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# The Legal Framework of the EU

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## 3.1 Introduction

This chapter provides a brief overview of the main competences of the EU, as well as the tools and processes the EU has to translate these competences into legal action. In other words, what may the EU actually do, and how does it act?<sup>1</sup> In addition, this chapter touches on a question that is increasingly important for the EU, certainly after Brexit, and that may become of increasing importance to the EAC as well: variable geometry. To what extent can integration differ per Member State or per group of Member States, or must all states integrate at the same pace? We begin, however, with the question which competences the EU actually has, and how competence can be determined in a concrete case.

## 3.2 Conferral, Scope, Nature and Use of EU Competences

Fundamentally, the EU remains an organization established by its Member States. Consequently, the EU does not have a general competence to act in whatever field it wants to. In EU-speak, this is often summarized by saying the EU has no *Kompetenz-Kompetenz*.<sup>2</sup> Instead, the EU only has those powers *conferred* on it by the Member States via the different Treaties.<sup>3</sup> All powers that have not been transferred to the EU remain with the Member States.<sup>4</sup>

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1 See generally on these issues *inter alia* L. Azoulay (ed), *The Question of Competence in the European Union* (OUP, 2014), A. Von Bogdandy and J. Bast (eds), *Principles of European Constitutional Law* (2nd ed., Hart Publishing 2010), A. Estella, *The EU Principle of Subsidiarity and its Critique* (OUP, 2002), P. Craig, 'Subsidiarity: A Legal and Political Analysis' (2012) 50 *JCMS* 72, or S. Weatherill, 'Competence Creep and Competence Control' (2004) 23 *YEL*, 1.

2 Cf. the German Constitutional Court in BVerfGE, 2 BvE 123,267, 2 BvE 2/08 (2009) *Lissabon Urteil* or BverGE 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 be 6/12 (2012) *ESM Treaty*.

3 D. Chalmers, *European Union Law* (CUP 2007), 140.

4 Of course, deciding where the boundaries of existing powers lie becomes a crucial element here.

The basic principle of conferred powers is laid down in Articles 4, 5(1) and (2) TEU, which provide that:

1. *The limits of Union competences are governed by the principle of conferral. (...)*
2. *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.*

If the EU wants to act in a certain field, therefore, it must first have received the competence from the Member States to do so. Concretely, this delegation of competences in the Treaties is done via *legal basis provisions*. These are provisions in the TEU or TFEU that explicitly give the EU the competence to act in a certain field, and that also indicate the legislative process the EU should follow to adopt such acts.<sup>5</sup> These legal bases can be very limited and specific, such as Article 157(3) TFEU, which only allows the EU to regulate in the field of sex equality in employment and occupation:

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

Other legal bases, however, are very open and wide-ranging. Article 114 TFEU on the creation of the internal market, the most important legal basis in EU law, provides a good example of such a broad legal basis. Article 26 TFEU states that EU should create one internal market.<sup>6</sup> This provision itself, however, only provides the *objective* of creating a market. It does not provide a legal basis to turn this objective into reality by adopting legal acts. This legal basis can be found in the first paragraph of Article 114 TFEU:

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5 See case 45/86, *Commission v. Council*, [1987] ECR 493. Such legal bases must be distinguished from the broader articles that determine the values and objectives of the EU, such as Articles 2 and 3 TEU. Such Articles only indicate what the EU should aspire to, but do not give the competence to adopt any acts.

6 See for a further discussion of EU internal market law EU chapters 9–13.

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.

Article 114 TFEU, therefore, empowers the EU to adopt legislation to harmonize all national laws that may hinder the free movement of goods, services, capital or people and therefore obstruct the internal market. Such a far-reaching power of course also raises the question where the *limits* of EU competences lie, and who gets to decide on these limits. After all, as we know from the Commerce Clause in the US Constitution, almost anything can be said to affect the internal market, as almost all rules will have some (indirect) effect on cross-border-trade.<sup>7</sup> Once we have established that the EU has been attributed a certain power, like regulating the internal market, we must then answer the additional question where the limits of this power lie.

### 3.2.1 *The Scope of EU Competences*

Crucially, when it comes to delineating EU competences, the line judge is the CJEU, and not the Member States or the EU legislative institutions.<sup>8</sup> Even though the EU does not have *Kompetenz-Kompetenz*, it is an EU institution that determines the scope of the competences that have been conferred by the Member States.<sup>9</sup> This exclusive power of the CJEU to determine

7 J.H. Choper, R.H. Fallon, Y. Kamisar, and S.H. Shiffrin, *Constitutional Law* (10th edn. Thomson 2006), 87 and 91. Further see T.W. Merrill, 'Towards a Principled Interpretation of the Commerce Clause', 22 *Harvard Journal of Law and Public Policy* (1998), 31, and D. McGimsey, 'The Commerce Clause and Federalism after Lopez and Morrison: The Case for Closing the Jurisdictional-Element loophole', 90, *California Law Review* (2002), 1675. Different from the US, however, the EU has less effective political counterbalances.

8 Case C-376/98 *Tobacco Advertising I* [2000] ECR I-8419, C-380/03 *Tobacco Advertising II* [2006] ECR I-11573, Case C-358/14, *Poland v Parliament and Council* (Tobacco Advertising III) ECLI:EU:C:2016:323, Joined Cases C-293 and 594/12 *Data Retention Directive*, ECLI:EU:C:2014:238.

9 As will be discussed further below, not all national supreme courts accept this absolute claim of the CJEU in its full extent, although in practice it is the CJEU that determines the limits of EU competences. Of course the Member States do retain the option of changing the EU Treaties if they disagree, even though this requires unanimity of 28 states, and therefore is not often a realistic option.

competence is important for the stability and effectiveness of the EU. Just imagine if each individual Member State or national court would be able to decide, for every single piece of EU legislation, whether the act was *ultra vires* or not. Similarly, the review by the EU Courts, and not the EU political institutions, also means that the EU political institutions must respect the nature and limits of EU competences as well.

In determining the scope of EU competences, the CJEU follows a teleological, or purposeful approach. It looks at the objectives and ambitions of the EU, and interprets EU competences in such a way that these objectives may be realized.<sup>10</sup> The main argument is that the Member States intended to give the EU the necessary powers to realize its objectives, as it were the same Member States that formulated these objectives in the first place. The result of this teleological approach is that the CJEU often chooses a rather expansive interpretation that increases EU competences. The best example of this purposeful approach, and its expansive effects, is the (in)famous *Tobacco Advertising* case law.<sup>11</sup>

The tobacco cases concerned a directive prohibiting all advertising and sponsorship of tobacco products.<sup>12</sup> The main legal basis for this act was the internal market clause of Article 114 paragraph 1 TFEU.<sup>13</sup> The Council, the European Parliament and the Commission claimed that the many differences in national laws on tobacco advertising were a threat to the internal market. If Italy allowed tobacco advertising but Sweden did not, for example, Italian newspapers or journals with tobacco advertisements could not be sold in Sweden, hindering their free movement. Germany, however, claimed that the real objective of the directive was to reduce smoking and protect public health. This was problematic according to Germany because the EU only has very limited competences in the field of public health. In fact, Article 168(5) TFEU explicitly prohibits harmonization in the field of public health, even though it also does obligate the EU to ensure 'a high level of human health protection' in all Union policies and activities.<sup>14</sup>

10 S. Douglas-Scott, *Constitutional Law of the European Union* (Pearson 2002), 261.

11 Case C-376/98 *Tobacco Advertising I* [2000] ECR I-8419 and C-380/03 *Tobacco Advertising II* [2006] ECR I-11573. For a recent addition in this debate also see Case C-358/14, *Poland v Parliament and Council* (Tobacco Advertising III) ECLI:EU:C:2016:323.

12 Directive 98/43.

13 Under the old, pre-Lisbon and Amsterdam numbering this was still Article 100A and 95 EC respectively.

14 With certain limited exceptions in Article 168(4) TFEU that were not applicable in this case.

In two landmark judgments the CJEU first held that the directive did exceed the competence under Article 114 TFEU as it was overly broad. For example, it also included advertisements on objects that would never cross the border.<sup>15</sup> An amended directive, however, which excluded these objects, was later upheld by the CJEU. These judgments contain two key findings concerning the delineation of EU competences. The first is the low threshold the CJEU requires before allowing the use of Article 114 TFEU. The second is that, once this low threshold has been met, EU measures based on the market competence of Article 114 TFEU may *also*, or even *predominantly* pursue other objectives, including public health. The reasoning of the CJEU here is exemplary and an important window into the logic of effectiveness that shapes EU law and contributes to its actual success. The CJEU first reiterates the fundamental principle of attribution:

Those provisions, read together, make it clear that the measures referred to in Article [114(1)] of the Treaty 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 [5 TEU] that the powers of the Community are limited to those specifically conferred on it.

Moreover, a measure adopted on the basis of Article [114] of the Treaty 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 [114] as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory. (...)<sup>16</sup>

The CJEU therefore insists that a measure can only be based on a legal basis if it ‘genuinely’ pursues the objective behind that legal basis, which it is for the Court to assess. Both in *Tobacco Advertising 1* and in *Tobacco Advertising 11*,

15 The directive also allowed Member States to impose stricter norms, but did not provide for a free movement clause (*Tobacco 1*, paras. 101 a.o.). See on this issue the further discussion on the free movement of goods in chapter 10.

16 *Tobacco Advertising 1*, paras. 83–84.

however, the CJEU subsequently held that there was a sufficient risk to free movement, now *or in the future*, to justify the use of Article 114 as a legal basis:

It is clear that, as a result of disparities between national laws on the advertising of tobacco products, obstacles to the free movement of goods or the freedom to provide services exist or may well arise.

In the case, for example, of periodicals, magazines and newspapers which contain advertising for tobacco products, it is true, as the applicant has demonstrated, that no obstacle exists at present to their importation into Member States which prohibit such advertising. However, in view of the trend in national legislation towards ever greater restrictions on advertising of tobacco products, reflecting the belief that such advertising gives rise to an appreciable increase in tobacco consumption, it is probable that obstacles to the free movement of press products will arise in the future.<sup>17</sup>

The EU therefore has a competence to regulate under Article 114(1) TFEU where there is an actual or potential obstacle, now or in the future to any of the fundamental freedoms.<sup>18</sup> Even the risk of *potential future obstacles*, therefore, is sufficient to create a competence under Article 114 TFEU.

Once this already low threshold for the use of Article 114 TFEU has been met, moreover, the CJEU held that the EU was also allowed to pursue *other objectives* than the internal market, including public health:<sup>19</sup>

Furthermore, provided that the conditions for recourse to Articles [114], 57(2) and 66 as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made. On the contrary, the third paragraph of Article 129(1) provides that health requirements are to form a constituent part of the Community's other

<sup>17</sup> *Tobacco Advertising I*, paras. 96–97.

<sup>18</sup> Cf. amongst many other confirmations of this line Case C-491/01 *British American Tobacco* [2002] ECR I-11453, par. 60, case C-434/02 *Arnold André* [2004] ECR I-11825, par. 30, case C-210/03 *Swedish Match* [2004] ECR I-11893, par. 29, or joined cases C-154/04 and C-155/04 *Alliance for Natural Health* [2005] ECR I-6451, par. 28. Measures are not allowed, however, on a 'mere finding of disparity between national rules'.

<sup>19</sup> Note also in this regard that, even though the EU has no competence in public health, Article 168 TFEU does obligate the EU to take public health into account in all its legislation.

policies and Article [114](3) expressly requires that, in the process of harmonisation, a high level of human health protection is to be ensured.<sup>20</sup>

When safeguarding the internal market, therefore, the EU may also pursue other objectives, further increasing the scope of EU competences. Here the CJEU clearly applied a very expansive doctrine of attribution to make sure the EU has sufficient competences to reach its objectives.<sup>21</sup> Many further examples can be given. In the *Ship Source Pollution* cases, for example, the EU could use its environmental competence to require Member States to impose criminal sanctions for the dumping of ship waste, as this was absolutely necessary to make the environmental competence effective.<sup>22</sup> In *ESMA*, the CJEU upheld that the competence under Article 114 TFEU includes the power to create agencies with far reaching powers.<sup>23</sup> In *Digital Rights Ireland* the CJEU found that Article 114 TFEU could also be used to require the retention of meta-data from telephones, as the diverging rules on data retention formed a risk for free movement.<sup>24</sup> Perhaps the most far-reaching example can be found in the *Kadi-I* saga.<sup>25</sup> Here the CJEU invented the notion of an ‘implicit underlying objective’, which could be transformed into a competence via Article 352 TFEU.<sup>26</sup>

20 *Tobacco Advertising I*, par 88.

21 For further examples see, amongst others, the *Ship Source Pollution* cases, where the EU could use its environmental competence to require Member States to impose criminal sanctions for the dumping of ship waste, as this was absolutely necessary to make the environmental competence effective. In *ESMA*, the CJEU upheld that the competence under Article 114 TFEU includes the power to create agencies with far reaching powers. In *Digital Rights Ireland* the CJEU found that Article 114 TFEU could also be used to require the retention of meta-data from telephones, as the diverging rules on data retention formed a risk for free movement.

22 Case C-176/03 *Commission v Council (Ship Source Pollution I)* [2005] ECR I-7879. The EU is not competent, however, to determine the ‘type and level’ of criminal sanction. See case C-440/05 *Ship Source Pollution II* [2007] ECR I-9097 par. 70. After Lisbon the EU has, however, received further, and more explicit, competences in the field of criminal law. See especially art. 82–86 TFEU.

23 Case C-270/12, *UK v Parliament and Council (ESMA)*, ECLI:EU:C:2014:18.

24 Case C-301/06 *Ireland v Parliament and Council (Data Retention)*, ECLI:EU:C:2009:68.

25 For a further analysis of these cases see A. Cuyvers, “‘Give me one good reason’: The unified standard of review for sanctions after Kadi II”, 51(6) *Common Market Law Review* (2014), 1759, and A. Cuyvers, “The Kadi II judgment of the General Court: the ECJ’s predicament and the consequences for Member States”. *European Constitutional Law Review*, 7, 481.

26 Joined cases C-402/05 P and C-415/05 P *Kadi I*, par. 226.



The expansive interpretation of competences followed by the CJEU has of course been criticized in many Member States, and one could say that the CJEU comes close to granting a general competence under Article 114 TFEU.<sup>27</sup> At the same time, the purposeful approach of the CJEU has been vital for enabling the EU and allowing it to be effective. As it only has a limited number of competences, these competences need to provide sufficient space for the EU to actually achieve its aims.<sup>28</sup> Moreover, it must also not be forgotten that it is the political institutions, including the Member States as represented in the Council of Ministers, that first adopt legal acts, and hence are of the opinion that these acts fit within a certain competence. The CJEU only reviews these acts once adopted. It is not the CJEU, therefore, that expands EU law all by itself, but rather the CJEU that empowers the political institutions to achieve EU objectives by following a purposive and permissive doctrine of competences.

### 3.2.2 *The Nature of EU Competences*

In addition to establishing the existence and the scope of EU competences, it is also important to understand the *different types* of EU competence. For the EU has three different types of competences, being exclusive competences, shared competences and supporting competences.<sup>29</sup>

#### 3.2.2.1 Exclusive Competences

An exclusive competence means that Member States transfer all their authority in a certain area to the EU, and hence have no powers left to regulate that field themselves. Even if the EU has not yet acted on a certain issue, say developing a trade agreement with a new state like South Sudan, Member States are not allowed to act nationally. The only way to act in an area of exclusive competence is via the EU.

Exclusive competences, therefore, are the most far reaching competences the EU has. This also explains why there only are a few exclusive competences,

27 Cf. P. Van Cleynenbreugel, 'Meroni Circumvented? Article 114 TFEU and the EU Regulatory Agencies', 21 *Maastricht Journal* 1 (2014), 64–88.

28 Note though that Article 352 TFEU also provides a residual competence for the EU. Where the Treaty provides an objective, but no explicit competence, Article 352 TFEU may be used as a fallback competence. The use of Article 352 TFEU, however, requires unanimity in the Council, and also separate approval of some national parliaments.

29 R. Schütze, 'The European Community's Federal Order of Competences A Retrospective Analysis', in: M. Dougan and S. Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009), 63.

as in most fields Member States are not willing to transfer all their authority to the EU. Article 3 TFEU provides an overview of the areas of exclusive competences:

1. *The Union shall have exclusive competence in the following areas:*
  - (a) *customs union;*
  - (b) *the establishing of the competition rules necessary for the functioning of the internal market;*
  - (c) *monetary policy for the Member States whose currency is the euro;*
  - (d) *the conservation of marine biological resources under the common fisheries policy;*
  - (e) *common commercial policy.'*

In these areas, such as the customs union or the common commercial policy, it was deemed necessary to have one coherent EU policy. For example, the EU customs union can only work effectively if all Member States use the exact same rules and rates. Similarly, the common commercial policy (CCCP) requires the EU to act as a single block externally. The effectiveness of this policy would be undermined if Member States could also negotiate trade deals bilaterally. Hence the decision was taken to create exclusive competences in these fields.

### 3.2.2.2 Shared Competences

The second, and largest group of competences are shared. As their name already indicates, these competences are shared between the EU and the Member States. This means that both the EU and the Member States are allowed to act in areas of shared competence. Article 4 TFEU provides an overview of the many and broad shared competences of the EU:

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;*
  - (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.'*

Such shared competences create the risk of conflict: What if a Member State and the EU both legislate to protect consumers on-line, for example, but the different regulations conflict? Three main principles regulate such conflict. Firstly, EU law always trumps national law, be it of an earlier or a later date. If there is a conflict, the EU law therefore trumps the national law.<sup>30</sup> Secondly, once the EU regulates a certain topic within a shared competence it 'occupies the field', which means that the Member States lose the authority to regulate this topic as well. As soon as the EU acts in an area of shared competences, therefore, the Member States lose their competence on the issue covered by the EU act. For example, if the EU regulates the nicotine content of cigarettes under the shared internal market competence, Member States lose their competence to regulate nicotine content themselves. They remain competent, however, to regulate other topics such as tar content or the size of cigarettes. How much authority Member States have left in the areas of shared competences, therefore, depends on how much EU legislation has already been adopted. Thirdly, even on those issues where Member States remain competent to act, the principle of sincere cooperation obligates them not to undermine the effectiveness or objectives of existing EU obligations.<sup>31</sup>

### 3.2.2.3 Supporting, Coordinating and Supplementing Competences

Supporting, coordinating and supplementing competences are the third, and most limited, type of EU competences. These are areas where the Member States retain their authority to regulate, but where the EU can help out, for example by coordinating national policies or providing subsidies. In contrast to shared competences, EU action under a supporting competence does not occupy the field. Even if the EU acts, therefore, national competences are not reduced. Article 6 TEU provides an overview of these more secondary competences:

<sup>30</sup> Also see the general discussion on the supremacy of EU law in EU chapter 4.

<sup>31</sup> Article 4 TEU.

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be:

- (a) *protection and improvement of human health;*
- (b) *industry;*
- (c) *culture;*
- (d) *tourism;*
- (e) *education, vocational training, youth and sport;*
- (f) *civil protection;*
- (g) *administrative cooperation.'*

One of the most successful examples of a supporting competence is the Erasmus programme allowing students to study abroad. The area of education is so sensitive and connected to national identity that the EU has received no competences to harmonize. The EU, therefore, cannot regulate curricula or school systems. The EU has, however, received the competence to support and supplement national education policy, for example by providing subsidies to certain programmes, or sharing best practises between Member States. The Erasmus programme is one example of such supporting action.

#### 3.2.2.4 The Residual Competence of Article 352 TFEU

Article 352 TFEU forms an intriguing and important addition to the entire system of EU competences. It provides a residual competence where the Treaties do provide an objective but, even under the expansive interpretation of the CJEU, no competence can be found in any of the legal basis provisions:

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.<sup>32</sup>

Besides an interesting legal conundrum, Article 352 TFEU creates a form of residual competence to ensure that objectives can be realized, and hence

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32 Article 352 TFEU.

further ensures EU effectiveness.<sup>33</sup> Here the EU system for attribution again has similarities to the federate US approach under the necessary and proper clause.<sup>34</sup> Article 352 TEU in fact even goes one step further, as the text of the necessary and proper clause only refers to the *powers* of the federal government, not the objectives.

The use of Article 352 TFEU, however, does require unanimity in the Council, which of course limits its use. In addition, because of its openness, some, including the *Bundesverfassungsgericht*, see it as a limited form of amendment, and hence require approval by the German parliament for any use of Article 352, further complicating the use of this residual competence.<sup>35</sup>

### 3.3 The Use of EU Competences: The Principles of Subsidiarity and Proportionality

Having a competence does not automatically mean that you should also use it, or use it to its fullest extent. Once it is established that the EU has a certain competence, therefore, two new questions arise: 1) when should the EU use a certain competence, and 2) how far should the EU go when using that competence? These questions are governed by the principles of subsidiarity and proportionality.

Under the principle of subsidiarity the EU 'shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States.'<sup>36</sup> Even if there is a competence, EU action is only called for where the Member States cannot achieve a similar result themselves. Although subsidiarity is a legal principle, it is highly political in nature, and difficult to adjudicate. The primary subsidiarity check takes place in the political

33 A. Dashwood, 'Article 308 as the Outer Limit of Expressly Conferred Community Competence', in: C. Barnard and O. Odudu (eds) *The Outer Limits of European Union Law* (Hart Publishing 2009), 35 et seq.

34 See however also the attempt to at least somewhat limit the potential this opens up in Declaration No. 41 on art. 352 TFEU. For example, art. 352 TFEU is not to be used in relation to such lofty aims as 'promoting peace'.

35 See especially its *Lissabon Urteil* of 30 June 2009, BVerfGE, 2 BvE 2/08. On the other hand also see Opinion 2/94 *Accession to the European Convention on Human Rights* [2006] ECR I-929, and the limits imposed by the CJEU therein. Further see J.H.H. Weiler, *The Constitution of Europe: Do the New Clothes have an Emperor?* (CUP 1999), 54–55.: 'No sphere of the material competence could be excluded from the Community acting under art. 352 TFEU'.

36 Article 5(3) TEU.

institutions and the national parliaments.<sup>37</sup> The CJEU primarily checks the formal subsidiarity requirements, for example if a legislative act actually contains a paragraph assessing subsidiarity. Logically, subsidiarity only applies to shared competences and not to exclusive competences, where the Member States are no longer allowed to act anyway.

If the EU should act, the principle of proportionality demands that ‘the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.’<sup>38</sup> For example, where a limited directive harmonizing product labels for chocolate would suffice, the EU should not adopt a regulation completely regulating the manufacturing of chocolate. Like subsidiarity, the principle of proportionality is also rather political, and hence left primarily to the political institutions.<sup>39</sup>

### 3.4 Variable Geometry and Enhanced Cooperation

If the EU has a competence, and if it is allowed to use it, a further question that arises is if this competence may only be used where all Member States participate or if it may also be used by a smaller sub-set of Member States. This question brings us to the problem of variable geometry and flexibility.

The default position is that all Member States participate in any EU action. Especially as the EU expanded, however, the need was felt for more flexibility. As with the euro, for example, some Member States wanted to integrate faster and deeper than others. How much flexibility should be allowed, and in what form, however, has always been a highly contentious point. On the one hand, it is argued that flexibility is simply necessary in so large a union. In addition, flexibility may ultimately deepen integration as it allows a ‘coalition of the willing’ to intensify integration in certain fields, with other Member States probably joining later. On the other hand, it is feared that a ‘Europe of

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37 See Protocol (No. 1) and (No. 2) on subsidiarity and the role of national parliaments that may give ‘yellow’ or ‘orange’ cards to legislative proposals where they think they infringe the principle of subsidiarity. On the complex nature of these concepts also see P.J.G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities* (3rd edition, Kluwer 1998), 233 et seq.

38 Article 5(4) TEU and the Protocol on the application of the principles of subsidiarity and proportionality.

39 At least in the field of competence determination. As we shall see in chapters 9–13, the CJEU does closely scrutinize proportionality where restrictions on free movement are concerned.

multiple speeds' is only the first step towards the unravelling of the EU, as it would undermine the necessary coherency and unity within the Union.

In practice, a great deal of flexibility already exists in today's EU.<sup>40</sup> Often this has been achieved by opt-outs in the Treaties, including accession treaties. For example, only 19 of the current 28 Member States participate in the Euro.<sup>41</sup> Similarly, some Member States, notably the UK, have an opt-out for Schengen, which lifts the borders between participating states, even though some non-EU states do participate. In the larger picture, there is also the European Economic Area (EEA) and the European Free Trade Agreement (EFTA) that provide a kind of alternative membership to the EU internal market.<sup>42</sup>

In addition to these existing forms of flexibility, Lisbon also further developed the Treaty mechanism for enhanced cooperation.<sup>43</sup> This mechanism allows a group of at least nine Member States to establish closer cooperation with each other *within* the framework of EU, and whilst using EU institutions and competences. They may only do so, however, as a last resort. This means that they must first try to achieve the desired objective with all Member States, and may only resort to enhanced cooperation where this objectively proves impossible.<sup>44</sup> The enhanced cooperation, furthermore, must always be open to other Member States that want to join. So far, however, this mechanism has only been used twice to adopt rules on divorce and Union patents, as the procedure is quite burdensome.

A third mechanism to allow for flexibility is to conclude international agreements between all or a group of Member States. Such agreements are often intimately connected with EU law, but formally qualify as international agreements between the Member States. The Fiscal Compact or the ESM Treaty provide clear examples of this practice, that is welcomed by some and seen as a threat to the 'Community method' by others.<sup>45</sup>

40 Cf already B de Witte, D. Hanf and E. Vos, *The many faces of Differentiation in EU law* (2001, Intersentia).

41 Of these, the UK, Denmark and Sweden even have a formal or informal exemption from the obligation to join the euro zone at some stage. See further EU chapter 13 on EMU.

42 See on these existing forms of flexibility and alternative membership also G. Davies, 'What Does It All Mean?', *German Law Journal Brexit Supplement* (2016), en B. De Witte, 'Near-membership, partial membership and the EU constitution', (2016) (4) *European Law Review*, p. 471.

43 Article 20 TEU and Articles 326 to 334 TFEU.

44 Article 20(2) TEU and Joined Cases C-274/11 and C-295/11 *Spain and Italy v Council* (Enhanced Cooperation), ECLI:EU:2013:240.

45 P. Craig, 'The Stability, Coordination and Governance Treaty: principle, politics and pragmatism', 37(7) 2102 *European Law Review* p. 231. See also the evidence given by

None of these mechanisms, however, seem to provide both the flexibility that seems necessary and the safeguards that are required to guarantee the unity and stability of European integration. Especially with *Brexit* looming, therefore, the search is on for alternative mechanisms and models that offer both, and that may satisfy those Member States that want deeper integration and those that want to remain more on the sidelines but remain part of the EU.<sup>46</sup> Current suggestions include, for example, the creation of several circles of integration, which range from a deeply integrated core with even a common military to less integrated ‘outer circles’ that primarily participate in economic integration, although it is as yet wholly unclear if it is actually feasible to separate these areas. In any event the question of flexibility and variable geometry is an important one for the EU, and will likely only increase in importance for the EAC as well. Consequently, it would seem an important area for further research and comparison.

### 3.5 EU Legal Instruments

Where the EU has a competence, it can only act through one of the legal instruments provided for in Article 288 TFEU, being regulations, directives, decisions, recommendations and opinions.

A regulation can best be described as an EU law. From the moment of its publication a regulation applies fully and directly in all Member States. Regulations require no national implementation, rather it is even prohibited to transpose a regulation into national law. Consequently, once a regulation has been adopted and published, it is the applicable law throughout the entire EU.

A directive, on the other hand, is an indirect instrument addressed to the Member States. The directive tells Member States to achieve a certain result, for example giving a right of residence of three months to all EU citizens.<sup>47</sup> The Member States must then implement this directive in their national law,

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M. Dougan and P. Craig for the European Scrutiny Committee of the House of Commons. House of Commons—European Scrutiny Committee, Treaty on Stability, Coordination and Governance: impact on the rule of law (62nd report, 27 March 2012).

46 See in this context also the ‘Cameron-deal’ that was supposed to prevent Brexit, and the right of the UK not to participate in deeper integration, as well as the obligation of the UK not to interfere where other Member States would like to integrate more deeply. See the European Council Conclusions of 18–19 February 2016, Annex I, EUCO 1/16. For analysis see ‘Editorial comments: Presiding the Union in times of crisis: The unenviable task of the Netherlands’ (2016) 53(2) *Common Market Law Review*, 327–328.

47 Directive 2004/38.



where they are free to choose the best national means and methods of doing so. Usually, Member States are given a period of two years for this implementation. Individuals and companies subsequently rely on the national laws transposing the directive, not on the directive itself.<sup>48</sup> The directive, therefore, is a less intrusive measure, as it allows Member States to make certain choices and to integrate a certain rule into their own national law and legal system. At the same time, directives also carry a higher risk of divergence between Member States, as the implementation may differ between Member States and as some Member States may fail to implement a directive or may implement it incorrectly.<sup>49</sup>

Decisions are legally binding acts addressed to specific addressees, and hence are not of general application. Examples are Commission decisions that grant specific farmers a subsidy or impose a fine on certain companies for violating of EU competition law. Recommendations and opinions, on the other hand, have no binding legal force. They can still have legal effect, for instance as soft law or via the principle of legitimate expectations, but are not binding as such.

### 3.6 EU Legislation and Decision-making

Where the EU wants to use a competence, for instance to adopt a regulation or a directive, it must act via one of the decision-making procedures provided for in the Treaty or secondary legislation.<sup>50</sup> These procedures, therefore, regulate *how* the EU can act. The most important decision making procedures that will be discussed here are the ordinary legislative procedure set out in Article 294 TFEU and the two main special legislative procedures.<sup>51</sup>

48 For the complex doctrine on the potential direct effect of directives see EU chapter 4.

49 As we shall see in EU chapter 7, it is then up to the Commission to check whether a directive has been implemented correctly and to start infringement proceedings where necessary.

50 For a discussion of non-legislative decision-making within the different institutions, see chapter 2, as these procedures often entail the Institutions taking decisions on their own and under their own internal rules, such as under Articles 31 TEU or 31, 106(3), 236, 290 or 291 TFEU. The discussion here will focus on the legislative decision-making procedures. For secondary legal bases see Case C-133/06 *Parliament v Council* (Secondary Legal Basis) [2008] ECR I-3189.

51 Pre-Lisbon this procedure was known as the co-decision procedure, in light of the important role for the European Parliament as co-legislator with full rights. See also EU chapter 2.

### 3.6.1 *The Ordinary Legislative Procedure*

The ordinary legislative procedure involves the Commission, the European Parliament and the Council in up to four 'rounds' when trying to adopt legislation. The procedure starts with the Commission submitting a proposal to the European Parliament and the Council for the first reading. The Parliament then adopts a position whereby it rejects the Commission proposal, accepts the proposal or, more commonly, proposes several amendments. The position of the Parliament is then communicated to the Council. If the Council approves with the position of the European Parliament, the act is adopted, and the procedure is finished. If the Council does not agree, it shall adopt its own position, for instance suggesting different amendments, and communicate this position to the European Parliament and the Commission. The Commission will then give its own views on the position of the Council to the Parliament.

The position of the Council and the views of the Commission then form the starting point for the second reading. If the Parliament agrees with the position of the Council at the end of the first reading, the act will be adopted as formulated by the Council. If the Parliament simply rejects the position of the Council, the proposed act is not adopted, and the procedure stops. Alternatively, however, the European Parliament may again suggest amendments. The Commission then gives an opinion on the amendments proposed by the Parliament, after which the ball is back again in the court of the Council. By a qualified majority the Council can then either approve all amendments by the Parliament and adopt the act, or, if it does not agree, convene a so called Conciliation Committee.<sup>52</sup>

The Conciliation Committee is composed of an equal number of representatives of the Council and the European Parliament. These representatives negotiate with each other and have six weeks to arrive at a text that is acceptable for both institutions.<sup>53</sup> The Commission also takes part in this Committee to advise and suggest possible compromises. If no compromise is reached, the act is not adopted. If a joint text can be agreed upon, however, the procedure continues to the third reading.

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52 For a discussion of the qualified majority voting procedure see EU chapter 2. If the Commission has given a negative opinion on certain amendments of the European Parliament, however, the Council may only adopt these by unanimity. This requirement further safeguards the position of the Commission at this stage of the legislative procedure.

53 The representatives of the Council thereby have to approve the outcome with a qualified majority, the representatives of the Parliament by a normal majority, following the voting rules of their respective institutions.

In the third reading, the European Parliament, by normal majority, and the Council, by qualified majority, each have six weeks to either accept or reject the compromise text drafted by the Conciliation Committee, no further amendments being allowed. If one or both of the institutions reject the text, the procedure ends and no act is adopted.

The ordinary legislative procedure therefore truly casts the Council and the European Parliament as co-legislators, and also provides significant influence to the Commission. As can already be guessed from the many different rounds, however, the ordinary legislative procedure can also take quite some time. Largely for this reason, the *trialogue* has been invented. Essentially, the trialogue moves the Conciliation Committee up to the first round. Instead of exchanging amendments for two rounds, a Committee with representatives from the Council and the Parliament is immediately set up to negotiate a joint text. This joint text is subsequently submitted to the Council and Parliament for an up or down vote, without any further amendments being allowed. The main advantage of the trialogue is its speed, certainly when compared against a normal ordinary legislative procedure. The downsides of trialogues, however, include the reduced space for open and transparent debate, as most of the negotiation takes place behind closed doors, and no further amendments are allowed. Benefits and advantages, therefore, have to be carefully weighed in practice.

### 3.6.2 *Special Legislative Procedures*

In addition to the ordinary legislative procedure, there are also some *special* legislative procedures. The key difference between special legislative procedures and the ordinary legislative procedure is the role played by the European Parliament. In special legislative procedures the Parliament always plays a more limited role.<sup>54</sup> The two main special legislative procedures are the Consent procedure and the Consultation procedure.

Under the Consent procedure, the European Parliament must consent to an act but does not have the power to table amendments. Formally, therefore, it can only say yes or no to the proposal on the table.<sup>55</sup> Under the Consultation procedure, Parliament only has to be consulted, i.e. given a chance to express its view on a proposal. Parliament, however, cannot block legislation under

54 Also see Article 289(2) TFEU. Particular legal bases can add certain additional elements to special legislative procedures.

55 See for examples of the consent procedure Articles 49 and 50 TEU, or 19(1), 218 and 352 TFEU.

this procedure. Usually, moreover, consent procedures require unanimity in the Council, preserving a veto for all Member States.<sup>56</sup>

### 3.6.3 *Determination of Legislative Procedure and the Qualification of Legislative Acts*

Which legislative procedure should be used for a specific act is determined by the legal basis. Each legal basis simply indicates the required procedure. Article 114(1) TFEU, for example, requires the ordinary legislative procedure, whereas Article 115 TFEU requires the special consultation procedure.<sup>57</sup>

The procedure used for the adoption of an act also determines its qualification as a legislative or a non-legislative act. Here again the rule is very simple. All measures adopted via the ordinary legislative procedure or a special legislative procedure qualify as *legislative acts*.<sup>58</sup> This qualification is linked to the involvement of the parliament. Vice versa, all acts adopted via non-legislative procedures are non-legislative acts. This qualification is purely formal. It only depends on the procedure used, and does not look at the content of the act at all. The qualification of an act as legislative is relevant for the hierarchy of acts in the EU. Because they partake in the democratic legitimacy of the European Parliament, legislative acts are hierarchically placed above non-legislative acts. The qualification as legislative or not-legislative, moreover, is also relevant for the remedies available against an act, as will be further discussed in chapter 7.

### 3.6.4 *Delegation and Implementation*

Often, EU legislative acts only provide a framework that needs to be further developed or implemented. The Council and the Parliament can decide to leave this task to the Commission, for example because it requires a certain administrative expertise or because they want to focus on more high level activities. In this context the EU Treaties distinguish between delegation and implementation.

<sup>56</sup> See for examples Articles 103(1), 109 and 115 TFEU.

<sup>57</sup> A complication can arise where an act must be based on multiple legal bases and the different legal bases cannot be combined. The selection or combination of legal bases in such cases is governed by Cases C-300/89 *Commission v Council* (Titanium Dioxide), ECLI:EU:C:1991:244, Case C-338/01 *Commission v. Council* (AGGF) [2004] ECR I-4829, Case C-411/06 *Commission v. Parliament and Council* (shipment of waste) ECLI:EU:C:2009:518, and Case C-166/07 *Parliament v. Council* (Irish Fund) [2009] ECR I-7135.

<sup>58</sup> Article 289(3). See also on this point Case C-583/11 P *Inuit Tapiriit Kanatami and others v Parliament and Council*, ECLI:EU:C:2013:625.

Under the process of *delegation* a 'legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.'<sup>59</sup> The delegated powers, however, may not concern the 'essential elements of an area', which must be dealt with in the legislative act itself.<sup>60</sup> The use of delegated powers, moreover, can be subject to control by the Parliament and the Council.<sup>61</sup>

Sometimes legislation also requires further implementation at the EU level, for instance where the Commission has to grant subsidies based on a legislative act establishing a subsidy scheme.<sup>62</sup> To this end, a legislative act may grant implementing powers to the Commission, or less commonly to the Council. These implementing powers can be significant and far-reaching in practice. For that reason, they are usually controlled by committees of national experts, reporting back to the Council and/or the European parliament, and with different powers of checking the Commission. This entire system of committees checking the implementation of EU law by the Commission is usually referred to as Comitology.<sup>63</sup>

The precise border between delegation and implementation can be difficult to draw in practice, as both can be very similar. For adopted acts, however, this should not create any headaches as each act is required to indicate, in its title, if it is delegated or implementing.<sup>64</sup>

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59 Article 290(1) TFEU.

60 See also ECJ, Case C-427/12 *Commission v Parliament and Council* (Biocidal Products), ECLI:EU:C2014:170.

61 Article 290(2) TFEU.

62 In addition, Member States of course always have the general obligation to implement EU law as well. See both the general obligation of sincere cooperation in Article 4(3) TEU and the specific obligation in Article 292(1) TFEU.

63 See Regulation 182/2011/EU laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers, OJ 2011 L 55/13.

64 Articles 290(3) and 291(4) TFEU.