# 3

# COMPETENCE

## 1 CENTRAL ISSUES

i. The general principle is, and always has been, that the EU only has the competence conferred on it by the Treaties. This is what is meant by saying that the EU has attributed competence. Prior to the Lisbon Treaty, it was however difficult to decide on the limits of that competence. There were no general categories of competence, and thus the limits of competence in a specific area could only be discerned by paying close attention to the detailed Treaty provisions. There could be real disagreement as to whether the competence in a particular area was, for example, exclusive or shared. These difficulties were compounded by the fact that the real scope of EU competence would have to take account of the case law interpreting the relevant Treaty provisions, and legislation made pursuant to those provisions. The difficulties were especially prominent in relation to Treaty articles that were broadly framed, such as Articles 95 and 308 EC.

ii. The existence and scope of EU competence were therefore key elements in the reform process that culminated in the Lisbon Treaty. There are now categories of competence specified in the Lisbon Treaty: the EU may have exclusive competence, shared competence, or competence only to take supporting, coordinating, or supplementary action. Legal consequences flow from that categorization. This chapter examines the three principal categories of EU competence and their implications for the divide between EU and Member State power. There are, however, certain areas of EU competence that do not fall within these categories and they will also be examined within the course of this chapter. The discussion will consider the extent to which the new regime clarifies the scope of EU competence and contains EU power.

iii. The Lisbon Treaty makes provision not only for the existence and scope of EU competence, but also for whether the competence should be exercised. This issue is governed by the principle of subsidiarity, which was initially introduced by the Maastricht Treaty. A revised version of the principle is contained in the Lisbon Treaty and a Protocol attached to the Tre aty. The meaning and application of this concept can give rise to problems, as will be seen in the subsequent discussion

## 2 IMPETUS FOR REFORM

The EU can only act within the limits of the powers assigned to it. It has in that sense attributed competences. This principle was previously embodied in Articles 5(1) and 7(1) EC and has been reaffirmed by Article 5(2) TEU of the Lisbon Treaty, which states that:

> Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

It was, however, not easy prior to the Lisbon Treaty to specify with exactitude the division of competence between the EU and Member States,[1] and was therefore an issue identified for further inquiry after the Nice Treaty 2000.[2] It was felt that Article 5 EC provided insufficient protection for rights of Member States, and little safeguard against an increasing shift of power from the states to the EU.

We should nonetheless be cautious about the assumption that the 'competence problem' was the result primarily of some unwarranted arrogation of power by the EU to the detriment of states' rights. The reality was that EU competence resulted from the symbiotic interaction of four variables: Member State choice as to the scope of EU competences as expressed in Treaty revisions; Member State, and, since the SEA, European Parliament acceptance of legislation that fleshed out the Treaty Articles; the jurisprudence of the EU Courts; and decisions taken by the institutions as to how to interpret, deploy, and prioritize the powers accorded to the EU.[3]

The Laeken Declaration[4] specified in greater detail the inquiry into competence that had been left open after the Nice Treaty 2000. Four principal forces drove the reform process: clarity, conferral, containment, and consideration. The desire for 'clarity' reflected the concern that the Treaty provisions on competences were unclear, jumbled, and unprincipled. The idea of 'conferral' captured not only the idea that the EU should act within the limits of the powers attributed to it, but also carried the more positive connotation that the EU should be accorded the powers necessary to fulfil the tasks assigned to it by the enabling Treaties. The desire for 'containment' reflected the concern that the EU had too much power, and that it should be substantively limited.[5] This argument must nonetheless be kept in perspective, since a significant factor in the distribution of competence has been the conscious decision of the Member States to grant new spheres of competence to the EU. This is where the fourth factor came into play, 'consideration' of whether the EU should continue to have the powers that it had been given in the past, a re-thinking of the areas in which the EU should be able to act.



[1] A Dashwood, 'The Limits of European Community Powers' (1996) 21 ELRev 113; G de Búrca, 'Setting Limits to EU Competences', Francisco Lucas Pires Working paper 2001/02, www.fd.unl.pt/je/wpflp02a.doc; U di Fabio, 'Some Remarks on the Allocation of Competences between the European Union and its Member States' (2002) 39 CMLRev 1289; A von Bogdandy and J Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform' (2002) 39 CMLRev 227; P Craig, 'Competence: Clarity, Conferral, Containment and Consideration' (2004) 29 ELRev 323; S Weatherill, 'Better Competence Monitoring' (2005) 30 ELRev 23; F Mayer, 'Competences—Reloaded? The Vertical Division of Powers in the EU and the New European Constitution' (2005) 3 I-CON 493; R Schutze, *From Dual to Cooperative Federalism, The Changing Structure of European Law* (Oxford University Press, 2009).

[2] Treaty of Nice, Declaration 23 [2001] OJ C80/1.

[3] P Craig, 'Competence and Member State Autonomy: Causality, Consequence and Legitimacy' in B de Witte and H Micklitz (eds), *The European Court of Justice and the Autonomy of Member States* (Intersentia, 2011) ch 1.

[4] European Council, 14–15 Dec 2001, 21–22.

[5] Mayer (n 1) 504–505.

The reality is that there was little systematic re-thinking of the areas in which the EU should be able to act. The Convention on the Future of Europe did not conduct any root and branch re-consideration of all heads of EU competence. The general strategy was to take the existing heads of competence as given. The emphasis was on clarity, conferral, and containment.

## 3 LISBON STRATEGY

### (A) CATEGORIES AND CONSEQUENCES

The Lisbon Treaty repeats with minor modifications the provisions in the Constitutional Treaty. The provisions are contained in the TEU and in the TFEU. Thus Article 4 TEU states that competences not conferred on the Union remain with the Member States. Article 5 TEU stipulates that the limits of Union competences are governed by the principle of conferral. It is however the TFEU that contains the main provisions on competence. There are categories of competence that apply to specified subject matter areas, and concrete legal consequences flow from such categorization. The principal categories are where the EU's competence is exclusive, where it is shared with the Member States, where the EU is limited to supporting/coordinating action, with special categories for EU action in the sphere of economic and employment policy, and Common Foreign and Security Policy, CFSP. Article 2 TFEU provides that:

> 1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.
> 2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.
> 3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.
> 4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.
> 5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.
>
> Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.
> 6. The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area.



### (B) EXPRESS AND IMPLIED POWER

There are two important points that should be stressed before examining the particular categories of competence, since these points apply to the entirety of the subsequent discussion.

First, there can be disagreement as to the ambit of a particular Treaty Article, and this is so irrespective of the category of competence which applies to the area. Treaty Articles may be drafted relatively specifically, or they may be framed in more broad open-textured terms. In either case

it is always possible for there to be disagreement about the ambit, scope, or interpretation of the relevant Treaty Article, more especially when it is cast in broad terms.[6] The ECJ has in general been disinclined to place limits on broadly worded Treaty Articles. It can however do so. In the *Tobacco Advertising* case the ECJ held that a directive relating to tobacco advertising could not be based on Article 95 EC.[7]

### Case C –376/98 **Germany v European Parliament and Council** [2000] ECR I-8419

[Note Lisbon Treaty renumbering: Arts 57(2), 66, 100a, 164 are now Arts 53(2), 62, 114 TFEU and Art 19 TEU]

Germany sought the annulment of a Directive designed to harmonize the law relating to the advertising and sponsorship of tobacco. The Directive had been based on Articles 57(2), 66, and 100a. Article 100a allows the adoption of harmonization measures for the functioning of the internal market. The ECJ cited Articles 100a, 3(c), and 7a of the EC Treaty. It then continued as follows.

THE ECJ

83. Those provisions, read together, make it clear that the measures referred to in Article 100a(1)... are intended to improve the conditions for the establishment and functioning of the internal market. To construe that article as meaning that it vests in the Community legislature a general power to regulate the internal market would not only be contrary to the express wording of the provisions cited above, but would also be incompatible with the principle embodied in Article 3b... that the powers of the Community are limited to those specifically conferred on it.

84. Moreover, a measure adopted on the basis of Article 100a... must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Article 100a as a legal base, judicial review of compliance with the proper legal basis might be nugatory. The Court would then be prevented from discharging the function entrusted to it by Article 164... of ensuring that the law is observed in the interpretation and application of the Treaty.

85. So, in considering whether Article 100a was the proper legal basis, the Court must verify whether the measure whose validity is at issue in fact pursues the objectives stated by the Community legislature...



While there are therefore limits to what is now Article 114 TFEU, subsequent case law on related subject matter has shown that the ECJ is willing to accept use of this Article as the legal basis for the enacted measure.[8] This is exemplified by the 2006 *Tobacco Advertising* case,[9] where the ECJ upheld the validity of a revised directive on tobacco advertising, which included, subject to limited

[6] See, eg, Case C–84/94 *United Kingdom v Council* [1996] ECR I–5755; Case C–233/94 *Germany v European Parliament and Council* [1997] ECR I–2405.

[7] T Hervey, 'Up in Smoke? Community (Anti)-Tobacco Law and Policy' (2001) 26 ELRev 101.

[8] Case C–377/98 *Netherlands v Parliament and Council* [2001] ECR I–7079; Case C–491/01 *The Queen v Secretary of State for Health, ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I–11453; Case C–210/03 *R v Secretary of State for Health, ex p. Swedish Match* [2004] ECR I–11893.

[9] Case C–380/03 *Germany v European Parliament and Council* [2006] ECR I–11573.

exceptions, prohibitions on advertising in the press and radio and constraints on sponsorship by tobacco companies. The Court concluded that this could be adopted under what was Article 95 EC, since there were disparities between the national laws on advertising and sponsorship of tobacco products, which could affect competition and inter-state trade.

Secondly, the EU institutions may claim that a particular Treaty Article contains an implied power to make the particular regulation. While the notion of implied power is well known in domestic and international legal systems, its meaning is more contestable. Under the narrower formulation, the existence of a given power implies the existence of any other power that is reasonably necessary for the exercise of the former. Under the wider formulation, the existence of a given objective implies the existence of power reasonably necessary to attain it. The narrow sense of implied power has long been accepted.[10] The ECJ has also embraced the wider formulation. This is exemplified by the following cases.

### Cases 281, 283–285, 287/85 **Germany v Commission** [1987] ECR 3203

[Note Lisbon Treaty renumbering: Art 118 is now Art 153 TFEU]

The Commission made a decision pursuant to Article 118 which established a prior communication and consultation process in relation to migration policies affecting workers from non-EC countries. The Member States were to inform the Commission and other Member States of their draft measures concerning entry, residence, equality of treatment, and the integration of such workers into the social and cultural life of the country. After notification to the Commission of such draft measures there would then be consultation with the Commission and other Member States. A number of States challenged this measure as being *ultra vires* the Commission. Article 118, which concerned collaboration in the social field, did not expressly give the Commission power to make binding decisions. The ECJ held that migration policy in relation to non-Member States could fall within Article 118, to some extent at least, because of the effects of such migration on the employment situation in the EC.

THE ECJ

27. . . [I]t must be considered whether the second paragraph of Article 118, which provides that the Commission is to act, *inter alia*, by arranging consultations, gives it the power to adopt a binding decision with a view to the arrangement of such consultations.

28. In that connection it must be emphasised that where an Article of the EEC Treaty . . . confers a specific task on the Commission it must be accepted, if that provision is not to be rendered wholly ineffective, that it confers on the Commission necessarily and *per se* the powers which are indispensable in order to carry out that task. Accordingly, the second paragraph of Article 118 must be interpreted as conferring on the Commission all the powers which are necessary in order to arrange the consultations. In order to perform that task of arranging consultation the Commission must necessarily be able to require the Member States to notify essential information, in the first place to identify the problems and in the second place in order to pinpoint the possible guidelines for any future joint action on the part of the Member States; likewise it must be able to require them to take part in consultation.

[10] Case 8/55 *Fédération Charbonnière de Belgique v High Authority* [1956] ECR 245, 280.

**Case 176/03 Commission v Council**
[2005] ECR I-7879

The Council enacted a Framework Decision under what was the Third Pillar, Title VI TEU, that required Member States to prescribe criminal penalties for certain environmental offences. The Commission argued that the measure should have been enacted under Article 175 EC, since it was concerned with the environment. The ECJ found that the principal aim of the Framework Decision was to protect the environment, and that it should have been made under Article 175. It accepted that, as a general rule, neither criminal law nor criminal procedure fell within Community competence, but then reasoned as follows.

THE ECJ

48. However, [this] does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.

The CFI has, however, more recently held that it is only exceptionally that such implicit powers are recognized, and in order to be so recognized they must be necessary to ensure the practical effect of the provisions of the Treaty or the basic regulation at issue.[11]



## 4 EXCLUSIVE COMPETENCE

### (A) BASIC PRINCIPLES

Article 2(1) TFEU establishes the category of exclusive competence, which carries the consequence that only the Union can legislate and adopt legally binding acts. The Member States can only do so if empowered by the Union or for the implementation of Union acts.

The subject matter areas that fall within exclusive competence are set out in Article 3(1) TFEU: customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the Euro; the conservation of marine biological resources under the common fisheries policy; and the common commercial policy. Article 3(2) TFEU states that the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.

### (B) AREA EXCLUSIVITY

The areas specified in Article 3(1) that fall within the EU's exclusive competence are limited. We have seen that a pressing concern in the Laeken Declaration and the Convention on the Future of Europe was to contain EU power. The domain of exclusive competence fares pretty well when

[11] Case T–240/04 *French Republic v Commission* [2007] ECR II–4035, [37]; Case T–143/06 *MTZ Polyfilms Ltd v Council* [2009] ECR II–4133, [47].

judged by this criterion, given that the areas that come within this category are relatively discrete and the list is small. This is important because the consequences of inclusion are severe: the Member States have no autonomous legislative competence and they cannot adopt any legally binding act. They can neither legislate, nor make any legally binding non-legislative act.

The very creation of categories of competence inevitably means that there will be problems of demarcating borderlines between the different categories. Such problems can arise in demarcating the line between exclusive and shared competence. There are, for example, ambiguities about the relationship between the competition rules, which are a species of exclusive competence, and the internal market, which is shared competence.[12] There may also be difficult borderline problems between provisions relating to the customs union and other aspects of the internal market, since the customs union falls within exclusive competence, while the internal market is shared competence. It may be difficult to decide whether a case is concerned with the customs union, tariffs, quotas, and the like, or whether it is really 'about' discriminatory taxation.[13]

## (c) CONDITIONAL EXCLUSIVITY

The EU is also accorded exclusive competence to make an international agreement,[14] provided that the conditions in Article 3(2) TFEU are met.

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



Article 3(2) TFEU should be read in conjunction with Article 216 TFEU. Article 216 is concerned with whether the EU has competence to conclude an international agreement. Article 3(2) deals with the related, but distinct, issue as to whether that competence is exclusive or not. Article 216 TFEU reads as follows.

> 1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.
> 2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

The catalyst for Article 216 TFEU was the report of the Working Group on External Action. Prior to the Lisbon Treaty the EC Treaty accorded express power to make international agreements in certain limited instances,[15] and this was supplemented by the ECJ's jurisprudence delineating the circumstances in which there could be an implied external competence to make an international agreement. The Working Group recommended that there should be a Treaty provision that

[12] P Craig, *The Lisbon Treaty, Law, Politics and Treaty Reform* (Oxford University Press, 2010) 159–161.
[13] Ch 18.
[14] The EU has legal personality: Art 47 TEU.
[15] Arts 111, 133, 174(4), 181, 310 EC.

reflected this case law.[16] This was embodied in the Constitutional Treaty, and taken over into the Lisbon Treaty as Article 216 TFEU. The breadth of Article 216 is readily apparent, and the reality is that it will be rarely, if ever, that the EU lacks power to conclude an international agreement. The case law on the scope of the EU's external competence, and the extent to which it is exclusive or parallel with that of the Member States, is complex.[17] Article 3(2) TFEU stipulates three instances in which the EU has exclusive external competence. The interpretation of this provision is by no means easy.[18] The complexity of the case law necessarily means that embodying the principles in a Treaty Article was always going to be difficult. Article 3(2) read together with Article 216 TFEU comes close to eliding the EU's power to act via an international agreement with the exclusivity of that power, an issue which pre-occupied much of the case law in this area.

## (i) *External Competence and Exclusivity: Pre-Lisbon*

We need therefore to take a brief step back to the pre-Lisbon case law to understand the significance of Article 3(2) TFEU. The ECJ had for some considerable time recognized Community competence to conclude an international agreement where this was necessary to effectuate its internal competence, even where there was no express external competence.[19] The issue of whether this implied external power was exclusive was treated as distinct from the existence of such power. Implied external competence could be exclusive or shared,[20] but the criteria for the divide were not entirely clear.[21] The ECJ's formulations as to when exclusivity could arise were however far-reaching.

Thus in *ERTA* the ECJ held that when the Community acted to implement a common policy pursuant to the Treaty, the Member States no longer had the right to take external action where this would affect the rules thus established or distort their scope.[22] This position was modified in *Kramer*.[23] The ECJ held that the EC could possess implied external powers even though it had not taken internal measures to implement the relevant policy, but that until the EC exercised its internal power the Member States retained competence to act, provided that their action was compatible with Community objectives. The scope of exclusivity was thrown into doubt in the *Inland*



[16] CONV 459/02, Final Report of Working Group VII on External Action, Brussels, 16 Dec 2002 [18].

[17] See below, 00–00; T Tridimas and P Eeckhout, 'The External Competence of the Community and the Case-Law of the Court of Justice: Principle versus Pragmatism' (1994) 14 YBEL 143; A Dashwood and C Hillion (eds), *The General Law of EC External Relations* (Sweet & Maxwell, 2000); P Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press, 2004); M Cremona, 'The Draft Constitutional Treaty: External Relations and External Action' (2003) 40 CMLRev 1347; P Koutrakos, *EU International Relations Law* (Hart, 2006); P Koutrakos, 'Legal Basis and Delimitation of Competence in EU External Relations' in M Cremona and B de Witte (eds), *EU Foreign Relations Law, Constitutional Fundamentals* (Hart, 2008) ch 6; M Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process' in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations, Salient Features of a Changing Landscape* (Cambridge University Press, 2008) ch 2; M Cremona, 'External Relations and External Competence of the European Union: the Emergence of an Integrated Policy' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 2nd edn, 2011) ch 9.

[18] Cremona, 'Draft Constitutional Treaty' (n 17); Craig (n 1).

[19] (N 17); Case 22/70 *Commission v Council* [1971] ECR 263; Cases 3, 4, and 6/76 *Kramer* [1976] ECR 1279; Opinion 1/76 *On the Draft Agreement Establishing a Laying-up Fund for Inland Waterway Vessels* [1977] ECR 741; Opinion 2/91 *Re the ILO Convention 170 on Chemicals at Work* [1993] ECR I–1061; Opinion 2/94 *Accession of the Community to the European Human Rights Convention* [1996] ECR I–1759.

[20] Opinion 1/03 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2006] ECR I–1145, [114]–[117].

[21] Cremona, 'External Relations' (n 17) A Dashwood and J Heliskoski, 'The Classic Authorities Revisited' in Dashwood and Hillion (n 17) 3.

[22] Case 22/70 *Commission v Council* (n 19).

[23] Cases 3, 4, and 6/76 *Kramer* (n 19).

*Waterways* case,[24] where the ECJ held that the EC could have exclusive external competence, even though it had not exercised its internal powers, if Member State action could place in jeopardy the Community objective sought to be attained.

The ECJ pulled back from the very broad reading of exclusivity in the *Inland Waterways* case in *Opinion 1/94 on the WTO Agreement*.[25] It held that exclusive external competence was in general dependent on the actual exercise of internal powers and not their mere existence.[26] The *Inland Waterways* case was distinguished on the ground that the EC's internal objective could not be attained without making an international agreement and internal EC rules could not realistically be made prior to the conclusion of such an agreement.[27] This rationale was held not to apply to the *WTO* case.[28] This reasoning has been followed in later decisions.[29]

Subsequent jurisprudence nonetheless revealed that the ECJ construed broadly the idea of the EC having exercised its powers internally, and that the ECJ was also prepared to give a wide interpretation to the circumstances where this gave rise to exclusive external competence for the EC. This was apparent from the 'open skies' litigation, involving Commission actions against several Member States.[30] The Commission alleged that Member States had infringed the Treaty by concluding bilateral 'open skies' agreements with the USA, on the ground that the EC had exclusive external competence in this area. It argued that the EC had exclusive external competence in line with the *ERTA* ruling, because it had exercised its internal competence to some degree within the relevant area. The ECJ accepted this argument. The Council had adopted a package of legislation based on Article 80(2) EC. The ECJ held that the *ERTA* ruling could apply to internal power exercised in this manner, and therefore the EC had an implied external competence. It followed that when the EC made common rules pursuant to this power, the Member States no longer had the right, acting individually or collectively, to undertake obligations towards non-Member States which affected those rules or distorted their scope.

The judgment confirmed the broad reading given to the phrase 'affected those rules or distorted their scope', since it was this that transformed external competence into exclusive external competence. The ECJ, in accord with prior case law, held that this would be so where the international agreement fell within the scope of the common rules, or within an area that was already largely covered by such rules, and this was so in the latter case even if there was no contradiction between the international commitments and the internal rules. EC legislative provisions relating to the treatment of non-Member State nationals, or expressly conferring power to negotiate with non-Member States, gave the EC exclusive external competence.

The same general message emerged from the *Lugano* Opinion:[31] implied external competence could be exclusive or shared, but where the EC had exercised its powers internally, then the ECJ would be inclined to conclude that this gave rise to exclusive external competence, whenever such

[24] Opinion 1/76 *Inland Waterways* (n 19).

[25] Opinion 1/94 *Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property, WTO* [1994] ECR I–5267.

[26] Ibid [77], [88]–[89].

[27] Ibid [85]–[86].

[28] Ibid [86], [99], [100], [105].

[29] See, eg, Opinion 2/92 *Competence of the Community or one of its Institutions to Participate in the Third Revised Decision of the OECD on National Treatment* [1995] ECR I–521.

[30] Case C–466/98 *Commission v United Kingdom* [2002] ECR I–9427; Case C–467/98 *Commission v Denmark* [2002] ECR I–9519; Case C–468/98 *Commission v Sweden* [2002] ECR I–9575; Case C–469/98 *Commission v Finland* [2002] ECR I–9627; Case C–471/98 *Commission v Belgium* [2002] ECR I–9681; Case C–472/98 *Commission* v *Luxembourg* [2002] ECR I–9741; Case C–475/98 *Commission v Austria* [2002] ECR I–9797.

[31] Opinion 1/03 *Lugano* (n 20) [114]–[115].

exclusive competence was needed to 'preserve the effectiveness of Community law and the proper functioning of the systems established by its rules'.[32]

### (ii) *External Competence and Exclusivity: Post-Lisbon*

Article 3(2) TFEU specifies three situations in which the EU has exclusive external competence. The first is where conclusion of an international agreement is provided for by a legislative act of the Union. The wording is significant. Article 3(2) TFEU does not state that the Union shall have exclusive external competence where a Union legislative act says that this shall be so. Nor does it state that the EU shall have such exclusive external competence only in the areas in which it has an exclusive internal competence. It states that where the conclusion of an international agreement is provided for in a legislative act, the Union will have exclusive external competence. Thus express external empowerment to conclude an international agreement is taken to mean exclusive external competence, with the corollary that Member States are pre-empted from concluding any such agreement independently, and from legislating or adopting any legally binding act.

The same elision of external power and exclusive external power is evident in the second situation listed in Article 3(2) TFEU. There is, as we have seen, ECJ jurisprudence that accords the EU competence to conclude an international agreement where this is necessary to effectuate its internal competence, even where there is no express external competence.[33] The effect of Article 3(2) TFEU is nonetheless that the EU has exclusive external competence to conclude an international agreement where it is necessary to enable the Union to exercise its competence internally, irrespective of the type of internal competence possessed by the EU. Taken literally this means that exclusive external competence to conclude an international agreement resides with the Union, where this is necessary for the exercise of internal competence, even where the internal competence is only shared or even where the EU can only take supporting or coordinating action. It might be argued that any EU external competence to make an international agreement must be bounded by the nature of its internal competence in the relevant area. The effect of Article 3(2) TFEU would still be that the EU would have exclusive external competence to conclude an international agreement that was necessary to enable the EU to exercise an internal competence, even where the internal competence only allowed supporting action, provided that the international agreement did not contain provisions that went beyond this type of action.

The third of the situations mentioned in Article 3(2) TFEU is that the EU shall have exclusive competence insofar as the conclusion of an international agreement 'may affect common rules or alter their scope'. This is in accord with the ECJ's case law considered above. The reality is that this phrase has been interpreted broadly by the ECJ, such that in most instances where the EU has exercised its power internally it will be held to have an exclusive external competence.

Cremona has argued convincingly that Article 3(2) 'conflates the two separate questions of the existence of implied external competence and the exclusivity of that competence',[34] and that the combination of this Article when read with Article 216 TFEU is that implied shared competence could disappear. This does seem to be the outcome of the Treaty provisions, subject to the caveats mentioned above, and it is, as Cremona states, hard to defend in policy terms.[35]

The result is moreover difficult to square with the practical realities in this area. Thus notwithstanding the relatively broad judicial reading given to exclusive external competence, the reality was that prior to the Lisbon Treaty many external powers were shared between the Member States

[32] Ibid [131].
[33] (N 19).
[34] Cremona 'Defining Competence' (n 17) 61.
[35] Ibid 62.

and the EU, through mixed agreements where power to conclude the agreement was shared with the Member States.[36] This might be because the conditions in the case law for the Community's exclusive external competence were not satisfied, where for example the EC had not adopted sufficient internal measures to accord it exclusive external competence.[37] External competence might also be shared because the EC Treaty did not confer sufficient competence on the EC to ratify the agreement in its entirety, thereby requiring allocation as between the EC and the Member States of the power to conclude the agreement with non-Member States,[38] or where the EC had some competence over the relevant area, but this was limited to laying down minimum requirements, thereby leaving Member States free to apply the rules flowing from the international agreement over and beyond this.[39]

## 5 SHARED COMPETENCE

### (A) BASIC PRINCIPLES

Article 2(2) TFEU defines shared competence. The wording is important and Article 2(2) states that:

> When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

The areas that fall within shared competence are delineated in Article 4 TFEU. Shared competence is the general residual category, since Article 4(1) provides that the Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the categories referred to in Articles 3 and 6 TFEU, which deal respectively with exclusive competence, and that where the Union is restricted to taking action to support, coordinate, or supplement Member State action. This follows also from Article 4(2), which states that shared competence applies in the 'principal areas' listed, implying thereby that the list is not necessarily exhaustive. The idea that shared competence is the default position must nonetheless be read subject to the special category of competence dealing with economic and employment policy, Article 5 TFEU, and that dealing with foreign and security policy, Article 2(4) TFEU, Title V TEU. Article 4 TFEU states that:

> 1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
> 2. Shared competence between the Union and the Member States applies in the following principal areas:
>
> (a) internal market;
>
> (b) social policy, for the aspects defined in this Treaty;

[36] D O'Keeffe and H Schermers (eds), *Mixed Agreements* (Martinus Nijhoff, 1983); M Cremona, 'The Doctrine of Exclusivity and the Position of Mixed Agreements in the External Relations of the European Community' (1982) 2 OJLS 393; M. Cremona, External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law', EUI Working Paper, Law No 2006/22.

[37] Opinion 1/94 (n 25) [99]–[105]; Opinion 2/00 *Opinion Pursuant to Article 300(6) EC, Cartegena Protocol* [2001] ECR I–9713, [45]–[46].

[38] Opinion 2/00 (n 37) [5].

[39] Opinion 2/91 (n 19) [16]–[21].

(c) economic, social and territorial cohesion;

(d) agriculture and fisheries, excluding the conservation of marine biological resources;

(e) environment;

(f) consumer protection;

(g) transport;

(h) trans-European networks;

(i) energy

(j) area of freedom, security and justice;

(k) common safety concerns in public health matters, for the aspects defined in this Treaty.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

There can be boundary problems between shared competence and the other two principal categories, exclusive competence and the category where the EU is limited to taking supporting, coordinating, or supplementary action. Thus it is, for example, not easy to decide which aspects of social policy come within shared competence. There are also problems in ensuring a fit between Article 4(3) and Article 4(4) TFEU, which assume that the relevant areas fall within shared competence, and the detailed provisions in these areas, many of which are framed in terms of the EU supporting, coordinating, and supplementing Member State action.[40]



## (3) PRE-EMPTION

Article 2(2) TFEU stipulates that the Member State can exercise competence only to the extent that the Union has not exercised or has decided to cease to exercise its competence within any such area. Member State action is therefore pre-empted where the Union has exercised its competence, with the consequence that the amount of shared power held by the Member State in these areas may diminish over time. This conclusion must however be qualified in four ways.

First, Member States will lose their competence within the regime of shared power only to the extent that the Union has exercised *its* competence. The scope of the EU's competence within these areas can only be determined by considering the detailed provisions that divide power in areas as diverse as social policy, energy, the internal market, and consumer protection. Thus the real limits on Union competence must be found in the detailed provisions which delineate what the EU can do in the diverse areas where power is shared.

Secondly, the pre-emption will occur only *to the extent* that the EU has exercised its competence in the relevant area. There are different ways in which the EU can intervene in a particular area.[41] The EU may choose to make uniform regulations, it may harmonize national laws, it

[40] Craig (n 12) 167–171.

[41] S Weatherill, 'Beyond Preemption? Shared Competence and Constitutional Change in the European Community' in D O' Keefe and P Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery Law Publishing, 1994) ch 2; M Dougan, 'Minimum Harmonization and the Internal Market' (2000) 37 CMLRev 853; M Dougan,

may engage in minimum harmonization, or it may impose requirements of mutual recognition. Thus, for example, where the EU chooses minimum harmonization, Member States will have room for action in the relevant area. The Member States were nonetheless sufficiently concerned about the possible pre-emptive impact of Article 2(2) TFEU to press for the inclusion of the Protocol on Shared Competence,[42] which seeks to reinforce the point made above. It provides that where the Union has taken action in an area governed by shared competence, 'the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area'.[43] It is nonetheless still possible for Union acts to cover the entire area subject to shared power, provided that the EU could do so under the relevant Treaty provisions.

Thirdly, Article 2(2) TFEU expressly provides for the possibility that the EU will cease to exercise competence in an area subject to shared competence, the consequence being that competence then reverts to the Member States. A Declaration attached to the Treaty[44] specifies different ways in which this might occur.

The final qualification concerns Article 4(3) and Article 4(4) TFEU. The essence of both Treaty provisions is to make clear that the Member States can continue to exercise power even if the EU has exercised its competence within these areas. Thus even if the EU has defined and implemented programmes relating to research, technological development and space, this does not preclude Member States from exercising their competence in such areas. The same reasoning is applied in the context of development cooperation and humanitarian aid.



## (c) SCOPE AND VARIATION

Shared competence constitutes, subject to the above, the default position in relation to division of competence within the Lisbon Treaty, but that does not mean that the nature of the sharing will be the same in all the areas to which shared competence applies. The reality is that shared competence is simply an umbrella term, with the consequence that there is significant variation as to the division of competence in different areas of EU law. It follows that the precise configuration of power sharing in areas such as the internal market, consumer protection, energy, social policy, the environment, and the like can only be determined by considering the detailed rules that govern these areas, which are found in the relevant provisions of the TFEU.

The sharing of power in relation to, for example, the four freedoms is very different from the complex world of power sharing that operates within the area of freedom, security, and justice. There are indeed significant variations of power sharing that operate within the overall area of freedom, security, and justice. There is no magic formula that applies to all areas of shared power that determines the precise delineation of power in any specific area.

This is not a criticism as such, but rather the consequence of the fact that the EU has been attributed competence in different areas through Treaty amendments, coupled with the fact that the precise degree of power it has been accorded differs between these areas. This is recognized by Article 2(6) TFEU, which states that 'the scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area'.

'Vive la Difference? Exploring the Legal Framework for Reflexive Harmonisation within the Single Market' (2002) 1 Annual of German and European Law 13.

[42] Protocol (No 25).
[43] See also Declaration 18.
[44] Ibid.

# 6 SUPPORTING, COORDINATING OR SUPPLEMENTARY ACTION

## (A) BASIC PRINCIPLES

The third general category of competence allows the EU to take action to support, coordinate or supplement Member State action, without thereby superseding their competence in these areas, and without entailing harmonization of Member States' laws: Article 2(5) TFEU.[45] While the EU cannot harmonize the law in these areas, it can pass legally binding acts on the basis of the provisions specific to them, and the Member States will be constrained to the extent stipulated by such acts. The meaning of supporting etc. action, and hence the precise extent of EU power, varies somewhat in the different areas listed, but it is clear that the EU has a significant degree of power in these areas, albeit falling short of harmonization.[46]

The areas that fall within such competence are set out in Article 6 TFEU: protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; and administrative cooperation. A bare reading of Article 6 TFEU gives the impression that the list is finite. This impression is however belied when reading the TFEU as a whole. It then becomes clear that there are other important areas in which the EU is limited, *prima facie* at least, to supporting, etc., action, notably in respect of some aspects of social policy,[47] and certain facets of employment policy.[48]

The creation of categories of competence inevitably means that there will be boundary problems as between them. Thus, for example, regulation of the media might come under the internal market, which is shared competence, or it might be regarded as falling within culture, where only supporting, etc., action is allowed. There are more [illegible] difficulties in deciding which aspects of social policy fall within shared competence, and which come within this category.



## (B) SCOPE AND VARIATION

It is important to understand the scope of EU power for areas that fall within this category. The meaning of EU action supporting, coordinating, or supplementing action by the Member States varies somewhat in the different areas listed, but the general approach is as follows.

Each substantive area begins with a provision setting out the objectives of Union action. Thus in relation to public health Article 168 TFEU lists, *inter alia*, the improvement of public health, prevention of illness, and the obviation of dangers to health. The EU is to complement national action on these topics. Member States have an obligation to coordinate their policies on such matters, in liaison with the Commission.[49] The Commission can coordinate action on such matters by exchanges of best practice, periodic monitoring, and evaluation.[50] The EU can also pass laws to establish 'incentive measures' designed to protect human health, and combat cross-border health scourges, subject to the mantra that this shall not entail harmonization.[51] Thus while harmoniza-

[45] R Schutze, 'Co-operative Federalism Constitutionalized: The Emergence of Complementary Competences in the EC Legal Order' (2006) 31 ELRev 167.
[46] See, eg, Art 167 TFEU, culture; Art 168 TFEU, public health; Art 173 TFEU, industry.
[47] Art 153 TFEU.
[48] Art 147 TFEU.
[49] Art 168(2) TFEU).
[50] Art 168(2) TFEU.
[51] Art 168(5) TFEU.

tion is ruled out, the EU still has significant room for intervention through 'persuasive soft law', in the form of guidelines on best practice, monitoring, and the like, and through 'legal incentive measures'.[52] The same combination of soft law and legal incentive measures falling short of harmonization can be found in the other areas within this category.[53]

The scope of EU power within these areas should not however be underestimated. The standard approach under the Lisbon Treaty is for the EU to be empowered to take measures to attain the objectives listed in that area. The language of the empowerment varies. It is sometimes framed in terms of taking 'incentive measures',[54] on other occasions the language is in terms of 'necessary measures',[55] in yet other instances the terminology is 'specific measures'.[56]

The salient point for present purposes is that whatsoever the precise terminology these measures constitute legally binding acts, normally passed in accordance with the ordinary legislative procedure. The boundary of this EU legislative competence is that such legal acts must be designed to achieve the objectives listed for EU involvement in the area. These objectives are however normally set at a relatively high level of generality, with the consequence that the EU is legally empowered to take binding measures provided that they fall within the remit of these broadly defined objectives and do not constitute harmonization of national laws. This is evident in relation to all areas that fall within this category of competence. The scope of EU legislative activity within these areas will be bounded by what is acceptable to the Member States in the Council and the European Parliament, but this does not alter the point being made here.



## (c) LEGAL ACTS, HARMONIZATION AND MEMBER STATE COMPETENCE

Article 2(5) TFEU provides that EU action designed to support, coordinate, or supplement Member State action does not supersede Member State competence. It also states that legally binding acts of the Union adopted on the basis of the provisions specific to these areas cannot entail harmonization of Member States' laws. Thus while the EU cannot harmonize the law in these areas, it can pass legally binding acts on the basis of the provisions specific to these areas. There are three important points that flow from this Treaty provision.

First, where the EU passes such legal acts they will bind the Member States and the competence of the Member States will be constrained to the extent stipulated by the legally binding act. Thus while Member State competence is not *per se* superseded merely because the EU has enacted legally binding acts, it will be constrained to the degree entailed by the EU legal act. It is clear moreover that the EU can pass legislative acts in these areas, provided that they do not entail harmonization and provided that there is foundation for the passage of such laws in the detailed provisions of the TFEU.

Secondly, the very meaning of harmonization, which the EU cannot do in relation to this category of competence, is not entirely clear. The proscription of harmonization measures means that legally binding acts cannot be adopted pursuant to Article 114 TFEU. A legally binding act made in an area where the EU only has competence to support, coordinate, or supplement Member State

[52] There are also aspects of public health that come within the shared power, where the scope for EU intervention is greater: Art 4(2)(k), Art 168(4) TFEU.

[53] Arts 165(4), 166(4) TFEU, education and vocational training; Art 167 TFEU, culture; Art 173(2)–(3) TFEU, industry; Art 195 TFEU, tourism; Art 196 TFEU civil protection.

[54] Arts 165(4), 166(4) TFEU, education and vocational training; Art 167(5) TFEU, culture; Art 168(5) TFEU, public health.

[55] Art 196(2) TFEU, civil protection.

[56] Art 195(2) TFEU, tourism; Art 173(3) TFEU, industry.

action could not be made pursuant to Article 114, since this would be an admission that the objective was to harmonize national law, which is the very thing prohibited by Article 2(5) TFEU. This however takes us only so far. The EU may enact a legally binding act in one of the areas covered by this category of competence, which is based on the relevant Treaty Article authorizing the making of such acts. It may then be argued that the enacted measure is tantamount to harmonization of national laws or regulations, even though it does not bear this imprint on the face of the measure. It would then be for the ECJ to decide whether in substance the contested measure constituted harmonization and was therefore caught by the limit in Article 2(5) TFEU. The line between a legitimate legally binding act that advances the objectives of the areas covered by this category of competence and illegitimate harmonization of national laws may nonetheless be a fine one in a particular case.

Thirdly, it should not be assumed that the consequences for the Member States of enactment of legally binding acts in these areas will necessarily be less far-reaching than harmonization. The assumption behind Article 2(5) TFEU is that harmonization of national laws is by its very nature more intrusive for Member States than other EU legal norms. This rationale may hold true, but it may not. It depends on the nature of the particular harmonization measure and the non-harmonization legally binding act.

## 7 ECONOMIC, EMPLOYMENT AND SOCIAL POLICY

### (A) BASIC PRINCIPLES

A division between exclusive, shared, and supporting competence can be understood, notwithstanding the difficulties mentioned above. The creation of a particular head of competence to deal with economic and employment policy however does little to enhance the symmetry of the new scheme. The Lisbon Treaty has a separate category of competence for these matters. Article 2(3) TFEU states that 'the Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide'. The detailed rules are then set out in Article 5 TFEU.[57]

> 1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.
>
> Specific provisions shall apply to those Member States whose currency is the euro.
>
> 2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.
>
> 3. The Union may take initiatives to ensure coordination of Member States' social policies.

The explanation for this separate category was political. There would have been significant opposition to the inclusion of these areas within shared competence, with the consequence of pre-emption of state action when the EU exercised power within this area. It is equally clear that there were those who felt that the category of supporting, coordinating, and complementary action was

[57] The 'fit' between Art 2(3) and Art 5 TFEU is not perfect, insofar as the former refers to economic and employment policy, while the latter also covers social policy. There is moreover a difference in language, in that the EU is enjoined in mandatory language to coordinate economic and employment policy, whereas it is accorded discretion in relation to social policy.

too weak. This was the explanation for the creation of a separate category, and its placement after shared power, but before the category of supporting, coordinating, and supplementary action.

The boundary problems that we have seen in the preceding discussion are evident here too, particularly in relation to social policy. The difficulties in this area are especially marked, since certain aspects of social policy fall within shared competence, although it is not precisely clear which; other aspects appear to fall within the category of supporting, coordinating, and supplementary action, even though they are not within the relevant list; and there is in addition separate provision for social policy in the category being considered here. The reach of Article 5(3) TFEU and its relationship with the more detailed Treaty provisions on social policy are not clear. The most natural 'linkage' would seem to be Article 156 TFEU, which empowers the Commission to encourage cooperation between Member States and facilitate coordination of their action in all fields of social policy, albeit through soft law measures.[58]

### (B) CATEGORY AND LEGAL CONSEQUENCE

The Treaty schema for competence in Article 2 TFEU is in general premised on the ascription of legal consequences for EU and Member State power as the result of coming within a particular category. Article 5 TFEU is an exception in this respect, since Article 2(3) TFEU does not spell out the legal consequences of inclusion within this category. It simply provides that the 'Member States shall coordinate their economic and employment policies within the arrangements as determined by this Treaty, which the Union shall have competence to provide'. The legal consequences of inclusion within this category can therefore only be divined by considering the language of Article 5 TFEU, which is couched largely in terms of coordination, and by considering the detailed provisions that apply to these areas. The detailed provisions concerning EU power over, for example, economic policy are considered in a separate chapter.[59]



## 8 COMMON FOREIGN AND SECURITY POLICY AND DEFENCE

The three-pillar structure that characterized the previous Treaty has not been preserved in the Lisbon Treaty. There are nonetheless distinct rules that apply in the context of foreign and security policy, and this warrants a separate head of competence for this area. It is set out in Article 2(4) TFEU.

> The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

The rules concerning the common foreign and security policy are set out in Title V TEU. Decision-making in this area continues to be more intergovernmental and less supranational

[58] The wording of the respective provisions does not however fit perfectly: Art 5(3) is framed in discretionary terms, 'the Union may take initiatives', while Art 156 TFEU is drafted in mandatory language, to the effect that the 'Commission shall' encourage the relevant cooperation and coordination.

[59] Ch 20.

by way of comparison with other areas of Union competence.[60] The European Council and the Council dominate decision-making, and the legal instruments applicable to CFSP are distinct from those generally applicable for the attainment of Union objectives.[61]

Suffice it to say for the present that Article 2(4) does not specify which type of competence applies in the context of the CFSP. In truth none of the categories is a good fit. It is clearly not within exclusive competence, since it is not listed in Article 3 TFEU, and in any event the substance of the CFSP simply does not accord with the idea of exclusive EU competence. Nor is it mentioned in the list of those areas that are subject to supporting, coordinating, or supplementing Member State action in Article 6 TFEU. This would seem to imply that it falls within the default category of shared competence in Article 4 TFEU, even though not mentioned in the non-exhaustive list.

The reality is however that the world of the CFSP may not readily fit within the frame of shared administration, insofar as this connotes pre-emption of Member State action when the EU has exercised its power in the area, nor does this idea cohere with Declarations appended to the Lisbon Treaty.[62] If the CFSP is regarded as within shared administration, the point made earlier concerning the need for close examination of the respective powers of the EU and Member States, in order to be clear about the nature of the power sharing, is of especial significance.

## 9 BROAD TREATY PROVISIONS: THE 'FLEXIBILITY' CLAUSE

The discussion thus far has been concerned with the principal categories of competence established by the Lisbon Treaty. The discussion in this and the following section focuses on two particular Treaty provisions, Articles 352 and 114 TFEU, the successor provisions to Articles 308 and 95 EC. These provisions are broadly framed, and thus give the EU a potentially wide regulatory competence. Member State concern over the extensive use of these provisions was a principal factor behind Treaty reform in this area and was reflected in the desire to ensure that EU power was contained. It is therefore important to see how far this has been achieved.



### (A) ARTICLE 308 EC

Article 352 TFEU is the successor provision to Article 308 EC. It is important to understand the legal and political background to Article 308 EC in order to understand Article 352 TFEU. Article 308 EC provided that:

> If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

Article 308 was a valuable legislative power, particularly when the Community did not possess specific legislative authority in certain areas. Thus the Article was used to legitimate legislation in

[60] Cremona (n 17).
[61] Craig (n 12) ch 10.
[62] Declarations 13 and 14 on the common foreign and security policy.

areas such as the environment and regional policy, before these matters were dealt with through later Treaty amendments. Weiler captures the importance of this provision and the manner in which it was interpreted.

**J Weiler, The Transformation of Europe**[63]

In a variety of fields, including, for example, conclusion of international agreements, the granting of emergency food aid to third countries, and creation of new institutions, the Community made use of Article 235[64] in a manner that was simply not consistent with the narrow interpretation of the Article as a codification of implied powers doctrine in its instrumental sense. Only a truly radical and 'creative' reading of the Article could explain and justify its usage as, for example, the legal basis for granting emergency food aid to non-associated states. But this wide reading, in which all the institutions partook, meant that it would become virtually impossible to find an activity which could not be brought within the objectives of the Treaty.

Article 308 EC required that the power should be used to attain a Community objective. Given, however, the breadth of the Treaty objectives, and given also the ECJ's purposive mode of interpreting Community aims, these 'conditions' did not place a severe constraint on the Council. They were not however entirely devoid of meaning, and the ECJ on occasion held that Article 308 could not be used to legitimate Community action,[65] although in the instant case it should be acknowledged that the ECJ was probably content to reach this conclusion, thereby avoiding subjecting itself to the ultimate authority of the European Court of Human Rights.

The most problematic aspect of Article 308 EC was the condition that the Treaty had not 'provided the necessary powers',[66] and therefore whether another Treaty Article could be used instead of Article 308.[67] This could be of particular significance where a specific Treaty Article provided for more extensive involvement of the European Parliament than did Article 308, which only required consultation with the EP.[68] The other situation in which the choice between Article 308 EC and a more specific Treaty Article could be significant was where there were differences in the voting rules under the respective Articles. Article 308 required unanimity in the Council, whereas many other Treaty provisions demanded only a qualified majority.



## (B) ARTICLE 352 TFEU

Article 308 EC was long viewed with suspicion by those calling for a clearer delimitation of Community competences, and in particular by the German *Länder*. Various calls for reform were made before and during IGCs. This issue was placed on the post-Nice and Laeken agenda

[63] (1991) 100 Yale LJ 2403, 2445–2446.

[64] Art 235 EEC was the predecessor provision to Art 308 EC.

[65] Opinion 2/94 *Accession of the Community to the European Human Rights Convention* [1996] ECR I–1759. Cf Opinion 2/91 *ILO Convention 170 on Chemicals at Work* [1993] ECR I–1061.

[66] Case 8/73 *Hauptzollamt Bremerhaven v Massey-Ferguson* [1973] ECR 897.

[67] Case 45/86 *Commission v Council (Tariff Preferences)* [1987] ECR 1493; Case 165/87 *Commission v Council* [1988] ECR 5545; Case C–295/90 *European Parliament v Council* [1992] ECR I–4193; Case C–209/97 *Commission v Council* [1999] ECR I–8067; Case C–377/98 *Netherlands v Parliament and Council* (n 8).

[68] Case 45/86 *Commission v Council* [1987] ECR 1493; Case C–350/92 *Spain v Council* [1995] ECR I–1985; Case C–271/94 *European Parliament v Council (Re the Edicom Decision)* [1996] ECR I–1689.

for reform of the EU. The Laeken Declaration expressly asked whether Article 308 EC ought to be reviewed, in light of the twin challenges of preventing the 'creeping expansion of competences' from encroaching on national and regional powers, while allowing the EU to 'continue to be able to react to fresh challenges and developments and… to explore new policy areas'.[69] The Working Group on Complementary Competences recognized the concerns about the use of Article 308. The Group nonetheless recommended the retention of the Article in order that it could provide for flexibility in limited instances.[70] The flexibility clause is now enshrined in Article 352 TFEU:

> 1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.
>
> 2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.
>
> 3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.
>
> 4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.



Article 352(1) TFEU is framed broadly in terms of the 'policies defined in the Treaties', with the exception of the CFSP. It can therefore serve as the basis for competence in almost all areas of EU law. The unanimity requirement means however that it will be more difficult to use this power in an enlarged EU, and Article 352 TFEU also requires the consent of the European Parliament, as opposed to mere consultation, as was previously the case under Article 308 EC. It is also important to recognize that the need for recourse to this power will diminish, given that the Lisbon Treaty created a legal basis for action in the areas where Article 308 EC had previously been used.[71] The German Federal Constitutional Court was nonetheless concerned about the scope of Article 352 and stipulated that the exercise of any such competence constitutionally required ratification by the German legislature.[72]

The conditions in Article 352(2)–(4) are novel. The import of Article 352(2) is not entirely clear. Weatherill has argued that uniquely within the Lisbon Treaty it provides national Parliaments with the opportunity to contest the existence of competence when legislative action is based on the flexibility clause, as opposed to other contexts where national Parliaments can simply challenge on grounds of subsidiarity.[73] This may be so. It does not however sit comfortably with the wording of Article 352(2), which is framed in terms of subsidiarity and is not suggestive of national

[69] Laeken Declaration (n 4) 22.

[70] CONV 375/1/02, Final Report of Working Group V on Complementary Competencies, Brussels, 4 Nov 2002, 14–18.

[71] See, eg, Energy, Art 194(2) TFEU; Civil Protection, Art 195(2) TFEU; Economic Aid to Third Countries, Arts 209(1), 212(2) TFEU.

[72] Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, [326]–[328], available at www.bverfg.de/entscheidungen/es20090630_2bve000208.html. English translation available at www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html.

[73] Weatherill (n 1).

Parliamentary power to challenge the existence of competence. The more natural interpretation is that because the flexibility clause entails an exceptional use of EU legislative power, the Commission therefore has an additional obligation, viz. to draw this to the attention of national Parliaments, in order that they may contest it on the grounds of subsidiarity.

## 10 BROAD TREATY PROVISIONS: THE HARMONIZATION CLAUSE

The changes made by the Lisbon Treaty to what is now Article 352 TFEU, in particular the fact that express legislative competence is granted in the areas where the Article was used in the past, means that this Article is likely to be less problematic in the future than it was previously.

The Lisbon Treaty has, by way of contrast, done little to alleviate problems of 'competence creep' in the terrain covered by Article 114 TFEU, which has not been changed. It is the main Treaty Article used to enact harmonization measures.

> 1. Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market



Concerns about over extensive use of this legislative competence arose because it was felt that the EU was too readily assuming power to harmonize national laws based on mere national divergence, with scant attention being given to the impact, if any, of that divergence on the functioning of the internal market.[74] The ECJ's ruling in the *Tobacco Advertising* case[75] appeared to signal some tightening up in this respect, but subsequent case law[76] revealed some softening of the ECJ's position on this issue. It is now more willing to find that regulatory competence exists because divergent national laws constitute an impediment to the functioning of the internal market and that harmonization contributes to the elimination of obstacles to the free movement of goods, or to the freedom to provide services, or to the removal of distortions of competition.

Impact Assessment[77] can, however, be used both politically and legally as a method of checking whether there really is a problem that requires harmonization at EU level.[78] Impact assessment is a set of steps to be followed when policy proposals are prepared, alerting political decision-makers to the advantages and disadvantages of policy options by assessing their potential impacts. The results of this process are summarized and presented in an Impact Assessment Report.[79] This does not replace political decision-making, which remains the pre-

[74] Weatherill (n 1); S Weatherill, 'Competence Creep and Competence Control' (2004) 23 YEL 1.

[75] Case C–376/98 *Germany v European Parliament and Council* [2000] ECR I–8419.

[76] See (ns 8–9); Ch 17 below; D Wyatt, 'Community Competence to Regulate the Internal Market' in M Dougan and S Currie (eds), *50 Years of the European Treaties, Looking Back and Thinking Forward* (Hart, 2009) ch 5.

[77] Impact Assessment, COM(2002)276 final; Impact Assessment—Next Steps, SEC(2004)1377; Better Regulation and Enhanced Impact Assessment, SEC(2007)926; Impact Assessment Guidelines, SEC(2009)92.

[78] Craig (n 12) 188–192.

[79] Impact Assessment Guidelines, SEC(2009)92, 1.1.

serve of the College of Commissioners. A typical Impact Assessment will address a range of issues including: the nature and scale of the problem; the views of stakeholders; whether the EU should be involved; the objectives of any such involvement; the main policy options for reaching these objectives, including their relative effectiveness/efficiency; and the likely economic, social, and environmental impacts of those options.

The Impact Assessment is not some panacea that will magically dispel concerns as to 'competence creep' or 'competence anxiety'. It is nonetheless central to addressing these concerns. The Impact Assessment Report considers the very issues that are pertinent to this inquiry. This includes the justification for EU action in terms of, for example, the need for harmonization because of the impact of diverse national laws on the functioning of the internal market. It also includes the subsidiarity calculus, which is an explicit step in the overall Impact Assessment process,[80] with a specific section devoted to verification of the EU's right of action and justification thereof in terms of subsidiarity.[81] The Impact Assessment strategy therefore constitutes a framework within which to address concerns as to competence anxiety. The strategy is not perfect, but it has been improved since its inception, and assessments, both official[82] and academic,[83] have generally been positive. If the data in a particular Impact Assessment Report are felt to be wanting then we should press for further improvement and not be satisfied with exiguous or laconic argument.

The very fact that there is a framework within which these issues are now considered is however a positive step, which facilitates scrutiny as to the nature of the justificatory arguments and their adequacy. This should in turn facilitate judicial review. The ECJ should be willing to consider the adequacy of the reasoning for EU legislative action, and to look behind the formal legislative preamble to the arguments that underpin it derived from the Impact Assessment.[84] The ECJ should be properly mindful of the Commission's expertise as evinced in the Impact Assessment. It should also be cognizant of the precepts in the Treaty, which in the case of Article 114 TFEU condition EU intervention on proof that approximation of laws is necessary for the functioning of the internal market. If the justificatory reasoning to this effect in the Impact Assessment is wanting then the ECJ should invalidate the relevant instrument, and thereby signal to the political institutions that the precepts in the Treaty are to be taken seriously.



## 11 SUBSIDIARITY

### (A) PRE-LISBON

Closely linked to the question of the 'existence' of competence is the principle of subsidiarity, which is intended to regulate the 'exercise' of competence. Subsidiarity was introduced in the

[80] Ibid 2.1, 2.3.

[81] Ibid 5.2.

[82] Evaluation of the Commission's Impact Assessment System, Final Report—Executive Summary (Apr 2007, Secretariat General of the Commission); Impact Assessment Board Report for 2008, SEC(2009)55.

[83] European Policy Forum, *Reducing the Regulatory Burden: The Arrival of Meaningful Regulatory Impact Analysis* (City Research Series No 2, 2004); C Radaelli and F de Francesco, *Regulatory Quality in Europe, Concepts, Measures and Policy Processes* (Manchester University Press, 2007); C Cecot, R Hahn, A Renda, and L Schrefler, 'An Evaluation of the Quality of Impact Assessment in the European Union with Lessons for the US and the EU' (2008) 2 Regulation & Governance 405.

[84] The ECJ referred to the impact assessment in Case C–58/08 *The Queen, on the application of Vodafone Ltd v Secretary of State for Business, Enterprise and Regulatory Reform*, 8 June 2010, [45], [55], [58], [65].

Maastricht Treaty, and was intended to curb the 'federalist' leanings of the Community. The pre-Lisbon formulation was contained in Article 5 EC:

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.
>
> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

The requirement in the first paragraph of Article 5 affirmed that the Community only has competence within the areas in which it has been given power. Article 5 also made it clear that subsidiarity would have to be considered only in relation to areas which did not fall within the Community's exclusive competence, although it was in reality taken into account in relation to areas that came within the Community's exclusive competence. The problem was that pre-Lisbon there was no simple criterion for determining the scope of the Community's exclusive competence, since the Treaty was not framed in those terms. The Commission took a broad view of exclusive competence,[85] and commentators differed considerably on the issue.[86]

The subsidiarity principle had three components: the Community was to take action only if the objectives of that action could not be sufficiently achieved by the Member States; the Community could better achieve the action, because of its scale or effects; if the Community did take action then this should not go beyond what was necessary to achieve the Treaty objectives. The first two parts of this formulation entailed what the Commission termed a test of comparative efficiency,[87] in the sense of determining whether it was better for action to be taken by the Community or the Member States, while the third part of the formulation brought in a proportionality test.

The 1993 Inter-institutional Agreement on Procedures for Implementing the Principle of Subsidiarity required all three institutions to have regard to the principle when devising Community legislation. This was re-confirmed by the Protocol on the Application of the Principles of Subsidiarity and Proportionality attached to the Amsterdam Treaty,[88] which set out in more detail the subsidiarity calculus.

The idea that matters should be dealt with at the level closest to those affected is fine in principle, but there were many areas in which the comparative efficiency calculus favoured Community action, since the realization of the Community objectives often demanded Community action to ensure the uniformity of general approach that was important for attainment of a common market.[89] There were moreover difficulties with the approach in the pre-Lisbon scheme.

[85] Bull. EC 10–1992, 116. See 1st Report of Commission on Subsidiarity, COM(94)533.

[86] AG Toth, 'A Legal Analysis of Subsidiarity' in D O'Keeffe and PM Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery, 1994) 39–40; J Steiner, 'Subsidiarity under the Maastricht Treaty' in ibid 57–58; N Emiliou, 'Subsidiarity: Panacea or Fig Leaf?' in ibid ch 5, and 'Subsidiarity: An Effective Barrier Against the "Enterprises of Ambition"?' (1992) 17 ELRev 383.

[87] Commission Communication to the Council and the European Parliament, Bull. EC 10–1992, 116.

[88] G de Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam', Jean Monnet Working Paper 7/1999, www.jeanmonnetprogram.org/.

[89] Better Lawmaking 1999, COM(1999)562 final, 2.

**A Estella, The EU Principle of Subsidiarity and its Critique**[90]

> The truth of the matter is that attempting to define *ex ante* criteria of a general and abstract character for the purpose of limiting central intervention stands little hope of success. The reasons for this limitation are functional and can be found in the nature of modern regulatory problems. The functional interconnection between regulatory areas . . . makes the task of establishing clear dividing lines difficult. Even in those areas in which there seem to be clear reasons in favour of national, or even regional or local, regulation . . . it will always be possible to argue that due to the close relationship between these areas and the development of the single market, some Community intervention will always be necessary.

The very existence of Article 5 EC nonetheless had an impact on the existence and form of Community action. The Commission considered whether action really was required at Community level,[91] and if this was so it would often proceed through directives rather than regulations.

## (B) POST-LISBON

### (i) *Subsidiarity Principle*

The subsidiarity principle has been retained in the Lisbon Treaty. It distinguishes between the existence of competence and the use of such competence, the latter being determined by subsidiarity and proportionality.[92] The principles are embodied in Article 5(3)–(4) TEU:[93]

> 3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.
>
> The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.
>
> 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.
>
> The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

The Lisbon Treaty contains a Protocol on the Application of the Principles of Subsidiarity and Proportionality,[94] which should be read in tandem with the Protocol on the Role of National Parliaments in the EU.[95] The Subsidiarity Protocol applies to only draft legislative acts,[96] and does

[90] (Oxford University Press, 2002) 113–114.
[91] Better Lawmaking 2000, COM(2000)772 final, 4–8, 15–21.
[92] Art 5(1) TEU.
[93] J-V Louis, 'National Parliaments and the Principle of Subsidiarity—Legal Options and Practical Limits' in I Pernice and E Tanchev (eds), *Ceci n'est pas une Constitution—Constitutionalization without a Constitution?* (Nomos, 2009) 131–154; G Bermann, 'National Parliaments and Subsidiarity: An Outsider's View' in ibid 155–161; J Peters, 'National Parliaments and Subsidiarity: Think Twice' [2005] European Constitutional L Rev 68.
[94] Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality.
[95] Protocol (No 1) On the Role of National Parliaments in the European Union.
[96] Subsidiarity and Proportionality Protocol (n 94) Art 3.

not cover delegated or implementing acts. It is possible that a detailed delegated act might be felt to infringe subsidiarity, but the Protocol provides no mechanism for checks by national Parliaments on such measures.

### (ii) *Subsidiarity Calculus*

The Subsidiarity Protocol imposes an obligation on the Commission to consult widely before proposing legislative acts.[97] The Commission must provide a detailed statement concerning proposed legislation so that compliance with subsidiarity and proportionality can be appraised. The statement must contain some assessment of the financial impact of the proposals, and there should be qualitative and, wherever possible, quantitative indicators to substantiate the conclusion that the objective can be better attained at Union level.[98] The Commission must submit an annual report on the application of subsidiarity to the European Council, the European Parliament, the Council, and to national Parliaments.[99] The ECJ has jurisdiction to consider infringement of subsidiarity under Article 263 TFEU, in actions brought by the Member States, or 'notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it'.[100]

### (iii) *Enhanced Role for National Parliaments*

The most important innovation in the Protocol on Subsidiarity is the enhanced role accorded to national Parliaments. The Commission must send all legislative proposals to the national Parliaments at the same time as to the Union institutions. The national Parliaments must also be provided with legislative resolutions of the EP, and positions adopted by the Council.[101] The Protocol provides for varying responses from the EU institutions depending on the number of national Parliaments that voice subsidiarity concerns about the proposed legislation.

A national Parliament or Chamber thereof may, within eight weeks, send the Presidents of the Commission, European Parliament, and Council a reasoned opinion as to why it considers that the proposal does not comply with subsidiarity.[102] The European Parliament, Council, and Commission must take this opinion into account.[103]

Where non-compliance with subsidiarity is expressed by national Parliaments that represent one third of all the votes allocated to such Parliaments, the Commission must review its proposal.[104] The Commission, after such review, may decide to maintain, amend, or withdraw the proposal, giving reasons for the decision.[105]

Where a measure is made in accord with the ordinary legislative procedure, and at least a simple majority of votes given to national parliaments signals non-compliance with subsidiarity, then the proposal must once again be reviewed, and although the Commission can decide not to amend it, the Commission must provide a reasoned opinion on the matter, and this can, in effect, be overridden by the European Parliament or the Council. Thus the EP acting by a majority of votes cast,

[97] Ibid Art 2.
[98] Ibid Art 5.
[99] Ibid Art 9.
[100] Ibid Art 8.
[101] Ibid Art 4.
[102] Ibid Art 6.
[103] Ibid Art 7(1).
[104] Ibid Art 7(2). This threshold is lowered to one quarter in cases of acts concerning the area of freedom, justice, and security that are based on Art 76 TFEU.
[105] Ibid Art 7(2).

or 55 per cent of members of the Council, can decide that the legislative proposal is not compatible with subsidiarity and that it should not be given further consideration.[106]

It should however be noted that while the Protocol imposes obligations on the Commission to ensure compliance with the principles of subsidiarity and proportionality, national Parliaments are afforded a role only in relation to the former and not the latter. The reasoned opinion submitted by the national Parliament must relate to subsidiarity. This is regrettable, as Weatherill rightly notes,[107] since it is difficult to disaggregate the two principles, and insofar as one can do so there is little reason why national Parliaments should not be able to proffer a reasoned opinion on proportionality as well as subsidiarity.

### (iv) *Political Control: Evaluation*

It remains to be seen how subsidiarity operates in practice. It is clear that there will be many areas in which the comparative efficiency calculus in Article 5(3) TFEU favours Union action, more especially in an enlarged EU. It is equally clear that subsidiarity has impacted on the form of Union action. If EU action is required, the Commission will often proceed through directives rather than regulations, and there has been a greater use of guidelines and codes of conduct.

Time will tell how far the new provisions in the Protocol according greater power to national Parliaments affect the incidence and nature of EU legislation. Much will depend on the willingness of national Parliaments to devote the requisite time and energy to the matter. The national Parliament has to submit a reasoned opinion as to why it believes that the measure infringes subsidiarity. It will have to present reasoned argument as to why the Commission's comparative efficiency calculus is defective. This may not be easy. It will be even more difficult for the requisite number of national Parliaments to present reasoned opinions in relation to the same Union measure so as to compel the Commission to review the proposal. The Commission is nonetheless likely to take seriously any such reasoned opinion, particularly if it emanates from a larger Member State.

The tension between desire to make subsidiarity a reality and the need to address problems at the EU level in order to achieve its overall objectives is, however, ever present, as is evident from the extract by the Commission President.



**JM Barroso, Political Guidelines for the Next Commission**[108]

> We must kill off the idea that the Member States and the EU level are rivals. Everyone should be working to the same goal—to secure the best results for citizens. Too often, mistrust has been the cause of failings in our system: it contributed to the shortcomings in our system of financial regulation exposed so brutally last year. The question is how best to improve this. That means an effective application of the principle of subsidiarity.
>
> For me, subsidiarity is the translation of a democratic principle, part of a very practical doctrine, aimed at making public policy work to best effect in a Union built on solidarity, and at the most appropriate level. The EU works best when it focuses on its core business. I want to concentrate our limited resources on where we can have most effect, and where we can bring most added value.

[106] Ibid Art 7(3).
[107] Weatherill (n 1).
[108] European Commission, Sept 2009, 40–41, available at http://ec.europa.eu/commission_2010–2014/president/pdf/press_20090903_en.pdf.

> At the same time, the continental scale of Europe and the scale of our ambitions points inevitably towards taking the wide view, looking at the bigger picture. This does not mean that the EU always has to make new laws—the Treaties mean we can make laws where this is needed, but they also inspire us to spark debate and spread ideas across the whole vision set out by our founding fathers.
>
> I want to be rigorous about where we need to have common rules and where we need only a common framework. We have not always got the balance right, and we have not always thought through the consequences of diversity in an EU of 27 . . . .
>
> The Lisbon Treaty puts in place new procedures to allow national parliaments to intervene if they have concerns about subsidiarity. But more importantly, we should develop a much clearer doctrine of how we decide when action needs to be taken at EU level, where the balance should lie between EU-level tools and national level tools, and what expectations should be placed on Member States implementing EU policy in their own countries.

### (v) *Legal Control: Evaluation*

The Protocol provides for recourse to the ECJ for infringement of subsidiarity under Article 263 TFEU, in an action brought by a Member State. The Protocol also provides for the action to be notified by the State on behalf of the national Parliament, and it remains to be seen how this works. There may be instances where the Member State has agreed in the Council to the EU measure, which the national Parliament then regards as infringing subsidiarity. This is the rationale for the provision allowing the Member State to notify the action on behalf of its Parliament. This still leaves open interesting questions as to how such a case will be argued. If the Member State has voted for the legislative action in the Council it will be odd for it then to contend before the Court that the measure violates subsidiarity. If the legal action is to be a reality the Member State will not simply have to notify the action on behalf of its Parliament, but also allow the Parliament through its chosen legal advocate to advance its arguments that the measure does not comply with subsidiarity, even if the Member State does not agree with those arguments.

This still leaves open the central issue, which is the intensity of the judicial review. The indications are that the ECJ will not lightly overturn EU action on the ground that it does not comply with subsidiarity.

This is apparent in *procedural* terms from *Germany v European Parliament and Council*.[109] The ECJ held that the duty to give reasons did not require that Community measures contain an express reference to the subsidiarity principle. It was sufficient that the recitals to the measure made it clear why the Community institutions believed that the aims of the measure could best be attained by Community action.

The difficulty of overturning a measure in *substantive* terms is apparent from the *Working Time Directive* case.[110] The UK argued that the Directive infringed subsidiarity, since it had not been shown that action at Community level would provide clear benefits compared with action at national level. The ECJ disposed of the argument briskly. It was, said the Court, the responsibility of the Council under Article 118a EEC[111] to adopt minimum requirements to contribute to improvement of health and safety. When the Council found it necessary to improve the existing level of protection and to harmonize the law in this area while maintain-

[109] Case C–233/94 *Germany v European Parliament and Council* (n 6) [26]–[28].
[110] Case C–84/94 *United Kingdom v Council* (n 6) [46]–[47], [55].
[111] Now Art 154 TFEU.

ing the improvements already made, achievement of that objective necessarily presupposed Community-wide action. A similarly 'light' judicial approach to subsidiarity review is evident in other cases.[112]

There are undoubtedly difficulties with judicial review in this area. If the ECJ continues with very light touch review, it will be open to the criticism that it is effectively denuding the obligation in Article 5(3)–(4) of all content. If, by way of contrast, the ECJ takes a detailed look at the evidence underlying the Commission's claim it will have to adjudicate on what may be a complex socio-economic calculus concerning the most effective level of government for different regulatory tasks.

The difficulty of adjudicating on the substantive issue of comparative efficiency would nonetheless be alleviated if the Union courts were to require more from the Commission in procedural terms. The obligation to give reasons could be used to require the Commission to disclose the qualitative and quantitative data that are meant to inform its reasoning pursuant to the Protocol. This would not solve all problems of substantive review, but would provide the EU Courts with more to go on, as compared to their present reliance on the exiguous reasoning contained in the Preamble to the contested measure.

The development of Impact Assessment[113] is significant in this context. It includes the subsidiarity calculus,[114] with a specific section devoted to verification of the EU's right of action in terms of subsidiarity.[115] The very fact that there is a framework within which these issues are considered is a positive step, which facilitates scrutiny as to the nature of the justificatory arguments and their adequacy. This should in turn facilitate judicial review. If the justification for EU action contained in the Impact Assessment appears merely formal, scant, or exiguous then the ECJ should not hesitate so to conclude, thereby indicating that the enhanced role accorded to subsidiarity in the Lisbon Treaty will be taken seriously.



### (vi) *Subsidiarity: Evaluation*

Subsidiarity has always been an emotive subject, ever since its introduction in the Maastricht Treaty. This is true just as much for academics as for political players involved with the EU. Thus legal academics have criticized, with justification, the low intensity judicial review undertaken by EU Courts when dealing with subsidiarity claims. There have been more far-reaching critiques, such as that by Davies,[116] who argued that the subsidiarity inquiry is misplaced, and that the focus should rather be on whether the challenged EU legislation is disproportionate by intruding too far into Member State values in relation to the objective sought to be attained by the EU legislation. Space precludes detailed analysis of these arguments.[117] The following points should nonetheless be borne in mind when conducting a legal evaluation of subsidiarity.

[112] Case C–377/98 *Netherlands v Parliament and Council* (n 8); Cases C–154–155/04 *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd* v *Secretary of State for Health* [2005] ECR I–6451, [99]–[108]; Case C–491/01 *British American Tobacco* (n 8) [177]–[185]; Case C–103/01 *Commission v Germany* [2003] ECR I–5369, [46]–[47]; Case T–168/01 *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II–2969, [201]–[202]; Case T–326/07 *Cheminova A/S v Commission* [2009] ECR II–2685, [250]–[261]; Case C–58/08 *Vodafone* (n 84) [72]–[80].

[113] (N 77).

[114] Impact Assessment Guidelines, SEC(2009)92, 2.1, 2.3.

[115] Ibid 5.2.

[116] G Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place at the Wrong Time' (2006) 43 CMLRev 63.

[117] P Craig, 'Subsidiarity, A Legal and Political Analysis' (forthcoming).

First, there have been few legal challenges based on subsidiarity since its introduction into the Treaty, fewer than twenty, which means roughly one per year. The real figure is actually lower than this, since some of the cases duplicate challenges made in other cases;[118] in others the challenge was clearly misplaced, given the nature of the Treaty provisions or EU regulatory scheme;[119] while in yet others the Member State adduced no evidence to substantiate the subsidiarity argument.[120] This leaves just over ten cases in nearly twenty years where has been a real subsidiarity challenge. There have been thousands of regulations, directives, and decisions enacted during this period, with just over ten subject to legal challenge. To put this figure in perspective, there will often be more than ten legal challenges in a month based on some other ground of judicial review.

Secondly, in a number of the 'real' cases the subsidiarity challenge was opposed by other Member States, who argued that the contested EU legislation was consistent with the subsidiarity principle. Any idea that Member States take a uniform view concerning the application of subsidiarity in a particular case is therefore untenable. It should also be recognized that some subsidiarity challenges have been brought by private parties and received no support from any Member State. This does not mean that such challenges were therefore misplaced. It does mean that no Member State supported the claim that the relevant EU legislation infringed subsidiarity.

Thirdly, it is by no means clear that the ECJ decisions in the real subsidiarity cases were wrong, or that they would have been different if judicial review had been more intensive. It is too easy to reason from the premise that judicial review *should* be more searching, to the conclusion that the result *would* have been different. The premise is correct, the conclusion is wrong. The result might be different, it might not. Thus even where the reasoning of the Advocate General was considerably more searching than that of the Court, as exemplified by Advocate General Maduro's Opinion in *Vodafone*,[121] the result was the same. The reality is that whether a particular judicial decision was right or wrong can only be determined by looking closely at the contested regulatory scheme and deciding whether it 'passed' the subsidiarity criterion. When judged from this perspective it is not self-evident that any of the challenged regulations should have fallen because of subsidiarity.

Finally, it might be argued in the light of the above that the existing subsidiarity principle is defective, that the focus should be on whether the EU norm violates proportionality by infringing too greatly on Member State values, and that if this were so then more cases would be brought by Member States and more might be successful.[122] Space precludes detailed examination of this hypothesis.[123] Suffice it to say the following for present purposes. It is not clear that any of the existing cases would or should have been decided differently even if this type of analysis had been applied by the EU Courts. There are moreover problems with this form of judicial scrutiny in terms of positive law, practical application, and at the conceptual level.

[118] Case T–326/07 *Cheminova* (n 112).

[119] Case T–65/98 *Van den Bergh Foods Ltd v Commission* [2003] ECR II–4653, [197]–[199]; Case T–420/05 *Vischim Srl v Commission* [2009] ECR II–3841, [221]–[223]; Case C–110/03 *Belgium v Commission* [2005] ECR I–2801, [56]–[58]; Case T–339/04 *France Télécom SA v Commission* [2007] ECR II–521, [77]–[82].

[120] Case C–64/05 P *Sweden v Commission* [2007] ECR I–11389, [74].

[121] Case C–58/08 *Vodafone* (n 84) [27]–[36].

[122] Davies (n 116).

[123] Craig (n 117).

## 12 CONCLUSION

i. EU competence is the result of the interaction of four variables: Member State choice as to the scope of EU competence, as expressed in Treaty revisions; Member State and, since the SEA, European Parliament acceptance of legislation that fleshed out the Treaty Articles; the jurisprudence of the EU Courts; and decisions taken by the institutions as to how to interpret, deploy, and prioritize the power accorded to the EU. We should therefore be cautious about the assumption that the 'competence problem' was the result primarily of some unwarranted arrogation of power by the EU to the detriment of states' rights.

ii. There were two principal objectives driving reform in this area: clarity as to the scope of EU competence and containment of EU power.

iii. The tripartite division in the Lisbon Treaty has gone some way towards greater clarity. The categories of exclusive competence, shared competence, and competence to support, coordinate, or supplement Member State action are helpful in this respect. So too is the fact that the Lisbon Treaty specifies the legal consequences of assignment of a subject matter area to a particular category. There are, however, limits to what can be achieved through categorization. There will necessarily be problems of demarcating the boundaries of each category.

iv. The category of exclusive competence is relatively narrow insofar as it relates to areas that are stipulated as falling within this head of competence, but the scope of exclusive competence in relation to external relations is broader and problematic.

v. Shared competence is the default position in the Lisbon Treaty. The broad range of areas that fall within shared competence means however that the informed observer can determine the reality of this divide only by looking at the detailed Treaty provisions that govern the relevant area. The nature of the divide will differ, often significantly, as between different areas that fall within the remit of shared competence. It also means that the informed observer who wishes to understand what the Member States are allowed to do in any such area will have to be acutely aware of whether and how the EU has exercised its power, since the Member States lose their competence to the extent that the EU has exercised its competence.

vi. The recognition in the Lisbon Treaty of the category where the EU supports, coordinates, or supplements Member State action is to be welcomed. There are boundaries on EU competence in these areas, through the proscription on harmonization. The Treaty nonetheless allows persuasive soft law and binding hard law to achieve the objectives spelt out for each area. Such measures do not formally supersede Member State competence, but the legal reality is that such legally binding acts made by the EU will constrain Member State competence. The informed observer who wishes to understand the division between EU competence and that of the Member States will therefore have to be cognizant of the specific Treaty provisions that govern each of these areas, and of any EU legislation made pursuant thereto.

vii. The other principal concern driving reform in this area was the desire to contain EU power. This concern was based in large part on the broad use of what are now Articles 114 and 352 TFEU. The Lisbon Treaty renders problems based on Article 352 TFEU less likely in the future: it requires unanimity in the Council; consent from the European Parliament; that national Parliaments are specifically alerted to use of this provision; and the EU has been given specific legislative competence in the areas where Article 308 EC was used in the past. The Lisbon Treaty will, by way of contrast, do little to alleviate problems of 'competence creep' in the terrain covered by Article 114 TFEU. Impact Assessment can however be used both politically and legally as a method of checking whether there really is a problem that requires harmonization at EU level.

viii. The strengthening of the role of national Parliaments in relation to subsidiarity is to be welcomed. It remains to be seen how effective this is in practice. The reality is that the Commission is likely to take seriously subsidiarity concerns voiced by Member States, especially the more powerful, and this is so even if the number of states voicing such concerns does not reach the levels to trigger the response mechanisms in the Protocol on subsidiarity and proportionality.

## 13 FURTHER READING

### (a) Books


Craig, P, *The Lisbon Treaty, Law, Politics and Treaty Reform* (Oxford University Press, 2010) ch 5.

Dashwood, A, and Hillion, C (eds), *The General Law of EC External Relations* (Sweet & Maxwell, 2000)

Eeckhout, P, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press, 2004)

Estella, A, *The EU Principle of Subsidiarity and its Critique* (Oxford University Press, 2002)

Schutze, R, *From Dual to Cooperative Federalism, The Changing Structure of European Law* (Oxford University Press, 2009)


### (b) Articles


Craig, P, 'Competence: Clarity, Conferral, Containment and Consideration' (2004) 29 ELRev 323

———, 'Competence and Member State Autonomy: Causality, Consequence and Legitimacy' in B de Witte and H Micklitz (eds), *The European Court of Justice and the Autonomy of Member States* (Intersentia, 2011) ch 1

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Davies, G, 'Subsidiarity: The wrong idea, in the wrong place, at the wrong time' (2006) 43 CMLRev 63

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