The Competences of the Union

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1. Introduction

The object of this chapter is to examine the way in which competences are designed and delineated in EU law at the vertical level between the EU and the Member States and discuss their salient features. Over the years, EU competences have expanded, though not so meteorically as one may think. To alleviate concerns among Member States about the impact of EU competence enlargement upon national legal systems, a number of principles were designed to limit the powers of the EU.[2] Having said that, there is hardly today an area of regulation that the EU does not play an active part – from trade and energy to sport and fundamental rights protection.

The gradual expansion of EU competence is visible in the insertion of specific legal bases as a result of the periodic Treaty revisions and architectural alterations that the EU has undergone. These vary from the Union's de-pillarisation and the attribution of the same legal value as the EU Treaties to the Charter of Fundamental Rights (the Charter). The Treaties' enrichment with new legal bases has also had a profound effect upon the character of EU legislation which is increasingly occupying more areas of national regulation. EU legislation is not only conferring a range of rights to the individual; it also provides for robust supervision, new liability norms, enforcement and sanctions (sometimes criminal in nature) against EU law breaches.

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[2] See particularly on the principles of conferral subsidiarity and proportionality: A. Dashwood, 'The Relationship between the Member States and the European Community / European Union' in A. McDonnell, *A Review of Forty Years of Community Law* (Aspen, Kluwer, 2005), p 49.

The contribution of all Member States, both individually and collectively, to the expansion of EU competence forms a central component to the debate. Correspondingly, the design of EU competences reflects the Member States' power balances at the time of each Treaty change. As such, the development of EU competences constitutes the political by-product of Member States investing in the benefits they can accrue from acting collectively. Henceforth, national law can no more be fully comprehended without knowledge of the degree of the sovereign states' obligations under EU law.

There has been almost a parallel development cycle. The Member States' choice to transfer more of their competences to the EU has coincided with increasing political discontent in some quarters about the extent of attribution of competences across a number of policy fields such as immigration and employment and social policy. When disputes arise, the CJEU's case law has only given effect to the imperatives achieved collectively by the Member States. It has also habitually expanded, through its teleological interpretation, the scope of EU law and thus the law-making competence of the EU. There are times where such an expansion has occurred softly due to the CJEU's reluctance to exercise a robust judicial review of EU contested measures. There are also instances where the CJEU has been more vigorous in effectuating the objectives that Member States have agreed in the text of the Treaty while abandoning national constitutional concerns.

This chapter serves to provide a *tour de horizon* of the nature and scope of EU competences.[3] It argues that despite its imperfections the current dispensation of competence delimitation in the Treaty is pitched at the appropriate level but is nonetheless in need of a more objective system of judicial review. The chapter intends to provide the reader with a panoramic, updated and coherent account on the current typology and nature of EU competences. It serves to reach out to an audience groping for knowledge of the incremental regulatory presence of the EU and the grey areas of EU competence delimitation. It is ultimately hoped that the chapter will provide a treatise of current complications pertinent to EU competences and enable the reader to crystal-gaze into palatable solutions about their future delimitation.

[3] The traditional competence-governing principles of subsidiarity and proportionality, inclusive of the role of national parliaments in monitoring compliance with these principles although crucial to the delimitation of EU competences, are discussed extensively in Chapters 6 and 7 of this volume.

2. Express Provisions Defining EU Competences

The division of competences in the EU has generated considerable scholarship during the past ten years or so.[4] The inclusion in the Treaty of specific provisions on competence provided signposts for the EU and national legislatures, as well as the EU and national courts. By extension, individual citizen rights were either acquired or affected as a result of EU law. Substantively, the Treaty was gradually enriched with a host of *leges speciale*s which have enabled EU Institutions to abstain from resorting regularly to implied powers in order to achieve the objectives of the Treaty. It is the insertion of new express competence provisions in the Treaty that this section examines.

Prior to the Lisbon Treaty, competences were virtually divided into subject-related and objective-related competences. These categories drew their titles from their subject-matter (exclusive, shared and complementary competences) or their objective (the provisions of current Articles 114 and 352 TFEU). As regards subject-related competences, it was clear, pre-Lisbon, that any action taken by the EU must have a legal basis either in the Treaty or in secondary legislation. Whilst certain Treaty provisions addressed the extent of that power, there was no express substantive division of powers in the Treaties.

The Lisbon Treaty resolved the above competence semantics issue by providing a formal catalogue of competences to designate the sectors where compromises between the EU and national decision-makers should be drawn. The Lisbon taxonomy of competences was further augmented by the insertion of new substantive competences in the area of healthcare, criminal justice, immigration, energy, social

[4] See chronologically: G De Burca and B de Witte, 'The Delimitation of Powers between the EU and the Member States' in A. Arnull and D. Wincott (eds.) *Accountability and Legitimacy in the European Union* (Oxford: Oxford University Press, 2002); S. Weatherill, 'Competence Creep and Competence Control' (2004) 23 *Yearbook of European Law* 1; F.C. Mayer, 'Competences – Reloaded? The Vertical Division of Powers in the EU after the New European Constitution' WHI - Paper 19/04, Available from *http://www.whi-berlin.eu/documents/whi-paper1904.pdf* [Last accessed 5.11.2015]; T. Konstadinides, *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States* (The Hague: Kluwer Law International, 2009); P Craig, 'Competence and Member State Autonomy: Causality, Consequence and Legitimacy' in H-W Micklitz and B de Witte (eds.) *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012)); E. Herlin-Karnell, 'EU Competence in Criminal Law after Lisbon' in A. Biondi et al (eds) *EU After Lisbon*; L. Azoulai (ed.) *The Question of Competence in the European Union* (Oxford: Oxford University Press, 2014).

policy and economic coordination to mention but a few areas. It is also worth stating that the Lisbon Treaty laid down in Article 4 (2) TEU an updated commitment from the part of the EU to 'respect the national identities of Member States, inherent in their fundamental structures, political and constitutional'. The scope of application of national identity has given rise to a set of intricate issues related to the preservation of national sovereignty that has been examined elsewhere. [5]

Overall, the wording of the Lisbon Treaty in relation to competences did not pledge for a radical transformation of the old system of competence delimitation. The new competence provisions provide an overview or checklist of the EU's spheres of activity. They do not establish a systematic description of the legal effects of EU powers with reference to national competence.[6] The Lisbon competence taxonomy is only intended to provide general guidance as to the scope of issues over which the EU has powers to take action. It is not designed to set EU competences in stone by exhaustively detailing the conduct of the EU Institutions in every single area of EU activity.

Having said that, the main position remains that every action at the EU level needs to be grounded on a clear legal basis stemming from the Treaties. This is particularly important in the field of EU foreign policy, since the areas of express internal competence also prescribe the potential for EU external action. EU's action on the international scene is amplified by the Treaty in the form of express provisions regarding its legal personality (Article 47 TEU), the capacity to negotiate agreements with third countries or international organisations (Article 218 TFEU), and the possibility to pursue common policies and actions to safeguard EU values,

[5] L. Besselink, 'National and Constitutional Identity Before and After Lisbon' (2010) 6 (3) *Utrecht Law Review* 36; A. von Bogdandy and S. Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' (2011) 48 (5) *Common Market Law Review* 1417; B. Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts. The Ordinary Functions of the Identity Clause' (2012) 31 (1) *Yearbook of European Law* 263; T. Konstadinides 'Dealing with Parallel Universes: Antinomies of Sovereignty and the Protection of National Identity in European Judicial Discourse' (2015) 34 (1) *Yearbook of European Law* 127.

[6] A similar argument has been made by Dougan and Tridimas. See M. Dougan, The Treaty of Lisbon 2007: Winning minds, not hearts' (2008) 45 *Common Market Law Review* 617; T. Tridimas, 'Competence after Lisbon: The elusive search for bright lines' in D. Ashiagbor, N. Countouris and I. Lianos (eds.) *The European Union After the Treaty of Lisbon* (Cambridge University Press, 2011). See further: R. Schütze, 'Lisbon and the Federal Order of Competence: A Prospective Analysis' (2008) 5 *European Law Review* 709; P. Craig, Competence: clarity, conferral, containment and consideration (2004) 29 (3) European Law Review 323.

fundamental interests, security, independence and integrity (Article 21 (a) TEU). The conclusion of international agreements is unproblematic in most cases. The EU legislature has to find an express power in the Treaties that authorises the EU to do so. There are cases, however, that raise concern as EU external powers may emerge from Treaty legal bases allowing for internal action and from measures adopted within the framework of these provisions.[7]

Thus, the EU can resort to internal legal bases in order to pursue international cooperation in a range of areas not stipulated by the Treaty. Most notably, in the absence of any such express powers in the Treaty, the CJEU has provided in the past that the EU may still be 'impliedly' competent to enter into international agreements. The powers of the EU to impliedly conclude international agreements under the post-Lisbon dispensation are now listed in Article 216 (1) TFEU, examined later in this chapter. Yet, before dissecting into EU competences by subject area, it is apt to focus on their typology, which in turn determines the course of action of the EU and its Member States vis-à-vis the proverbial pie-sharing of authority and assigned responsibilities.

2.1 Getting to grips with the Lisbon typology

The Lisbon Treaty provides for a competence categorisation which resembles the ill-fated EU Constitutional Treaty (ECT) aborted almost ten years ago. In the ECT, Part I – Title III, entitled 'Union Competences' specified the three categories of Union's competences (exclusive, shared and supporting) and asserted for each given category the consequences of the EU's exercise of its competences for the Member States. Similarly, in the Lisbon Treaty, Title I, entitled 'Categories and Areas of the Union's Competence', sets out the different categories of EU competence and describes the legislative and implementing roles of the EU and the Member States. Article 2 TFEU provides a broad categorisation of defined powers while Articles 3, 4 and 6 TFEU distinguish between exclusive, shared and supporting competences.

The provisions on the different policy fields, as well as the specifications for each legal basis addressed in Article 2 TFEU, stipulate that supranational competences shall be exercised according to the Treaty provisions relating to each area. This

[7] See Chapter 36 of this volume.

reference covers both competences, and the form of legal acts provided for in those provisions. Moreover, Article 296 TFEU is significant in relation to the allocation of EU competences – it stipulates that 'where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality'. It also imposes a duty upon the EU legislature to give reasons in relation to all legal acts, regardless of their nature as legislative, delegated or implementing acts.

Outside of exclusive, shared and supporting competences, the Lisbon Treaty maintains a separate category of competences. This category can be perceived as an anomaly as it lists competences which do not fit squarely into the above tripartite classification and are not assigned to a particular group. These are the politically sensitive areas of coordination of economic and employment policies of the Member States mutually reinforcing each other (Articles 5 TFEU), and the CFSP (Articles 24 TFEU). The *sui generis* nature of competences in this category does not preclude the application of the principles of sincere cooperation and primacy of EU law, although the CFSP is still the only policy area that is regulated by the TEU.[8]

2.2 Exclusive Competence

Within the sphere of exclusive competence, only the EU may legislate and adopt legally binding acts. As Craig noted when the ECT first introduced an express competence typology, this is why 'the domain of exclusive competence comes out reasonably in terms of clarity.'[9] Apart from a few borderline issues, under the Lisbon Treaty the EU enjoys exclusive competence in a handful of sectors where it is solely responsible for legislating. That is to say that under Article 3 (1) TFEU, Member States are barred from enacting legislation on customs, internal market related competition rules, monetary policy, external trade and fisheries. In the absence of supranational measures, Member States have to be purposely authorised by the EU to adopt measures in any of these categories, inclusive of measures to assist with the implementation of acts adopted by the EU.

[8] See for an overview of the CFSP peculiarity: R. Wessel, 'The legal dimension of European foreign policy in Å.K. Aarstad et al (eds.) *Handbook of European Foreign Policy* (Sage, 2015)

[9] P. Craig, 'What Constitution does Europe Need? The House that Giscard Built: Constitutional Rooms with a View', The Federal Trust for Education and Research (London, August 2003).

Although generally straightforward to apply, exclusive competences can take different forms. Hence, for clarification we will use a subjective categorisation dividing exclusivity into: *a priori* exclusivity as expressed in Article 3 (1) TFEU; the questionable implied exclusivity resulting from market harmonisation legislation; and derived exclusivity in the context of the EU's conclusion of international agreements as expressed in Article 3 (2) TFEU.

The areas that fall under the *a priori* exclusive effect of EU law are limited in extent and have been historically developed through a combination of Treaty revisions (for instance in the area of the European Monetary Union); secondary legislation (most notably in the area of Common Fisheries Policy) and the jurisprudence of the CJEU (particularly in the field of external powers to sign international agreements) - all of which have been duly codified in the Lisbon Treaty. [10] Article 3 (1) TFEU provides a list of the EU's exclusive competences inclusive of the customs union, competition rules necessary for the functioning of the internal market, monetary policy and Common Commercial Policy (hereafter, CCP), to name but a few areas. Within these areas of exclusive activity, EU Institutions are legally capable of acting independently, therefore precluding any national action. Such a strict dividing line between exclusive and shared competences was historically absent from the Treaty. All competences in the Treaty of Rome, except perhaps from the CCP, appeared to be shared between the former Community and the Member States.

Textually, the concept of exclusive competence appeared for the first time in the Treaty of Maastricht, Article 3b (the current Article 5 TEU) that contains the principles of conferral or attribution of powers, subsidiarity and proportionality. This provision still expressly excludes the application of the principle of subsidiarity in areas 'which do not fall within the exclusive competence' of the EU [emphasis added]. This limitation upon the principle of subsidiarity relieved the EU legislative Institutions from the practical obligation of proving, in accordance with the subsidiarity test, that EU action is necessary in order to attain the objectives of the Treaty. The Protocol on the application of the principles of subsidiarity and

[10] See for a detailed account of EU exclusive competences R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2009), Chapter 3, p.156 onwards; R. Schütze, 'Dual federalism constitutionalised: the emergence of exclusive competences in the EC legal order' (2007) 32 (1) *European Law Review* 3.

proportionality introduced later by the Treaty of Amsterdam, contained a further reference to the notion of exclusivity.[11]

Hence, action by the Member States in a field of exclusive competence is only possible where the EU has been explicitly empowered to act. Having said that, the EU has not recently introduced any new exclusive competences. In *Pringle*, the CJEU held against the claimant's argument that the European Stability Mechanism (the ESM, hereafter) established by Decision 2011/199 with the aim to amend Article 136 (3) TFEU, encroached upon the exclusive competence held by the EU. It approved the ESM as an economic policy measure under Articles 2 (3) and 5 (1) TFEU (coordination of Member States' economic policies) because it had repercussions on the stability of the Euro currency. Last, it was emphasised that Article 136 (3) TFEU only confirmed the Member States' competence to establish a stability mechanism. It did not open the door to a novel EU exclusive competence although the dividing line between monetary and economic policy remains very thin and elastic.[12]

This discussion leads us to enquire what happens in cases of EU inactivity – i.e. when the EU legislative Institutions have not yet exercised an exclusive competence prescribed by the Treaty. In these circumstances, a Member State is not precluded from legislating, but its right to do so would be subject to acting as a 'trustee of the EU interest' by adopting measures necessary to the achievement of a supranational aim. This term was coined a while ago by the CJEU in *Commission v UK* in respect of the Common Fisheries Policy.[13] The idea is that the objective of implied authorisation for national legislation in areas of EU exclusive competence should have an equivalent outcome to EU legislation, namely promoting the 'common interest'. Practically, this attitude represents a way of remedying the legal vacuum arising when

[11] See Chapter 6 of this volume.

[12] For instance, commentators like Paul Craig have argued that 'it is difficult to see why the ESM should be regarded as infringing the exclusive competence of the EU over monetary policy, once we unpack the object or purpose for treating that competence as exclusive.' P. Craig, 'Pringle and the Nature of Legal Reasoning' (2014) 21 *Maastricht Journal of European and Comparative Law* 205, p.216. The legality of the ESM has split academic opinion on the merit of the CJEU's purposive considerations in upholding the ESM as a means to provide financial assistance to euro-area Member States. See P. Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology' (2013) 20 *Maastricht Journal of European and Comparative Law* 1; G. Beck, 'The Legal Reasoning of the Court of Justice and the Euro Crisis – the Flexibility of the Cumulative Approach and the *Pringle* Case' (2013) 20 *Maastricht Journal of European and Comparative Law* 4.

[13] Case 804/79 *Commission v UK* [1981] ECR 1045.

the EU has not addressed promptly national regulatory needs. Symbolically, however, it can be described as a departure from the traditional notion of exclusivity.

Another textual departure from the Treaty concerns the alleged exclusivity resulting out of internal market harmonisation – what we may confidently refer to as an artificial type of exclusivity. In 1992, the Commission emphasised the link between exclusive competence and the imperatives of free movement and the internal market, which now comprises a field of shared competence.[14] The Commission's objective-based approach to EU competences, which is somewhat prominent to this day, exposed a problem pertaining to the categorisation of competences in EU law. This problem was eventually clarified (insofar as Article 114 TFEU is concerned) by the CJEU where it held that the EU's competence under Article 114 TFEU is not exclusive (and hence it is subject to the subsidiarity principle).[15] Yet, a brief study of the current formulation of Article 114 TFEU is sufficient to prove that such demarcation lines are still blurred as a result of EU competences often exercised by the objectives which they serve as opposed to their subject matter.[16]

The use of Article 114 TFEU, discussed in more detail below in the context of shared competence, forms an example of an otherwise shared power becoming exclusive in effect once exercised.[17] The provision, aimed at eliminating trade barriers and competition distortions, has in recent years become a wide competence which has been utilised by the EU in order to regulate areas of national activity sometimes loosely connected with the internal market (e.g. crime prevention through data retention and money laundering).[18] In the same direction, the relevant case law of the CJEU concerning challenges against harmonisation measures adopted under Article 114 TFEU reveals that the EU legislature is allowed a broad margin of discretion to

[14] Commission Communication to the Council and European Parliament, 'The Principle of Subsidiarity' SEC (92) 1990 final, 27 October 1992.

[15] Case C-491/01 *BAT* [2002] ECR I-11453, para 179

[16] D. Wyatt, 'Community Competence to Regulate the Internal Market', Oxford Faculty of Law Research Paper 9/2007; T. Konstadinides, *Division of Powers in European Union Law* (Kluwer, 2009), Chapter 6; I. Maletić, *The Law and Policy of Harmonisation in Europe's Internal Market* (Cheltenham: Edward Elgar, 2013), Chapter 4.

[17] See for a helpful summary on the harmonization competence of Article 114 TFEU: R. Schütze, *An Introduction to European Law* (Cambridge: Cambridge University Press, 2012), p.63-68.

[18] See Directive 2006/24/EC on data retention (annulled) [2006] OJ L 105/54 EC and Directive 2015/849 on money laundering [2015] OJ L 141/73.

regulate the socio-economic and political choices of Member States.[19] This is perhaps because the exercise of national regulatory autonomy often carries the potential of causing a disparity or distortion to the internal market - i.e. the main obstacle that Article 114 TFEU was created to overcome. When this occurs, EU action takes place to improve the conditions for the establishment and functioning of the internal market (broadly construed) by producing exclusive results.

Having said that, there are instances where Article 114 TFEU has engaged in direct conflict with another legal basis related to an area falling under EU exclusive competences. Such conflict has been observed in two cases concerning the distinction between the CCP, which relates to trade with non-Member States (an exclusive competence), and trade in the internal market (a shared competence). In both cases, the CJEU decided to give prevalence to its exclusive competence over the shared one. The first case concerned an inter-institutional dispute over the use of the correct legal basis on the authorisation of the signing of an international agreement on audiovisual services by an EU Decision (2011/853). Anticipating a competence slippery slope, the CJEU held that such an agreement should have been concluded under the relevant CCP legal basis of Article 207 TFEU (exclusive competence) and not the internal market provision of Article 114 TFEU (shared competence).[20]

Subsequently, the CJEU resorted to the same argument in *Daiichi* where it decided that the Agreement on Trade-Related Aspects of Intellectual Property (TRIPs) falls within the CCP exclusive competence of the EU.[21] The message that these two cases carry with respect to EU external action is that the EU legislature shall take stock of the objective of the relevant agreement altogether and not that of the specific provision used. No doubt, the above decisions will affect the future division of competences between the EU and the Member States in the conclusion of international agreements with third parties. What is more, the CJEU seems to have stopped Article 114 TFEU from achieving EU objectives that squarely fall under its realm of EU exclusive competences.

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[19] D. Wyatt, 'The Growing Competence of the European Community' (2005) 16 *European Business Law Review* 483.

[20] Case C-137/12 *Commission v Council of the EU* [2013] ECLI:EU:C:2013:675.

[21] Case C-414/11 *Daiitchi* [2013] ECLI:EU:C:2013:520. See also comment: I. Van Damme 'Case C-414/11 *Daiichi*: the impact of the Lisbon Treaty on the competence of the EU over the TRIPS Agreement' (2015) 4 (1) *Cambridge Journal of International & Comparative Law* 73.

As illustrated above, the interplay between internal and external powers elucidates the competence issues relevant to the conclusion of international treaties. Beyond the specific subject area of CCP, the Treaty provides that certain international agreements may fall into the category of exclusive competence. This category is not rigid but open for development. Article 3 (2) TFEU takes stock of the CJEU's established case law which has highlighted that the EU can 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 can become exclusive.[22]

Like a number of competence provisions found written in the Treaty, Article 3 (2) TFEU illustrates an attempt to codify the CJEU's established jurisprudence on derived exclusivity.[23] The term *derived* is used here to distinguish such a type of exclusivity from the previously-mentioned *a priori* exclusivity enshrined in Article 3 (1) TFEU. According to Article 3 (2) TFEU, derived exclusivity emerges where EU competence is provided for in a legislative act of the EU; it is necessary to enable the EU to exercise its internal competence; and insofar as its conclusion may affect common rules or alter their scope. 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. For instance, the CJEU confirmed recently in Opinion 1/13, in relation to the issue of accepting the accession of a non-Member State to the 1980 Hague Convention on child abduction, that EU external competence 'may [also] be exercised through the intermediary of the Member States acting in the EU's interest.'[24] This case illustrates that the CJEU's interpretation of derived exclusivity is excessive because it gives the EU authority to prescribe the code of conduct of international agreements concluded by the Member States in the field of private international law.

[22] T. Konstadinides 'EU Foreign Policy under the Doctrine of Implied Powers: Codification Drawbacks and Constitutional Limitations' (2014) 39 (4) *European Law Review* 511.

[23] See below, Section 3.2.

[24] Opinion 1/13 [2014] ECLI:EU:C:2014:2292.

2.3 Shared Competence

Shared competence between the EU and the Member States is the default position in EU law, meaning that the majority of the EU's powers lie in this sphere. Both the EU and Member States may legislate, but once the EU has adopted an act, the Member States lose their competence. In this category, Member States are only competent to exercise their powers insofar as: the EU has not yet exercised its competences, or to the extent that the EU has stopped exercising its competence. Article 4 (2) TFEU provides that the EU has shared competence in a number of specific fields such as the Environment and Energy, and in broader fields such as the internal market or the so-called Area of Freedom, Security and Justice (AFSJ). The latter field is broken down into specialised areas such as asylum law and cooperation in civil and criminal matters.

Each of the fields of shared competence is governed by different rules. This can be challenging because the expansion of EU shared competence has spawned considerable policy fusion. For instance, the overlap between the internal market and AFSJ competences has become flagrant since the entry into force of the Lisbon Treaty. Such a policy overlap owes much to the shared features between, for instance, EU internal market regulation (e.g. relating to transport and road safety) and the cooperation of law enforcement bodies on offences covered by the Treaty (Article 87 TFEU).[25]

Prior to the Lisbon Treaty, shared competence involved primarily the internal market and the AFSJ (with the exception of criminal law) whilst it was subject to debate whether social policy, environmental policy, consumer protection, some aspects of public health, transport policy and agricultural policy constituted shared or complementary competences. This uncertainty cohered with the softer impact of EU competence upon national regulatory activity in these areas. The degree of EU harmonisation allowed in general was and still is to a great extent determined by the relevant legal bases that determine the extent of EU action in specific aspects of

[25] M. Szwarc, 'The pillars of the European Union still exist?' (2015) 11 (2) *European Constitutional Law Review* 357.

policy areas. For practical reasons, we can resort to the Von Bogdandy and Bast classification of shared powers as either concurrent or parallel.[26]

On the one hand, the internal market can be labelled as a concurrent power since Member States have very little room for the exercise of their own powers. On the other hand, the express caveat in the use of the EU's new energy competence forms a good example of parallelism. Although both the EU and the Member States can act in the field of energy, Article 194 (2) TFEU, reduces the pre-emptive effect of EU legislation in the field by confirming that that the adoption of measures which 'affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply' is prohibited.[27] Hence, the degree of pre-emption in EU shared competence is contingent upon, inter alia, the limits set by the Treaty.

These examples demonstrate that the precise amount of power conferred upon the EU differs substantially between areas. They also reveal a great deal about the powers vested in the Member States. Certain Treaty provisions on shared competence consist of a virtually complete regulatory code, severely restricting or pre-empting national freedom of manoeuvre. Conversely, other Treaty provisions on shared competence establish a partial regulatory code, therefore not resulting in a uniform legislative regime. In both cases, in the absence of EU harmonisation legislation (i.e. for as long as the EU legislature has not yet exercised its competence), Member States enjoy the freedom to legislate and maintain independent regulatory strategies. This is true even after the EU has exercised its competence insofar as the Member States respect their obligations under EU secondary legislation which may only provide for minimum harmonisation or are justified in doing so by an express Treaty derogation or an (unwritten) imperative requirement - policy consideration.[28]

Yet, Member States have more often than not been astounded at how the exercise of their regulatory freedom is reduced with the passage of time and how their actions

[26] A. Von Bogdandy A and J. Bast, 'The Vertical Order of Competences' (2002) 39 *Common Market Law Review* 227.

[27] K. Haraldsdottir, 'The limits of EU competence to regulate conditions for exploitation of energy resources: analysis of article 194 (2) TFEU' (2014) 23 (6) *European Energy and Environmental Law Review* 208.

[28] See Case C–213/07 *Michaniki* AE [2008] ECR I–9999; Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609.

may impinge upon EU law when they act loosely within its scope. Luxembourg judges have availed of the opportunity to use the EU law toolset to bring national action within the scope of EU law in most cases appearing before them.[29] First, the CJEU's jurisprudence on free movement provisions provides numerous examples of Treaty obligations in relation to measures adopted by Member States that can affect the internal market, which implicitly creates potential hindrances to the exercise of fundamental freedoms under the Treaty. For instance, in the area of the free movement of goods, the 'market access test' stipulates that any national measure adopted by a Member State, which hinders market access for products manufactured in another Member State, constitutes a measure equivalent to a quantitative restriction. This is regardless of whether or not such a national measure was designed to discriminate.[30] Second, the CJEU has emphasised the Member States' duty of loyal cooperation - i.e. if the situation is covered by the material scope of EU law, Member States ought to exercise their competences in accordance with EU law.[31]

It arises from the above examples that most fields that bestow the EU and its Member States with a shared competence provide that Member States shall be pre-empted by the EU legislative Institutions' exercise of power or by due regard to the scope of application of EU law. The preclusion of national regulatory powers by the CJEU reinforces the effect of Weiler's notion of normative supranationality by adding next to the principles of direct effect and primacy of EU law the notion of implied pre-emption.[32] As such, vast areas such as the internal market, although 'shared' textually are difficult to pin down as such because they have been heavily populated by EU legislation. As previously illustrated, the above developments raise concern about how 'shared' these areas actually are.

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[29] See on the interpretative approach of the CJEU: G. Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press, 2012); G. Beck, *The Legal Reasoning of the European Court of Justice* (Hart Publishing, 2013).

[30] This formula is manifest in the CJEU's post *Keck* case law (Case C-267/91 & C-268/91 *Keck* [1993] ECR-I 6097). See more recently: AG Bot Opinion in Case C-333/14 *The Scotch Whisky Association* ECLI:EU:C:2015:527, para 58 onwards.

[31] See for instance: C-369/90 *Micheletti* [1992] ECR 1-4239; Opinion of A.G. Maduro in C-135/08 *Rottmann* [2010] ECR I-1449; C-446/03 *Marks & Spencer Plc* [2005] ECR I-10837; C-148/02 *Garcia Avello* [2003] ECR I-11613; C-192/05 *Tas Hagen* [2006] ECR I-10451. See also on the duty of sincere cooperation: G. De Baere and T. Roes, 'EU loyalty as good faith' (2015) 64 (4) *International & Comparative Law Quarterly* 829.

[32] See J.H.H. Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights Within the Legal Order of the European Communities' (1986) *Washington Law Review* 1103.

In the EU's defence, the model of a fully integrated and deregulated market agreed by the Member States demands that EU initiatives override national trade and economic measures. At the same time, we should not overlook the fact that Member States have also reserved areas where EU legislation may entail minimum harmonisation leaving them therefore a margin for action in a specific field that the EU has exercised its competences.

EU consumer law comprises a good example where, following harmonisation (e.g. Directive 98/6/EC on the indication of prices of products offered to consumers),[33] Member States can still adopt or retain rules which match or which are more favourable to consumers, exceeding the minimum standard demanded by a Directive. Yet, even in these areas the EU has moved forward in promoting a culture of full harmonisation of some key regulatory aspects in order to increase legal certainty for both consumers and businesses, eliminating the barriers stemming from the fragmentation of current rules, and therefore completing the internal market in this area. This approach was evident with the passage of the 2005 Unfair Commercial Practices Directive (2005/29), the 2008 Timeshare Directive (2008/112) and most recently the 2014 EU Consumer Rights Directive (2011/83/EC) which introduces a new collective actions regime.[34]

The above study leaves us with practically one situation that falls squarely outside the entire typology of EU competences where Member States will enjoy absolute freedom to exercise their competence. This is possible in the rare occurrence that the EU ceases to exercise its competence by, for instance, repealing a legislative act without replacing it. This is what happened in the context of shared competences with the Data Retention Directive which came into force in 2006.[35] In the UK, a statutory instrument (hereafter, DRIPA) was introduced in 2009 to transpose the Directive (adopted under Article 114 TFEU) into domestic law. In April 2014, the CJEU ruled in favour of *Digital Rights Ireland (DRI)* and annulled the Directive on the basis of its

[33] Directive 98/6 [1998] OJ L 166/51.

[34] Directive 2005/29 [2005] OJ L 149/ 22; Directive 2008/112 [2008] OJ L 345/68; Directive 2011/83/EC [2011] OJ L 304/64.

[35] Directive 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks [2006] OJL 105/54.

violation of Articles 7 and 8 ECHR.[36] By July 2014 the DRIPA received Royal Assent, although it was successfully challenged on similar grounds in the High Court by MPs David Davis and Tom Watson.[37] In the absence of new Data Retention legislation, a new draft Investigatory Powers Bill, replacing DRIPA, was announced on 4 November 2015 and went in force on 30 December 2016.[38] While the data retention *saga* represents a good example of a shared competence returning back to the Member States, it also illustrates that the repatriation of national competences can create esoteric constitutional problems that have to be addressed in litigation before national courts.

2.3.1 Recourse to Article 114 TFEU

As discussed previously, in tandem with the trend of exclusivity through pre-emption, the regulatory autonomy of Member States in the field of shared competences has been curtailed by the liberal use of Article 114 TFEU. This trend marks a trajectory from a 'subject' to an 'objective' driven approach to shared competence at the EU level. In this respect, it has been argued that Article 114 TFEU constitutes 'the central legal basis to resolve Europe's institutional and regulatory shortcomings.'[39]

A legislative act under Article 114 TFEU must fulfil two conditions: it must approximate national measures and it must have as its object the establishment and functioning of the internal market. We should also note that Article 114 TFEU constitutes a *lex generalis* and, as such, it may give way to a *lex specialis* when available. To use the example of energy policy again, prior to the insertion of Article 194 TFEU (which ensures that Member States can diversify their energy supplies and improve competitiveness), the EU could take action for the functioning of the energy market through resort to Article 114 TFEU. In these circumstances, Article 114 TFEU was used to protect the consumer where existing disparities in national product safety rules hindered the functioning of the internal market, leading to unequal competition.

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[36] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland & Seitlinger* [2014] ECLI:EU:C:2014:238.

[37] [2015] EWHC 2092 (Admin).

[38] Available from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/473770/Draft_Investigatory_Powers_Bill.pdf [last accessed on 15.12.2015].

[39] E. Fahey, 'Does the Emperor have Financial Crisis Clothes? Reflections on the Legal Basis of the European Banking Authority' (2011) 74 (4) *Modern Law Review* 581.

Post-Lisbon, the *lex specialis* of Article 194 TFEU has made resort to the *lex generals* of Article 114 TFEU redundant in this policy sector.

What is more, with regard to the limits of Article 114 TFEU, there are a number of specificities in relation to its application that provide Member States with a certain latitude to retain their regulatory autonomy. For instance, Member States can maintain a high level of protection in relation to health and safety, the environment and consumer protection.[40] This includes introducing national rules in case specific problems emerge after EU harmonisation. There, the Commission would decide whether a measure is excluding, discriminatory, a hidden trade restriction or an obstruction to the functioning of the internal market and would notify the Member States. Once a national derogation from harmonisation is approved, the Commission would propose adaptation of the measure in question. The Commission or a Member State may also bring a matter before the CJEU if another Member State makes improper use of its derogatory powers provided in Article 114 TFEU. Finally, a safeguard clause may authorise Member States to adopt provisional measures subject to EU control.

Despite the above exceptions, the prevailing perception is that Article 114 TFEU may still be employed by EU Institutions as a vehicle towards forcing legislation upon Member States.[41] The identification by the EU legislature of a link (however tenuous) between the object of legislation and the internal market appears to be sufficient.[42] In this respect, Article 114 TFEU still serves the same objective as its predecessor Article 100a EC (renumbered to Article 95 EC in Maastricht) introduced by the Single European Act back in 1987: this is to accelerate the accomplishment of the internal market. Having a harmonisation provision in place under which the Council can operate under qualified majority has proved to be a particularly useful means to approximate areas where the EU legislature notices disparities between national rules obstructing the EU's fundamental freedoms. Such rules were taken to have a negative effect on the functioning of the internal market or caused appreciable distortions of

[40] Public health is not included in the so-called environmental guarantee inherent in Article 114 TFEU.

[41] Joined Cases C-439/05 P and C-454/05 P *Land Oberösterreich & Austria v Commission* [2005] ECR II-4005.

[42] See for analysis on the tenuous internal market link of legislation adopted under Art.114 TFEU: T. Konstadinides, 'Wavering between Centres of Gravity: Comment on *Ireland v. Parliament and Council*' (2010) 35 (1) *European Law Review* 88.

competition. As a result, the EU has employed Article 114 TFEU in order to substitute national provisions / market obstacles by adopting appropriate measures.

Indeed, it has been some time since the CJEU engaged with the constitutional orthodoxy of *Tobacco Advertising I,*[43] a judgment celebrated for its compliance with the fundamental principle of conferral of powers.[44] Against the literal interpretation of the Treaty in this judgment, the CJEU hardly questioned in subsequent cases whether or not the object of measures adopted by the EU legislature under Article 114 TFEU genuinely improved the conditions for the establishment and functioning of the internal market. It rather upheld the general competence of the EU legislature to regulate the internal market. There is very little in the post-*Tobacco Advertising* jurisprudence of the CJEU which suggests that either the EU legislature or the judiciary will exercise a degree of self-restraint as part of a wider effort to set clear limits to EU market dominance.[45]

As illustrated in more recent cases, the mere finding of disparities between national laws and abstract risks to free movement are not only sufficient to justify recourse to Article 114 TFEU as a legal basis but, additionally (and most surprisingly perhaps from a rule of law perspective), do not raise an issue of legality. This is because the breadth of the internal market is so wide that it makes it almost impossible to contemplate any area of national competence that will not be affected by a supranational measure genuinely aimed at the improvement of the conditions of the functioning of the internal market (from roaming to money laundering).

It is established in the case law, for example, that even future divergences in the laws of the Member States may justify recourse to Article 114 TFEU provided that they are reasonably likely to occur. Hence, by resorting to Article 114 TFEU, the EU legislature arguably stays within its margins of competence since any contested measure will almost always be considered necessary for the proper operation of the internal market. It follows that the utilisation of Article 114 TFEU has inevitable side

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[43] Case C-376/98 *Germany v. European Parliament and Council* [2000] ECR 1-8419.

[44] S. Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising' (2011) 12 *German Law Journal* 827; S. Weatherill, in *Judging Europe's Judges: The legitimacy of the case law of the CJEU* (Hart Publishing, 2013) p.104.

[45] C-380/03 *Germany v European Parliament and Council* [2006] ECR-11573; Case C-210/03 *Swedish Match* [2004] ECR I-11893; Case C-58/08 *Vodafone and Others* (roaming) [2010] ECR I-4999.

effects upon national sovereignty, of which the Ministers in the Council are fully aware.

Notwithstanding the above procrustean approach to EU competence, in recent years the EU legislature has employed Article 114 TFEU as a legal basis to set up agencies that contribute to the proper functioning of the internal market, even when their powers are essentially non-regulatory in nature. In *UK v European Parliament and Council*, the UK unsuccessfully challenged Regulation 460/2004 establishing the European Network and Information Security Agency (ENISA) on the ground that Article 114 TFEU did not provide an appropriate legal basis for its adoption.[46] The British argument was based on the nature of the power conferred on the EU legislature under Article 114 TFEU, which is limited in the adoption of harmonisation measures addressed to individual Member States. The UK dismissed the contention that Article 114 TFEU can be utilised by the EU legislature to establish EU bodies and confer tasks upon them. The CJEU disagreed and confirmed the legality of ENISA arguing that the term 'measures for the approximation' written in Article 114 TFEU confers on EU legislature considerable discretion as regards the method of approximation for achieving the desired result.

All in all, the CJEU confirmed that there is nothing in the wording of Article 114 TFEU which suggests that the addressees of the measures adopted by the EU legislature have to solely be Member States. Article 114 TFEU may also be an appropriate legal basis for measures that are legally binding on individuals in order to preserve the unity of the internal market. This configuration was also confirmed in a more recent challenge.[47] In line with its previous decision in *ENISA*, the CJEU held that Article 114 TFEU supplies an appropriate legal basis for the European Securities and Markets Authority's (ESMA) powers to adopt emergency measures on the financial markets of the Member States in order to regulate or prohibit short selling. The CJEU concluded that the Regulation in question (No 236/2012), which vests the ESMA with powers of intervention, was directed at the harmonisation of the Member States' laws, regulations and administrative provisions. Its purpose was, therefore, to

[46] Case C-217/ 04 *UK v Parliament and Council* (ENISA) [2006] ECRI-3771.

[47] Case C-270/12 *UK v Parliament and Council* (ESMA). The case has been criticised for going beyond the legal limits set by the *Meroni* doctrine (1958) and the *Romano* dicta (1981).

improve the conditions for the establishment and functioning of the internal market in the financial field.[48]

The CJEU's judgments on agencies do not follow an economic analysis in identifying whether differences in the laws of the Member States cause direct obstacles to trade. Other cases also lead to the same conclusion. A good example can be drawn from the UK's unsuccessful challenge against Regulation 2065/2003, aimed to set up a pan-European procedure for the authorisation of smoke flavourings for food.[49] The CJEU stressed that it was apparent that the purpose of the Regulation was to improve the conditions for the establishment of the internal market, especially since the evaluations relating to the safety of food products corresponds to the Article 114 (3) TFEU objective of ensuring a high level of health protection as well as the legal principles enshrined in the Treaty and the CJEU's established case law.

The CJEU's case law has been somewhat inconsistent on setting clear boundaries with regard to Article 114 TFEU as a general legislative power for the EU. For instance while the Luxembourg judges took a corrective approach viz. an orthodox use of Article 114 TFEU in the *PNR case*,[50] they abstained from doing so in *Ireland v Council*[51] and in *DRI*, addressed above. The former case challenged the EU legislature's recourse to Article 114 TFEU as the legal basis for the adoption of the Data Retention Directive (violation of the principle of conferral) whilst the latter case concerned the Directive's compatibility with the right to privacy enshrined in the ECHR. While the CJEU dismissed Ireland's conferral arguments in the first case, it upheld the DRI's human rights allegations in the latter.

The challenges before the CJEU against the respective legislation adopted under Article 114 TFEU make us none the wiser as regards the exercise of EU shared competence in areas such as the internal market and the AFSJ. Worse than that, as seen, they fail to restraint the use of Article 114 TFEU in the field of criminal law that

[48] It has been argued that the CJEU developed new constitutional doctrine in *ESMA*. See D. Adamski, 'The ESMA doctrine: a constitutional revolution and the economics of delegation' 2014 39 (6) *European Law Review* 812.

[49] Case C-66/04 *UK v Parliament and Council* (Smoke Flavourings) [2005] ECR I-10553

[50] Joined Cases C-317/04 and C-318/04 *European Parliament v. Council and Commission* (PNR) [2006] ECR I-4721

[51] Case C-301/06 *Ireland v Parliament and Council* [2009] ECR I-593.

the Treaty provides a clear legal basis under Article 83 TFEU for the adoption of relevant measures. With regard to surveillance, the CJEU has acquiesced to the will of the EU legislature (and the national governments who pushed for more surveillance legislation at the EU level after the 2005 terrorist attacks in London) and appears to have authorised the use of Article 114 TFEU insofar as there are some procedural guarantees inserted in the legislative measure in question. Even if the European Commission does not plan to present a new legislative initiative on data retention, there is nothing in the CJEU's previous judgments that prevents recourse to Article 114 TFEU as a legal basis for a future Directive on electronic surveillance in the investigation of serious crime.

2.4 Supporting Competence

Supporting or complementary competence found in Article 6 TFEU covers a handful of areas where EU action is supplementary to the action of the Member States. EU and national competences co-exist on the same plane and are exercised in parallel. When the EU exercises a supporting competence by adopting legally binding acts, Member States are not blocked from regulating the given field, as when the area in question falls under shared competence. In contrast, national autonomous action is allowed and the EU may only 'complement' such an action and 'contribute' to achieve the common objectives set out in the Treaty without being allowed to adopt harmonisation rules. This stands true as long as the EU measures enacted support national ones. However, once EU acts are adopted, they are binding upon the Member States and partly supersede the field they cover. In the event of conflict, therefore, the principle of primacy of EU law would apply as a coordinating norm.

To use an example, a popular area of EU supporting competences pertains to the protection and improvement of public health (the first area of supporting competence listed in Article 6 (a) TFEU). The EU has enjoyed competence in the area of health since the introduction of Article 129 EC (now Article 168 TFEU) by the Maastricht Treaty which expressly excluded 'any harmonisation of the laws and regulations of the Member States'.[52] This is still reflected in the current Article 168 (5) TFEU which

[52] Schütze notes that 'the competence was a prime illustration of the inter-governmental corset increasingly placed around Community competences: the sharp textual edges of the new provision constituted a tight constitutional frame designed to contain Community action that might otherwise

renews this commitment by granting a limited competence to the EU to promote cooperation in relation to health policy by adopting incentive measures using the co-decision procedure. Post-Lisbon incentive measures include aspects such as cross-border threats to health regarding alcohol and tobacco. On the face of it, such competence appears corrective to the post *Tobacco Advertising* precedent - the EU Institutions may adopt incentive measures instead of harmonisation Directives under Article 114 TFEU in order to help Member States adopt a tobacco control strategy designed to protect the public from tobacco promotion.

Yet, there are considerable overlaps and dividing line issues between the category of supporting competence and that of shared competence. For instance, the fact that under Article 168 TFEU the EU may only support national action by passing incentive measures does not exclude the adoption of harmonising measures aimed at the protection of human health. Such measures can be passed indirectly under a legal basis that falls under the shared competence category (as listed in Article 4 TFEU). For instance, Article 191 (2) TFEU, enabling environmental legislation, may be employed to achieve a health objective (e.g. improvement of air and water quality) as long as this is compatible with the core aim of the measure (e.g. to protect the environment). A similar result may also be achieved by EU harmonisation measures adopted under Article 114 TFEU, as was the case with the *Tobacco Advertising* saga, facilitating measures for the establishment and functioning of the internal market. As the CJEU's established case law confirms, insofar as a measure is considered necessary for the completion and proper operation of the internal market, its implications for national health policy may not raise an issue as regards EU legal competence.

It can therefore be concluded with a degree of certainty that in cases where an EU harmonising measure serves an internal market aim as well as pursuing health objectives, the CJEU will consider the measure as being adopted within the legitimate contours of Article 114 TFEU, as opposed to Article 191 TFEU.[53] Whether the EU

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have been based on [Article 114 TFEU].' R. Schütze, 'Cooperative federalism constitutionalised: the emergence of complementary competences in the EC legal order' (2006) 31 (2) *European Law Review* 167, p.179

[53] See Case 491/01, *R.* v. *Secretary of State for Health, ex p. British American Tobacco (Investments) Ltd. and Imperial Tobacco Ltd* [2002]

oversteps its competence boundaries will depend on how genuine or negligible the impact of the legislation is on the internal market. The CJEU has been cautious identifying whether the EU legislature has manifestly acted beyond the limits of its discretion. It has stressed that Article 114 TFEU cannot be used if other legal bases are more appropriate. This was emphasised in the *Waste Directive* and in *Waste Shipments* cases, where the CJEU held that any effect of the measures in question to the internal market was ancillary.[54] The CJEU decided that Article 191 TFEU was in these cases a more appropriate legal basis than Article 114 TFEU for the adoption of Directive 91/156 on waste and Regulation 259/93 on shipments of waste.[55] This appears to be a preferable approach to overstretching Article 114 TFEU in order to bring national health care schemes within the scope of internal market regulation.

Other fields of supporting competence pose less of a challenge to the exercise of national competence, but leave doubts about the effectiveness of EU action to coordinate Member States' practices. For instance, the proliferation of legal instruments in the field of civil contingencies was not coupled with straightforward and binding commitments for the Member States. The new competence of civil protection under Article 196 TFEU provides that 'the Union shall encourage cooperation between Member States in order to improve the effectiveness of systems for preventing against natural or man-made disasters.' Under Article 196 (2) TFEU, the European Parliament and the Council can establish supplementary measures to assist Member States achieving such objectives.[56] The introduction of Article 196 TFEU thus provides a *lex specialis* in the area of civil protection and therefore makes any future resort to *lex generales* unnecessary.[57] Yet, the availability of a specific legal basis for civil protection does not necessarily produce more legal certainty viz. a more unified response to terrorist attacks for example.

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[54] Case C-155/91 *Commission v Council* (Waste Directive) [1993] ECR-I; Case C411/06 *Commission v Parliament and Council* (Waste Shipments) [2009] ECR-I

[55] Directive 91/156 [1991] OJ L 78/32; Regulation 259/93 [1993] OJ L 030/0001.

[56] House of Commons European Scrutiny Committee's 57 Report provides a detailed assessment of Article 196 TFEU (pp64 onwards).

[57] At the moment, there are two Decisions covering prevention, preparedness and response which pre-date Article 196 TFEU. They were adopted under the (generic) flexibility clause of Article 352 TFEU examined in detail later.

Lisbon's introduction of a 'solidarity clause' in Article 222 TFEU constitutes a further development in the field of EU civil protection aiming to address, inter alia, terrorist attacks. Article 222 TFEU states that the EU and its Member States 'shall act jointly in a spirit of solidarity' and mobilise all available instruments to assist a Member State (at its request) in the event of a terrorist attack or a natural or man-made disaster. In contrast with Article 214 TFEU (external emergencies which call for humanitarian aid and relief for third countries - victims of natural or man-made disasters), Article 222 TFEU is addressing internal emergencies. It is also broader in scope.[58]

The Treaty of Lisbon thus contains significant changes regarding civil protection where, inter alia, the EU has been charged with the task of assisting in the preparation and promotion of swift effective cooperative action between national civil protection services and to promote consistency in international activities. In this context, Article 222 TFEU would operate alongside Article 196 TFEU as a means of adopting civil protection legislation. The above combination of legal bases aside, civil protection does not allow for any drastic changes in the way the Member States conduct their policies. It rather constitutes a soft mutual commitment for non-conventional threats to the EU's security and stability.[59]

2.5 Separate Categories of Competence

With reference to the coordination of economic and employment policies in Article 5 TFEU, the CJEU has clarified that Member States 'are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union, such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance.'[60] It is, however, subject to speculation whether the current dispensation is practical provided

[58] T. Konstadinides and A. Karatzia, 'Civil Protection and Lisbon's Mutual Solidarity Clause: Legal and Operational Aspects' in Biondi, A., Dagilyte, E. and Kucuk, E. (eds.) Solidarity in EU Law: Legal Principle in the Making (Cheltenham, Edward Elgar Publishing, 2017).

[59] For instance, Declaration No. 37 on Article 222 TFEU establishes that Member States are free to choose the most appropriate means to comply with their own solidarity obligation towards their counterparts.

[60] Case C-370/12 *Pringle v Ireland* [2012] ECLI:EU:C:2012:756, para. 158.

that economic and employment policies could have been assigned to one of the three mainstream categories of competence.

We can start appreciating how difficult it is to pigeonhole these areas in any single category, especially when it comes to delicate political questions involving the EU's permissible degree of oversight over the Member States' economic policy and the promotion of a high level of employment as illustrated in Article 9 TFEU. On the one hand, the streamlining of economic policies has implications for the EU's exclusivity over the European Monetary Union (EMU) policy. It also raises questions about the EU or Member States' liability for the debts of national governments of the Eurozone Member States (Article 125 TFEU). On the other hand, the modernisation and coordination of social protection systems lies within the policy mix of EU employment and social policies. Employment policy includes areas of shared competence such as working time, and health and safety (Article 153 TFEU), while social policy is a supporting competence under Article 156 TFEU, on the basis of which the EU Institutions can adopt soft measures on, inter alia, working conditions and social security.

In relation to CFSP, building a new competence block constitutes a pragmatic decision to keep EU foreign policy separate (in the TEU) from the rest of EU law proper (in the TFEU). It is a political gesture to indirectly sustain the intergovernmental pillar system of the EU. The incentive to maintain a strong intergovernmental flavour within the EU's external action is evident in Title V of the TEU which establishes in Article 24 (1) TEU that the CFSP is still governed by specific rules and procedures and is excluded from the TFEU list of EU competences. Yet, despite the preservation of the status quo, there are still elements of innovation in Lisbon's CFSP provisions which prepare the ground for dangerous liaisons between the TEU and the TFEU. For instance, while the TEU retains the qualified majority exception in the CFSP, it embeds the decisions of the European Council on the so-called EU strategic interests and objectives in a firm legal framework that allows for EU exercise of both CFSP and TFEU external competences.[61]

[61] Art. 22 TEU provides for European Council decisions which can be implemented in accordance to the procedures laid down by the Treaties.

The above considerations are important when looking in detail at the Lisbon redrafting of Article 40 TEU which now protects the integrity of the CFSP from the TFEU as much as it protects the TFEU from possible encroachment by the CFSP.[62] This is a change of culture given the past express preference of former Article 47 TEU (the predecessor to Article 40 TEU) to non-CFSP legal bases. Such a preference was endorsed by the CJEU in the relevant case law concerning the delimitation between non-CFSP and CFSP legal bases.[63] By contrast, Lisbon's Article 40 TEU constitutes a 'mutual' non-affectation clause which is valuable when a legal act touches upon both CFSP and non-CFSP fields.[64] This is important because each field is characterised by its own unique procedures. For instance, in *Parliament v Council*, the CJEU held that a Regulation on 'smart sanctions' 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.[65]

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 whether an alleged TFEU act is in fact a CFSP act, and vice versa. The interaction between CFSP and TFEU competences under the Lisbon setting is deemed to attract considerable academic commentary vis-à-vis the arduous task that the CJEU has been charged with - i.e. guarding the boundaries between CFSP and TFEU by upholding what is now the 'mutual' non-affectation clause of Article 40 TEU.

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[62] See on the demarcation between CFSP and other EU external policies in light of Article 40 TEU: R. Schütze, *European Constitutional Law* (Cambridge, Cambridge University Press, 2012), p.197-199.

[63] See in this regard Case C-91/05 *Commission v Council* (ECOWAS) [2008] ECR I-3651; 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; C. Hillion and R.A. Wessel, Competence distribution in EU external relations after Ecowas: clarification or continued fuzziness? (2009) 46 (2) *Common Market Law Review* 551.

[64] 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.

[65] Case C-130/10 *European Parliament v Council* [2012] ECLI:EU:C:2012:472.

3. Express Embodiments of Implied Competence

As discussed, when the EU is provided with an objective to achieve under the Treaty, it is generally provided with a legal basis / express legal competence to adopt measures for this purpose. Such a legal basis provides the relevant enabling provisions that detail the type of measure that can be used and the process that must be followed which differs from one policy area to the next. As is known, whether by accident or design, the EU Institutions do not possess the express competence to legislate in every situation. The CJEU has provided that the EU may possess implied competence which can be inferred from its objectives. This section will discuss the concept of implied competence in EU law broadly defined in relation to EU activity taking place outside the strict bounds of the Treaty. There is both an internal and an external dimension to implied powers which provides the EU with a basis for powers where it may be necessary in order to supplement an express legal competence. In addition to implied powers as accepted by the CJEU, the Treaty has contained for a long time a *petite révision* clause in Article 352 TFEU employed by the EU Institutions in order to legislate in areas not yet covered by express legal provisions to meet the implied objectives of the Treaty. [66]

Internal implied powers are used in the absence of express powers in the Treaty in order to achieve an EU objective. For instance, the CJEU stressed that a Treaty provision conferring a specific task on the Commission powers may also confer powers which are 'indispensable' in order to carry out that specific task. [67] Although not revolutionary at first reading, the CJEU managed to convince Member States that EU Institutions have the implied competence to carry out tasks broadly related to specific tasks conferred upon them.

Implied powers to carry out internal competences may also be used to support external powers, although no such external powers are provided in the Treaty. The CJEU has gone at great lengths to endorse the doctrine of implied powers in relation to EU external competences establishing that parallel powers exist in an area where

[66] R. Schütze, 'Organised Change towards an "Ever Closer Union": Article 308 EC and the Limits to the Community's Legislative Competence' (2003) 22 *Yearbook of European Law* 79, p.81.

[67] Internal implied powers are rarely used. The most prominent case on internal implied powers is perhaps Joined Cases 281, 283-285 and 287/87 *Germany and Others v Commission* [1987] ECR 3203.

the EU already has competence to act. Put simply, an external implied power is an extension of an internal conferred power, so that the latter does not become nugatory. The doctrine of EU external implied powers was only recently codified in Article 3 (2) and 216 TFEU by the Lisbon Treaty while internal implied powers remain uncodified.

As mentioned, the Treaty also provides a residual power, which we will consider in this section not because it forms an 'implied power' *strictu sensu* but due to the fact that - as described by Engström - it is a provision that offers 'an "intended" imposition of implied powers'. [68] We share this view here since the broad authorisation of Article 352 TFEU owes to the absence of an express Treaty competence and the 'implied power' derives from the need of the EU legislature to attain an EU objective. Comparing legislation based on the doctrine of implied powers as opposed to Article 352 TFEU, Engström notes that 'parallelism entails deriving external powers from internal competence while Article 352 serves primarily to create internal competence.'[69]

Indeed, the CJEU has developed the doctrine of external implied powers in a way that has kept it separate from the contours of Article 352 TFEU. For instance, in Opinion 2/94, the CJEU was explicit that Article 352 TFEU is not part of the implied powers doctrine.[70] Instead, the CJEU provided a narrow interpretation of Article 352 TFEU in order to avoid the undesired effect of submitting itself to the scrutiny of the ECHR as a distinct legal order with its own principles, judicial structure, and case-law. It affirmed its loyalty to the principle of conferral instead of making a declaration in line with the principle of implied powers, namely that the EU could reserve a broad competence in the area of fundamental rights. This is despite the fact that the Community had exclusive competence to conclude Protocol 12 of the ECHR on equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the ECHR in order to attain the objectives of the two anti-

[68] V. Engström, 'Reasoning on Powers of Organisations' in J. Klabbers, A. Wallendahl *Research Handbook on the Law of International Organizations*, p.63 onwards, p.63.

[69] V. Engström, *Constructing the Powers of International Institutions, Powers as a way of imaging organisations*, (Martinus Nijhoff Publishers, 2012), p.53.

[70] P. Eeckhout, *EU External Relations Law* (Oxford: Oxford University Press, 2011), p.99

discrimination Directives adopted in 2000 under Article 13 EC (now Article 19 TFEU).[71] Such competence was never activated.

We will hereafter discuss the two diverse provisions that encapsulate implied competences in EU law. On the one hand, the commonly-accepted doctrine of EU external implied competence now vested in Article 216 (1) TFEU which provides the EU legislature with a derivative external power to conclude international agreements. It is argued that its precise contours are still open to interpretation. On the other hand, Article 352 TFEU, an implied competence with a broad formulation, relates to the objectives of the EU in general and it currently serves primarily to create internal competences in a limited amount of cases. We consider them together because the effect of the exercise of either provisions is the expansion of EU competences beyond the strict margins of the Treaty. This is why they have been grouped as express embodiments of the implied competences doctrine for the purpose of this chapter. We will discuss them in chronological order – as mentioned, Article 216 (1) TFEU made its appearance at a much later stage in the evolution of EU law.

3.1 The Flexibility Clause of Article 352 TFEU

The flexibility clause of Article 352 TFEU is a shared competence between the EU and the Member States which provides that the powers specifically allocated to the EU may not prove to be adequate for the purpose of attaining the objectives expressly set by the Treaties. It provides the EU with the option of extending its powers beyond those conferred by the Treaties. As such, it represents the most general power in the EU system of legislative competences. Its purpose is to enable the EU to react in unforeseen circumstances via the establishment of common EU policies. Therefore, whenever Article 352 TFEU is cited as the legal basis for a legislative proposal, it is common practice for Member States to check whether the proposal is necessary to attain one of the Treaty's objectives and whether the Treaty has not provided the necessary power elsewhere. The pre-Lisbon version of the flexibility clause (Article 308 EC) mentioned that it shall only be used in the course of the operation of the

[71] Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/0022; Directive 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

common market.[72] This is no longer the case, which, at least in theory, makes the scope of Article 352 TFEU applicable in other fields, such as external relations, and, therefore, much wider.

Despite the widening of Article 352 TFEU, the Lisbon Treaty has also added certain restrictions to it. Under Article 352 (2) TFEU, national parliaments shall ensure compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol 12 of the Treaty on the application of the principles of subsidiarity and proportionality. Furthermore, under Article 352 (4) TFEU, the flexibility clause is inapplicable in the CFSP domain and any proposal citing it shall respect the limits of the above-mentioned non-affectation clause of Article 40 TEU. Additionally, Member States have unilaterally taken a stance against an unprecedented use of Article 352 TFEU by introducing legislation which impacts on proposed legislation based on the flexibility clause.

In the UK, the EU Act 2011 mandates that there is a requirement for Parliamentary approval in order to agree to any Treaty change, or the use of any passerelle or, in certain circumstances, recourse to Article 352 TFEU. In particular, section 8 of the EU Act 2011 appears controversial in that it requires parliamentary approval by an Act of Parliament before the UK can agree to any future use of Article 352 TFEU whether it is used as part of the legal base or exclusively for a proposed EU measure. Despite these parliamentary controls, recourse to Article 352 is not as frequent as it used to be. There are approximately thirteen legislative proposals since Lisbon of which just a fraction has come into force.[73]

But why this change of circumstances? First, the former frequent use of the flexibility clause owed to the limited range of competences available in the Treaty.[74] As already discussed, this position has changed. Second, since its inception the use of the

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[72] See for a detailed account on former Article 308 EC: R. Schütze, 'Organised Change towards an "Ever Closer Union": Article 308 EC and the Limits to the Community's Legislative Competence' (2003) 22 *Yearbook of European Law* 79; A. Dashwood, 'Article 308 EC as the Outer Limits of Expressly conferred Community Competence' in C. Barnard and O. Odudu (eds.) *The Outer Limits of European Union Law* (Oxford, Hart Publishing, 2009).

[73] 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.

[74] CF. Bergström and J. Almer, 'The Residual Competence: Basic Statistics on Legislation with a Legal Basis in Article 308 EC', SIEPS Working Document, 3 September 2002.

flexibility clause was inhibited not only by its residual nature (used only when the Treaty did not provide the necessary powers) but also by the requirement of unanimity voting in the Council. Third, as mentioned, the operational constraints to Article 352 TFEU are now watertight viz. subsidiarity checks and non-CFSP application. Fourth, the CJEU's self-restraint in Opinions 1/94 and 2/94 as well as the powerful warnings issued by national courts and parliaments against an unprecedented use of EU residual competence have been influential on the future use of the flexibility clause.[75]

The above variables aside, the fact that national governments are still alert about the flexibility clause reflects that the nature of Article 352 TFEU is still to some extent controversial. Perhaps this is because the flexibility provision is a constant reminder that the notion of the EU's limited powers has been imperfect from its outset or perhaps only flawless when the EU institutions operate within the margins of the specific legal bases available in the TFEU. Thus, the controversy surrounding the advance of EU competence beyond conferral through resort to the flexibility clause is predominantly historical / cultural.[76]

Indeed, Article 352 TFEU has informed a much smaller number of legislative proposals (about 3-4 per year). To provide some examples, Article 352 TFEU has been used for legislation to recognise electronic versions of the EU's Official Journal as authentic and legally binding (Regulation); approving the framework of the EU Fundamental Rights Agency (Decision); a decision to give EU historical archives at the European University Institute in Florence (Regulation); and a decision to adopt a "Europe for Citizens" programme (Regulation).[77] One can, therefore, arrive to the conclusion that the use of Article 352 TFEU has been downgraded and, therefore, currently used for rather trivial proposals.

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[75] See *Lisbon Urteil* above.

[76] We have illustrated elsewhere the contours of growth and decline of such competence and its codification in the Treaties. See T. Konstadinides, note 78 above.

[77] See T. Konstadinides, 'Report on Article 352 TFEU ('flexibility clause')', Evidence on the Government's Review of the Balance of Competences between the UK and the EU, Subsidiarity and Proportionality, December 2014. Available from https://www.gov.uk/government/consultations/subsidiarity-and-proportionality-review-of-the-balance-of-competences [last accessed: 17.12.2015]

Nonetheless, recent legislative proposals by the Commission have brought the policing of the use of the flexibility provision back to the fore. A look at Commission's recent proposals, however, demonstrates that Article 352 TFEU can still be utilised to introduce a small number of far-reaching measures where there is political will. Yet, given the limitations of the flexibility clause such proposals can, at least in theory, be easily trumped by the Member States. Such proposals included a Directive on the placement on the market of food from animal clones. The proposal caused the reaction of the European Scrutiny Committee of the House of Commons which argued that legislation on animal clones food amounted to 'EU competence creep' because action by the EU was not necessary in this area - its objective was not to protect animals but rather to address consumer perceptions of food derived from animal clones.[78] The latter did not consist one of the objectives set out in the Treaties so as to legitimately trigger recourse to Article 352 TFEU. The Committee noted that, in any event, relying on Article 352 TFEU requires primary legislation pursuant to Section 8 of the EU Act 2011, and stressed that the Government had a veto over the adoption of the proposed Directive, which it had to exercise.

Another controversial proposal concerned a Regulation about the exercise of the right to take collective action within the context of freedom of establishment and services ('Monti II' Regulation 2679/98). The proposal was based on Article 352 TFEU because of the lack of explicit provisions in the Treaty conferring the EU with necessary powers on the right to take collective action. However, legislation was halted by national parliaments which utilised the so-called 'yellow card' procedure under Article 12 TEU and Protocol 2 attached to the Lisbon Treaty. The examples demonstrate that the Treaty is still a framework to be fleshed out and complemented but it has certain limitations - some of them imposed by EU law and others imposed by national law (especially the role of national parliaments).

Given the safeguards written in respect to recourse to Article 352 TFEU, most of the problems related to its application appear to be internal and rather political. For instance, it has been argued that the UK government needs to find ways to police Article 352 TFEU requirements proactively and at an early stage in the legislative

[78] See the Committee's reasoned opinion: http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xxxii/8303.htm [last accessed: 17.12.2015]

process to avoid the risk of precedence setting and avoid any criticism about competence creep.[79] On the same note, it should be acknowledged that the existence of safeguards (i.e. unanimity and an approval by an Act of Parliament under EU Act 2011 in the UK) take place at a late stage in the legislative process. These safeguards neither remedy potential EU 'competence creep' nor do they relieve the governments of the Member States of their responsibility to scrutinise proposals early in the legislative process.[80]

3.2 External Implied Competence under Article 216 (1) TFEU

As discussed, the Lisbon Treaty has expanded the possibilities of resorting to Article 352 TFEU by relaxing the historic link between the EU's internal objectives and its external policies. Yet, although it has been established that Article 352 TFEU 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 *leges speciales* on external relations introduced in the Lisbon Treaty have made recourse to Article 352 TFEU harder. This is evident in the above-mentioned modest number of proposals under Article 352 TFEU since the coming into force of the Lisbon Treaty.

Notwithstanding this development, in the past 40 years or so, the CJEU has 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. The principles emanating from the CJEU's voluminous and

[79] Animal Cloning: the use of Article 352 TFEU Witnesses. Available from: http://www.parliamentlive.tv/Main/Player.aspx?meetingId=15300 [last accessed: 17.12.2015].

[80] See European Scrutiny Committee, 'European Private Company', Documents considered by the Committee on 19 July 2011. Available from: http://www.publications.parliament.uk [last accessed: 17.12.2015].

sometimes complex case law are post-Lisbon somewhat condensed in Article 216 (1) TFEU.[81]

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: first, where the Treaties so provide; second, 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 third, 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. Once exercised, such power could become exclusive. Such exclusive implied external competence or derived exclusivity is now manifest in Article 3 (2) TFEU. 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*, an authority in the field of EU external relations law.[82] 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. 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*). Furthermore, Member States were pre-empted in *ERTA* from unilateral external action in the field of transport. 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.

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[81] T. Konstadinides 'EU Foreign Policy under the Doctrine of Implied Powers: Codification Drawbacks and Constitutional Limitations' (2014) 39 (4) *European Law Review* 511.

[82] Case 22/70 *Commission v Council* (ERTA) [1971] ECR 263.

In respect 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 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 (AFSJ). 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.

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. 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.[83] 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. As a result, the constitutionalisation of necessity as a cause of recourse to external competence compromises the orthodoxy embedded in the principle of parallelism - i.e. that only the existence of an internal provision empowers the EU to act externally.

When interpreting 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

[83] See Opinion 1/76 [1977] ECR 741 concerning the negotiation of an Agreement establishing a European Laying-up Fund for Inland Waterway Vessels; Opinion 1/94 [1994] E.C.R. 1-5267 It 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.

powers in the original Treaty of Rome (1957) which provided only for treaty-making powers in the context of the CCP and Association Agreements. 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 above, specific legal bases now confer competences to the EU that relate explicitly to almost every field of external action. For instance, as established in *Daiichi*, the EU's exclusive external competence for CCP covers the whole of the TRIPS Agreement. In contrast with the former situation where express external competences were scattered across the former EC Treaty, post-Lisbon, EU express external powers constitute Part Five of the TFEU. This Part includes fresh legal bases for areas ranging from humanitarian aid (Article 214 TFEU) to implementation of CFSP decisions on the imposition of economic sanctions or restrictive measures (Article 215 TFEU). 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.[84]

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. 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

[84] Instead smart sanctions are now adopted under Article 75 TFEU or Article 215 (2) TFEU. See earlier discussion on *Parliament v Council.*

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.

4. The balance of EU competences

EU law owes its existence to a partial transfer of sovereignty by the Member States. Since the EU is a creation of the Member States, its competence ultimately derives from these states and is delegated to EU Institutions which should act as agents of the common interest. As a result, the ratification of the Treaties neither implies unconditional authority from the part of the EU nor a wholesale devaluation of national constitutionally entrenched rights. Equally, membership in the EU shall not entail a process of constant constitutional assessment of EU action stemming from domestic law to such a degree that the cohesion and unity of EU law would be put in jeopardy.

Different conceptual frameworks have been employed to explain the nature of coordination and problem-solving at European level. Schütze's cooperative federalism model, for instance, embraces the notion that shared competence is the norm the EU is based upon a compromise between maximalism and minimalism: a majority-rule federal system where national governments and supranational institutions engage to advanced cooperation and joint problem-solving exercises. Such a decentralised model is predicated on the maxim that Member States remain the Masters of the Treaties.[85]

At the same time though, we shall appreciate that ultimate decision-making does not rest upon national governments but upon the supranational institutions entrusted by the Member States to act as their agents.[86] Frequently these agents push their own agenda, inclusive of the objective of 'an ever closer union', a term currently resisted by the UK. Hence, it is not accidental that respect to national constitutional traditions and identities (as it is recently the trend in the case law)[87] is back to the fore of the EU

[85] See R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford University Press, 2009).

[86] P. Craig, Integration, Democracy and Legitimacy in P. Craig and G. de Burca (eds.), *The Evolution of EU Law* (Oxford University Press, 2011) 13–40, p.22

[87] T. Konstadinides 'Dealing with Parallel Universes: Antinomies of Sovereignty and the Protection of National Identity in European Judicial Discourse' (2015) 34 (1) *Yearbook of European Law* 127.

future debate. Constitutional courts, such as the BVerfG, seem to be playing their last trump card by making references to the CJEU almost prescribing the outcome of its decisions.[88] Of course, CJEU decisions such as the *OMT* and *Melloni* illustrate that national peculiarities sit uncomfortably next to the requirement of uniformity as a necessary component of the EU legal order.[89] By prescribing the permissible degree of deviation from EU law, the CJEU also protects the constitutional texts of the majority of its Member States who may be indirectly compromised by the higher threshold of protection mandated by the constitution of a particular Member State.

Notwithstanding its resistance to downplay the relevance of all 28 constitutions for European integration, it cannot be denied that the CJEU's jurisprudence still relies heavily on the *effect utile* doctrine. It is thus, often inconsistent with historical precedent. Amongst other decisions, in *Daiichi* the CJEU deviated from its previous findings in Opinion 1/76 by establishing EU competence to interpret external patent law (i.e. TRIPS) while simultaneously providing for internal competence to approve internal patent law. Moreover, the Luxembourg judges' effectiveness-laden approach also empowers the CJEU to deliver preliminary rulings even in situations where the matter in the case at hand falls outside the scope of EU law (in internal situations). Instead of determining its jurisdiction according to EU express competences, the CJEU prioritises the broader EU interest in order to forestall future differences of interpretation. Its set precedent suggests that 'provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.'[90]

Furthermore, the CJEU's pro-integrationist stance allows it to acquiescence to a top-down preemptive approach. In this regard, the duty of loyalty is a useful mechanism to reverse the roles initially attributed to the Member States and the EU - it is the Member States that have a duty of agency or abstention even where the competence at

[88] Bundesverfassungsgericht (2 BvR 2728/13) Unreported January 14, 2014 (Germany); Case C-62/14 *Gauweiler v Deutscher Bundestag* [2015] ECLI:EU:C:2015:400. See P. Craig and M. Markakis, 'Gauweiler and the legality of outright monetary transactions' (2016) 41 (1) *European Law Review* 4; P. Koutrakos, 'Gauweiler: what next?' (2015) 40 (4) *European Law Review* 473; S. Dahan et al, 'Whatever it takes? Regarding the OMT ruling of the German Federal Constitutional Court' (2015) 18 (1) *Journal of International Economic Law* 137.

[89] Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107.

[90] See Case C‑32/11 *Allianz Hungária Biztosító and Others* [2013] ECLI:EU:C:2013:16, para 20; Case C‑413/13 *Kunsten* [2014] ECLI:EU:C:2014:2411, para 18.

issue is neither exclusive *ab initio* nor pre-emptive through the application of the CJEU's established case law.[91] This is particularly the case recently in the field of EU external competence clearly illustrated by the *OIV* case and *Opinion 1/13* of the CJEU.[92] Both cases confirm the CJEU's unconcealed interference with national competence. In particular, the CJEU appears unprepared and unwilling to recognise the implications of EU Member States' membership in other international organisations which, similar to the EU, prescribe obligations and commitments for states and their governments.

Such an extensive interpretation of EU competences by the CJEU has boosted the claim of the EU as an independent legal order by externalising its norms to third actors using the maxim: *in foro interno / in foro externo*. Consequently, the CJEU has invoked EU fundamental values such as the autonomy of EU law and fundamental rights in order to escape unsettling international obligations.[93] Despite these external developments, it can be claimed that the EU is yet to set its house in order internally. Inter alia, the issue of democratic legitimacy is still sensitive while the public is shut out from EU decision-making. The Euro and migration crises have worsened the problem. Hence, the legislative conferral of new competences to the EU and the broad interpretation of existing ones by the CJEU remain key areas of concern and have in turn posed questions concerning the future level of diffusion of state authority to the EU.

Last but not least, the CJEU has employed fundamental rights protection as a barrier to national competence. It has stated that its established case law concerning the scope of the general principles of EU law also applies to the EU Charter of Fundamental

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[91] G. De Baere and T. Roes, 'EU loyalty as good faith'(2015) 64 (4) *International & Comparative Law Quarterly* 829.

[92] See T. Konstadinides, 'In the Union of Wine: Loose Ends in the Relationship between the European Union and the Member States in the field of External Representation' (2015) 21 (4) *European Public Law* 679

[93] A number of decisions demonstrate how the CJEU perceives its relation with other international organisations such as the ECHR (draft accession agreement incompatibility with the Treaties vis-a-vis ceding jurisdiction to another international organisation); the UN (viz. the far-reaching Regulations on 'smart sanctions' implementing UNSC Resolutions in the *Kadi* case (Case C–402/05 P and C–415/05, P, [2008 ECRI-6351]) or third countries such as the US (as it was recently illustrated in the *Schrems* judgment (C-362/14, 13/11/2015) regarding the legality of the EU-US safe harbour agreement). Last the EU has taken the role of a crisis or problem-solver in situations bearing financial, environmental or broader security risks, such as the diversification of external energy supply in view of the late Ukraine-Russia crisis.

Rights (the Charter) as an instrument of justice binding upon the Member States.[94] Thus, for instance, since asylum policy (which falls under the AFSJ) is a shared competence, Article 18 of the Charter provides a roadmap for strengthening the rights and protection pertaining to asylum. It guarantees that the right to asylum applies in all fields of action of both the EU and the Member States that fall widely within its scope of application of EU law.

The CJEU has also entertained the possibility of applying the Charter outside the Treaty's prescribed list of EU competences. For instance, in *Åkerberg Fransson* the CJEU applied the Charter against the imposition of administrative fines and criminal penalties related to tax fraud.[95] The competence hook there was the EU's power to harmonise VAT - hence Sweden had to observe the Charter when exercising its own competence (i.e. imposing penalties) while giving effect to the 'VAT Directive' (89/666). [96] Very skilfully, the CJEU established a parallel between the 'implementation' of EU law (where the Charter indeed applies under Article 51 (1) CFR) with the national circumstances that fell within the 'scope of application' of EU law (where the Charter did not technically apply).[97]

The judicial contribution to the expansion of EU competence indeed forms an important component in the delimitation of competences between the EU and the Member States. Historically, the CJEU has given an expansive interpretation to the right to free movement albeit whether this concerns goods (mutual recognition), persons (direct effect of Article 21 TFEU in relation to EU citizenship) or services (the infamous 'medical tourism' cases). Yet, two factors have reduced the CJEU's velocity: The first is the codification of judicial precedent into legislation. The development of mutual

[94] See Article 6 TEU. See also F. Fontanelli, 'The Implementation of European Union Law by Member States Under Article 51(1) of the Charter of Fundamental Rights' (2014) 20 (2) *Columbia Journal of European Law* 194. Note that the limit of EU competence is reinforced by Article 51(2) of the Charter, which states that the Charter does not extend the field of application of EU law beyond the powers of the Union, or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

[95] Case C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105. See also AG Bot's Opinion in the same case, para 40. See also the BVerfG's reaction to *Åkerberg Fransson* in Judgment of 24 April 2013, 1 BvR 1215/07 concerning a constitutional complaint against the Counter-Terrorism Database Act 2006.

[96] Directive 89/666 [1989] OJ L 395/36.

[97] See F. Fontanelli, 'The Implementation of European Union Law by Member States under Article 51(1) of the Charter of Fundamental Rights' (2014) 20 *Columbia Journal of European Law* 193.

recognition in measures on the freedom to provide services and criminal law does not need an introduction. The second is the CJEU's own exercise of self-restraint with regard to its previous blanket application of EU fundamental freedoms, most recently concerning the right to move and reside freely in the territory of the Member States. This right has been balanced with ongoing concerns in the Member States related to the maintenance of financial equilibrium of the national social security systems.[98]

The recent CJEU decisions in *Dano* and *Alimanovic* appear receptive to national concerns related to free movement of persons who constitute an economic burden on Member States. First, in *Dano*, the CJEU stressed that Member States may exclude from entitlement to social assistance EU citizens who arrive in their territory without intending to find a job. Subsequently, in *Alimanovic*, the CJEU held that EU citizens who travel to a Member State of which they are not nationals in order to seek employment may be excluded from entitlement to certain social benefits. This apparent trend seems to be in synch with most Member States' view on the matter of free movement and how it impinges upon access to social benefits.[99]

Apart from the CJEU's interpretation, there are three additional variables touched upon in this chapter.[100] These are the political choice of the Member States to transfer more competences to the EU through Treaty amendment; the capacity of the EU Institutions to incrementally pass EU legislation and, last, the Member States governments' acceptance of voluminous EU legislation. The latter is of course contingent upon the government that is in power at a given time when such acceptance occurs. For instance, in Sweden, the implementation of the Data Retention Directive (2006/24/EC) adopted in 2006 was delayed due to fundamental rights concerns. Sweden, which was initially in favour of Data Retention legislation, had a change of government in 2006 - and as it seems a change of plan - which resulted in minimal implementation of the Directive. The

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[98] Case C-333/13 *Dano* [2014] ECLI:EU:C:2014:2358; Case C-67/14 *Alimanovic* [2015] ECLI:EU:C:2015:597.

[99] See T. Konstadinides T. and N. O'Meara, 'The UK Government's plans to renegotiate EU membership' submitted to the House of Commons European Scrutiny Committee on 5 October 2015 as part of the Committee's enquiry into the 'UK Government's renegotiation of EU membership: parliamentary sovereignty and scrutiny'. Available from http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/European%20Scrutiny/UK%20Governments%20renegotiation%20of%20EU%20membership%20parliamentary%20sovereignty%20and%20scrutiny/written/22301.html [last accessed 20.12.2015]

[100] These variables where first identified by Paul Craig. See P. Craig, Competence and Member State Autonomy: Causality, Consequence and Legitimacy, p.2.

consequence of this was that in 2010, the Commission started infringement proceedings against Sweden and held that the government had failed to fulfill its obligations under the Directive.[101]

Notwithstanding the importance of all the above-mentioned variables pertaining to EU competence delimitation, the prevailing concern about the scope of EU competence has at times produced inaccurate fables in the Member States about how, for instance, EU Institutions can deploy their legislative competence. For instance, the residual competence of Article 352 TFEU, the most general of all legal bases in the Treaty, has been considered as carrying the potential of devaluing the principle of conferral due to its functional breadth. Indeed, ten years ago Weatherill was right to warn that Article 352 TFEU together with Article 114 TFEU were 'properly implicated by the Laeken Declaration in the crime of competence creep'.[102] However, things have changed in the last 10 years. While Article 114 TFEU retains its strength, Article 352 TFEU has atrophied considerably due to the availability of new specific legal bases that enable the EU's objectives to be given effect. In any case, the fact that the Treaty's flexibility clause has always been constrained by unanimity voting in the Council reinforces the argument that often *creeping* occurred with the national governments' consent.

All in all, the development of EU competence as a legal device includes a host of integration milestones achieved through common action by the Member States. Hence, as far as Member States are concerned, the growth of EU competence is often self-inflicted. Probably this explains why overall the EU has positioned itself relatively succinctly within the plurality of constitutional systems that compose it. Indeed, the notion of state sovereignty is unsustainable in normative terms given the systematic expansion of EU competence in recent years. Additionally, the EU has incrementally built a strong external profile which results in more competence conferral in order to represent Member States externally and conclude international agreements on their behalf.[103]

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[101] See T. Konstadinides, 'Mass Surveillance and Data Protection in EU Law: The Data Retention Directive Saga' in Bergström M. and Jonsson Cornell A.J. (eds.) European Police and Criminal Law Cooperation (Oxford, Hart Publishing, 2014). Chapter 5.

[102] S. Weatherill, 'Better Competence Monitoring' (2005) 30 (1) *European Law Review* 23, p.36.

[103] There, the EU has also often resorted to exclusivity as an attribute of external action empowerment. Hence, Member States have endorsed any competence dilation and transfer to the EU level.

5. Concluding remarks – the future

This chapter provided an overview of EU competences, mapping their delimitation through the Treaty's typology. Overall, it painted a positive picture of the current scheme of competence allocation, providing examples where attention is needed. The debate on competence delimitation both pre- and post-Lisbon has cohered around the clarification of the scope of existing powers, rather than traversing new boundaries with a view to limit the ability of the EU to respond promptly to new challenges. This is despite the (political) trend/narrative, evident in a minority of Member States, favouring repatriation of powers from the EU. For instance, prior to 'Brexit', renegotiation or repatriation of powers was presented across a raft of policy areas by the British Government despite the overall positive outcome of its preceding balance of competence review.[104] The UK's perceived success at renegotiating the terms of its membership was considered key to the Government's subsequent support for the remain option in the EU referendum that took place on 23 June 2016.

The preceding analysis on the legal and political reality of EU competence reveals that the EU enjoys a range of competences which differ in nature according to their category (whether exclusive, shared, supporting) and according to sectoral areas within those categories. The EU still operates under the maxim that the Treaty cannot confer new powers or functions on the EU institutions, even if those functions are exercised outside the Treaty. Yet, certain issues remain to be clarified beyond the traditional dividing lines pertaining to the division of competence between the EU and the Member States examined in this contribution (i.e. inclusive of the Member States' gradual transfer of competences to the EU; the EU Institutions' regulatory powers; and the CJEU's teleological approach).

For example, policy responses to the financial crisis have tested the limitations of the current Treaty framework to the extent that we have witnessed intergovernmental agreements concluded outside the confines of the Treaties. Such a plurilateral

[104] T. Helm, 'Lords accuse Tories of 'burying' review that cleared EU of interference', The Guardian, 28.03.2015. Available from http://www.theguardian.com/world/2015/mar/28/lords-accuse-tories-burying-eu-powers-review [last accessed 09.12.2015]

arrangement was evidenced in the Treaty on Stability, Coordination and Governance, a response to the financial crisis, where EU institutions chose to deploy their competences outside the boundaries of EU law.[105] Whether this effort points to a trend of renationalisation of particular EU competences remains to be seen, although this chapter argues that clarification is more desirable and more practical. In particular, a preference is drawn towards the option of having a clear-cut delimitation where possible, a borderline clarification where a precise competence division is impractical, and effective judicial monitoring by the CJEU in both cases.

Although, as argued above, the current competence dispensation is overall useful to retain, one cannot oversee the rise of differentiation as an alternative form of action by a group of Member States. Differentiation has been manifested in three ways – two of those contain competence-enhancing features whilst one is competence-restrictive in nature. First, Member States have established alternative legal orders outside the EU like the abovementioned Treaty on Stability, Coordination and Governance.[106] Second, in recent years the option of variable geometry has become a central feature of EU competence. This is because this method, given legal armour by the Treaty's provisions on enhanced and structured cooperation, allows pace-setter states to carve new areas of EU activity that may have a spill-over effect upon traditional areas of EU competence. Third, differentiation can take shape as pure unilateralism aiming at repatriating powers back to the Member States. The current renegotiation and prospective EU referendum in the UK forms such an example.

We are yet to see how such purely unilateral initiatives are going to play out as constraints to EU competences and as ways of involving the electorates to decide on complex matters such as the necessity of supranational legislation in highly technical areas.[107] Whatever the case may be, Commission President Junker confirmed that 'eventually, it will no longer be possible that 33, 34 or 35 states will proceed with the

[105] P. Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism' (2012) 37 *European Law Review* 231.

[106] Recently, the CJEU dismissed Spain's actions against the European regulations implementing enhanced cooperation in the area of the creation of unitary patent protection. See Judgments in Case C-146/13 *Spain v Parliament and Council*; Case C-147/13 *Spain v Council* [2015] ECLI:EU:C:2015:299.

[107] P. Craig, The United Kingdom, the European Union, and Sovereignty, in Sovereignty and the Law in R. Rawlings and P. Leyland, *Domestic, European, and International Perspectives* (OUP, 2013) p.170

same speed and the same momentum in the same direction…'[108] Junker's remark demonstrates that differentiation, in whatever form it manifests itself, will feature heavily in the competence debate. It remains to be seen whether it will destabilise the EU as a system of governance based on one-speed 'Communitarian' cooperation / integration.

Some of the competence concerns of the Member States illustrated in this chapter are indeed well-grounded. On the one hand, the conferral of new competences from the Member States to the EU is incremental beyond doubt – yet EU integration seems to lack a clear narrative dimension. On the other hand, the CJEU's role in the broad interpretation accorded to Treaty provisions, especially in cases described by the Member States as purely internal situations can be off-putting. The CJEU is, however, the end user when it comes to deciding about EU competence stretches in the relevant litigation. The examples provided in this chapter illustrate that the story of EU competence – a story bearing the marks of 'division' or 'delimitation' is strongly linked to national priorities driving the maturity of the EU as a multi-level political system, a diplomatic actor, a conflict manager, a security provider and a global promoter of values.

Indeed, the EU has transformed from a constitutional actor and regulator (in the areas where Member States have commonly agreed that this should be the case) to a disciplinarian and a global player. As such, judicial supervision, input legitimacy and the safeguarding of EU constitutional values (such as democracy and the rule of law enshrined in Article 2 TEU) have gained political impetus in the Member States. The prevailing argument is that the EU is perceived as an autonomous legal order distinct from other international organisations, and hence on this basis it must take responsibility and subject its norms to judicial review.[109] Accountability is crucial in order to correct systemic threats to the rule of law arising, for instance, from the EU's external action. Indeed, the EU's emerging global profile is a good example of how the Treaty's competence goalposts have shifted considerably since the Maastricht Treaty which formally extended the EU's competence to foreign policy.

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[108] See full speech: http://uk.reuters.com/article/2015/11/18/uk-britain-eu-juncker-idUKKCN0T72N320151118

[109] See for a detailed account of judicial review in EU law: A. Turk, *Judicial Review in EU Law* (Cheltenham, Edward Elgar, 2009)

The EU has indeed marked its territory as a contributor to global regulatory standards in areas such as foreign direct investment (draft free trade agreement with Singapore);[110] emissions trading[111] and international trade (Transatlantic Trade and Investment Partnership with the US).[112] The current richness of EU activity is sanctioned by the current competence dispensation which reflects the interest of the Member States to move further down the integration path. The flexibility surrounding the current delimitation rules encourages the EU Institutions to transverse literal interpretations of EU competence, marking, therefore, the occasional sea change in the sovereign practices of the Member States and ultimately the EU's overall regulatory presence.

There is certainly scope for a more rigid distribution of powers at EU level inclusive of a further attempt to draw procedural dividing lines and avoid overlaps. This can be obtained in the future through Treaty change. The meticulous exercise construing a new Treaty would take time and effort to negotiate and agree upon its final text. Whilst the timeframe of a Treaty revision is uncertain, the EU is bound to witness sporadic calls for sectoral changes uprooting in integration-sceptic Member States. In some cases, such changes would be welcome and thus introduced via treaty amendment in accordance with Article 48 TFEU (i.e. in par with the constitutional requirements of the Member States) or sectoral secondary legislation. In other cases, proposals for drastic changes may jeopardise the unity of the EU and, thus, may not be possible. Such situations may rarely result in national executives campaigning for extreme solutions, inclusive of withdrawal from the EU under the Article 50 TEU procedure.[113]

Positioning ourselves in the competence debate, we shall be vigilant not to neglect the fact that the EU with all its complexity is a pluralist entity that focuses on collective gains. On one hand, the conception that there is too much EU integration can hardly

[110] D. Leys, 'EU competence in foreign direct investment: will the EU Court of Justice end the controversy?' (2015) 10 (7/8) *Global Trade and Customs Journal* 267.

[111] J. van Zeben, 'The Allocation of Regulatory Competence in the EU Emissions Trading System' (Cambridge, CUP, 2014).

[112] See for detail: http://ec.europa.eu/trade/policy/in-focus/ttip/ [last accessed 17.12.2015].

[113] J.C. Piris, 'Which Options Would Be Available to the United Kingdom in Case of a Withdrawal from the EU?' (July 22, 2015). CSF-SSSUP Working Paper No 1/2015. Available from SSRN: http://ssrn.com/abstract=2634655 [last accessed: 20.12.2015]. See also with reference to the termination of Treaties: Vienna Convention on the Law of the Treaties: Art 31 (2), 70, 72.

be a justification to rebuild the current system of competence delimitation. On the other hand, to admit that there is an existential problem at the core of EU competence delimitation will require all Member States to do something about it. As things currently stand, the majority of national executives have neither expressed the urge nor do they possess the will power to break away from the existing imperfect but, nonetheless, functioning system of EU competence delimitation. To a large extent the collective mood about the division of competences in EU law can be summarised in a cosmopolitan federalist variation of an old maxim: 'if it's only broken according to one or two Member States, don't fix it'. The role of the counterfactual is bound to remain key in measuring the future competences of the Union and their effect on the Member States.