouts et al 2015, *op. cit*., fn 1, pp. 17-18.
[106] Barents and Brinkhorst 2012, *op.cit* fn 1,., fn 1, pp. 196-198.

such an extensive interpretation, referring also to the negative opinion 2/94 of the ECJ on the accession to the ECHR.[107]

2 The current division of competences between the European Union and the Member States

2.1 The concept of legal basis

II-1. *How is the concept of legal basis in EU law understood and presented in your country?*

The most in-depth study done in the Netherlands on the legal basis of Union acts was done by Van Ooik and dates back to 1999. He has identified different meanings of the concept of legal basis, but most importantly in this context is that he explains it in terms of being the legal justification, by a norm of 'higher' law, for the actions of public authorities, both national and international ones. These actions need to be interpreted broadly, so be it legislative acts, executive ones or individual decisions. He further makes a distinction between the principle of attribution and the legal basis principle, observing that in the context of international organisations the principle of attribution is mostly being referred to with a view to the vertical division of competences, between the international organisation and the member states. The legal basis principle, he argues, is geared foremost towards the horizontal division of powers, in-between the different organs. As such, the legal basis is very much seen as an issue that concerns the relation between primary and secondary Union law.[108] Barents and Brinkhorst have emphasised in particular that the legal basis requirement, as an expression of the system of attributed powers, fulfils two functions; a guarantee function, protecting legal subjects from unlawful actions on the part of both the Union and the Member States, and an instrumental function, procuring the EU institutions with the necessary foundations to act and develop policies.[109]

In a more recent study, the principle of legality and the concept of legal basis have been considered as each other's counterparts, their linkage more specifically being explained in the following terms: "The principle of attributed powers and its 'derivative, the legal basis requirement, have, as a primary function, to uphold the institutional balance and the division of powers between the EU and its Member States. Nevertheless, we submit that they can also be considered, in the EU context, as the equivalent of the principle of legality, to be understood as the requirement that any act of government that imposes unilateral obligations on citizens must have a basis in law, that is, that it must have a statutory basis." [110]

II-2. ***What is the institutional practice of your country concerning the legal bases of EU acts?***

In response to question I-7 we have already identified institutional practice on the part of the Dutch parliament regarding the assessment of the legal bases of proposed EU acts. But there is also a longer established institutional practice regarding the assessment of all new legislative and policy proposals put forward by the European Commission, as well as by groups of Member States or the European Parliament. These are discussed in the so-called interdepartmental working group 'Assessment New Commission proposals' (BNC), which convenes weekly and which is given the task to draw up a

[107] NJB 2007, p. 208.
[108] Van Ooik 1999, *op.cit*, fn 3, pp. 21-22.
[109] Barents and Brinkorst 2012, *op.cit*, fn. 1, p. 193.
[110] S. Prechal, S. de Vries and H. van Eijken, The Principle of Attributed Powers and the 'Scope of EU Law', in: Besselink *et al* 2011, *op.cit*., fn 18, p. 214.

'BNC-fiche' on the contents and purpose of all relevant proposals and providing an assessment of their consequences for the EU and the Netherlands.[111]

The BNC working group formulates a first Dutch viewpoint with regard to the negotiations in Brussels, which is submitted for approval to the Dutch government by the Coordination Committee for European Integration and Association issues. It is agreed with parliament that the BNC-fiche is sent to the Second Chamber and Senate as well as the Dutch members of the European Parliament within six – and in exceptional cases three – weeks after publication of the proposal. For legislative and regulatory proposals the legal basis of the proposal is mentioned and the government gives and assessment regarding competence, subsidiarity and proportionality. With respect to Commission communications, no legal basis is mentioned but the government gives a similar assessment on account of the same three principles.

Since the entry into force of the Lisbon Treaty, Dutch courts have not made any references for preliminary rulings regarding the validity of acts of the Union institutions, organs or bodies for lack of competence. Neither has the Netherlands initiated any Article 263 TFEU procedure for annulment on the ground of lack of a (correct) legal basis or competence of the EU. However, it has intervened in cases in which the correctness of the used legal basis was contested, an example of this being Case C-399/12, *Germany v. Commission,*[112] concerning a Commission proposal on the basis of Article 218(9) TFEU for a Council Decision establishing the position to be adopted on behalf of the European Union with regard to certain recommendations to be adopted in the framework of the International Organisation of Vine and Wine. Member States are a member of this organisation but not the EU.

2.2 Request for changes in the balance of competences

II-3. ***What are the themes and who are the authors of requests aimed at modifying the competences of the European Union?***

II-4. ***In your country, has there recently been a review of the balance of competences in the Union?***

In addition to the response to question I-4, we can observe here that the current government agreed in 2012 to make a better division of authority between the European Union and the Member States one of its priorities.[113] The general strategy was to have a 'more focused' EU on the basis of the principle 'European where necessary, national where possible'. The Dutch government has, however, not been a proponent of changing the basic Treaties to relocate EU powers to the national level or to introduce specific opt-outs for the Netherlands. Instead, the government's strategy has been to focus on existing EU legislation and on the priorities for future legislation. This has resulted in the so-called Subsidiarity exercise. This concerned a review of 54 EU issues and legislative acts.[114] The explicit wish of the government was to start and to contribute to a wider discourse on the division of power between the EU and the Member States, rather than to isolate the Dutch position from that of other

[111] See also B. van Mourik, *Parlementaire controle op Europese besluitvorming*, Wolf Legal Publishers, 2012, pp. 40-43 in particular.
[112] ECLI:EU:C:2014:2258.
[113] See the Coalition Agreement between the VVD (Liberal Party) and the PvdA (Labour Party) of 29 October 2012, p. 14. Available from: https://www.rijksoverheid.nl/documenten/rapporten/2012/10/29/regeerakkoord, last accessed on 2 November 2015.
[114] Letter of the Minister of Foreign Affairs of 21 June 2013, MINBUZA-2013.184321.

Member States.[115] Indeed, the Dutch initiative fits in well with the Commission's current *Regulatory Fitness and Performance Programme* (REFIT) and its renewed Better Regulation agenda.

The areas in which the Dutch government advocates legislative restraint on the part of the EU legislator are criminal procedure, direct taxation and social security measures. The government formulated 9 general recommendations:

1. Every action of the EU needs to be based on a clear legal basis from the Treaties and the European Commission should abstain from proposing legislation for which the connection to the legal basis is "too indirect and uncertain" (creeping competences).
2. If no power exists for the EU to legislate, the Commission should refrain from other actions as well (such as issuing communications etc.).
3. If the Member States in the Council agree on their objections against specific EU legislation, the Council and the Commission may politically agree that the Commission will abstain from further initiatives in the field.
4. EU legislation should focus on main aspects and general objectives instead of prescribing in great detail how these objectives should be achieved. National discretion should be preserved as much as possible.
5. The Commission should specify as much as possible costs of implementation.
6. In order to ensure proportionality, impact assessments should be better and more structurally used; and sunset clauses as well as evaluation clauses should be included in EU legislation more frequently.
7. The Member States should be 'maximally' involved if legislation that concerns them directly is adopted by way of implementing acts, delegated acts or by actions of agencies. The enforcement practices in the Member States should be taken account of.
8. If the CJEU interprets EU legislation in a way that was not foreseen and/or intended by the EU legislator, the EU legislator should amend the EU legislation concerned.
9. The new Commission taking office in 2014 should be the occasion to reconsider the priorities of the EU.

Most of these guidelines mirror EU principles or already existing practices, which confirms the idea that the Dutch government carefully seeks to avoid taking an outsider's position.

The government sees the European Council's Strategic Agenda for the Union in times of change (June 2014) as a direct follow up of its initiative, as it is based on the formulation of concrete priorities for the future.[116]

II-5. *What is the political and scholarly reaction to such reviews of the balance of competences of the European Union?*

In general, the responses to the Subsidiarity exercise have been far from overwhelming. Those that have reacted to the Government's initiative have been quite critical. In September 2013 the *Tweede Kamer* held a plenary debate to discuss the Subsidiarity exercise.[117] The opposition parties questioned

[115] To that end, the Minister for Foreign Affairs had for instance introduced the initiative in the Council with an eye to influencing the political agreement with the new Commission.
[116] Ministry for Foreign Affairs, Annual Report 2014, Tweede Kamer 2014–2015, 34 200 V, nr. 1, at p. 12.
[117] *Tweede Kamer,* Handelingen 2013-2014, nr. 3, item 6, date of the meeting: 19 september 2013.

whether the Government's focus on concrete legislation was appropriate, and some advocated the focus should rather be on powers and policy areas. Proposals were put forward to come to a treaty amendment to sharpen the distinction between national and EU powers. Education policy, public health and rural developments were mentioned as areas that should be 'ring-fenced' as national competences. One MP proposed to give a majority of national parliaments and/or governments the right to withdraw EU legislation, a proposal to which the Minister for Foreign Affairs expressed his sympathy. Although not introduced during the plenary session in the *Tweede Kamer*, the Greens (Groen Links) had proposed a 'positive' list, i.e. of issues the EU should regulate.[118]

Although the debate resulted in agreements to report regularly on the progress, there has been no structural follow up on the Government's initiative. The exercise reemerged in the political arena in Spring 2014 when the Social Liberal party D66 (strongly pro-European) argued that the concrete results had been meagre and did not extend beyond incidental results in concrete legislative negotiations.[119]

Several scholars have criticized the Subsidiarity exercise as well. Heringa argued that the principles formulated are too vague to guide legislative policies.[120] On top of that he rejected the specific recommendation to conclude political agreements to force the Commission not to exercise its right of legislative initiative. Also Van Riel and Bos (both are affiliated with the Social Economic Council – SER, one of the most important advisory institutions of the government) have been very critical on the attempts to curtail the Commission.[121] One of the authors of this report has argued that the proposals for the involvement of the EU needs to be reconsidered have been chosen haphazardly.[122] No criteria have been developed on the basis of which the 24 legislative issues have been selected. Indeed, subsidiarity concerns explain only in part why the Dutch government sees the list of issues as problematic. Rather than subsidiarity, many of the concerns are related to proportionality aspects such as the administrative and financial burdens that EU legislation imposes on public authorities and business and the high level of detail of legislation. The lack of a systematic approach would make it difficult for the Subsidiarity exercise to be picked up in other Member States and to contribute to a broader discussion on the division of powers in the EU. Van Riel and Bos have argued that a framework for testing EU legislative proposals should be developed based on economic criteria, such as benefits of scale, cross border external effects and differences in preferences.[123]

The broader political context of the Subsidiarity exercise has been addressed by Korteweg.[124] Korteweg contrasts the Subsidiarity exercise with the British Balance of Competences review and concludes that the Dutch initiative may function as a bridge between the British review and the other

[118] http://www.trouw.nl/tr/nl/4324/Nieuws/article/detail/3464130/2013/06/24/Lijst-GroenLinks-Dit-mag-EU-wel-regelen.html, last accessed on 2 November 2015.
[119] See questions posed by D66 leader Pechtold, kenmerk 2014Z07141, answered by the Minister of Foreign Affairs by letter of 9 May 2014.
[120] A.W. Heringa, 'Subsidiariteitsexercitie, of te wel hoeveel/hoe weinig de EU minder kan doen?' ("Subsidiarity exercise, or how much/little the EU could do less"), blog entry of 24 June 2013, http://www.montesquieu-instituut.nl/id/vjarb3yf0zzr/nieuws/subsidiariteitsexercitie_of_te_wel, last accessed on 2 November 2015.
[121] B. van Riel and M. Bos, 'De subsidiariteitsbrief van het kabinet: geef de Europese Commissie maar weer de schuld!', *Internationale Spectator* 2013 (67) nrs. 9, 66-69.
[122] T. van den Brink, 'De begrenzing van de bevoegdheden van de Europese Unie als een gedeelde constitutionele opdracht', *SEW*, 2014 (6), pp. 266-275.
[123] B. van Riel and M. Bos, 'De subsidiariteitsbrief van het kabinet: geef de Europese Commissie maar weer de schuld!', *Internationale Spectator* 2013 (67) nrs. 9, 66-69.
[124] R. Korteweg, 'Rutte en Cameron delen de diagnose, maar niet de remedie', *Internationale Spectator*, October 2013, pp. 28-29.

Member States' wishes. At the same time, however, the Dutch initiative sent a clear signal to the UK that big reforms are unrealistic, but trying to curtail the Commission's ambitions is not.

In a reaction to Cameron's speech (rather than the Dutch Subsidiarity exercise) Smits has argued that the lack of clear and objective criteria to delineate national and EU competences constitutes a serious problem.[125]

3 Sharing of competences and executive federalism

3.1 The conceptualization of European Union executive federalism

III-1. ***How is the difference between legislative competences and executive competences of the European Union perceived and presented in your country?***

The shared EU legal order: terminology

In the Netherlands, the EU legal order is in general presented as a *shared legal order*, in which the implementation of Union law is carried out through cooperation between institutions and authorities at Union and national level.[126] Instead of or in addition to the term 'shared', sometimes the terms 'integrated' or 'composite' (legal order) are used, the former to stress the interconnectedness of the EU and national levels of government,[127] the latter to stress the interdependence of both.[128]

In the shared legal order the Union level lays - and has laid - down general binding rules in the Treaties and by means of secondary EU-law instruments (regulations, directives, decisions). The latter group can be divided between legislative acts and the non-legislative (delegated or implementing) acts of Articles 290 and 291 TFEU. This distinction has led to both scholarly and political discussion. Scholars have argued that the lack of substantive criteria has politicized the choice between delegation and implementation. In that regard, it is remarkable that especially the power for the Commission to adopt delegated acts is often seen as problematic even though the Commission may equally possess farreaching powers under article 291 TFEU.[129] In EU pensions law, the Dutch government has been very active to remove a delegated power from the Proposal for the Recast IORP II Directive to avoid the possibility that the Commission would impose capital requirements on pensions institutions, without paying much attention to possible alternatives for the Commission and the responsible agency (EIOPA) to reach the same result.[130] In a recent parliamentary debate on a Citizens' initiative – with the title: No transfer of powers to the EU without a referendum – several MPs referred to the power of the European Commission to adopt delegated acts, the broad discretionary power the Commission

[125] R. Smits, 'Wie doet Wat?', NtER 2013 (6), pp. 213-218.
[126] This section is mainly based on W.J. Eijsbouts, J.H. Jans, A. Prechal, L.A.J. Senden (red.), *Europees Recht. Algemeen Deel sinds het Verdrag van Lissabon*, Europa Law Publishing: Groningen 2015 (tweede druk), and J.H. Jans, S. Prechal, R.J.G.M. Widdershoven, *Inleiding tot het Europees bestuursrecht*, Ars Aequi Libri: Nijmegen 2013 (derde druk). The latter is the Dutch version of J.H. Jans, S. Prechal, R.J.G.M. Widdershoven, *Europeanisation of Public Law*, Europa Law Publishing: Groningen 2015 (second edition), but focuses much more on the consequence of being a part of the shared legal order for Dutch administrative law.
[127] Jans et al 2015, p. 7.
[128] L.F.M. Besselink, *A Composite European Constitution*, Europa Law Publishing: Groningen 2007.
[129] A. van den Brink and H. van Meerten, 'EU bestuurlijke regelgeving in de praktijk: het IORP II richtlijn voorstel als voorbeeld', *NtEr* 2015, issue 4, pp. 133 – 140.
[130] *Idem*.

would possess and the possibility that rules are adopted under that power which are not in the Dutch interest.[131]

It is important to note that delegated and implementing acts are in Dutch academic scholarship referred to as 'administrative rule-making', because the word 'non-legislative' may (incorrectly) suggest that these rules are not of a generally binding nature. In this respect it of importance that in Dutch constitutional doctrine the word 'legislation' is also defined substantively, including both statutory (or formal) legislation and general binding rules of a lower status. All these Union rules are sometimes - for instance in the area of competition law on the basis of the Treaty, but in other areas on the basis of specific regulations (REACH, GMOs) as well - applied or executed vis-à-vis individuals by Union institutions, bodies or agencies.[132] This application is referred to as direct administration or internal EU administrative law.[133] The Commission competence of oversight of Article 17 TEU is generally not discussed in the context of direct administration, but as part of the supervisory powers of the Union.

In academic literature the direct administration by Union institutions, bodies and agencies is, however, presented as an exception. As a rule, the application and enforcement of the Union rules within the shared legal order takes place at the level of the Member States by means of national law. This process is referred to as indirect administration and requires the implementation of Union law by national law.[134] 'Implementation' includes both regulatory activities, such as the transposition of directives and the 'operationalization' of regulations by means of statutory law or general binding acts of a lower status, and the application/execution and enforcement of the Union acts (or, in case of directives, the national rules transposing them) by the designated administrative authority vis-à-vis individuals or citizens.

In academic doctrine the national application/execution of EU law is seldom (or never) referred to as 'executive federalism'. Instead, the term multi-level legal order is mainly used if the author wants to stress that the EU shared legal order functions in a multi-level legal 'landscape', which also includes international law, f.i. the European Convention of Human Rights, and the decentralized level.[135] The use of the word 'multi' when only describing the co-operative administration by two levels (EU, national) seems a bit exaggerated. The concept of (multi-level) governance is used by legal academics, when they want to indicate that their study goes beyond the application of formal top down legal instruments, but also includes informal and/or horizontal semi-legal instruments or non-legal instruments.[136] A recent contribution of Vandamme, however, attempts to draw lines between the

[131] Tweede Kamer 2014–2015, 33 848, nr. 17.
[132] Dutch doctrine tends to use the word 'application' instead of 'execution', not as a matter of principle as both may be considered synonymous, but because the Dutch word 'executie' is often used in the more narrow sense of the enforcement of judicial decisions.
[133] R.J.G.M. Widdershoven, 'Developing Administrative Law in Europe: National Convergence or Imposed Uniformity', *REALaw* 2014/2, pp. 5-17; Jans *et al* (eds.) 2015, p. 7.
[134] Jans *et al* (eds.) 2015, pp. 13-18.
[135] See e.g. T. Barkhuysen, *Eenheid en coherentie van rechtsbescherming in de veellagige Europese rechtsorde* (Unity and Coherence of Legal Protection in the Multi-Level European Legal Order), Kluwer: Deventer 2006; H. van Eijken, J. Emaus, M. Luchtman, R. Widdershoven, 'The European Citizen as Bearer of Fundamental Rights in a Multi-Layered Legal Order', in: T. van den Brink. M. Luchtman and M. Scholten (eds.), *Sovereignty in the Shared Legal EU Order. Core Values in Regulation and Enforcement*, Intersentia 2015, pp. 249-298.
[136] See e.g. O. Ştefan, Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance, *Maastricht Journal of European and Comparative Law,* (21) 2014 (2), pp. 359-379.

concepts of (cooperative) federalism, multi-level governance and the European directive as a multi-tiered instrument.[137]

Academia, practice and politicians

The above picture is visible in the EU textbook, '*Europees recht. Algemeen Deel'* (European law. General aspects).[138] The book not only contains chapters on direct effect and legal protection (including the doctrine of procedural autonomy), but devotes a separate chapter to the concept of *shared authority*. This concept not only includes shared administration, but also shared law and shared democracy. European administrative law is the subject of the textbook '*Inleiding tot het Europees bestuursrecht*'.[139] The book studies both the Union and national component of the process of shared implementation of Union law, with a strong emphasis on the latter component; 'internal' administrative law of the EU itself (direct administration) is only addressed when it has implications for national administrative law. Finally, it can be noted that also textbooks on Dutch administrative law pay some attention to the fact that national administrative law is often applied in a EU context, and that EU law, therefore, may influence general concepts as general principles, judicial protection, state liability et cetera.[140]

As regards practice, it, first, can be noted that the Dutch courts, and certainly the highest administrative courts, are very much aware of their role as *juge du droit commun* in the shared legal order (see also question III-4). The same goes for those parts of the administration which are designated to apply specific rules of Union law, such as customs law, migration law, competition law, telecommunication law, energy law, financial supervision law and so on. Obviously, the knowledge of Union law and the awareness of being part of a shared EU legal order is less if an administration and its civil servants are only sporadically confronted with Union law. To enlarge also their knowledge, several organizational structures have been set up (see question III-3).

With regard to the vocabulary used the terms '(in)direct administration or execution (in Dutch: 'indirect bestuur/ indirecte uitvoering') are not frequently used. Instead, the notions that are used to describe the shared responsibilities of the EU and the Member States include: Centralized system[141]/ decentralized systems [142] / decentralized enforcement ('*gedecentraliseerde administratieve handhaving*') [143], centralised and decentralised governance [144], shared administration ('*gedeeld bestuur*')[145], shared responsibilities ('*gedeelde verantwoordelijkheden*')[146]. In the field of enforcement, the vocabulary does refer to direct or indirect administration. The terms 'indirect and direct

[137] T. Vandamme. 'EU-Directives and Multi-Level Governance. Can Lessons be Drawn from Cooperative Federalism?', *Maastricht Journal of European and Comparative Law*, (21) 2014 (2), pp. 341-358.
[138] Eijsbouts *et al*, 2015, *op cit.,* fn 1.
[139] Jans *et al* 2015, *op.cit.*, fn 124.
[140] E.g. L.J.A. Damen *et al*, *Bestuursrecht*, BJu: Den Haag 2013; Van Wijk/Konijnbelt/Van Male, *Hoofdstukken van bestuursrecht*, Kluwer; Deventer 2014, R.J.N. Schlössels and S.E. Zijlstra, *Bestuursrecht in de sociale rechtsstaat*, Deel 1, Kluwer: Deventer 2010.
[141] F.M. Fleurke, 'Van centralisatie naar decentralisatie. Een analyse van het wijzigingsvoorstel van de Commissie en het verloop daarvan inzake de Europese regeling voor de handel in broeikasgasemissierechten', *NTER* 2009/2, p. 64-73.
[142] G.A. van der Sluijs, 'Informatie-uitwisseling tussen nationale mededingingsautoriteiten; een Europees succesverhaal?', *M&M* 2003/5.
[143] J. Steenbergen en M.H. van der Woude, 'Het EU-mededingingsrecht na 1 mei 2004: Verordening 1/2003', *SEW* 2004/26.
[144] M. De Visser, *Network based Governance in EC Law*, Oxford and Portland, Oregon: Hart Publishing 2009.
[145] W.J.M. Voermans en F.H. van der Burg, *Unierecht in de Nederlandse rechtsorde*, Kluwer: Deventer 2012.
[146] A.T. Ottow, 'Europeanisering van het markttoezicht', *SEW* 2011/1, p. 4.

enforcement' to describe the different ways that EU law can be enforced and the terms 'direct control' (to describe the situation in which the Commission (or a Union body acting on its behalf) takes enforcement action against individual parties) and 'indirect control' (to describe the situation in which national authorities take enforcement actions)) are being used.[147] In order to describe the governance systems of supervisory network systems, De Visser has used the term 'network governance.[148] She applied a functional definition and draws out the specifically legal issues for EU competition and EU communications law. [149]

National politicians are generally aware of the fact that their legislative activities are to some – and sometimes decisive - extent guided and limited by Union law. In this sense, the system of executive federalism is both deemed to be inevitable as necessary by most Whether they appreciate the EU influence depends on their political views and the specific topic. Whether all politicians are aware of the concept of shared administration – and of its consequence that large parts of the Dutch administration (paid by the Dutch tax payer) are mainly applying Union law – we do not know. What we do know is that the concept as such is not discussed fundamentally in parliament and that there is still a tendency amongst certain politicians to speak about 'Brussels' in a way so as to distance themselves from it, creating a public image – and also taken up as such by media - that they are not part of the European decision-making machinery.[150] At local and regional level, knowledge of Union law and Union concepts as shared administration is generally not very high.

Political statements on the future of the Union offer insights into how executive federalism is perceived and understood. Former Dutch minister Frans Timmermans is perceived and understood: '*We should not be disconcerted by false oppositions, as if it would an all or nothing issue: either a European federation or the isolated nation state. (…) That is a misleasing opposition. The EU is unlike the USA. But it is more that loose conglomeration of nation states. It is permanent search for the optimal balance between a federation and a confederation*.'[151] His successor Minister Koenders stated: '*The time of federal visions is over as far as I am concerned. More European legislation and powers is not the answer right now, and nor is institutional 'navel gazing' through treaty amendments. But false promises of 'less Europe' or the demolition of Europe are no credible options either. The putative romanticism of the past is no solution for tomorrow. (…)What we need to restore trust is a new, sober European contract. On the basis of which we can restore trust in public authorities and institutions by means of practical, concrete improvements for citizens to be realized at all levels: European and national.* (…)'.[152]

III-2. *How is the doctrine of procedural autonomy of Member States perceived and presented?*

[147] Keessen, p. 86.
[148] M. De Visser, *Network based Governance in EC Law*, Oxford and Portland, Oregon: Hart Publishing 2009.
[149] M. De Visser, *Network based Governance in EC Law*, Oxford and Portland, Oregon: Hart Publishing 2009.
[150] This was also criticised by the Dutch Advisory Council on International Affairs in its Report 88, fn 23.
[151] Europaspeech by (then) Dutch Minister of Foreign Affairs Frans Timmermans on 19 februari 2014, https://www.rijksoverheid.nl/onderwerpen/europese-unie/documenten/toespraken/2014/02/19/europaspeech-nl.
[152] Speech by Dutch Minister of Foreign Affairs Bert Koenders on the European Union: Het vernieuwen van de Europese belofte, Leiden, 30 maart 2015, https://www.rijksoverheid.nl/onderwerpen/europese-unie/documenten/toespraken/2015/03/30/het-vernieuwen-van-de-europese-belofte-speech-van-minister-koenders-over-de-europese-unie.

In the Netherlands the doctrine of procedural autonomy is generally presented as a species of the genus institutional autonomy.[153] The former includes both, national autonomy in relation to administrative procedures and in relation to judicial protection. Institutional autonomy may include procedural autonomy, but is particularly used to indicate the rule that, unless secondary Union law provides otherwise, it is for the Member State to determine which organs of the Member State (the central government, autonomous regulators or authorities, provinces, municipalities et cetera) are responsible for the implementation and administration of specific Union rules and how these organs are precisely organized.

Although scholarship is aware of the link between the doctrine of procedural autonomy and the principle of conferral, the former doctrine is not very much discussed in the context of the latter. In this respect references to Articles 4 and 5 TEU or Declaration no. 18 are as yet completely absent. In practice scholars tend to concentrate on the consequences for national law of the limitations of procedural autonomy by means of sectoral secondary rules and the *Rewe* principles of equivalence and effectiveness.[154] Moreover it is, as a matter of principle, accepted that the EU legislator is competent to lay down such rules, as (and in so far) they are justified by the legitimate aim to ensure an effective and more equal application of the substantive sectoral rules in question. The same goes for the *Rewe* principles: that the national rules that govern a dispute with a Union dimension may not be less favorable than those governing similar domestic action (equivalence) and that these rules must not render virtually impossible or excessively difficult the exercise of rights conferred by Union law (effectiveness), is as such generally not considered to be unreasonable.

This having been said, that does not mean that the Union interference with national institutional or procedural autonomy is not criticized at all. This criticism does not so much concern the Union rules on organizational matters – such as the requirement of independence - that have been prescribed in, in particular, the area of market supervision (see also question III-5). What is however criticized quite fiercely, is the limitation by the CJEU, through a strict test on *Rewe* effectiveness, of the application of the Dutch general principle of legitimate expectations, a principle that offers more protection than Union law, in particular in the areas of state aid and European subsidies.[155] According to many scholars the strict approach of the Court is too authority-friendly and undermines the protection of individuals offered by the Dutch unwritten principle of legitimate expectations and by the codification of the principle in the area of subsidies in the Dutch General Administrative Law Act (GALA).[156] Similar critique, although not that fiercely, is heard in respect of the possible limitation of national fundamental rights as a result of the *Melloni* requirements of primacy, unity and effectiveness.[157]

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[153] Jans *et al*, 2015, *op.cit*., fn 124, p. 19, 44.

[154] As already stated under question III-1, the doctrine of procedural autonomy and the limitations of this autonomy have not attracted much attention in the political area.

[155] F.i. Case C-24/95 *Alcan* ECLI:EU:C:1997:163 (state aid); Case C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening*, ECLI:EU:C:2008:165 (European subsidies); Case C-568/11 *Agroferm* [2013], ECLI:EU:C:2013:407 (*European subsidies*).

[156] See e.g. J. van den Brink & W. den Ouden, 'Europeanisering door rechtsbeginselen. Op weg naar rechtseenheid en duidelijkheid of de bescherming van de Nederlandse burger in gevaar' (Europeanization by means of legal principles. On the road to legal unity and certainty or a thread to the protection of the Dutch citizen), in: B. Schueler and R. Widdershoven, *Europeanisering van het algemeen bestuursrecht*, BJu: Den Haag 2014, pp. 75-98.

[157] J. Reestman & L.F.M. Besselink, 'Editorial After Akerberg Fransson and Melloni', *European Constitutional Law Review* 2013, pp. 169-175. Other scholars are of the opinion that the application of the test in the circumstances of the *Melloni* case is defendable, as the issue in question – the surrender of person convicted in *absentia* – was completely determined by a Union framework decision, approved by a unanimous vote of the

Finally, some scholars have criticized the way the CJEU has eroded the national legality principle, by stating that, in the absence of a national legal base, an EU regulation provision can provide for a legal base for a decision of a national authority to alter, to the detriment of the beneficiary, the amount of an irregularly paid out European grant.[158] They claim that national law should provide such institutional competence, on the basis of the national legality principle.[159] In academic literature the legality and legitimate expectations issues jointly have been labeled as 'a European attack against the Dutch legal principles'.[160]

As regards judicial protection by the administrative courts, the case law of the CJEU is not considered to be very controversial. This is partly due to the fact that landmark cases as *Factortame* and *Francovich*,[161] which led to quite some controversy in other Member States, did not raise many voices in the Netherlands, as the Dutch judicial system already provided for the possibility of interim relief in national and Union matters (*Factortame*) and had already a generous system of state liability in both national and Union matters (*Francovich*).[162] For the other part, the lack of 'fuss' can be explained by the fact that, as yet, Dutch procedural rules have 'survived' the generally mild procedural rule-of-reason test, which the CJEU normally applies when assessing the effectiveness principle in the area of judicial protection.[163] Thus, in the Dutch case of *Van der Weerd* the CJEU declared the rules on *ex officio* application of Article 8:69 GALA, which, in national and Union cases, only allow for such application by the administrative courts if the parties have put forward grounds related to the Union rules in question, to be consistent with the effectiveness principle, because the rules were justified by the rights of defense and the principle of proper conduct of procedure.[164] Similarly, in the case of *Heemskerk & Schaap*,[165] the CJEU considered the Dutch prohibition of *reformatio in pejus* to be consistent with the effectiveness principle, as it could be justified by the rights of defense and the principles of legal certainty and legitimate expectations. Finally, the Dutch case of *Kühne & Heitz* has forced the Dutch administrative courts to extend the obligation to review final administrative decisions contrary to Union law to a very limited extent, namely in the exceptional case that the *Kühne & Heitz* conditions cumulatively apply.[166] In practice, nearly all *Kühne and Heitz* requests have been refused because the individuals in question had not exhausted all available judicial remedies; therefore the second condition of *Kühne and Heitz*, that the administrative decision has become final as a result of a judgment by a national court ruling in final instance, had not been fulfilled. In that case, according to both Union and Dutch law, the legal certainty of final decisions prevails over the obligation to review.

Member States. See J.A.E. Vervaele, 'The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU', *REALaw* 2013/2, pp. 37-54..

[158] Case C-599/13 *Somvao* ECLI:EU:C:2014:2462; see already in that direction, Case C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening*, ECLI:EU:C:2008:165.

[159] See e.g. Jans *et al* 2015, *op.cit*, fn 124, pp. 24-31.

[160] M.J.M. Verhoeven, J.E. van den Brink, A. Drahmann, *Europees offensief tegen nationale rechtsbeginselen. Over legaliteit, rechtszekerheid, vertrouwen en transparantie*, Jonge VAR-reeks 8, BJu: Den Haag 2010.

[161] Case C-213/89 *Factortame* ECLI:EU:C:1990257, and Joined Cases C-6/90 and C-9/90 *Francovich* ECLI:EU:C:1991428, respectively.

[162] For details Jans *et al*, 2013, pp. 318-320; Raymond Schlössels, 'Francovich in een versnipperd rechtscultureel landschap', Harmonisatie van overheidsaansprakelijkheid aan de Europese horizon?', in: Schueler & Widdershoven 2014, *op.cit.* fn 143, pp. 199-214.

[163] Jans *et al* 2015, fn 124, p. 59.

[164] Case C-222/05 to C-225/05 *Van der Weerd* ECLI:EU:C:2007:318. Cf. Jans *et al* (eds.) 2015, pp. 417-419, for details of the Dutch rules on ex officio application.

[165] Case C-455/06 *Heemskerk & Schaap* ECLI:EU:C:2008:650.

[166] Case C-453/00 Kühne & Heitz ECLI:EU:C:2004:17. See for more, also about the application of the case by Dutch administrative courts, Jans *et al* 2015, pp. 391-396.

3.2. The legal problems of the practice related to executive federalism

III-3. *In your country, is there an organizational structure and/or specific procedures to aid the administrations to resolve the legal problems inherent to the indirect or shared execution of the law of the European Union?*

Point of departure is that the national body or authority that has been designated by national law to apply Union law (f.i. a directive or regulation), is responsible for the correct execution of this task. Moreover, it should comply with primary Union obligations, such as the fundamental freedoms and the state aid provisions (Articles 107 and 108 TFEU). To ensure compliance with Union law, since 2012 the responsible ministers of the central Dutch government have been empowered by the *Wet Naleving Europese regelgeving publieke entiteiten* (Law on compliance with Union legislation of public entities) to take supervisory measures against 'public entities' who have infringed Union obligations.[167] The term 'public entities' includes both local and regional authorities, and semi-autonomous authorities at the national level. The Law provides for three ministerial, supervisory instruments. First, the power to give specific instructions to a public entity where the latter has failed to apply (correctly) its Union obligations. Second, the power to act in the place – and on account – of the public entity in order to comply with a Union obligation. And, third, the power to recover from the public entity possible Union financial sanctions which have been imposed on the Netherlands on the basis of Article 260 TFEU or of the European subsidy rules for infringing Union law by this entity. As yet these powers have not been used.

In the Netherlands, there are no specific procedures to aid the administrations in applying Union law correctly. To that end, however, some organizational structures have been set up. Probably most important is *Europa decentraal* (Europe decentralized).[168] This center of expertise has been founded in 2002 by the *Vereniging voor Nederlandse Gemeenten* (VNG, Association of Dutch Municipalities), the *Interprovinciaal Overleg* (IPO, Inter-provincial Council), the *Unie van Waterschappen* (UvW, Union of Waterboards) and the central government (Minister of Interior Affairs). Its aim is to enlarge the European knowledge and expertise of decentralized authorities and to enhance the correct implementation of Union law by these authorities. In order to so, it advises decentralized authorities on concrete European questions (Help Desk), it organizes courses, it publishes reports and manuals et cetera. Most questions are about state aid, public procurement, competition law and the Services Directive. *Europa decentraal* is subsidized by the VNG/IPO/UvW (50%) and by the Minister of Interior Affairs (50%). In 2014 it received a subsidy of 725.000 Euro.

Another interesting organization is the Expert Center on Public Procurement, PIANOo. This center has been founded in 2005 as a part of the Department of Economic Affairs and receives a departemental subsidy of 1.2 million Euro (2013). PIANOo performs similar activities as *Europa decentraal*: advising (Question Desk), organization of courses, publishing reports and manuals, in the area of public procurement.

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[167] Stb. 2012, 245. In the area of European subsidies these central supervision powers already existed since 2002 on the basis of the *Wet toezicht Europese subsidies* (Law on the Supervision of European subsidies, Stb. 2002, 40). These powers have never been used. See for details, C. de Kruif, *Onderlinge overheidsaansprakelijkheid voor schendingen van Europees recht* (Mutual Governemental Liability for Breaches of European Law), Apeldoorn/Antwerpen: Maklu-uitgevers 2012 (with summary in English).

[168] www.Europadecentraal.nl, last accessed on 2 November 2015.

III-4. ***In your country, are there specific legal problems in the indirect or shared execution of the law of the European Union?***

Primacy and direct effect

As observed already under question I-3, the Dutch legal system has no problems in accepting the consequence of the Union principles of primacy and direct effect.[169] In line with the landmark cases of *Van Gend & Loos* and *Costa/ENEL*,[170] the Dutch courts have accepted that individuals can rely on Union rights *independently* of the Dutch legislation or constitution and, moreover, that the principle of primacy also applies to Union rules which have no direct effect.[171] The latter is perhaps surprising, because Articles 93 and 94 of the Dutch Constitution empower the courts to disapply national statutory rules if they are in conflict with provisions of international treaties that are 'binding on all persons'. As the criterion for an international provision to be 'binding on all persons' is the same as the Union criterion of direct effect ('unconditional and sufficiently precise'),[172] the courts could have applied these national provisions to effectuate the latter principle. In the mentioned Dutch case law, however, it has been decided that the direct applicability of Union law is based on Union law itself – the 'independent legal order' doctrine of Court of Justice - and not on the system of Articles 93 and 94 of the Constitution.

In practice the application of the principle of direct effect and of the connected principle of consistent interpretation (indirect effect) does not lead to serious legal problems. Perhaps most controversial is the *Boxtel* doctrine of the Dutch *Raad van State* concerning the application of the principle of direct effect of incorrect transposed directives in *potential* triangular situations.[173] Starting point of the doctrine is the case of *Wells*,[174] in which the Court declared that in a triangular situation the prohibition of inverse direct effect (or of horizontal side-effects) does not prevent an individual from invoking the provisions of an incorrect transposed directive against a Member State, although this might have negative consequences for another individual, if these consequences are 'mere adverse repercussion on the rights' of the latter individual. This is only different if the adverse repercussions would be 'directly linked' to the performance of an obligation of the latter individual under the directive. In the *Boxtel* case the Dutch Council of State has derived from *Wells* the rule that an administrative authority itself is not allowed to apply directly effective provisions of directives provision if this would have negative consequences for an individual, as long as another individual has not *actually* invoked this provision. The consequence of this doctrine is that the authority is forced to take a decision contrary to the directive, a decision that will (only) be annulled if an individual invokes the directive before a court and contests the decision. This is not only fairly impractical as it prevents the authorities from taking on its own motion a directive consistent decision in the first place, but seems also to be inconsistent with *Wells* and subsequent case law.[175] As has been repeatedly stated in Dutch literature,[176] the decisive reason for the Court in *Wells* to not consider the negative

[169] Jans *et al* (eds.) 2015, fn 124, p. 87-89.
[170] Case 26/62 *Van Gend & Loos* ECLI:EU:C:1963:1; Case 6/64 *Costa v. Enel* ECLI:EU:C:1964:66.
[171] Dutch *Hoge Raad* 2 November 2004, ECLI:NL:HR:2004:AR1797, and Dutch *Raad van State* 7 July 1995, ECLI:NL:RVS:1995:AN584. See also under I-3.
[172] Dutch *Hoge Raad* 10 October 2014, ECLI:NL:HR:2014:2928.
[173] Dutch *Raad van State* 7 december 2005, ECLI:NL:RVS:2005:AU7583 and ECLI:NL:RVS:2005:AU7570.
[174] Case C-201/02 *Wells* ECLI:EU:C:2004:12.
[175] Case C-244/12 *Salzburger Flughafen* ECLI:EU:C:2013:203..
[176] Jans *et al* 2015, p. 113-117; M.J.M. Verhoeven, *The Costanzo Obligation. The obligations of National Administrative Authorities in the Case of Incompatibility between National Law and European Law*, Ius Commune Europaeum Series, no. 93, Intersentia: Cambridge/Antwerp/Portland 2011.

consequences of the directive for an individual to be a forbidden form of inverse direct effect seems not to be whether the directive has actually been invoked by another individual, but that the directive provision in question (only) contained obligations for the Member State, which were not directly linked to obligations of an individual. In that case the authority itself is allowed to apply the directive as the negative consequences for an individual are considered to be 'mere adverse repercussions' on its rights, stemming from the Member States' obligation under the directive (collateral damage). The CJEU will only have difficulty accepting horizontal side-effects of incorrectly transposed directive provisions, if these provisions seek to create obligation for individuals. In spite of the academic criticism the Dutch Raad van State has as yet not (clearly) departed from the *Boxtel* doctrine.

Legal protection

The Dutch administrative courts are well aware of the fact that, as a consequence of the concept of shared execution/administration of Union law, they have to apply at the same time the law of the EU and national law when reviewing administrative action in the execution of EU law. The number of Dutch preliminary references is - and has always been - high compared to other Member States. In the period between 1961 and the end of 2014,[177] Dutch courts referred 909 cases to Luxemburg. With this number the Netherlands qualifies as third behind the much bigger Member States Germany (2137) and Italy (1279).

These preliminary references – and also the academic administrative law literature – do not reveal situations in which individuals are deprived from complete legal protection as a result of lacunae in the Dutch judicial system, as was the case in *Borelli*.[178] As a matter of principle, the Dutch system of judicial protection guarantees access to a court against every form of administrative action. As a rule, the administrative courts are competent to decide on appeals against administrative decisions, instigated by natural or legal persons (including NGOs), having an interest that is directly affected by the decision. If and in so far the administrative courts do not provide access – f.i. because the administrative action in question does not qualify as an appealable administrative decision – individuals can start proceedings against the administration before the civil or 'ordinary' courts.[179] These courts are obliged to provide for additional judicial protection in administrative matters under Article 112 of the Dutch Constitution. In practice, the 'civil route' is mainly important for the judicial protection against general applicable acts (including statutory acts) and against factual conduct of the administration. In their case law, the Dutch administrative courts have – sometimes under reference by analogy to the case of *Unibet*[180] - repeatedly stated that it is not contrary to the Union principle of effective judicial protection that individuals cannot appeal before the administrative courts against administrative action that does not qualify as an administrative decision – for instance air quality plans, established on the basis of Directive 1996/62 – because the action in question can be contested before the civil courts.[181] The judicial protection provided by these courts is considered to be effective as well.

Although the Dutch system of judicial protection may thus, as a matter of principle, be without lacunae, some aspects are still criticized. Such criticism concerns, for instance, the alleged (lack of)

[177] Cf. Annual Report, Statistics of judicial activity of the Court of Justice 2014.
[178] Case C-97/91 *Borelli* ECLI:EU:C:1992:491.
[179] Dutch *Hoge Raad* 31 December 1915 (*Guldemond-Noordwijkerhout*), *NJ* 1916/407; Dutch *Hoge Raad* 28 February 1992 (*Changoe*), *AB* 1992/301.
[180] Case C-432/05 *Unibet* ECLI:EU:C:2007:163.
[181] See Dutch *Raad van State* 31 March 2010, ECLI:NL:RVS:2010:BL9651; Dutch *Raad van State* 4 August 2010, ECLI:NL:RVS:2010:BN3158: Dutch *College van Beroep voor het bedrijfsleven* 28 April 2009, ECLI:NL:CBB:2009:BI7098.

intensity of the judicial scrutiny of asylum law decisions by the Dutch Raad van State,[182] and of general environmental rules by the civil courts.[183] Furthermore, there are possible tensions between the Dutch judicial protection in environmental cases and the specific requirements concerning judicial protection, provided for in the Aarhus Convention, as implemented in the Aarhus Directive.[184] In the first place it is questionable whether the obligation of Article 6:13 of the General Administrative Law Act (GALA) – according to which an individual can only appeal to the court if he or she has made use of his or her right of participation in the decision-making stage - is consistent with the Aarhus-provisions, as interpreted in the case of Djurgärden.[185] Second, it is submitted by some scholars that the Dutch conditions for NGOs to qualify as interested parties who have a right of appeal, may be too strict in the light of the same case.[186] Third and finally, the recently introduced relativity requirement (Article 8:69a GALA), poses questions under the Aarhus rules. The requirement does not prevent an interested party from filing an appeal, but limits the grounds on which the appeal may lead to the annulment of the contested decision: this is not possible on a basis of grounds which clearly do not aim to protect the interests of the party that invokes it. As yet the Dutch courts have not tested the Aarhus consistency of the requirement.[187] Moreover, the Dutch *Raad van State* applies the requirement quite leniently, making it for instance possible that decisions affecting a Habitat area can be annulled on the grounds raised by NGOs and by natural persons living not too far from the area. Nevertheless, it may be problematic that, unlike the Aarhus rules, the relativity requirement is not formulated as a limitation of access to the court, but as a limitation of the grounds that may lead to annulment. According to Advocate General Wathelet in his Opinion in the case *Commission versus Germany* of 15 May 2015,[188] a similar provision in Article 113 of the German VwGO is inconsistent with the Aarhus rules, because it prevents the courts from testing the substantive and procedural legality of environmental decisions, although the appeal is considered to be admissible. If the Court of Justice follows the Advocate General, this will also affect the Dutch relativity requirement.

III-5. ***What is the attitude in your country to the establishment at Union level of principles and rules of administrative procedure required to be applied to the execution of the European Union's policies?***

Sectoral harmonization

In the Netherlands, the sectoral harmonization by means of secondary Union law of national administrative procedures, organizational matters, judicial protection et cetera, is to a large extent taken for granted. As already stated under question III-2, nobody denies that the EU legislator is, as a matter of principle, competent to lay down such rules in a specific sectoral area and their content is generally neither fiercely criticized nor applauded.

Nevertheless specific sectoral EU rules may give rise to critical remarks from scholars or practitioners. This is for instance the case with the sectoral enforcement rules concerning the recovery of irregularly

[182] M. Reneman, *EU Asylum Procedures and the Right to an Effective Remedy*, Hart Publishing: Oxford-Portland 2014.
[183] p.m.
[184] Aarhus Directive 2003/35, amending Directives 85/337 and 96/91.
[185] Case C-263/08 *Djurgärden-Lilla Värtans Miljöskyddsförening* ECLI:EU:C:2009:631. See for this criticism, K. de Graaf, J. Jans, B. Marseille, 'Verbazingwekkend, maar toch ook weer niet', in: Schueler & Widdershoven 2014, *op.cit*. fn 143, pp. 215-231.
[186] De Graaf *et al* 2014, fn 172.
[187] In a judgment of 25 March 2014, ECLI:NL:RVS:2014:115, a non-Aarhus Union case, the Dutch *Raad van State* has judged that the requirement is not contrary to the Rewe principles of equivalence and effectiveness, and the principle of effective judicial protection. See Jans *et al* 2015, *op.cit*, fn 124, p. 380.
[188] Case C-137/14.

granted European subsidies and of not paid customs duties, which are considered to be too strict.[189] Moreover the Aarhus rules, already mentioned under question III-4, are somewhat controversial: some lawyers criticise these for being unclear, too intruding and for being based on the misconception that courts are effective enforcers of environmental rules,[190] but others applaud them as they form a guarantee against political measures limiting judicial protection in environmental cases.[191] Furthermore, the interpretation of specific sectoral rules may lead to discussion and differences of opinion. This is for instance the case with the Union independence requirements in the areas of telecommunication and energy. According to some scholars, the regulatory framework of the Dutch ACM (Authority Consumer and Market) – which is the supervisor/regulator in the areas of competition, telecommunication, energy and consumer matters – does not comply with the independence requirement laid down in the relevant directives.[192]

In contrast to the above mentioned, critically received, sectoral policy rules, the establishment of Union principles and sectoral rules may also be welcomed in Dutch legal scholarship and practice. An example constitutes the establishment of the principle of transparency[193] and its appearances in sectoral policy rules governing the issuing of public contracts,[194] concession contracts[195] and EU subsidies.[196] The principle of transparency has not been codified in the GALA, nor has an unwritten principle of transparency been recognised as an established administrative principle of law in the Netherlands.[197] Nevertheless, elements of the principle of transparency are ensured, indirectly, through principles such as legal certainty and the duty of care and provisions on administrative procedure laid down in the GALA.[198] What is more, the Dutch judiciary applies elements of the principle of transparency even voluntarily where EU law does not strictly require

[189] Jans *et al* 2015, *op.cit*., fn 124, pp. 218-220.
[190] E.g. N. Verheij, 'Uit zuinigheid naar relativiteit. Naar een Schutznormvereiste in het bestuursrecht', in: A.W. Heringa e.a. (red.), *Het bestuursrecht beschermd*, Sdu: Den Haag 2006, pp. 99-112; B.J. Schueler, *Tussen te veel en te weinig. Subjectivering en finaliteit in de bestuursrechtspraak*, preadvies Vereniging voor Bouwrecht, Den Haag: IBR 2009.
[191] E.g. De Graaf *et al* 2015, *op.cit.* fn 172 and M. Eliantonio and Ch. W. Backes, 'Access to Courts for Environmental NGOs at the European and national level: Improvements and room for improvements since Maastricht', in: M. de Visser and A.P. van der Mei (eds.), *The Treaty on European Union 1993-2013: Reflections from Maastricht*, Cambridge: Intersentia 2013, pp. 557-580.
[192] I.M. Schouten and A.J.C. de Moor-van Vugt, 'De onafhankelijkheid van de Autoriteit Consument en Markt', *SEW* 2015/24, afl. 2, p. 62-75.
[193] In public procurement law the principle was identified for the first time in case C-87/94 *Walloon Buses* ECLI:EU:C:1996:161.
[194] Article 76 paragraph 1 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2015 on public procurement and repealing Directive 2004/18/EC, [2014] OJ L 94/65.
[195] Article 3 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, [2014] OJ L 94/1.
[196] Article 59 paragraph 1 of Regulation 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation 1605/2002, [2012] OJ L 298/1.
[197] J.E. van den Brink and W. den Ouden. 'Europeanisering door rechtsbeginselen. Op weg naar rechtseenheid en duidelijkheid of de bescherming van de Nederlandse burger in gevaar? ', in*:* B. Schueler and R. Widdershoven (eds.), *Europeanisering van het algemeen bestuursrecht*, Den Haag: Boom Juridische Uitgevers, 2015, at p. 94.
[198] A. Drahmann,, *Transparante en eerlijke verdeling van schaarse besluiten. Een onderzoek naar de toegevoegde waarde van een transparantieverplichting bij de verdeling van schaarse besluiten in het Nederlandse bestuursrecht*, Deventer: Kluwer, 2015.

this.[199] In this regard, it is interesting to note that in legal scholarship the adoption of the principle of transparency in Dutch case law is encouraged and even a codification of this principle suggested.[200]

Finally, it should be noted that some scholars in the area of general administrative law criticize the sectoral harmonization of being a 'patchwork codification' (codification of bits and pieces), solely driven by the specific needs of the sector concerned and lacking a common vision on administrative procedures and the relation between the administration and citizens.[201] In some areas – for instance the areas covered by the Services Directive and the Aarhus Directive - the imposed rules strongly favor the interests of individuals, while in others – for instance in the area of EU (agricultural) subsidies and customs - they primarily aim at efficient administration and strict national enforcement. From a general perspective on administrative law, this is considered to be not very coherent.

General codification of administrative procedures

The European Parliament' initiative to establish a Regulation concerning the administrative procedure of the EU is generally considered to be a good initiative.[202] As the proposal rightly points out, such more systematic and comprehensive codification will indeed enhance the accessibility of the current 'fragmented' standards and make it less difficult for citizens to understand their administrative rights under Union law. [203] Whether such regulation should also apply to the national (indirect) administration 'acting in the scope of Union law' has not been discussed very thoroughly. However, in academic literature such application is favored, as almost all principles that will be codified, are already binding for the national administration 'when acting in the scope of Union law'.[204] The codification will enhance the administration's awareness of the Union obligation to apply these principles (when acting in the scope of Union law) and will probably enlarge the level of compliance with the principles and, thus, the quality of the administration.

Whether it is desirable that at EU level a more detailed codification of administrative procedures is laid down, such as the Model Rules on EU Administrative Procedures of the *Research Network on EU Administrative Law (ReNEUAL)*, is more controversial. This controversy does not so much concern the application of a detailed codification to the direct administration of Union law by the Union institutions. However, according to some, including the Governmental Commissioner on General Rules of Administrative Law, Michiel Scheltema, these model rules should not apply to the Member States when acting in the scope of Union Law (which is, by the way, as yet not the intention of *ReNEUAL*).[205] The main reason is that this will lead to the situation that the Dutch administration will have to apply two sets of detailed rules, namely the Model Rules (when acting in the scope of Union law) and the rules of the Dutch GALA in purely national cases. This is considered to be unworkable, as the Model and GALA rules, although inspired by similar principles, differ considerably as regards structure, regulated topics and precise content. Furthermore, it is feared that such detailed European

[199] See for instance Dutch *College van Beroep voor het Bedrijfsleven,* 3 juni 2009, ECLI:NL:CBB:2009:BI6466; Dutch *College van Beroep voor het Bedrijfsleven,* 19 December 2007 ECLI:NL:CBB:2007:BC2460; Dutch *Hoge Raad,* 4 April 2003, ECLI:NL:HR:2003:AF2830.
[200] Van den Brink and Den Ouden 2015, *op.cit*, fn 184, p. 95; Jans *et al* 2015, *op.cit*., fn 124, p. 259.
[201] Widdershoven in Schueler and Widdershoven 2014, *op.cit*., fn 143; Jans *et al* 2015, *op.cit*., fn 124, pp. 494-496.
[202] European Parliament resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024 (INI)).
[203] T. Barkhuysen, 'Naar een Europese Algemene Wet Bestuursrecht', *NJB* 2015/89, afl. 2, p. 93.
[204] R. Widdershoven, 'Europeanisering van het algemeen bestuursrecht: stand van zaken en toekomstperspectief', in: Schueler & Widdershoven 2014, *op.cit*, fn 143, p. 9-31.
[205] *Ibid*. and M. Scheltema, 'Een Europese Awb? Ja, maar beperkt: het is geen nationale Awb?', *NTB* 2014/36, afl. 9/10, p. 275-27.

rules will prove to be too inflexible and that they will endanger the existence of typical Dutch administrative procedural features, such as the procedure for objections. At the same time, many scholars are enthusiastic about the substance of the Model Rules, as far as they regulate topics and aspects which are as yet missing in the GALA.[206] This enthusiasm concerns for instance book IV on Contracts, and elements of book III, on single-case decision making, such as the rules on evidence and on the withdrawal of decisions. It is suggested that the Dutch legislator should draw inspiration from these ReNEUAL rules when adapting or supplementing the GALA.

3.2 The joint management of EU funds and in particular the Structural Funds

III-6. ***In your country, how does the division of planning and execution competences work for operations financed by EU funds, in particular the Structural Funds, function?***

In the Netherlands every EU fund has its own organizational structure.[207] With regard to the ESF, the management has been centralized, being conducted by the Agency for Social Affairs and Employment (Agentschap Sociale Zaken en Werkgelegenheid), part of the Ministry of Social Affairs and Employment. This Agency is also responsible for the management of the Asylum, Migration and Integration Fund and the European Globalisation Adjustment Fund (EGF).
The management of the ERDF has been decentralized to four regional authorities. The operational programme of the Northern provinces is conducted by the Cooperation Northern Netherlands (Samenwerkingsverband Noord-Nederland (SNN)). This is a joint venture of the provinces Groningen, Friesland and Drenthe. The province of Noord-Brabant conducts the operational programme of the Southern provinces and the province of Gelderland is responsible for the management of the operational programme of the Eastern provinces. The city of Rotterdam conducts the operational programme concerning the Western provinces and the cities of Utrecht, Amsterdam, The Hague and Rotterdam. The Ministry of Economic Affairs supervises the financial management of these four ERDF-programmes. The European Agricultural Fund for Regional Development (EAFRD) is conducted by the Ministry of Economic Affairs as well as the provinces. The management of the European Agricultural Guarantee Fund (EAGF) and the European Maritime and Fisheries Fund (EMFF) has been totally centralized at the level of the Ministry of Economic Affairs.

Two studies have been published on the management of EU funds in the Netherlands.[208] Both studies show that the procedure for the planning and execution of EU funds is experienced as being very complicated. This has also been expressed in the Joint position paper of the Dutch central, regional and local government "The Future of Cohesion policy", published in 2010.[209] The difficulties

[206] Barkhuysen 2015, *op.cit.*, fn 190; F.J. van Ommeren and C.J. Wolswinkel 'Naar een Algemene wet bestuursrecht voor de EU', *NTB* 2014/23, afl. 7, p. 189-196; G.H. Addink, 'Europees bestuursrecht in ontwikkeling: op weg naar een Europese Awb', *NTB* 2014/24, afl. 7, p. 197-206.
[207] See for an extensive overview of the organizational structure for the management of Structural Funds and other EU funds in the Netherlands J.E. van den Brink, *De uitvoering van Europese subsidieregelingen in Nederland. Juridische knelpunten en uitdagingen* (PhD Leiden University), Kluwer 2012 and D.E. Comijs, *Europese Structuurfondsen* (PhD Utrecht University), Deventer: Kluwer 1998.
[208] J.E. van den Brink, *De uitvoering van Europese subsidieregelingen in Nederland. Juridische knelpunten en uitdagingen* (PhD Leiden University), Kluwer 2012 and D.E. Comijs, *Europese Structuurfondsen* (PhD Utrecht University), Deventer: Kluwer 1998.
[209] https://www.rijksoverheid.nl/documenten/rapporten/2010/07/16/the-future-of-cohesion-policy, last accessed on 2 November 2015.

experienced are caused by the mixed administration[210] existing within the framework of the implementation of the EU funds.[211] Its consequence is that in many cases the European subsidy legislation cannot be implemented without the national law. However, in practice the two legal orders turn out to be insufficiently in line with one another. In many cases the basic principle that European subsidy legislation has supremacy over national – including implementing - law does not resolve the observed legal problems. Thus, excluding application of national conflicting law does not mean that the European subsidy legislation can be directly applied by national implementing bodies. Furthermore, interpretation of national law in conformity with EU law does not always offer a solution either.

It appears that the problems with the execution of EU funds in the Netherlands are not only caused by the fact that the Dutch (subsidy) law is not always in line with EU law, but that they also result from the complicated and, on some points, unclear European subsidy legislation. For the Dutch legislator and administrative bodies it is not always easy to establish to what extent the European subsidy legislation extends to the Dutch subsidy relationship, or to what extent it is required to establish and/or to apply Dutch (subsidy) law. Moreover, the ESF affair in the nineties[212] – which concerned many shortcomings in the financial management of this fund on the basis of which the European Commission decided to stop all payments to the Netherlands – has resulted in Dutch officials being very afraid to make mistakes when managing EU funds. Therefore, Dutch authorities are used to interpreting European regulations as well as Dutch implementation rules very strictly. Unfortunately this has resulted in much more attention to the bookkeeping of projects financed with EU money, rather than on the results of the projects themselves. This creates the risk that the most valuable projects will not be financed with European money, but instead only projects which are easy to control.

The fact that EU and Dutch subsidy rules are insufficiently in line with one another comes in particular to the fore in the rules concerning the recovery of EU subsidies in case of irregularities. Where the European rules demand that national authorities recover every EU penny which has been irregularly spent, this is not always possible on the basis of the Dutch subsidy rules because of the Dutch principle of legitimate expectations. This difference is due to the fact that the underlying basic principles of European and Dutch subsidy law vary. Union law assumes that there exists an equal relationship between national implementing bodies on the one hand and final recipients of European subsidies on the other hand. The idea – which is also expressed in the case law of the CJEU – is that final recipients of European subsidies themselves choose to participate in a European subsidy scheme. This 'free choice' justifies that the final recipient of the European subsidy vis-à-vis the subsidy granting (European) authority does not have to be given more legal protection than a contract partner in normal commercial transactions. By contrast, the basis of the subsidy section of the Dutch GALA is that the subsidy relationship between the administrative body and the subsidy recipient implies a legal relationship governed by public law. Legal regulations about granting subsidies were partly considered important in order to protect subsidy recipients against a whimsical government. The idea that a subsidy recipient must be glad to receive any financial contribution from the government and is

[210] Mixed administration refers to a more far-reaching form of shared administration and can be said to exist where at the executive level administrations by the Member States and by the Commission are so closely intertwined that is it hardly possible to distinguish one from the other. See Jans *et al* 2015, *op cit*. Fn 124, p. 31.
[211] Van den Brink 2012, *op.cit.,* fn 195, p. 931.
[212] Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others* [2008], ECLI:EU:C:2008:165.

therefore entitled to little or no legal protection was sidelined with the entry into force of the subsidy section of the GALA.

III-7. ***In your country, is there specific jurisprudence relative to the management of Union funds, in particular Structural Funds?***

The Dutch Courts are quite often confronted with disputes concerning the management of EU funds. Most cases concern the European Social Fund – one of the European Structural and Investment Funds – and the Agricultural Funds (the European Agricultural Fund for Rural Development and the European Agricultural Guarantee Fund). Most disputes concern the recovery of European subsidies because the Dutch authorities claim there has been fraud or irregularities. In such cases the relevant Union regulations oblige national authorities to withdraw the European subsidy.

In answering the above question we will focus on three interesting aspects in Dutch case law concerning EU subsidies. First of all, the principle of legitimate expectations, as in many cases beneficiaries of EU subsidies plead that the recovery of EU subsidies by the Dutch authorities is unlawful because of legitimate expectations. Secondly, the principle of legality, as in two cases the Dutch administrative court, *Raad van State* (Council of State), referred the important preliminary question to the CJEU asking whether Dutch authorities could directly derive the power to recover EU subsidies from EU law. Finally, we will reflect on the role of EU soft law in jurisprudence of Dutch courts related to the question whether there have been irregularities.

Principle of legitimate expectations

The principle of legitimate expectations (*vertrouwensbeginsel*) aims to protect individuals against the arbitrary actions of a public authority and, to this end, requires the state to act as far as possible in conformity with legitimate expectations to which it has given rise.[213] In Dutch administrative law this principle is one of the most important legal principles by which acts of the administration are judged.[214] As has been stated above, in many Dutch recovery cases beneficiaries of EU subsidies attempt to plead legitimate expectations, which makes the recovery of EU subsidies by the Dutch authorities unlawful. They argue that earlier decisions of Dutch authorities in which they were granted the European subsidy created these expectations. In this regard it is important to note that in the Netherlands the principle of legitimate expectations in relation to the revocation of unlawful subsidies (Article 4:49 *Algemene wet bestuursrecht* (GALA) offers on two points more protection than the unwritten European principle. In the first place, the Dutch principle can operate *contra legem*, whereas the European one cannot. This means that in some cases the subsidy cannot be recovered, although it is clear that the subsidy is unlawful. In the second place, the Dutch rules require less diligence on the part of individuals relying on an expectation created by erroneous information from the competent authorities. The standard is 'the (prudent) man in the street' and not – as it is for the European principle – a prudent and diligent trader, who is quickly supposed to recognise errors on the part of the authorities. Errors are expected to be recognised if they are manifest: for more complex matters one should be able to trust the competent and usually specialized authorities.

In situations where the recovery of European subsidies in case of irregularities has not been

[213] Jans *et al* 2015, *op.cit*., fn 124, p. 207.
[214] Jans *et al* 2015, *op.cit.*, fn 124, p. 209.

Europeanised by a Union regulation and therefore is based on national law, Austrian, German and Danish judges asked the Court of Justice whether they were also allowed to apply the national principle of legitimate expectations when this principle offered more protection. Prior to 2008 the CJEU answered this question affirmatively, although application of the national principle had to satisfy the requirements of equivalence and effectiveness. However in the judgment *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others*[215] following preliminary questions of the Dutch Council of State, the Court seems to apply the unwritten European principle to a situation in which the national authorities acted on the basis of national law in order to recover wrongly paid European aid.[216] The Court provides that it is for the national court to assess whether the principles of legal certainty and the protection of legitimate expectations, *as they are understood in Community law*, may legitimately be relied on as a defence against claims for repayment by the national authorities. In *Agroferm AS,*[217] a Danish case, the Court asserts that line of reasoning and applies the European principle stating that it cannot be relied upon against an unambiguous provision of European Union law; nor can the conduct of a national competent authority that is in breach of European Union law, give rise to a legitimate expectation, on the part of a trader of beneficial treatment contrary to European Union law. From this line of reasoning it follows that there is no room for national authorities and courts to apply the Dutch principle of legitimate expectations in recovery cases. As a consequence, in cases concerning the recovery of European subsidies the Dutch Council of State applies the unwritten European principle of legitimate expectations and interprets Article 4:49 of the GALA in conformity with the European requirements.[218]Thus the Dutch principle of legitimate expectations has *de facto* become ineffective in the area of EU subsidies.[219]

The case law of the CJEU as well as the case law of the Dutch Council of State has been critically received in Dutch legal scholarship.[220] The strict view of the CJEU is considered to offer insufficient protection to the citizen that acted in good faith on the basis of information/indications competent authorities provided. This is at odds with the notions of legal certainty and legitimate expectations that have an important place in the Dutch legal system.

Principle of legality

The structural funds regulations contain, in every programme period,[221] an obligation for Member States to withdraw a European subsidy whenever an irregularity is at stake. However, the national subsidy provisions which are also applicable to the cancellation of European subsidies limit the possibility of national authorities to cancel and recover the European subsidy. The Dutch Council of State raised in two cases the preliminary question of whether the aforementioned obligation of the

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[215] Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Others* [2008 ECLI:EU:C:2008:165]; Davidson wrote an extensive commentary on this judgment. See J. M. Davidson, 'The Full Effect of Community Law – An Increasing Encroachment upon National Law and Principles', *REALaw* 2008, pp. 113-126.

[216] Davidson 2008, *op. cit.,* fn 202.

[217] Case C−568/11 *Agroferm AS* [2013], ECLI:EU:C:2013:407.

[218] See for example Dutch *Raad van State* 23 June 2010, ECLI:NL:RVS:2010:BM8827. See also Jans *et al* 2015, *op.cit*, fn 124, p. 230.

[219] Van den Brink and Den Ouden 2014, *op.cit*., fn 184, p. 86.

[220] Van den Brink and Den Ouden 2014, *op.cit*., fn 184, p. 86; Jans *et al* 2015, *op.cit*, fn 124, p. 225.

[221] See for example Article 143(2) of Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.

Member State, in the absence of a legal basis in national law, can provide for a legal basis for a decision of a national authority to alter, to the detriment of the beneficiary, the amount of an irregularly paid European grant. As has already been discussed under question III-2, the CJEU answered this question affirmatively.[222] Some scholars have criticized this case law for the reasons that the European regulation contains an obligation only for the *Member State.*[223] On the basis of the Dutch legality principle, an institutional competence for the specific *national authority* should be provided for in national law.[224] However, the focus of the CJEU is on the Union obligation to recover an irregularly paid European grant and the protection of the EU's financial interests and, hardly surprising, not on internal legality problems in the Netherlands.

European soft law

Jurisprudence related to the management of EU funds regularly contains references to soft law of the European Commission, such as working documents or interpretative notes that provide guidance in the implementation of EU subsidy regulations. The Dutch Trade and Industry Appeals Tribunal, one of the highest administrative courts in the Netherlands, acknowledges and accepts the use of European soft law by the Dutch administration as a reference point when assessing the eligibility of aid applications.[225] However, the Trade and Industry Appeals Tribunal does not accept that the Dutch administration strictly adheres to the guidance the European Commission has provided. This becomes clear in the so-called 'fifty trees' rulings handed down in the year 2010 and 2011.[226] The competent authority uses the Working Document for on-the-spot checks[227] not as a guideline, but rather as a legally binding act.[228] The Trade and Industry Appeals Tribunal considers this practice unacceptable for the reason that it runs counter to the very nature of this working document.[229] The court requires that an individual assessment is made as prescribed by the underlying EU subsidy regulation.[230] What is more, the Tribunal applies the same reasoning in situations where the provisions of the same working document are transposed into a ministerial decree, an act having legally binding force.[231] It again requires the Dutch minister to make an individual assessment as required by the provision laid down in the EU subsidy regulation.[232] Interestingly, the Tribunal does not call into question the validity of the soft law document. In Dutch legal scholarship it is argued that in this situation, a preliminary question on the validity of the working document would have been appropriate.[233]

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[222] Case C-599/13 *Somvao* ECLI:EU:C:2014:2462; see already in that direction, Case C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening*, ECLI:EU:C:2008:165.
[223] See e.g. Jans *et al* 2015, *op.cit*., fn 143, pp. 24-31.
[224] See also Jans *et al* 2015, *op.cit*., fn 143, p. 26.
[225] For instance: CBb 2 October 2009, ECLI:NL:CBB:2009:BJ9418, par. 5.2; CBB 30 November 2006, ECLI:NL:CBB:2006:AZ3568, par. 5.6; CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425 par. 2.6.
[226] CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425 par. 2.6; CBb 21 September 2011, ECLI:NL:CBB:2011:BU1249, par. 2.3.3.
[227] Working Document AGRI/60363/2005-REV1, on-the-spot checks of area according to articles 23-32 of Commission Regulation (EC) No 796/2004.
[228] CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425 par. 2.6.
[229] CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425 par. 2.6.
[230] CBb 27 October 2010, ECLI:NL:CBB:2010:BO2425 par. 2.6; CBb 21 September 2011, ECLI:NL:CBB:2011:BU1249, par. 2.3.3.
[231] Namely *the Regeling GLB-inkomenssteun 200 9 (*the act has been has been repealed at 1 January 2015, see *Stcrt.* 2014, 36127.
[232] CBb 13 March 2013, ECLI:NL:CBB:2013:BZ6298, par. 4.2; CBb 16 September 2013, ECLI:NL:CBB:2013:152, par. 6.6.1.
[233] See J.E. van den Brink and J.C.A. van Dam, *Administratiefrechtelijke Beslissingen* 2014/187, case note to CBb16 September 2013, ECLI:NL:CBB:2013:152. See also J.E. van den Brink and C. van Dam, Nederlandse bestuursrechters en Unierechtelijke 'beleidsregels', JB*plus* 2014, pp. 3-27 and C. van Dam, De doorwerking van Europese administratieve soft law: in strijd met Nederlandse legaliteit, *Netherlands Administrative Law Library*,

III-8. *How does the cooperation between the Court of Auditors of the European Union and the corresponding organizations of your country function?*

The cooperation between the European Court of Auditors and the national Supreme Audit Institutions (SAI's) is based on Article 287 TFEU. These bodies share a contact committee within the framework of which there is periodic deliberation on important issues, like currently banking supervision. From this, shared audits may ensue. The Netherlands, Germany and the European Court of Auditors work together on this.[234] When audits also concern the Netherlands, the Dutch Court of Audit (*Algemene Rekenkamer*) will be informed and enabled to take part in missions of ECA auditors.

The SAI's, including the ECA, are also united in the INTOSAI (International Organisation of Supreme Audit Institutions) and EUROSAI (European Organisation of Supreme Audit Institutions). In this framework audit standards are being developed; the ISSAI's that are related to international audit standards.

III-9. *If you wish to do so, present other relevant examples of shared management which reveal problems of division of competences between the EU and its Member States.*

We refer here to the answer given under question III-5.

January 2013, also available at: http://www.nall.nl/tijdschrift/nall/2013/01/NALL-D-12-00008, last accessed on 3 November 2015.

[234] http://www.eca.europa.eu/sites/cc/en/Pages/About.aspx, last accessed on 2 November 2015.