Accepted copy: (2014) 39 (4) *European Law Review* 511-530

EU Foreign Policy under the Doctrine of Implied Powers: Codification Drawbacks and Constitutional Limitations

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EU foreign policy; external competence; implied powers

Abstract

In recent years, the proliferation of EU powers to enter into international obligations has raised concerns about the respect the EU places upon Member States' autonomy to conduct foreign policy at the national level. This article provides a fresh take on the EU doctrine of implied powers by examining its current scope as well as its implications for national autonomy to unilaterally conclude international agreements. Since the doctrine has been encapsulated in the Lisbon Treaty, the article provides a discussion of the constitutionalisation of EU implied external powers and offers new insights into established case law. It discusses whether the Lisbon codification is a shorthand solution which does little justice to the otherwise detailed jurisprudence of the Court of Justice of the EU (CJEU) in ensuring the proper balancing of powers between the EU and the Member States in the foreign policy realm.

Introduction

It is a long-established practice that in the field of EU foreign policy, the EU may broadly act by means of adopting unilateral / autonomous measures (under Title V TEU and Parts 4 and 5 TFEU) or via the conclusion of international agreements (under Article 218 TFEU). As regards the latter, in most cases, the EU legislature has to find an express power in the Treaties which provides the EU with explicit authorisation to conclude international agreements in a given field with one or more third countries or international organisations.[1] In other cases, however, it is accepted that EU external powers emerge from Treaty legal bases allowing for internal action and from measures adopted within the framework of those provisions by the EU Institutions. Under such (internal) legal bases the EU may pursue international cooperation by concluding

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[1] For example when it comes to EU policy on the environment, Article 191 (4) TFEU expressly provides for EU external competence to cooperate with third countries and international organisations via the negotiation of agreements.

relevant agreements. In the absence of any such express powers in the Treaty (either internal or external) the CJEU has provided that the EU may still be competent to enter into international agreements – such competence "may also be implied from those provisions".[2]

In the past forty years or so, the CJEU has indeed filled in the gaps of the EU constitutional framework in the external arena by developing its implied competence reasoning in numerous thematically diverse cases. These range from inter-institutional disputes (resolved through Article 263 TFEU) to CJEU opinions (delivered under Article 218 (11) TFEU) on EU competence to conclude international agreements in the fields of transport, safety in the workplace, commercial policy in respect of services and the recognition of judgments in civil and commercial matters.[3] The principles emanating from the CJEU's voluminous and sometimes complex case law are post-Lisbon somewhat condensed in Article 216 (1) TFEU, which provides:

> The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

This contribution focuses on the powers of the EU to impliedly conclude international agreements under the post-Lisbon dispensation when it is 'necessary' to achieve one of the objectives listed in Article 216 (1) TFEU. It is divided into two main parts. The first part provides a discussion of the circumstances under which the EU currently possesses implied Treaty-making powers. In doing so, it unfolds Article 216 (1) TFEU as the provision which amounts to a codification of the doctrine of EU implied external powers. In short, the first part of this article discusses whether Article 216 (1) TFEU constitutes a clarification of the doctrine of implied powers or rather a mere reduction of complex case law within a single Treaty provision. The second part of this article assesses the limitations of Article 216 (1) TFEU through an assessment of its legal profile as a general competence norm and its effect in previously intergovernmental areas.

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[2] Opinion 2/94 *(ECHR)* [1996] ECR I-1759, para 26.

[3] See for reference *Council v Commission (ERTA)* (22/70) [1971] ECR 263; Opinion 1/76 *(Inland Waterways)* [1977] ECR 741; Opinion 2/91 *(ILO Convention)* [1993] ECR I-1061; Opinion 1/94 (*WTO Agreement)* [1994] ECRI-5267; Opinion 2/94 *(ECHR)* [1996] ECR I-1759; Opinion 1/03 *(Lugano Convention*) [2006] ECR I–1145.

Although the main focus of this article is based on a technical area of EU law, it aims to address the EU law savvy reader in as much as the less EU law expert in order to help comprehend the complexities of EU foreign policy and throw light on what are not easily accessible parts of this general area of the first importance. This is crucial now that the price of EU membership has been put into question by a number of old Member States, including the UK and the Netherlands. The article helps to grasp how precisely the language of the Lisbon Treaty reflects the CJEU's past jurisprudence on EU external policy and how might the CJEU interpret the relevant provisions when it will be given the opportunity to do so in future cases (the codification angle). It also addresses the issue of whether in the absence of express Treaty authorisation the existence of EU implied powers to enter into international agreements constitutes a cause for concern for Member States (the constitutional/subsidiarity angle).

Apart from the obvious codification issues that necessitate a fresh analysis of the doctrine of implied powers, the discussion in this article is topical in light of certain developments. First, the parallel codification in Lisbon - along with the existence of implied powers under Article 216 (1) TFEU - of implied exclusivity in Article 3 (2) TFEU muddies the waters vis-à-vis the conformity of the Lisbon Treaty with past CJEU jurisprudence on the nature of implied powers. Second, Advocate General Kokott's recent insightful opinions in *UK v Council*[4] and *Commission v Council*[5] raise considerable interest because they constitute the first formal attempts post Lisbon to demystify Article 216 (1) TFEU, albeit as a side issue to the cases at hand. One could argue that we shall not rely too heavily on Kokott's analysis of Article 216 (1) TFEU which may have no resonance in the CJEU's future case law. The present author, however, not only finds her reasonings pragmatic but also utilises them to make speculations about future judicial clarification of the doctrine of EU implied powers to conclude international agreements.[6]

Codification drawbacks

[4] Advocate General Kokott in *UK v Council of the EU* (C-431/11) March 21,2013. The facts of the case will be explained below. Please note that this is not a case on implied powers and, as such, it is likely that the CJEU will not delve into an analysis of Article 216 (1) TFEU in its prospective judgment. The outcome of the case is not, therefore, important for the purpose of the current analysis.

[5] Advocate General Kokott in *European Commission v Council of the EU* (C-137/12) June 27, 2013. Similarly this is not a case on implied powers but concerns whether the authorisation of the signing of an international agreement on audiovisual services by an EU Decision (2011/853/EU) should have been concluded under the relevant Common Commercial Policy legal basis of Article 207 TFEU or the internal market provision of Article 114 TFEU.

[6] Especially, with reference to the second case, the Advocate General recognised that the CJEU's judgment "could make an important contribution to the further development of the ERTA doctrine [discussed below] in connection with the current Articles 3(2) TFEU and 216 (1) TFEU."' ibid, para. 6.

The doctrine of implied powers currently expressed in Article 216 (1) TFEU originates from the EU Constitutional Treaty and owes its existence to the European Convention's Working Group on External Action.[7] Prior to the Lisbon Treaty, the former EC Treaty bestowed express power to the EU to sign international agreements only in limited instances. Such power was supplemented by the CJEU's jurisprudence delineating the circumstances in which there could be an implied external competence to that effect.[8] The Convention's Working Group on External Action recommended that there should be an express Treaty provision that reflects this case law. This was later materialised in the EU Constitutional Treaty's almost laconic Article III-323 (1). This provision was transferred almost intact into the Lisbon Treaty in the form of Article 216 (1) TFEU.

The aim of current Article 216 (1) TFEU is plain, i.e. to codify the CJEU's voluminous case law on the EU's external implied powers in order to arrive at a clearer competence delimitation. Yet, the draftsman's refusal to adhere to a single reference point (or judgment) is what sets Article 216 (1) TFEU apart from other provisions aiming to codify the CJEU's case law. For instance, there is no clarification in the Treaty of Lisbon about which CJEU judgment(s) Article 216 (1) TFEU aims to codify. A Declaration would have, therefore, been helpful in the same manner that Declaration 17 attached to the Treaty of Lisbon on the principle of EU law primacy is explicit about the case law of the CJEU.[9] Since the analysis of the CJEU's case law on implied powers has been thorough elsewhere, we will limit our examination to the quality of its codification in the Treaty.[10] Having said that, we may occasionally afford a short detour to summarise the CJEU's jurisprudence in order to remind the reader of how European judges have perceived the EU's implied powers and consider whether their vision has been recorded correctly by the Treaty drafter.

Implied Powers in the Lisbon Treaty

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[7] Final Report of Working Group VII on External Action, Brussels, 16.12.2002, CONV 459/02.

[8] See Advocate General Kokott in *European Commission v Council of the EU* (C-137/12) June 27, 2013, para. 44.

[9] Declaration 17 states that EU law cannot 'be overridden by domestic legal provisions, however framed' by referring directly to *Flaminio Costa v ENEL* (6/64) [1964] ECR 585.

[10] See for a more recent detailed analysis of the case law of the CJEU on implied powers: P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations*, 2nd ed. (Oxford: Oxford University Press, 2011), Chapter 3. A pre-Lisbon overview is also provided by G. De Baere, *Constitutional Principles of EU External Relations* (Oxford: Oxford University Press, 2008), Chapter 1.3.

According to the CJEU's established case law, EU competence to conclude international agreements may emerge not only from an express conferment by the Treaty but may equally flow implicitly from i) other provisions of the Treaty and ii) from measures adopted within the framework of those provisions by EU Institutions.[11] What is more, the CJEU has accepted that iii) whenever EU law creates, for EU Institutions, powers within its internal system for the purpose of attaining a specific objective, the EU has authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect.[12] The latter is also known as the principle of *parallelism.*[13]

Almost in the same vein, while taking stock of the express treaty-making provisions provided in the Treaties, Article 216 (1) TFEU constitutes a residual competence under which the EU may conclude an international agreement with one or more third countries or international organisations in the following three situations: i) where the Treaties so provide, ii) where the conclusion of an agreement is necessary in order to achieve, within the framework of the EU's policies, one of the objectives referred to in the Treaties (also known as the principle of *necessity*), and iii) [where the conclusion of an agreement] is provided for in a legally binding EU act or is likely to affect *common rules* or alter their scope.

We will hereafter consider each situation in turn by discussing, in particular, how the Lisbon Treaty has codified the principles of *parallelism* and *necessity*. We will also look briefly into the meaning of *common rules*. We shall note from the outset that the first situation covered in Article 216 (1) TFEU (viz. conclusion of an international agreement where the Treaties so provide) acknowledges the express primary treaty-making powers conferred to the EU by the Treaty under Articles 4 (1) TEU and Article 5 TEU. As such, it is rather self-explanatory and does not create any operational problems, so it will not be considered thereafter. Suffice to stress, however, that the wording of Article 216 (1) TFEU is somewhat elliptical; although it places emphasis on the existence of implied powers it does not seem to take into account their nature (exclusive or shared). Whilst implied exclusive powers are codified in Article 3 (2) TFEU, implied shared powers are not expressly mentioned in the Treaty. Therefore, a corrective reading of Article 216 (1) TFEU should not only include implied exclusive powers under Article 3 (2) TFEU but also the principles emanating from the past

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[11] *Council v Commission (European Road Transport Agreement or ERTA)* (22/70) [1971] ECR 263, para. 16

[12] Opinion 1/76 *(Inland Waterways)* [1977] ECR 741, para. 3; Opinion 2/91 *(ILO Convention)* [1993] ECR I-1061, para. 7.

[13] R. Schütze, "Parallel External Powers in the European Community: From Cubist Perspectives Towards Naturalist Constitutional Principles?" (2004) 23 *Yearbook of European Law* 225.

jurisprudence of the CJEU on implied shared external competence which does not enjoy textual reference under any provision in the Lisbon Treaty.[14]

Parallelism and Necessity: A slippery formulation of implied powers

Two key principles arising from the CJEU's case law are important in the codification of the doctrine of implied powers: those of *parallelism* and *necessity*.

As it is well-documented, the principle of parallelism stems from *ERTA*, a classic authority in the field of EU external relations law. It is well-known that *ERTA* concerned a dispute between the Commission and Council over the negotiation of an international road transport agreement on safety rules in the absence of an express Treaty provision on external competence.[15] The CJEU pointed out that the adoption of a common transport policy formed a Treaty objective and that common rules for its attainment had already been laid down by an EU Regulation.[16] It was held, therefore, that the Treaty's internal provisions (*in foro interno*) in the field of transport legitimised EU external action in the same field (*in foro externo*).

What is more, Member States were pre-empted in *ERTA* from unilateral external action in the field of transport (the doctrine of *pre-emption*). The CJEU stressed that in the case at hand the conclusion of international agreements on road transport by Member States acting outside of the common institutions would not only jeopardise EU internal competences but would also be detrimental to the unity of the common market and the uniform application of EU law. With this in mind, the CJEU highlighted that the EU could enter into international agreements both by virtue of express conferment and by relying on other Treaty provisions and measures adopted by the EU legislature in the framework of those provisions. Once exercised, such power could become exclusive. Such exclusive implied external competence or derived exclusivity is now manifest in Article 3 (2) TFEU, which is discussed later in the context of the constitutional limitations of EU implied powers.

To return to the principle of *parallelism*, Article 216 (1) TFEU embraces the CJEU's *in foro interno - in foro externo* motif and expands the *ERTA* effect even further. Its wording implies that international agreements can be based on either the list of EU

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[14]See M. Klamert, "New Conferral or old Confusion? The perils of making implied competences explicit and the example of the external competence for environmental policy" CLEER Working Papers 2011/6, p.6. Klamert argues that "what the Lisbon Treaty provides is not all there is with regard to Union competences."

[15] *Commission* v *Council* (ERTA) (22/70) [1971] ECR 263, para. 15-19.

[16] Council Regulation 543/69 on the harmonisation of certain social legislation relating to road transport [1969] OJ L 77/49

objectives mentioned, for instance, in Article 3 TEU or a decision adopted in an area under the Treaties, such as Title V of the TFEU (Area of Freedom Security and Justice). On the one hand, this broad formulation confirms the elusiveness characterising the doctrine of implied powers as first established in *ERTA*. On the other hand, it keeps EU external action adaptable to changing needs. Furthermore, similar to *ERTA*, Article 216 (1) TFEU is in par with the doctrine of *pre-emption,* which constitutes the external axiom of the principle of EU law primacy.[17]

Not only did the *ERTA parallelism* dicta and its codification in the Lisbon Treaty render the doctrine of implied powers slippery. In addition, post-*ERTA*, the abstract test of *necessity* became increasingly important in establishing that recourse to an external competence is instrumental in achieving a Treaty objective.[18] This means that the *ERTA* implied powers no more depend solely on the content and scope of EU primary law and existing secondary legislation. Instead, they are equally determined by the necessity of an effective use of the treaty-making power in each situation. In an attempt to capture the essence of the whole corpus of the CJEU's case law on implied powers, Article 216 (1) TFEU confirms such a necessity-driven assessment of implied powers. Nonetheless, necessity is too foggy a notion to justify any EU action because it links EU external competence with broad Treaty objectives rather than explicit internal legal bases. It is argued, therefore, that the constitutionalisation of necessity as a cause of recourse to external competence appears to compromise the orthodoxy embedded in the principle of parallelism - i.e that only the existence of an internal provision empowers the EU to act externally.

But where does the principle of *necessity* originate from? Necessity first became prominent in Opinion 1/76 concerning the negotiation of an Agreement establishing a European Laying-up Fund for Inland Waterway Vessels.[19] Contrary to its previous decision in *ERTA,* the CJEU disregarded whether the primary law provision on common transport policy provided implicitly for a treaty-making power. Instead, it pointed out that the competence to bind the EU in relation to third countries could arise by implication from the Treaty provisions establishing internal powers in the field of transport. It was therefore sufficient that the conclusion of an international agreement setting up a European laying-up fund for inland waterway vessels was necessary to

[17] See J.H.H. Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge: Cambridge University Press, 1999), p.172; P.J Kuijper, *Of 'Mixity' and 'Double Hatting': EU External Relations Explained* (Amsterdam: Vossiuspers UvA, 2008). Kuijper argues that 'Article 216 TFEU goes on to define the general treaty-making power by reference of the definition by the Court of exclusive treaty-making power.'

[18] Five years after *ERTA,* in *Kramer* (6/76) [1976] ECR 1279 the CJEU stressed that the existence of external competence to conclude an international agreement on matters that fall within the EU's internal competence did not solely depend on the prior adoption of common rules but also arose when it was necessary to attain one of the EU objectives. See the analysis that follows.

[19] Opinion 1/76 [1977] ECR 741. See especially paras. 3 and 4.

attain a Treaty objective. In such a situation, the CJEU suggested that a treaty-making power does not even require the previous adoption of secondary legislation – it can rather emerge out of *necessity*.[20] As such, the CJEU provided an alternative formulation of the parallelism principle which was not coupled by any restriction upon the EU's discretion to exercise its external competence. In essence, the CJEU merely made the use of implied powers subject to the subjective and rather unpredictable test of necessity.

It is not surprising that Opinion 1/76 has been criticised for contradicting the Treaty's orthodoxy vis-à-vis the EU's respect to the principle of conferral.[21] This is perhaps due to the case's peculiar factual and legal background concerning Rhine navigation and the overcapacity in barges on certain waterways which involved vessels from Switzerland. According to the CJEU it was not possible to eliminate the economic situation caused by the inland waterways overcapacity without first establishing autonomous common rules. It was therefore necessary to bring Switzerland into the scheme by means of an international agreement. As illustrated, the Laying-up Fund Agreement was necessary in order to achieve the Treaty's (transport) objectives. Seen in this perspective, Opinion 1/76 shall be treated as an exception – a case where the CJEU was being pragmatic, establishing that the EU may in certain circumstances achieve the Treaty's objectives only if it is capable of concluding international agreements to that effect.

The CJEU softened its Opinion 1/76 approach in later cases, especially in Opinion 1/94 which involved the question of EU competence to conclude all parts of the WTO Agreement concerning trade in Services (GATS) and trade-related aspects of intellectual property (TRIPS) on the basis of the Treaty. The dispute was focused first, on the issue of competence of the EU to conclude all the parts of the WTO Agreement which related exclusively to the scope of the Treaties' application. Second, the case concerned the effect of the exercise of such competence upon the ability of Member States to conclude the WTO Agreement unilaterally. In its judgment the CJEU narrowed severely the circumstances in which action to attain EU objectives may be *necessary.* Opinion 1/94 is indicative of the CJEU's self-restrain in holding inter alia that the EU may have exclusive implied external competence to regulate services and intellectual property only where it has adopted secondary legislation or where it has adopted provisions which concern third country nationals. In the end, the WTO Agreements were jointly concluded by the Commission and the Member States. This is

[20] See for an analysis of different notions of necessity in R. Holdgaard, *External Relations Law of the European Community: Legal Reasoning and Legal Discources* (The Hague: Kluwer Law International, 2008) Chapter 4.

[21] A. Dashwood and J. Heliskoski, "The Classic Authorities Revisited" in A. Dashwood and C. Hillion (eds) *The General Law of EC External Relations* (London: Sweet & Maxwell, 2000).

because at the time there was no internal EU legislation in place which would (even remotely) be relied upon by the EU legislature to enter into international agreements in the fields of trade in services and intellectual property. This position has changed since the coming into force of the Lisbon Treaty whereby trade in services and commercial aspects of intellectual property are no more treated as different from the trade of goods.[22]

The Place of Mixity in the context of Implied Powers

The recognition of shared competence in Opinion 1/94 had considerable impact upon the role of the Member States as complementary actors in EU external relations. The competence symbiosis advocated by the CJEU in the conclusion of the WTO Agreements is still significant in the negotiation, conclusion and implementation of international agreements. Currently, shared competence constitutes more often than not "the rule rather than the exception" in the conduct of EU foreign policy.[23] The mixity formula[24] promoted by the CJEU in Opinion 1/94 has facilitated EU external action in a range of fields.[25]

At one level, the CJEU has been effective in managing mixity by pointing Member States to the duty of sincere cooperation enshrined in Article 4 (3) TEU and the requirement of unity in the EU's international representation.[26] At another level, it has recognised mixity as a means of safeguarding national competences in the absence of implied pre-emption emanating from EU external action. According to a commentator, "mixed agreements are an evolving phenomenon. What is mixed competence today may

[22] Current Article 207 (1) TFEU has expanded the scope of Common Commercial Policy to all matters relating to trade in goods and services, commercial aspects of intellectual property and foreign direct investment. See for detail D. Leczykiewicz, "Common Commercial Policy: The Expanding Competence of the European Union in the Area of International Trade" (2005) *German Law Journal* 1673, p.1675.

[23] P. Koutrakos, "The External Dimension of the Internal Market and the Individual" in N.N. Shuibhne (ed) *Regulating the Internal Market* (Cheltenham: Edward Elgar, 2006) p.292.

[24] Mixity is taken to include all international agreements with third countries or international organisations concluded simultaneously by the EU and one or more Member States. The subject matter of the agreement at hand falls partially within EU exclusive competence and partially within the Member States' concurrent competence. The term mixed agreements was used early by the CJEU in *Demirel* (12/86) [1987] ECR 3719. The typology and specific legal implications of mixed agreements have been analysed in detail elsewhere. See for a most recent account C. Hillion and P. Koutrakos, *Mixed Agreement Revisited: The EU and its Member States in the World* (Oxford: Hart Publishing, 2010).

[25] See in that regard Opinion 2/91 (ILO Convention No 170) [1993] ECR I-1061; Opinion 2/92 (OECD National Treatment Instrument) [1995] ECR I-521; *Hermes* (53/96) [1998] ECR I-3603; *Dior* (Joined Cases C-300/98 & 392/98) [2000] ECR I-11307.

[26] *Commission v Ireland (MOX Plant)* (C-459/03) [2006] ECR I-4635; C*ommission v. Sweden (PFOS)* (C-246/07) [2010] ECR I-3317.

be exclusive [EU] competence tomorrow."[27] This comment is taken to mean that while at times the conclusion of an international agreement by the EU entails a practice of competence restraint, in other cases it involves competence enhancement. Despite the unpredictability of mixity, it is important to mention that Opinion 1/94 reflects the current European judges' understanding of *necessity* in the use of implied powers. This is a rather balanced approach which refutes the all-encompassing advancement of the CJEU in Opinion 1/76.

But how does the concept of mixity play out with the use of Article 216 (1) TFEU in order, for instance, to amend a mixed agreement concluded simultaneously by the EU and its Member States? In the recent *UK v Council*, Advocate General Kokott explored the theoretical possibility of utilising Article 216 (1) TFEU for extending EU social legislation to third countries via an amendment of the European Economic Area (EEA) Agreement. The EEA was established through a mixed agreement between the then EEC, the ECSC, the EC Member States and the EFTA members.[28] The facts of *UK v Council* will be explained in more detail later. At this stage, suffice to mention that the Advocate General pointed to Article 216 (1) TFEU as a potential legal basis for amending the EEA Agreement. The amendment was *necessary* in order to achieve parity between the EU and the EEA social conditions in place rather than to expand EU external competence in the field of social policy.[29] The *parallelism* between the EEA Agreement and EU internal market law constituted the point of departure for considering the use of Article 216 (1) TFEU in the context of amending the EEA agreement. As commented by the Advocate General in the more recent *Commission v Council*, when the EU acts in the external domain 'establishing and ensuring the functioning of the internal market falls within the meaning of Article 216 (1) TFEU'.[30]

Implied Powers and the Notion of Common Rules

Although the logic of the parallelism principle appears somewhat straightforward, its scope still remains uncertain. This is particularly the case when it comes to the notion of *common rules*, which features both in the final variant of Article 216 (1) TFEU as well as the CJEU's judgments on implied powers. The idea is that an international agreement

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[27] M. Maresceau "A Typology of Mixed Bilateral Agreements" in C. Hillion and P. Koutrakos, *Mixed Agreement Revisited: The EU and its Member States in the World* (Oxford: Hart Publishing, 2010), p.16.

[28] Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation [1994] OJ L1/1; See Opinion 1/91 (Agreement on the EEA) [1991] ECR I-6079

[29] See Advocate General Kokott in Case C-431/11, *UK v Council of the EU*, 21 March 2013, para 68.

[30] Advocate General Kokott in Case C-137/12, *European Commission v Council of the EU*, 27 June 2013, para 43.

shall be impliedly concluded by the EU where it is likely to affect common rules or alter their scope. The CJEU has built its case law on the matter on a trial and error basis. For instance, in *ERTA* it established that whenever the EU adopts common rules (whatever form these may take) using a legal basis drawn from the Treaties to implement a common policy envisaged in the Treaty, the Member States lose their right to act unilaterally in order to enter into agreements with third countries in a way which will affect those rules.[31] The CJEU used a somewhat similar tone in its *Open Skies* judgments on external air transport policy but arrived at a different assessment of implied powers.

In *Open Skies* a number of infringement cases were brought by the Commission against eight Member States (including the UK, Denmark and Germany) challenging the legality of bilateral agreements on air transport concluded between them and the US.[32] The Commission contended inter alia that the Member States in question did not have the treaty-making competence to conclude bilateral agreements on access of airlines to international airports with the US; such agreements are exclusive in nature to Member States which are not parties. Instead, the Commission submitted that these agreements were in breach of the right to establishment under Article 47 TFEU and as such the EU had exclusive competence on the matter. In its judgment, the CJEU held that by virtue of the *ERTA* dicta, Member States cannot enter into agreements on matters which fall under EU exclusive powers. Most significantly, the CJEU focused on whether the EU harmonisation measures (or common rules) at hand adopted under Article 100 (2) TFEU in the field of sea and air transport were affected by virtue of the conduct of the eight defaulting Member States. The CJEU illustrated the continued relevance of the *ERTA* doctrine *ex post* the adoption of harmonisation measures. In particular, it posited that the objective pursued by EU harmonisation measures on air transportation (particularly on air fares and rates on intra-EU routes and on computerised reservations systems) would have been negatively affected if Member States were entitled to conclude their own bilateral international agreements with third countries.

Recent jurisprudence suggests that the CJEU has adopted a sectoral approach to EU's external competence. In that sense, it has departed from its *ERTA* reliance on the *effet-utile* of a competence of primary law laid down in the Treaty. Its new narrow approach to external powers is deduced from a thorough analysis of particular EU law provisions.

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[31] = *Council v Commission (ERTA)* (22/70) [1971] ECR 263, para 17.

[32] = *Commission v United Kingdom* (C-466/98) [2002] ECR I-9427, *Commission v Denmark* (C-467/98) [2002] ECR I-9519, *Commission v Sweden* (C-468/98) [2002] ECR I-9575, *Commission v Finland* (C-469/98) [2002] ECR I-9627, *Commission v Belgium* (C-471/98) [2002] ECR I-9681,*Commission v Luxembourg* (C-472/98) [2002] ECR I-9741, *Commission v Austria* (C-475/98) [2002] ECR I-9797, and *Commission v Germany* (C-476/98) [2002] ECR I-9855.

This novelty, criticised for rendering the *ERTA* doctrine unpredictable,[33] has no doubt been shaped by the development of express organising principles in the EU legal order. The principles of conferral and proportionality enshrined in Article 5 TEU, for instance, have altered the previous all-encompassing approach to implied powers based on the *effet-utile* principle.[34]

Constitutional limitations

A set of constitutional questions emerge when one considers the utility of Article 216 (1) TFEU. Some of these questions go beyond the nebulous issue of Lisbon's codification of past CJEU jurisprudence explored so far. They touch upon issues regarding the legal nature of the doctrine of implied powers. For example, one should note the position of the doctrine vis-à-vis the introduction of specific legal bases in the Lisbon Treaty and their potential effect on future resort to Article 216 (1) TFEU. Furthermore, the possibility of a spill-over effect of Article 216 (1) TFEU on previously intergovernmental areas due to the abolition of the former EU Pillar structure is key to Lisbon's reforms.

Last but not least, the relationship between the doctrine of implied powers and derived exclusivity as manifested in Article 3 (2) TFEU deserves special attention. The resolution of these issues is crucial in order to determine the boundaries of national autonomy to conclude international agreements. This section argues that the fragile nature of Article 216 (1) TFEU as a general competence norm, the Treaty's inherent limits to the use of implied powers in previously intergovernmental areas and cross-sectoral international agreements and, finally, the obscure nature of implied powers as to when they are exclusive or shared will potentially minimise future resort to the doctrine of implied powers.

A Fragile General Competence Norm

When reading Article 216 (1) TFEU it is worth considering that the CJEU developed the doctrine of implied external powers due to the lack of express external powers in the original Treaty of Rome (1957) which provided only for treaty-making powers in the context of the Common Commercial Policy (ex Article 113 EEC) and Association

[33] B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (London: Routledge, 2012), p. 84.

[34] C. Hillion mentions that "since the implied powers doctrine was established, notions of conferred powers, subsidiarity and proportionality inserted into the [EU] constitutional fabric, both as organising principles of the [EU] legal order." C. Hillion "*ERTA*, *ECHR* and *Open Skies*: Laying the Grounds of the EU System of External Relations" in M. Poiares Maduro and L. Azoulai (eds) *The Past and Future of EU Law* (Oxford: Hart Publishing, 2010) p.225.

Agreements (ex Article 238 EEC). In light of the proliferation of new competences in every Treaty revision, it can be argued that the Lisbon Treaty hardly lacks express provisions which could trigger the use of implied powers to achieve the EU's external objectives. Since Article 216 (1) TFEU constitutes a general competence norm, the question turns on whether implied external powers are necessary anymore, considering that new express powers were introduced by the Lisbon Treaty.

As mentioned, there are specific legal bases now conferring competences to the EU that relate explicitly to almost every field of external action. One needs to be reminded that prior to the Lisbon Treaty, these express external competences were scattered all across the former EC Treaty. Post-Lisbon, however, EU express external powers constitute Part Five of the TFEU.[35] Humanitarian aid comprises a new legal basis added to the Treaty by Lisbon. In the same manner, under Article 215 TFEU, Lisbon provides for the legal basis for implementing CFSP decisions on the imposition of economic sanctions or restrictive measures. This provision provides a means for implementing UN Security Council Resolutions. It also establishes a specific competence norm for the so-called "smart sanctions", so that reliance on the subsidiary competence under Article 352 TFEU for their adoption is no more necessary.[36]

Finally, the Solidarity Clause under Article 222 TFEU is a new but rather obscure provision, since the triggering event (albeit in the form of natural, man-made disaster or terrorist attack) may not necessarily originate from an external source.[37] Still, however, Article 222 TFEU is rationalised as a legal basis on external action because it complements the Member States' external commitment under Article 42 (7) TEU. The latter is known as the mutual assistance clause and it has been attached to the Common Security and Defence Policy (CSDP) by the Lisbon Treaty. Hence, given the rich amount of new legal competences in Lisbon, it is easy to conclude that there is no added value in the constitutionalisation of implied powers.

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[35] Part Five consists of the Common Commercial Policy (Articles 206 and 207 TFEU); development cooperation (Articles 208 to 211 TFEU); economic, financial and technical cooperation with third countries (Articles 212-213 TFEU); humanitarian aid (Article 214 TFEU); restrictive measures (Article 215 TFEU); association (Article 217 TFEU); the external dimension of monetary policy (Article 219 TFEU); relations with international organisations (Article 220 TFEU); and the solidarity clause (Article 222 TFEU).

[36] See, *Kadi and Al Barakaat v Council and Commission* (Joined Cases C-402/05 P and C-415/05 P) [2008] ECR I-6351.

[37] See T. Konstadinides, "Civil protection cooperation in EU law: Is there room for solidarity to wriggle past?" (2013) 19(2) ELJ 267; S. Blockmans, "L'union fait la force: making the most of the Solidarity Clause (Art. 222 TFEU)" in I. Govaere and S. Poli (eds), *EU Governance of Global Emergencies* (Leiden: Brill Publishers, 2014).

Against the above argument, we shall note that there remain numerous policy areas where the "internal" legal basis makes no reference to the possibility of the EU acting "externally" by way of conclusion of international agreements.[38] As a result, the EU may still act externally in certain areas by using the implied powers doctrine. It cannot, therefore, be argued with any certainty how frequent resort to implied powers will be in future. The revolving door will be there but simply would not be easily opened in light of the rich body of express legal competences in the field of external action written in the TFEU. Although it appears rare in the current setting that the EU will experience a shortage of express provisions which will allow it to conclude international agreements, there is a possibility that the EU may wish to act externally in areas that the Treaty drafter did not foresee. Having said that, a specific legal basis would always be preferable. For instance, in *UK v Council*, discussed earlier in the context of Article 216 (1) TFEU configuration, Advocate General Kokott was confronted with the question of legal basis vis-à-vis the EU's external action. The issue concerned the legal basis EU Institutions may resort to in order to extend EU internal legislation on social security systems to third countries by virtue of amendments into existing mixed agreements (more precisely the EEA Agreement).[39] The Advocate General considered the action for annulment brought by the UK against Decision 2011/407 which established the position to be taken by the EU in the EEA and stressed that as an alternative to its original legal bases of Article 48 TFEU (social security) and 218 (9) TFEU (negotiation of international agreements) the contested Decision:

> ... can also be based on the *ERTA* doctrine, as expressed in Article 216 (1) TFEU. Since, however, in Article 217 TFEU [conclusion of international agreements establishing association] there is another, more specific substantive legal basis for the contested decision, recourse should not be had, in the final analysis, to Article 216 (1) TFEU, but to Article 217 TFEU.[40]

In the case at hand, Article 217 TFEU (formerly Article 238 EEC) constituted the legal basis under which the EU concluded the EEA Agreement in the first place. Kokott's Opinion therefore correctly suggests that resort to Article 216 (1) TFEU would be secondary in light of a more specific legal basis for the conclusion of an international agreement.

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[38] See for instance the relevant Treaty provisions on agriculture, transport, internal market, intellectual property, social policy, to name but a few substantive areas.
[39] Advocate General Kokott in *UK v Council of the EU*, (C-431/11) March 21,2013.
[40] See fn 39, para 70.

The present author has made elsewhere the same argument with reference to Article 352 TFEU.[41] Indeed, Article 216 (1) TFEU is comparable to the general law-making power of Article 352 TFEU. With reference to Article 352 TFEU, the Lisbon Treaty has expanded the possibilities of resorting to it by relaxing the link between the EU's internal objectives and its external policies. Yet, although Article 352 TFEU goes further than its former self (Article 308 EC), in that it is no longer linked to powers "necessary to attain, in the course of the operation of the common market, one of the objectives of the Community" but covers all areas of the EU's activity (apart from CFSP), its inherent limitations make self-conferral by the EU a difficult task. Declaration 42 explicitly mentions that Article 352 TFEU cannot be used to evade the ordinary Treaty revision procedure under Article 48 TEU. Furthermore, a number of new specific legal bases introduced in the Lisbon Treaty have made recourse to Article 352 TFEU harder. This is evident in the modest number of proposals under Article 352 TFEU since the coming into force of the Lisbon Treaty.[42]

Article 216 (1) TFEU, on the other hand, appears broader compared to Article 352 TFEU. For instance, unlike Article 352 TFEU, there is no express limitation in Article 216 (1) TFEU that implied powers will not encroach on CFSP, although this is highly unlikely. The same is true about the potential spill-over effect of implied powers to pre-Lisbon areas of intergovernmental cooperation. Indeed Article 216 (1) seems to have loosened the link between internal objectives and external action as such. The Lisbon Treaty seems to endorse that action under Article 216 (1) TFEU encompasses any matter of foreign policy that comes under EU objectives.

Does reference to "objectives" imply that the draftsman's intention was to reach beyond prior case law, rendering Article 216 (1) a procrustean frame? Schütze has warned that if the CJEU interprets the parallelism that arises from the text of Article 216 (1) TFEU literally then the EU will gain another, perhaps stronger, residual power on top of Article 352 TFEU for external action.[43] This view chimes with Advocate General Kokott's Opinion in *Commission v Council,* where she mentions that the EU's external competence in connection with the functioning of the internal market falls within the scope of Article 216 (1) TFEU and not Article 114 TFEU as one would have imagined.[44] As a result, Article 216 (1) TFEU appears to constitute a "two in one" deal

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[41] T. Konstadinides, "Drawing the line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause" (2012) 31(1) *Yearbook of European Law* 227.

[42] See fn 41 for more detail on Article 352 TFEU

[43] R Schütze, *European Constitutional Law* (Cambridge: Cambridge University Press, 2012) p.195-196.

[44] Advocate General Kokott in Case C-137/12, *European Commission v Council of the EU* (C-137/12) June 27, 2013, para 44.

in the law of EU external relations. It combines the might of Article 114 TFEU and the flexibility of Article 352 TFEU in a single provision. But is this development as alarming as it sounds? In order to provide an answer, we need to examine Article 216 (1) TFEU in the light of Article 352 TFEU and Article 114 TFEU.

With reference to Article 352 TFEU, back in the days of the European Community the provision was effectively utilised in different ways: from a legal basis for EU external action in the field of human rights[45] to an inter-pillar legal basis.[46] Post-Lisbon, however, Article 352 TFEU has been amended in such a way that it looks as if the Treaty drafter codified the CJEU's ruling in *Kadi I* which distinguished between the objectives of the former European Community and those of the European Union.[47] Under the ToL, the bridge between the TFEU and the TEU does not extend to Article 352 TFEU. In this respect, it can be argued with some certainty that Article 216 (1) TFEU has effectively replaced Article 352 TFEU as a legal basis where no alternative specific legal basis exists vis-à-vis implied external competence.[48] This is indeed a development worthy of observation especially because of the practicalities of utilising Article 216 (1) TFEU as opposed to Article 352 TFEU which has numerous safeguards written to it and, most importantly, resort to it is subject to unanimity.[49]

By contrast to Article 352 TFEU, the vocabulary of Article 216 (1) TFEU does not maintain any comparable express constraints to its use regarding voting in the Council or even establish a national monitoring procedure for subsidiarity compliance by the EU legislature.[50] The procedural basis for the "implied" conclusion of agreements with third countries or international organisations is provided by Article 218 TFEU. Article 218

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[45] See for instance Council Regulation 976/1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries [1999] OJ L 120/8.

[46] Council Regulation 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan [2002] OJ L 139/9.

[47] Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat v Council and Commission* (C-402/05 and C-415/05) [2008] ECR I-6351.

[48] J. Klabbers "*Völkerrechtsfreundlich*: International Law and the Union's Legal Order" in P. Koutrakos (ed) *European Foreign Policy: Legal and Political Perspectives* (Cheltenham: Edward Elgar, 2011), p.86.

[49] See T. Konstadinides, "Drawing the line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause" (2012) 31 (1) *Yearbook of European Law* 227.

[50] Surprisingly, while the UK's European Union Act 2011 s.8 (3) provides that in general the UK may not agree to a decision under Article 352 TFEU unless the decision has been approved by an Act of Parliament, there is no such restriction to the application of Article 216 (1) TFEU.

(8) TFEU, in particular, stresses that the Council shall act by qualified majority voting save from agreements in fields where unanimity is required for the adoption of EU acts, association agreements and the prospective accession of the EU to ECHR. One may, therefore, argue that due to qualified majority voting and its broad character, Article 216 (1) TFEU might turn into a new legal basis for the conclusion of international agreements in controversial areas.

With respect to Article 114 TFEU, long before Lisbon, when the Treaty did not bestow the former European Community with adequate competence to legislate in certain areas (e.g. the development of a common public health policy), EU Institutions employed the Treaty's implied power under former Article 114 TFEU on the basis of the EU's functional competences (e.g. in order to eliminate distortions of competition by the provisions of national law). Hence the "accusation" that Article 114 TFEU has been 'complicit in the crime of competence creep'.[51] With the emergence of Article 216 (1) TFEU it seems that Article 114 TFEU has been deprived of the opportunity to branch out to the area of EU foreign policy because it is focused on establishing or ensuring the functioning of the internal market.[52]

The above development does not make Article 216 (1) TFEU an all-encompassing competence in the foreign policy terrain. While, for instance, in *Commission v Council* Advocate General Kokott explained her preference for employing Article 216 (1) TFEU over Article 114 TFEU as a legal basis for giving effect to an international agreement on audiovisual services by drawing a line between the 'external' and the 'internal', in the end she relied on a specific legal basis for setting uniform legal standards with a view to facilitating cross-border trade. Article 207 TFEU was regarded as a suitable legal basis for signing the Convention at hand.[53] It is argued that the CJEU will most likely adopt a similar orthodox stance vis-à-vis EU implied powers – i.e. that even as a harmonisation provision, Article 216 (1) TFEU will always be trumped by a *lex specialis*.

Implied Powers, the former Pillars and Cross-Sectoral Agreements

As already discussed, at first glance, Article 216 (1) TFEU seems to embrace any matter of foreign policy that comes under EU objectives. Its broad wording together with the post-Lisbon de-pillarisation of the EU has ironed the traditional "internal"-"external" policy schism. Competence under Article 216 (1) TFEU seems to go beyond the scope of the *ERTA* doctrine of parallelism which, as mentioned, sprung out of an internal

[51] S. Weatherill, "Why Harmonise?" in T. Tridimas and P. Nebbia (eds) *European Union Law for the Twenty-First Century* (Oxford: Hart Publishing, 2004), p.24.
[52] Advocate General Kokott in *European Commission v Council of the EU*, (C-137/12) June 27, 2013, para. 56.
[53] See fn 52 paras. 44, 45, 56, 88.

competence and not an internal objective. Yet, the reference to "one of the objectives referred to in the Treaties" suggests that Article 216 (1) TFEU broadens the scope of EU implied powers and, therefore, gives the impression that the *ERTA* doctrine extends into areas of cooperation which previously fell under the former intergovernmental (second and third) EU pillars of cooperation.

But how do implied powers relate to matters that fall under the old pillars? The future looks promising for the doctrine of implied powers with regard to the former third pillar (Police and Judicial Cooperation in Criminal Matters). It appears that post-Lisbon international agreements within the Area of Freedom Security and Justice (AFSJ) are based on either the objectives or on a decision adopted within the area of the AFSJ provisions of the Treaty. This is because despite the external character of AFSJ policies (e.g. immigration, asylum, transnational crime), there is no express external competence for the EU to act in the field other than Articles 78 (2) (g) and 79 (3) TFEU. The lack of express external powers in the AFSJ owes to the fact that it begun its lifecycle as an internal policy put together for the benefit of the European citizenry. Implied powers may therefore come handy for the Council in this "Area", which is very much in the making and will not fully lift off until this year.

On the other hand, Article 216 (1) TFEU only in theory seems to impact upon the former second pillar (Common Foreign and Security Policy) which even after Lisbon remains tucked away in the TEU and very much safeguarded by national veto. The way the two Treaties (the TFEU and the TEU) are kept separate suggests that the jurisdictional scope of the doctrine of implied powers under Article 216 (1) TFEU can only go as far as covering the entire TFEU and cannot expand beyond it. In any event, Article 216 (1) TFEU only concerns the availability of EU competence to enter into international agreements. It cannot be invoked in order to enlarge the range of actions that may be taken under the legal basis in question.[54] In this respect it only comprises a *petite revision* of EU external relations policy.[55]

A further challenge posed by the Lisbon Treaty on the use of implied powers is related to the choice of legal basis for cross-sectoral international agreements involving multiple objectives such as Common Foreign and Security Policy (CFSP) and development. Such multi-tasking is still problematic for EU Institutions. For instance, international agreements have to be carefully worded in order to avoid potential annulment actions against the secondary legislative provision (e.g. a Council Decision) which gives them effect. Such annulment may arise, for instance, due to encroachment

[54] See Opinion 1/94 (*WTO Agreement)* [1994] ECR I-5267, para 81.

[55] This jargon was first used in relation to former Article 308 EC (now Article 352 TFEU). See T.A. Börzel, *The State of the European Union: Law, Politics and Society* (Oxford: Oxford University Press, 2003), p.53

by the general exercise of EU power on the CFSP.[56] This is all the more important because the drafting of Article 216 (1) TFEU hints that the provision may be employed to pursue equally CFSP as much as non-CFSP objectives. As such, the "non-affectation clause" of Article 40 TEU (past Article 47 TEU) has to be used prudently by the CJEU as a means of ring-fencing any potential expansion of the scope of EU implied powers under Article 216 (1) TFEU by the EU legislature.[57] The landmark *ECOWAS* judgment involving an action for annulment brought by the Commission against a Council Decision that provided financial contributions and assistance to prevent the spread of small arms in ECOWAS states forms the only (pre-Lisbon) authority on the delimitation between non-CFSP and CFSP legal bases.[58] There, the CJEU annulled the contested Council Decision. It held that under ex Article 47 TEU, the EU could not have recourse to a legal basis falling within the CFSP in order to adopt provisions which also fall within a competence conferred by the former EC Treaty on the Community. As such, the measure in question had to be adopted under the former first pillar.

Current Article 40 TEU, however, is different to its predecessor. It does not provide for such one-sided protection of the TFEU from possible encroachment by the CFSP. It also protects CFSP and in that respect it constitutes a *mutual* non-affectation clause when a legal act touches upon both CFSP and non-CFSP fields. This is important because each field is characterised by its own unique procedures. For instance, in the recent judgment of *Parliament v Council*, the CJEU held that a Regulation on "smart sanctions"[59] was rightly based on Article 215 (2) TFEU, thereby rejecting the European Parliament's argument that the measure ought to have been taken on the basis of Article 75 TFEU, which ensured a greater degree of parliamentary participation through the ordinary legislative procedure.[60]

The current absence in Article 40 TEU of the past express preference to non-CFSP legal bases implies that European judges will now have the opportunity to adjudicate on

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[56] See *Commission v Council (ECOWAS)* (C-91/05) [2008] ECR I-3651.

[57] Article 40 TEU provides: The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter.

[58] *Commission v Council (ECOWAS)* (C-91/05) [2008] ECR-3651. See case annotation C. Hillion and R. Wessel, "The fuzziness of horizontal competence distribution in EU external relations: lessons from the ECOWAS case" (2009) 46 CMLRev 551.

[59] Council Regulation (EU) No 1286/2009 of 22 December 2009 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban [2009] OJ L346/42

[60] *Parliament v Council* (C-130/10) [2012] ECR I-0000.

whether an alleged TFEU act is in fact a CFSP act and vice versa. The interaction between CFSP and TFEU competences under this new dispensation has attracted considerable commentary vis-à-vis the new task that the CJEU has been charged with - i.e. guarding the boundaries between CFSP and TFEU by upholding the non-affectation clause of Article 40 TEU.[61] It remains to be seen how the CJEU will go on about resolving the "conundrum" of legal bases questions in cases where an act under Article 216 (1) TFEU pursues a mixed objective.[62]

The unclear nature of Implied Powers

Article 216 (1) TFEU gives birth to EU external implied competences without however taking into account their nature, whether exclusive or shared. From our discussion it arises that EU's implied external powers can be either exclusive or shared in so far as the conclusion of an agreement is "necessary" to fulfil the objectives of the Treaty. On the one hand, according to the Lisbon Treaty, implied powers only become exclusive when the requirements of Article 3 (2) TFEU have been met. On the other hand, with regard to shared competence, the Lisbon Treaty does not contain an express reference to implied powers unless, of course, these are explicitly provided in individual areas of shared activity between the EU and the Member States.

When it comes to exclusivity, the boundary between EU competences is getting rather blurry when one reads Article 216 (1) TFEU in the light of Article 3 (2) TFEU on the EU's exclusive powers, which provides:

> The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

It shall be mentioned that Article 3 (2) TFEU was also transferred from the EU Constitutional Treaty (Article I-13 (2)) into the Lisbon Treaty in an attempt to codify

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[61] See in this regard A. Dashwood "Article 47 and the Relationship between First and Second Pillar Competences" in A. Dashwood and M. Maresceau (eds), *Law and Practice of EU External Relations* (Cambridge: Cambridge University Press, 2008) p.99; P. Eeckhout, "The EU's Common Foreign and Security Policy after Lisbon: From Pillar Talk to Constitutionalism" in A. Biondi and P. Eeckhout (eds), *EU After Lisbon* (Oxford: Oxford University Press, 2012), p.272.

[62] See for instance in the context of energy: B. Van Vooren, "EU External Energy Policy" in M. Trybus and L. Rubini, *Treaty of Lisbon and the Future of European Law and Policy* (Cheltenham: Edward Elgar, 2012), p. 301.

the CJEU's established jurisprudence on derived exclusivity.[63] The term "derived" is used here to distinguish such a type of exclusivity from the so-called *a priori* exclusivity or exclusivity in principle enshrined in Article 3 (1) TFEU. According to Article 3 (2) TFEU, derived exclusivity emerges where EU competence i) is provided for in a legislative act of the EU[64]; ii) it is necessary to enable the EU to exercise its internal competence[65]; iii) insofar as its conclusion may affect common rules or alter their scope.[66] The CJEU has, therefore, derived rules establishing that EU competence to conclude international agreements is exclusive even in fields where competence is shared with the Member States.

In other words, a shared internal competence may paradoxically correspond to an exclusive external competence by means of the doctrine of implied powers. Through a teleological reading of the principle of loyalty provided in Article 4 (3) TFEU, the CJEU established in Opinion 2/91 that the adoption of EU rules internally pre-empts Member States from acting externally. In the case of the ILO Convention No 170 the CJEU implied an external competence from internal legislation adopted under Article 153 TFEU (social provisions). This means in essence that Member States are prohibited from entering into international agreements that might compromise EU internal rules or alter their scope. This is the position regardless of the likelihood of overlap or conflict between the EU internal rules and the relevant international agreement that the EU wishes to enter into.[67]

Nonetheless, not all EU external powers are exclusive or pre-emptive in nature. For instance, in Opinion 2/91 Member States were allowed to maintain or introduce more stringent protective measures. Likewise, in subsequent Opinion 1/94, mentioned earlier, the EU harmonisation laws in the fields covered by GATS and TRIPS did not cover all service sectors. Thus, despite EU exclusive competence to negotiate with non-Member States in the field of services, exclusivity did not apply to the whole of GATS. Similarly in the *Open Skies* cases not all aspects of bilateral air services agreements fell within EU exclusive competence. The CJEU was explicit that EU exclusive competence will apply to the whole agreement if the relevant international agreement is related to an area covered 'to a considerable extent' by internal rules.[68] Last but not least, "the nature and

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[63] See for a thorough analysis of exclusive EU external competence: D. Wyatt and A. Dashwood, *European Union Law* (Oxford: Hart Publishing, 2011), pp.922-933.
[64] *Commission v Council (ERTA)* (22/70) [1971] ECR 263.
[65] Opinion 1/76 *(Inland Waterways)* [1977] ECR 741*;* Opinion 1/94 (*WTO Agreement)* [1994] ECR I-5267, para. 82; *Commission v Denmark (Open Skies)* (C-467/98) [2002] ECR I-9519, para 57; Opinion 1/03 *(Lugano Convention)* [2006] ECR I-1145, para. 115.
[66] Opinion 2/91 *(ILO Convention)* [1993] ECR I-1061, paras 9-11*;* Opinion 1/94 (*WTO Agreement)* [1994] ECR I-5267 (paras. 77, 95-96).
[67] Opinion 2/91 (*ILO Convention)* [1993] ECR I-1061, para. 25; *Commission v Denmark (Open Skies)* (C-467/98) [2002] ECR I-9519, para. 82.
[68] See Opinion 2/91 and *Open Skies* case above

content" of the internal rules as well as the "future development" of EU law in the relevant area are also decisive to the establishment of derived exclusivity.[69] Uniformity of EU external action and the unity of the internal market in tune with the principle of loyalty found in Article 4 (3) TEU are key in requiring Member States to refrain from acting unilaterally.

The above observations aside, until Opinion 1/03 the CJEU never seemed to have found the right moment to make a distinction between the existence of implied powers and their exclusive or shared nature. Instead most judgments followed the *ERTA* doctrine which was crucial in the development of EU exclusive competence to act externally. In the context of the conclusion of the new Lugano Convention by the EU, the CJEU stressed that implied powers may be either exclusive or shared. This judicial pronouncement in Opinion 1/03 indicates that the recognition of implied shared competence is possible even after Lisbon. This is especially because at the time the CJEU gave its verdict in Opinion 1/03 in 2006, the doctrine of implied powers was already codified in Article III-323 of the EU Constitutional Treaty which pended ratification by all Member States. This is an interesting event because, as pointed in the introduction of this contribution, Article III-323 is the predecessor of Article 216 (1) TFEU. Given this historical background, it appears highly improbable that the effect of Opinion 1/03 has been minimised (or indeed taken into account) by Article 216 (1) TFEU. The Lisbon Treaty is silent about whether implied powers can be shared. Hence, the CJEU's recognition of the existence of the category of implied shared competence following the drafting of Article III-323 of the EU Constitutional Treaty can be used as evidence that the CJEU will carry on upholding implied shared powers under the Lisbon formulation. This is crucial since similarly to the Lisbon Treaty the EU Constitutional Treaty lacked an express reference to implied shared competence.

In addition, the wording of Article 3 (2) TFEU which gives expression to the judicial notion of derived exclusivity is very similarly drafted to Article 216 (1) TFEU and it can easily be concluded at first sight that post-Lisbon implied powers are *de facto* exclusive in all areas of EU external action. If this is true then the Lisbon Treaty has forged either "a narrow definition of existence of implied powers" or "a broad definition of exclusive implied powers".[70] Both results would be out of tune with the CJEU's long trail of case law on external implied powers. We need to note, however, that there is a fundamental difference between the two provisions. While Article 216 (1) TFEU tells us whether the EU has competence to conclude an international agreement (albeit exclusively or together with Member States), Article 3 (2) TFEU determines when the nature of such competence is exclusive.[71] Hence, the issue of whether implied external

[69] Opinion 1/03 *(Lugano Convention)* [2006] ECR I-1145, para. 126.
[70] A. Dimopoulos, *EU Foreign Investment Law* (Oxford: Oxford University Press, 2012) p.70.
[71] See P. Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (Oxford: Oxford University Press, 2010), p.399.

powers under Article 216 (1) TFEU are always exclusive shall be treated as distinct from the existence of such power. Article 3 (2) TFEU does not exist in splendid isolation and resort to it has been affected by the new EU external competences added to the Treaty of Lisbon. As such, one can empathise with Craig, who has stressed that 'it will be rare, if ever, for the EU to lack power to conclude an international agreement.'[72]

Meanwhile, there is a valid ground for criticism suggesting that in the post-Lisbon constellation mixity plays an immaterial role in EU implied external action. Even worse for the principle of subsidiarity, as Cremona put it, albeit in the context of the EU Constitutional Treaty, "implied *shared* competence would disappear".[73] Although silent on implied shared competence, Protocol 25 annexed to the Lisbon Treaty on the exercise of shared competence under Article 2 TFEU provides that "when the EU has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area." This formulation does not seem to exclude the application of the *ERTA* doctrine in the field of shared powers. If it did, Protocol 25 would have explicitly mentioned Article 3 (2) TFEU.[74] Nonetheless, the exact facilitation required for the establishment of implied shared competence remains somewhat oblique after the Treaty of Lisbon.[75] On the one hand, according to the CJEU jurisprudence the EU has implied shared competence when the conclusion of an international agreement would *facilitate* the exercise of an *internal competence*. On the other hand, according to Article 216 (1) TFEU, the EU has implied shared competence when the conclusion of an international agreement is *necessary* for the attainment of the *Treaty's objectives*.[76] This lack of

[72] P. Craig, *EU Administrative Law* 2nd ed. (Oxford: Oxford University Press, 2012) p.373.

[73] M. Cremona, "A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty", EUI Working Paper 2006/30, p.10.

[74] Advocate General Kokott in *European Commission v Council of the EU*, (C-137/12) June 27, 2013, para. 115.

[75] See M. Buck, "The EU's Representation in Multilateral Environmental Negotiations after Lisbon" in E. Morgera (ed.) *The External Environmental Policy of the EU* (Cambridge: Cambridge University Press), p.87. Buck argues that the new Lisbon provisions on shared competence under Article 4 TFEU and Protocol 25 are not directly related to the new provisions on the EU external competence.

[76] See Opinion 1/03 *(Lugano Convention)* [2006] ECR I-1145 ; It has been argued that the EU Constitutional Treaty's Article I-13 (2) (which has been copied into Article 216 (1) TFEU) did not take into the account the innovation of Opinion 1/03 with reference to implied shared competence. This is according to some commentators because at the time of the Convention on the Future of Europe, the Lugano Opinion had not yet been delivered by the CJEU. See M. Klamert, "New Conferral or old Confusion? The perils of making implied competences explicit and the example of the external competence for environmental policy" CLEER Working Papers 2011/6. See also on shared competence: M. Klamert and N. Maydell, "Lost in Exclusivity: Implied Non-exclusive External Competences in

parity between the CJEU's relevant case law and the draftsman's choice of wording in Article 216 (1) TFEU raises questions as to whether pre-Lisbon decisions on implied shared powers can still be relied on by the CJEU in future cases.[77]

Conclusion

The formulation of Article 216 (1) TFEU with regard to the circumstances under which the EU may conclude an international agreement has not attracted much academic commentary. It has rather been considered as part and parcel of the reforms introduced in the area of EU external competence by the Lisbon Treaty.[78] This is perhaps because the trend of codification of CJEU case law in the Treaties and EU secondary legislation is neither new nor rare. Indeed, periodic EU Treaty revisions have codified numerous decisions emanating from the Luxembourg Court in Treaty provisions, sometimes even copying the CJEU's phraseology in verbatim.[79] For instance, the Maastricht Treaty confirmed the CJEU's case law on development aid[80] by forging development cooperation as a distinct competence under what forms now Title XVI of the Treaty.[81] The Lisbon Treaty forms no exception. It includes various provisions, especially with reference to EU competences typology, where the drafter has expressly affirmed previous decisions of the European Courts.[82] Similarly, as demonstrated in this article,

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Community Law" (2008) 13 EFARev 502.

[77] See for a critical discussion on shared implied powers S. Hindelang and N. Maydell "The EU's Common Investment Policy - Connecting the Dots" (2011) European Yearbook of International Economic Law 1, pp.21-25

[78] See M. Cremona, "External Relations and External Competence of the European Union: The Emergence of an Integrated Policy" in G. de Búrca and P. Craig (eds) *The Evolution of EU Law* 2nd ed. (Oxford: Oxford University Press, 2011), pp.225-226; P. Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford: Oxford University Press, 2010), pp.165-167; P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* 2nd ed. (Oxford: Oxford University Press, 2011), pp.112-113; D. Wyatt and A. Dashwood, *European Union Law* (Oxford: Hart Publishing, 2011), pp.918-922; R. Schütze, *European Constitutional Law* (Cambridge: Cambridge University Press, 2012), pp.194-196.

[79] Some commentators have considered whether EU law has a doctrine of precedent. See T. Tridimas, "Precedent and the Court of Justice: a Jurisprudence of Doubt?" in P. Eleftheriadis and J. Dickson, *Philosophical Foundations of European Union Law* (Oxford: Oxford University Press, 2012), chapter 12.

[80] See for instance Opinion 1/78 *(International Agreement on Natural Rubber)* [1979] ECR 2871; *Commission v Council* (45/86) [1987] ECR 1493. In the absence of an express Treaty competence in the field of development cooperation, the CJEU's case law concerned the development aspects of Common Commercial Policy.

[81] See former Articles 177 and 178 EC.

[82] For a detailed discussion of the typology of competences in the Lisbon Treaty see: T. Konstadinides, *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU*

the Lisbon Treaty has attempted to codify the CJEU's trail of complex judgments on EU implied external powers. Not only does it include a generic statement in Article 216 (1) TFEU about the existence of implied competence but it also explains in a separate provision (Article 3 (2) TFEU) when implied powers to conclude international agreements are exclusive. This addition compensates for the former provision's lack of detail as to whether the nature of implied competence is exclusive or shared - i.e. whether external action is essential to achieve the objectives of the Treaty or merely facilitates them. Finally, there is no codification in the Treaty of implied shared powers which contradicts the CJEU's acceptance of the fact that implied powers can be either exclusive or shared. If we accept that Lisbon attempted to constitutionalise the CJEU's established case law, then the lack of a separate provision on implied shared powers appears to be an omission rather than an exclusion.

EU foreign policy under the doctrine of implied powers is a fast-moving field and prior to Lisbon the CJEU kept moving the goalposts in the name of necessity, effectiveness and uniformity or, simply, pragmatism. One has to be reminded, however, that EU action, either internal or external, is confined by a number of organising constitutional principles inherent in the TEU. For instance, a wide interpretation of Article 216 (1) TFEU could ultimately arrogate to EU powers in infringement of the principle of conferral enshrined in Article 5 TEU. It could also be in breach of the principle of consistency, which provides that EU policies shall be in tune with each other.[83] Although not articulated in the general EU objectives, consistency appears to be justiciable under Art 21 (3) TEU. The reference to consistency *qua* sincere cooperation under Article 4 (3) TEU (which applies in as much to Member States as to the EU itself) is based on setting common principles and unified objectives in EU foreign policy whose aim is to eliminate contradiction.[84]

As such, an orthodox interpretation of implied powers does not provide the EU legislature with a blank card to engage in a substantive expansion of EU external competence. Yet, in the words of a commentator, it is "through implied powers and the avoidance of mixity [that] the EU has been able to achieve greater efficacy" in all fields

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and the Member States (The Hague: Kluwer Law International, European Monographs Series, 2009), chapter 7.

[83] See C. Hillion, "*Tous pour un, Un pour tous*! Coherence in the External relations of the European Union" in M. Cremona (ed.), *Developments in EU External Relations Law* (Oxford: Oxford University Press, 2008) pp.10-36; E. Herlin-Karnell and T. Konstadinides "The Rise and Expressions of Consistency in EU Law: Legal and Strategic Implications for European Integration" (2013) 15 CYELS (forthcoming).

[84] G. De Baere, *Constitutional Principles of EU External Relations* (Oxford: Oxford University Press, 2008), p.251.

of external action.[85] But how far can the EU employ efficacy (or the *effet-utile* principle) as a *raison d'être* for concluding international agreements?

It has so far been established that with reference to EU implied external powers, the Treaty of Lisbon has somewhat incompetently incorporated past CJEU case law. The drafter appears at times to have misunderstood what the CJEU did in its long jurisprudence on implied powers. Nonetheless, action under Article 216 (1) TFEU remains subject to conferral. It is only a Treaty making competence as opposed to a general legislative one and still, to some respect, subject to the *ERTA* doctrine. It, therefore, appears unlikely that the EU will turn such competence to an open sesame for entering, for instance, into international commitments in fields which are intimate to national sovereignty. Since review of decisions adopted pursuant to Article 216 (1) TFEU (and Article 3 (2) TFEU to the same extent) is left to the CJEU, the ultimate question is what will happen if a case lands before it to provide an opinion on its scope.

It is likely that the CJEU will hold that for any matter that comes under EU objectives the EU legislature needs the right formulation. The CJEU will therefore decide cases according to what is politically expedient at a given moment. Yet, it is unlikely that the CJEU will push for further development of the doctrine of implied powers. It can be argued that similar to the CJEU's rhetoric in Opinion 2/94[86] with reference to the use of Article 352 TFEU (former Article 308 EC) as a means of the EU accession to the ECHR, any future expansive interpretation of Article 216 (1) TFEU, in the CFSP for instance, would require a Treaty revision.

Still, however, one could argue that despite the fact that post-Lisbon the doctrine of implied powers has been entrusted to the Member States as the Masters of the Treaties, the CJEU may still continue to develop its implied powers case law. Such an argument may draw evidence from Opinion 1/2003 concerning EU competence to conclude the Lugano Convention on jurisdiction and enforcement of judgments in civil and commercial matters. In its judgment the CJEU adopted a restrictive approach to the ways in which implied powers may become exclusive. As such, the CJEU went against the spirit of Article III-323 of the ill-fated EU Constitutional Treaty which at the time was pending ratification in the Member States.[87] Like the Lisbon Treaty, the EU Constitutional Treaty purported to codify the CJEU's established jurisprudence on implied powers providing for a similar open-ended treatise of implied powers. It is worth noting that Opinion 1/03 constitutes the last major development in the case law on implied powers. At the same time, it needs to be read against the particular context

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[85] See above, p.29.
[86] Opinion 2/94 [1996] ECR I-1783.
[87] See P. Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* 2nd ed. (Oxford: Oxford University Press, 2011), p.113.

of the case and not to be taken as an absolute authority in the field of implied external powers of the EU.[88]

The Lisbon Treaty has certainly changed the atmosphere in the area of external relations vis-à-vis competence delimitation. Despite the reforms discussed in this article, it is unlikely that the EU is going to centralise external action and take it away from the Member States. One has to consider the "counterfactual alternatives" before criticising the way the Lisbon Treaty has codified EU implied external competence.[89] The prospect of repatriation to Member States of the current EU external powers independently seems unconvincing. A plethora of bilateral and trilateral agreements negotiated by Member States themselves would be the alternative to EU external action. To put it differently, Member States would have to cope with today's complexities of foreign policy that the EU currently deals with on their behalf.

What is more, there is a complex web of international obligations that binds Member States *qua* EU law. There are also externalities flowing independent of Member States' collective action over the same issue. Not only such externalities / peculiarities have been respected by the EU, they have also been defended before international tribunals on behalf of the Member States. For instance, in the *EC / Asbestos dispute*, the former European Community successfully defended a French ban on asbestos against Canada's protests.[90] The WTO panel and appellate bodies found that the measure was justified to protect human health. All above reasons create a convincing case against repatriation of external competence back to the Member States. In light of the above it is also not surprising that the new Lisbon provisions on external action escaped the scrutiny of national courts including the *Bundesverfassungsgericht* in its Lisbon *Urteil*.[91] It seems that the benefits of EU external action reaped by Member States have outweighed the semantic drawbacks of implied powers under Article 216 (1) TFEU.

The above thoughts, however, do not suggest that we should stop thinking about the scope of EU external competence and ways to better our understanding as to how the EU conducts its foreign policy, notwithstanding expressly or impliedly. The present

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[88] Opinion 1/03 *(Lugano Convention)* [2006] ECR I-1145, para. 121.

[89] P. Craig presentation in '40 Years of the European Communities Act 1972: A Retrospective', British Institute of International and Comparative Law, 6 December 2012. http://www.biicl.org/events/view/-/id/728/

[90] *EC*-Asbestos, WT/DS135/AB/R. See for a case analysis: M. Cordonier Segger and M.W. Gehring, "The WTO and Precaution: Sustainable Development Implications of the WTO Asbestos Dispute" (2003) 15 (3) JEL 289.

[91] Judgment on 30 June 2009, Bundesverfassungsgericht, BVerfG, 2 BvE 2/08. See T. Lock, "Why the EU is not a State: Some Critical Remarks" (2009) 5 (3) EUConst 345, p.415.

author speculates that the transition from the pre-Lisbon delimitation of competence based broadly on *effet utile* to the current one based on an attempt to codify the CJEU's jurisprudence will be much less workable than one would have imagined back when the Lisbon Treaty was drafted. Member States should, however, approach such problems with a critical eye and not with negativism pointing to yet another Treaty revision. This is crucial in the context of the doctrine of implied external powers, whose constitutionalisation suggests that any further contribution to its development by the CJEU has ceased. Therefore, although the CJEU remains the initiator of the implied powers doctrine, any future change in its scope lies with the Member States acting collectively in the European Council by amending the Treaty. This development shifts the burden of responsibility on the Member States (the political level) to determine the scope of EU powers in the foreign domain.

It is suggested that the EU's heads of state and government need to be equipped with the technicalities which characterise the complex system of EU external relations before they sit on the negotiating table. The UK balance of competence review, which is an audit of what the EU does and how it affects the UK and involves academics, practitioners and policy makers, is a good example of inter-state assessment on how EU law has impacted Member States in a variety of areas. It aims, inter alia, to predict the circumstances where Member States, contrary to the principle of conferral and subsidiarity, are liable to be prevented from acting autonomously in the international arena. Not surprisingly, a scrutiny of the scope of EU implied powers constitutes a key part of this review.[92]

To conclude, the above analysis has established that the Lisbon Treaty provisions on external competence do not entail a wholesale diminution of the role of Member States. The notion of implied powers in EU external relations law, however, constitutes an example of loose codification of the CJEU's long and complex jurisprudence. Nonetheless, as it has been argued in this contribution, the supervening exclusivity mandated through Article 216 (1) TFEU does not constitute a revolving door which would generate an unprecedented expansion of EU powers in the field of EU external action. No doubt, competence overlaps are inevitable – yet they need to be managed pragmatically. Grey areas, such as the somewhat sloppy drafting of Article 216 (1) TFEU, are bound to exist and constitutional lawyers will agree that it is a fact of life that any amount of re-drafting rules will not change that overnight.

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[92] The UK Review of the Balance of Competences between the UK and the European Union was launched by the Foreign and Commonwealth Office in July 2012 and it will conclude in Autumn 2014. Foreign policy is one of the main areas of the government's Review. See for more details: *http://www.gov.uk/review-of-the-balance-of-competences.* See also the call for evidence on foreign policy: *http://www.gov.uk/government/publications/call-for-evidence-foreign-policy-report*