Subsidiarity and Proportionality in European Law

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The principle of subsidiarity is enshrined in Article five of the Treaty of the European Union, requiring action from the European Community institutions only if national action is insufficient in accomplishing the objectives of the proposed action. Often required to determine the limitations of actions of a national or Community actor within the Treaty, the European Court of Justice has begun developing an inferred definition of the principle of subsidiarity through its rulings and reasonings. Subsidiarity is inherent in the reasoning of the case of Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn; however, the principle is undermined in the Court’s final ruling in order to sustain the legitimate hierarchical authority of the ECJ in all matters relating to the internal market. This paper will present the case and discuss the arguments for subsidiarity in the ECJ’s Omega ruling and the undermining of the principle within the same argument and the final ruling.

I The Case Omega Spielhallen-und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn

Events began in 1994, prior to the public opening of a “laserdrome” in Bonn, Germany. The community of Bonn determined that the community as a collective would not tolerate the existence of a “laserdrome” installation; the “playing at killing” to the
collective citizens constituted, in the legal complaint, an affront to human dignity, a fundamental human right enshrined in the first sentence of the first paragraph of the German Basic (Constitutional) Law.\(^1\) The Bonn police authority forbid the German company Omega that operated the Laserdrome from “facilitating or allowing in its [...] establishment games with the object of firing on human targets using a laser beam or other technical devices (such as infrared, for example), thereby, by recording shots hitting their targets, ’playing at killing’ people.”\(^2\) The police threatened a fine should the company continue the game. The law of the North Rhine-Westphalia Police authorities determined that “The police authorities may take measures necessary to avert a risk to public order or safety in an individual case.”\(^3\)

Omega’s objection to the Cologne District Authority’s decision in November 1995 was rejected, as was its ensuing court action in the Cologne Administrative Court in September 1998. Omega’s appeal to the Higher Administrative Court for the Land of North Rhine-Westphalia also failed.\(^4\) Omega then appealed to the Federal Administrative Court of Germany, the Bundesverwaltungsgericht. Among its legal objections, Omega included a point of European Community law; the contested order, Omega argued, infringed the free movement of services protected under Article 49 EC as the Omega laserdrome imported necessary parts for the laser game from the British company Pulsar.\(^5\)

The Bundesverwaltungsgericht believed that German national law upheld the earlier dismissals; however, the objection concerning Article 49 caused the court

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\(^1\) Para. 11, *Omega Spielhallen-und Automatenaufstellungs-GmbH v. Oberürgermeisterin der Bundesstadt Bonn* C-C36/02.
\(^2\) Para. 5 Omega Judgment.
\(^3\) Para. 6 Omega Judgment.
\(^4\) Para. 8 Omega Judgment.
\(^5\) Para. 9 Omega Judgment.
uncertainty; was the national law was compatible with Community law?\textsuperscript{6} Did the measure restricting the laserdrome for the protection of public policy violate the Community law concerning the free movement of services? The European Court of Justice (ECJ) determined that the concern was valid, despite the Bonn police authority protest that the British contract occurred after the laserdrome had been forbidden negating the ECJ competence in the case. The ECJ ruled that

“Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that activity is an affront to human dignity.”

The ECJ determined that the German people were in this case able to assert their interpretation of a fundamental human right without menacing the fundamental freedom of the right to provide services protected in Article 49 EC.

II. Subsidiarity in Community Law

The principle of subsidiarity, found in Article 5 of the Treaty of the European Union (TEU) or Treaty of the European Community (TEC), establishes that the Community and its institutions, in this instance the ECJ, “shall take action…only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”\textsuperscript{7} The Community will participate in a national measure only if the measure taken by the Member State interferes in the fundamental economic freedoms that are exclusive Community competences and/or violate

\textsuperscript{6} Para. 10 Omega Judgment.
\textsuperscript{7} Article 5 (3) Treaty of the European Union.
Community objectives and principles, such as proportionality. In *Omega*, the necessity of the ECJ opinion arose from the potential effect of the Bonn police restriction on the Community fundamental freedom of Article 49, the free movement of services. Pulsar’s services were legally practiced in the United Kingdom (UK); Germany’s restriction of Pulsar’s services within the state derogated from the Community market rules, yet the German courts found that the German Constitution permitted this restriction. The *Omega* case re-exposed a possible conflict between the two coexisting legal systems.\(^8\)

The European Community legal system both upholds and threatens the authority of the Member State legal systems. Through the subsidiarity principle, the ECJ acknowledges the necessity of the various national and domestic legal systems. The ECJ observes the formal legal “levels” suggested in the subsidiarity principles, but it also derives substance from the Member States’ legal traditions. The TEU in Article 164 states “The Court of Justice shall ensure that in the interpretation of the Treaty the law is observed.” The “law” is recognised again in Article 173 (1) when it is stipulated that “infringement of this Treaty, or of any rule of law relating to its application” can lead to judicial review and annulment. The “law” to which the Treaty refers is not specific; assumedly it is that which is common to the Member States, those “general principles common to the laws of the Member States.”\(^9\) The ECJ depends upon the Member States for legal traditions; yet it threatens to usurp those traditions in a case like *Omega*.

\(^8\) A former case, *Maastricht-Urteil v. Bundesverfassungsgericht*, in the German Court has judged that no treaty (i.e. the TEU) can supersede the German Basic Law (Constitution of Germany), but that the Member States are “Masters of the Treaties.” Due to the judgment in this case, there is a tenuous relationship between the ECJ and the Bundesverfassungsgericht as *Bundesverfassungsgericht* declared that the EC and its law exists at the whim of the states, thus inferring a possible negation of the legal hierarchy of Community law espoused by the ECJ.

\(^9\) Article 215 (2) TEU.
The reasoning of the ECJ in the Omega case upholds the German Constitutional interpretation of the fundamental right of human dignity while asserting a Community legal basis for the interpretation. In doing so, the ECJ both makes an argument for the Community principle of subsidiarity and then undermines the same argument in favour of its own authority. The Omega ruling’s tension between the application of a domestically interpreted principle and acceptance of this interpretation as a specifically permissible derogation from a larger Community norm to insure a separate less uniformly defined Community norm illustrates several controversial aspects of the principle of subsidiarity. At which “level” is the most appropriate action able to achieve the most appropriate objectives, the national or the Community level?

III. The Argument for Subsidiarity in the Omega Ruling

Pogge and Beitz treat national origin as “a contingent fact about a person that should not be permitted to deform the person’s life” in a social contract. Life’s contingencies (national origin, ethnicity, economic strata, social class, etc.) in many respects imply the inequality of individuals even prior to birth (e.g. maternal malnutrition); a social contract understood from this perspective tries to remedy inequalities through legislation. In the Omega ruling, the ECJ recognizes the need to eliminate discrimination based on nationality to preserve the equality of the internal market’s free exchange of services. Article 49 (1) TEC establishes that “Within the framework of the provisions set out below, restrictions on the freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who

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are established in a State of the Community other than that of the person for whom the services are intended.”\textsuperscript{11} Case law supports the uninhibited right of foreign EC nationals to provide services that are legally provided within one Member State to the nationals of another EC Member State. Thus the ECJ in its \textit{Omega} ruling required the consideration of the maligned economic rights of Pulsar as a legal “person” or entity within Community law.

Legal parties that fear being politically marginalized when exercising economic rights within the national legal system of one Member State have access to the economic rights promised by the European Community, provided that these parties exercise these economic rights in one or several different Member States. The German Omega company, through contracting with the British provider Pulsar, enabled these economic rights and thus could contest their misapplication in German national court, which would then be required to refer a related question to the ECJ. The ECJ understood that “the contested order was adopted independently of any consideration linked to the nationality of the providers or recipients of the services placed under a restriction;”\textsuperscript{12} yet this was not a sufficient reason for the contested order’s exemption under Article forty-nine. If the free trade of any service is hindered due to a national law, this provides sufficient reason for the national law to be considered for repeal at the Community level. The ECJ has reasoned consistently that the “observance of the principle laid down in Article 49 EC requires not only the elimination of all discrimination on grounds of nationality but also the abolition of any restriction liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides

\textsuperscript{11} Article 49 (1) TEU.
\textsuperscript{12} Para. 29 \textit{Omega}. 
similar services.” The fact that Pulsar’s economic rights have been restricted in Germany when compared to its economic rights in other Member States is condemned within the context of pure Community economic law. From this aspect, the ECJ action is necessary; city, district, and national (both that of Germany and the UK) action had been unable to address Pulsar’s economic rights. The local and national system had proven insufficient in their application of Pulsar’s fundamental freedoms; the principle of subsidiarity determines that the ECJ must thus participate “as the objectives of the proposed action cannot be sufficiently achieved by the Member States.”

However, Article 46, paragraph 1, applicable to Article 49 through the use of Article 55, states “The provisions of this chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.” Here enters the argument of the German state; the measures taken under the German Constitution were to protect a fundamental human right, dignity, towards which the “commercial exploitation of a ‘killing game’ in Omega’s ‘laserdrome’ constituted an affront.” The ECJ, while concerned with Pulsar’s freedom to provide services, has a growing case law evidencing the Court’s concern with the importance of fundamental human rights as these relate to the use of the internal market and its relevant freedoms.

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14 Article 5 (2) TEU.
15 Article 46 (1) TEU.
16 Para. 11 Omega.
The ECJ reasoning considered the arguments and the results of possible opinions. To allow Germany to decide what constitutes an “affront” to human dignity, specifically a “killing game” like that offered by the Omega laserdrome, permits Germany to uniquely (within the EC) define through concrete action “a common legal conception in all Member States.”\(^{17}\) To allow for variations in enforcement of free services in Member States could be disruptive to the internal market rules. Projected into the future, an ECJ endorsement of the German decision might imply possible harmonisation of such an action throughout the Member States. The ECJ reasoned “the concept of ‘public policy’ in the Community context, particularly as justification for a derogation from the fundamental freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions.”\(^{18}\) “[H]owever,” the ECJ countered, “the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another.”\(^{19}\)

This reasoning contains ideas derived from the principle of subsidiarity. Neil MacCormick claims “to think normatively is to think judgementally;”\(^{20}\) however, this does not imply that both types of thought exercised in the same circumstances by separate individuals must achieve the same conclusion. To inevitably link the two in a singular systemic conclusion is to deprive both of their essential uniqueness. Judgement, as MacCormick observes, is personal and thus individually applied, perhaps in the name of a universal norm, but nevertheless, different parties, or, in the case of Omega, different

\(^{17}\) Para. 15 Omega.

\(^{18}\) Para. 30 Omega.

\(^{19}\) Para. 31 Omega.

states, can perceive opposing judgements as fulfilling the same normative requirements. How can this be permissible in the case of the limitation of the freedom to provide services if different states are to be members of the same economic community?

The answer is found in the principle of subsidiarity. First, the Court of Justice establishes the Member States as individual identities within a common legal system. Grotius observed that the creation of a social contract, such as a Constitution and the legislation derived from it, arises from a recognised human need for fellowship and respect; the enactment of this fellowship and respect through laws and legislation is an expression of community identity and its common values. In an international system, state communities preserve their cultures and identities through the mutual respect of such social contracts in international agreements; in *Omega*, the ECJ acknowledges this need for respect of the Member States domestic and cultural values when it refers to “a margin of discretion.” In the *Omega* case, Germany seeks to preserve a rule of its social contract—the Constitution, the German Basic Law. The value and identity that the German Federal High Court desires to preserve is embedded in a uniquely German concept of “human dignity.” “Playing at killing” in the laserdrome is corrosive to this concept, determines the German Federal High Court.

Identity, Advocate General Stix-Hackl notes, is an essential aspect in the concept of human dignity: “That link between the concept of dignity and those of the self-determination and freedom of mankind clearly shows why the idea of the dignity of man also often finds expression in other concepts and principles that have to be safeguarded,

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such as personality and identity.”

These concepts and principles are inferred rather than overt; they are protected “in the context of the fundamental concordance of values in relation to the status of human dignity under relevant national law and in Community law.”

Each society will have a specific context, which composes the society’s identity, in which it will infer and interpret the value of human dignity; the normative thinking will necessarily be judgmentally applied differently in different Member States according to the social context, the “specific circumstances,” in which it must be applied—according to the Member State’s identity.

A “margin of discretion” for this identity, explains AG Stix-Hackl, is important in the concept of public policy, a concept the aspects of which, unlike human dignity, “have to be strictly interpreted” in order to prevent the misapplication of Community law that would be attributed to variant Member State determinations of public policy. Here, the uniform application of Pulsar’s freedom to provide services throughout the EC Member States is reinforced. Despite a national identity, the Member State is a voluntary member of an international community, the European Community; the international community in fact permits the Member State to hold a national identity through recognising its individual membership in the EC. Grotius treats this type of state sovereignty that can be expressed and preserved through an international agreement as a valuable manifestation of human autonomy, a unique manifestation that is made possible through the existence of other states.

The case-law of the ECJ “attempts to strike a balance between, on the

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23 Para. 107, Advocate General Stix-Hackl *Omega* Opinion.
24 Para. 31 *Omega*.
25 Para. 98, AG Stix-Hackl *Omega* Opinion.
one hand, the necessary stemming of exceptions to the fundamental freedoms assured under the primary legislation and the associated possibilities of justification, and, on the other, the scope of discretion afforded to Member States.”  

The ECJ wishes to preserve the values and identity of the Member States while upholding the uniformly effected Community freedoms throughout the Member States as agreed to by the Member States in the creation of the TEC.

The ECJ desires for a Community level of actionable objectives while preserving the actionable objectives essential to the national identity of a Member State, such as its domestic protection of human dignity, are embodied in the principle of subsidiarity. The recognition of the need to restrain from an action that can be more effectively achieved at a national level is inherent in the respect for national identity and legislative autonomy in areas outside of the Community internal market competence. Subsidiarity represents this important tension between the different levels of possible intervention and the effects of that intervention at the different levels upon the different participants. The principle of subsidiarity demands that actions be taken at the most appropriate level at which the desired effects will be best achieved. The ECJ reasoning considers possible action and its effects in its rationalisation of its final ruling before determining the level of its intervention. What reasoning influences its final decision of non-intervention in the German expression of the protection of human dignity?

Again, the Court considers the fundamental right and the best level of its interpretation in action, echoing the principle of subsidiarity. AG Stix-Hackl observes the diversity between the criteria by which to interpret a fundamental right like that of “human dignity” and that of “freedom of expression” and “freedom of assembly.”

27 Para. 96, AG Stix-Hackl *Omega* Opinion.
addressed in the *Schmidberger* case, where the exercise of the last two fundamental rights was permitted despite their infringement upon the fundamental freedom of the movement of goods.²⁸ In both *Omega* and *Schmidberger*, the ECJ examined “the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty.”²⁹ However, in *Schmidberger*, exercise of the relevant fundamental rights in opposition to a Community fundamental freedom, despite Court declarations of a “margin of discretion,” received a “no less restrictive means” criterion for legitimacy.³⁰ In *Omega*, AG Stix-Hackl comments “Because of the inchoate nature of the concept of human dignity…it is almost impossible—unlike in the *Schmidberger* judgement—immediately to equate the substance of the guarantee of human dignity under the German Basic Law with that of the guarantee of human dignity as recognised by Community Law.”³¹ Because human dignity requires a context in which it can be interpreted, and because that context is dependent upon the society which creates that context, “human dignity” cannot be evaluated at the Community level; the Community level is too broad. Conversely, the “freedom of expression” and “freedom of assembly,” due to the characteristics by which they are generally exercised, possess more particular limitations at a more distant level concerning their implementation in opposition to a Community fundamental freedom.

The ECJ’s reasoning in accordance with the subsidiarity principle in the opinion of Stix-Hackl is made more obvious. The ECJ recognises its inability to appropriately intervene in this legal decision of the German Federal High Court. The protection of the

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²⁸ In *Schmidberger*, protesters in Austria disrupted traffic causing impediment to the free movement of goods along the road where the protests occurred.
²⁹ Para. 77, Case C-112/00, Schmidberger v Austria [2003] ECR I-5659.
³⁰ Para. 92-93, Case C-112/00, Schmidberger v Austria [2003] ECR I-5659.
³¹ Para. 92, AG Stix-Hackl Omega Opinion.
concept of human dignity is an objective that can be “sufficiently achieved by the Member State”\textsuperscript{32} and would in fact be impractical if implemented through a judgement by the ECJ, unlike the more explicit fundamental rights of expression and assembly. The ECJ is too far-removed from the national effects of the interpretation of human dignity to achieve the desired objectives of a proposed action. The normative ideal of human dignity can be more effectively acted upon by the national legal structures of the different Member States, which better comprehend the social context in which the fundamental right must be protected. This conclusion is in strong concord with the principle of subsidiarity.

Russell Kirk observed that Alexis de Tocqueville opposed the “centralising impulse of modern democracies” because this limits individual interpretation of one’s social or legal significance. In the \textit{Omega} case, the ECJ avoids this “centralising impulse” through its reasoned respect consistent with the principle of subsidiarity. Pulsar is permitted to assert its fundamental Community freedoms, recognised and respected at the Community level of action; however, Germany is able to affirm its collective social identity in respect to the protection of human dignity with the support and acknowledgment of the Community. Both Pulsar and Germany are legal entities with specific rights at the Community level; both are subject to action at the level of law that produces the most immediate effects to the German constituents that made the complaint against the laserdrome, provided that, in accordance with the principle of proportionality, the effects of the legal action do not affect the rights of those uninvolved in the disagreement. The principle of proportionality is that by which the effects of a legal action are measured, and thus is essential in the application of the principle of subsidiarity.

\textsuperscript{32} Article 5 (2) TEU.
subsidiarity, which seeks to insure that “the scale or the effects of the proposed action,”\(^{33}\) the proportional effects of the proposed action, are achieved at the most relevant level of effect, the level most in proportion to the action being taken.

IV. Undermining the Argument for Subsidiarity in the Omega Ruling

From a Wilsonian perspective, a system is most inclusive of the society and less discriminatory to the individual when clear goals exist while the administrations involved in achieving these goals have autonomy in their achievement. Emilios Christodoulidis described the “endemic misrecognition of all systems,”\(^ {34}\) how a system cannot be literally applied in each and every society, and how in fact each society will interpret legal objectives in a separate context. A community by definition shares common values and thus is best able to define these common values through community actions; in order to account for the difference in perception in the achievement of Community objectives in Member States, the subsidiarity principle supposedly allows for a “margin of discretion” among the Member States in enforcing certain Community law.

However, this “margin of discretion” is “within the limits imposed by the Treaty.”\(^ {35}\) The ECJ in its Omega ruling does not want to limit the power of the Court to intervene when the internal market fundamental freedoms are affected. Despite the Omega case reasoning that corresponds to the principle of subsidiarity, the ECJ attempts to undermine the “levels” at which legal decisions can be made by incorporating disparate levels of legal decisions into the Court’s jurisdiction, into one legitimate final

\(^{33}\) Article 5 (2) TEU.


\(^{35}\) Para. 31 Omega. (Also in Para. 18 Van Dyun, and Para. 34 Bouchereau.)
“level” of decision-making, that of the ECJ. In its reasoning that subordinates all other legal systems to the final approval and authorisation of the ECJ, the Court undermines the principle of subsidiarity.

The ECJ accepts the case as admissible over the objections of the Bonn authorities that point out the agreement between Omega and Pulsar arose after the initial German prohibition and thus had no actual Community effect and no admissibility under the ECJ. The ECJ decides that admissibility is not contingent upon the established facts but on the “forward-looking nature and the content of the prohibition which it lays down, that order is capable of restricting the future development of contractual relations between the two parties.” The ECJ establishes its right to intervene prior to an actual conflict but instead in anticipation to a possible conflict with Community law. This pre-empts the principle of subsidiarity; the intervention of the ECJ at the national level is in response to an objective of the Community Court of Justice, not the objective addressed in the proposed action of the case. The Community is concerned with the preservation of its fundamental freedoms and its ability to rule on all limitations concerning these freedoms, not in the immediate effects of the limitations on the German constituents concerned with the protection of human dignity or even in the immediate effects of the proposed action on the British company Pulsar. AG Stix-Hackl notes as much in her opinion,

“Where the Community provision affords the Member States a degree of discretion or a choice between various modes of implementation, they must exercise their discretion with respect for Community fundamental rights so that the national rule in question is therefore applied in a manner reconcilable with Community protection of fundamental rights.”

36 Para. 21 Omega.
37 Para. 64, AG Stix-Hackl Omega Opinion.
This concern does not coincide with subsidiarity; its objectives are clearly Community-oriented. John Rawls describes the social contract as creating the principles of justice as a product of a contract individuals make “for mutual advantage,” to exit Hobbes’ State of Nature and govern themselves and cooperate via law.\(^{38}\) Generally, Rawls’ “mutual advantage” is economic. Nussbaum points out that the representatives of government never fully represent the interests of most of the government’s peoples. The government is limited in its representation by the current power structures and the more salient and relevant policies.\(^{39}\) In the case of the European Community, the salient policies are economic; the principles of Community justice are market-oriented. Maintaining the internal market rules and regulations is the main purpose of the European Court of Justice. Therefore, any infringement on the fundamental freedoms of the market requires the intervention of the Court of Justice despite “the scale or effects of the proposed action”\(^{40}\) on related parties. In the primacy of the ECJ’s economic jurisdiction, all other effects are subject first to this consideration, collapsing the levels of intervention espoused in the subsidiarity principle. “Measures which restrict the freedom to provide services may be justified…only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures.”\(^{41}\) The ECJ determines if the national measure fits this particular criterion; it is not a nationally limited decision notwithstanding the scale of its immediate effects.


\(^{40}\) Article 5 (2) TEU.

\(^{41}\) Para. 36 *Omega*. 
James L. Gibson and Gregory A. Caldeira analysed the “legitimacy,” defined by the authors of the study as an “empirical concept referring to the patterns of beliefs among the mass public;”\textsuperscript{42} of the European Court of Justice after the surprisingly difficult ratification of the Maastricht TEU in 1992. In their findings is the reflection that the ECJ lacks the “legitimacy” among Community citizens that is found for the national high courts, “closer” and perceived as more accountable to their national constituencies.

Gibson and Caldeira make a point that is important in the ECJ Omega ruling:

“Perception that an institution is legitimate, that it has the authority to make the decisions it makes, do not require a great deal of understanding of the actual operation of the institution, even though such perceptions and expectations can become extremely important to the effective functioning of courts.”\textsuperscript{43}

In line with this concept, the ECJ reasoning is not in keeping with the principle of subsidiarity but rather seeks to override this principle in pursuit of its own perceived legitimacy. In its reasoning, the ECJ invalidates the authority of the German Federal High Court to determine what constitutes the value of “human dignity” and instead imposes its own conception of what is permissible as derogation to the rules of the internal market. In this way, the ECJ does not change the ruling of the German legal system, which could lead to a Community conflict concerning legitimacy and the ideas found in the principle of subsidiarity (specifically which legal system has a more valid claim to the objectives of the proposed actions), but rather absorbs the German legal system into the ECJ judicial hierarchy. The ECJ rules on the permissibility of the German High Court to impose a very specific restriction on the fundamental freedom of Article forty-nine.


The ECJ uses the principle of proportionality to usurp the subsidiarity principle through interpreting the principle of proportionality as the means by which the ECJ can exclusively determine the permissibility of internal market derogation: “apparent from well-established case-law… the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State.” Having established that the jurisdiction of the ECJ ruling includes the ability to determine “the scale or effects” of any action related to the internal market, whatever the objectives of the action, the ECJ graciously reasons that “by prohibiting only the variant of the laser game the object of which is to fire on human targets and thus ‘play at killing’ people, the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities.”

The final ruling states “Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on the grounds of protecting public policy by reason of the fact that activity is an affront to human dignity.” Subsidiarity, despite its inferred influence in a large part of the reasoning surrounding the determination of “human dignity” and fundamental rights and their interpretation at different levels of legal effect, is not present in the ECJ’s final ruling. The ECJ simply decides that this exact exception to the economic rules of the internal market is not prohibited under Community law and therefore will be permitted to exist.

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44 Para. 38 Omega.
45 Para. 39 Omega.
V. Conclusion

In the legal reasoning of the *Omega* case, a strong argument is made for subsidiarity in the consideration of laws and legal measures that affect the values of the society of a Member State of the European Community. However, the ECJ final ruling seeks to establish its own authority in all matters related to the internal market, despite the acknowledged ability of the Member States to sufficiently achieve the objectives of the actions proposed in the case, the protection of human dignity. Thus the reasoning in the case provides a basis for an argument in defence of the principle of subsidiarity while subordinating the same argument to the final authority of the European Court of Justice.

“Within the geographical space wherein the Community legal order functions, it is not alone. There are here other, no less robust, legally constituted entities which are states…the member states.”

As the competences reserved to the Member States and ceded to the European Community become less distinct, the legal jurisdictions of the national courts and the ECJ also blur. The principle of subsidiarity is meant to protect legal parties covered under either or both the national and the European legal systems through the idea that action will be taken with regard to “the scale or effects” of that action upon the relevant parties. Yet as the jurisdictions overlap and the different courts manoeuvre to maintain or establish legitimate authority, the tension encompassed by the principle of subsidiarity becomes a possible constraint upon the ECJ’s legitimacy; thus, while the ECJ considers the ideas of the principle in its *Omega* reasoning, in its final ruling, the ECJ chooses not to mention this consideration and instead reasserts its own authority to rule on all matters relating to the internal market.

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*Schmidberger v Austria* Case C-112/00, [2003] ECR I-5659.
