



A NATION FREE TO CHOOSE



NATIONAL SOVEREIGNTY OR EU LAW?

National self-determination is a key principle of the UN Charter, 1945.

However, under the terms of our EU membership, the **Court of Justice of the European Union** has the final say in interpreting treaties and legislation. Commonly known as the 'European Court of Justice' (ECJ), it can require member states to take "*any necessary measures*" to comply with its judgements, and impose penalty payments "*as seen appropriate*" (potentially unlimited fines) for non-compliance.

The ECJ has ruled [1] that

- EU members must obey EU law, and cannot override it with domestic measures
- This holds even if it is alleged that the national constitution has been violated by EU law
- EU membership obligations produce a **permanent** limitation of national sovereign rights.

A key concept is the '**acquis communautaire**' – 'the occupied field', meaning a legal ratchet.[2] Under this, member states commit to both the entire body of EU law, including ECJ rulings, and EU goals. This binding ratchet has been carried over through the Treaties of Maastricht and Nice into the current Treaty of Lisbon.

To even discuss the return of lost powers would be illegal under EU law, as it would go against the goals of the EU (European integration, ever closer union, political, economic and monetary union) and the letter of the law (the *acquis*).

Therefore if EU member states wanted to exercise powers or take part in forms of national co-operation not permitted by EU obligations, they would effectively need to leave the EU. There is no middle way.[3]



Footnotes to 'A Nation Free To Choose'

The EU was formerly known as the EC / EEC, and before 2009, EU law was 'EC law' / 'Community law'.

[1] EU legal supremacy was established well before Ted Heath's assurances on the erosion of sovereignty. "Member States' courts... were bound to apply Community law. It could not be overridden by domestic legal provisions however framed without being deprived of its character as Community law." (*ECJ, Case 26/62*)

This was tested in 1970 - although the (West) Germans dragged their feet, they eventually caved in. "No provision of municipal law may prevail over a Community law. The validity of a Community act or its application remains unimpaired, even if it is alleged that the basic rights of the national constitution were violated" (*Case 11/70, re: an alleged violation of the German national Basic Law by a Community regulation*)

The ECJ had already decided:

"The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a **permanent** limitation of their sovereign rights... against which a subsequent act incompatible with the concept of the Community cannot prevail" (*Case 6/64*).

[2] "The *acquis communautaire* is the entire body of Community law, including Treaties, all secondary legislation, decisions [etc]... by virtue of the concept, member states commit themselves to the goals of the Community as well as its law." (*Cases 161/78 and 44/84*).

The Treaty of Lisbon (ref. TEU, Title I, Article I) inherited this ratchet from the Treaty of Nice – Title I, Art. 3. (See also Treaty of Nice, Title I, Art. 2; Title II, Art. 10 for more on EU membership obligations).

This ratchet is a reason why the EU decided that Greece could not stay in the EU but leave the Euro and have its own currency. It would also explain why David Cameron's reported move to 'partially withdraw' from the costly Working Time Directive was not followed through. Ditto, before the 1975 EEC referendum, Foreign Secretary Jim Callaghan only renegotiated Britain's EU membership in **secondary** matters, like the scale of payments or trade terms with New Zealand. Return of powers was not touched upon, for obvious reasons, as it would have given the game away that repatriation was a mirage.

There are understandably some recent misconceptions. For instance, there is talk of 'repatriating powers on justice and home affairs (JHA) agreed before the Lisbon Treaty'. However, Title VII, Art. 44 of the Treaty of Nice makes it clear that these JHA **agreements** are **not** part of the 'acquis communautaire'.

Whereas **administration** of the Common Fisheries Policy has been devolved to national level - it doesn't give the UK the right to independently decide or change EU policies.

'Associate Membership of the EU' (obtained by countries like Switzerland) isn't actually 'EU membership' without the obligations – it is a colloquialism for an Association Agreement.

The Treaty of Lisbon has some small print about the EU 'choosing not to exercise power any more'. (ref. TFEU, Declaration 18). It actually relates to the repeal of individual laws and, being a Declaration has no legal force, so the legal precedent does not change. The EU could theoretically decide to cease to exercise some powers in favour of a global governance institution like a climate change body, but it would **not** empower member states to act in breach of any wide-ranging EU obligations.

Any Treaty revisions are tasked to the European Council, which as an EU institution is bound to support the political objectives of the EU, legal continuity and consistency (ref. TEU, Title III, Art. 13).

[3] The 1969 Vienna Convention on Treaty Law also supports the principle of self-determination and independence and would indicate how a post-EU relationship with our neighbours might be concluded. It would seem that, by default, if the UK left the EU, existing operational arrangements would remain, but on an **inter-governmental** basis. A comprehensive set of new arrangements would need to be put in place, but this would be no stranger to the other EU countries, who have just agreed an 'ESM' bailout Treaty.

Key Reference Material

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- The EU's Acquis Communautaire, Standard Note, SN/IA/5944, House of Commons Library, 2011
- Repatriating EU Powers to Member States, Standard Note, SN/IA/6153, House of Commons Library, 2011