3

EU External Competence

Central Issues

- As indicated in the previous chapters, the European Union possesses legal personality and capacity to act as a legal subject in international relations. However, the EU cannot undertake whatever international action it wishes. Its treaty-making capacity is governed by the principle of conferral laid down in Article 5 TEU, which states that the Union shall act within the powers conferred on it by the Member States.
- In this chapter, we examine the conditions under which the Union acts externally. The general conditions to conclude international agreements are laid down in Article 216(1) TFEU. First, this is the case when the Treaty expressly confers such external competence on the Union. Secondly, such competence may also be implied when, according to the *ERTA* principle, the EU has adopted internal rules based on expressly conferred internal powers; or when, exceptionally, action of the Union is required to attain EU Treaty objectives and the Union is installed with a legal basis to act.
- Competences and legal bases determine the role the EU can play as a global actor but also decisively influence the interinstitutional relationship and the relations between the EU and its Member States. Consequently, political battles and arguments colour the legal provisions and arguments. From the outset, the CJEU has played a decisive role as final arbiter between the institutional actors and Member States in establishing the specific competences of the Union. While the integrationist agenda is visible in the first rulings establishing the *ERTA* doctrine, the judges

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have been more careful in subsequent meticulous rulings on competences. These rulings have contributed to the careful balancing of interests but also added to the complex web of competences and conditions for their use. These complexities have not diminished since the Lisbon codification.

I. Current State of Affairs in EU External Competences

A. Treaty-making Power of the European Union

As we will see, international agreements are the tools 'par excellence' for the Union to engage in external relations. In contrast to states, which possess an inherent treaty-making capacity (Article 6 VCLT), international organisations such as the European Union are endowed with treaty-making capacity only when this is conferred upon them. This capacity or power is based on their constituent rules and the necessity to perform their functions and to fulfil their purposes.[1] One of these constituent rules limiting this capacity is the general principle of conferral in the TEU which 'must be observed with respect to both the internal and international action of the European Union'[2] (see also Chapter 2).

The EU's treaty-making capacity is now addressed in EU primary law by Article 216 TFEU but was already reflected early on, in *Costa v Enel* (1963)[3] and *ERTA* (1971).[4]

Article 216(1) TFEU

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.

[1] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331, Art 6. See also A Peters, 'Treaty Making Power' in *Max Planck Encyclopaedia of Public International Law* (Oxford, Oxford University Press, 2009) paras 35–48; HG Schermers and NM Blokker, *International Institutional Law*, 6th edn (Leiden, Brill/Nijhoff, 2018) para 209.

[2] Case C-600/14 *Germany v Council* (*COTIF*), ECLI:EU:C:2017:935, para 44, citing Opinion 2/94 (*Accession of the Community to the ECHR*), ECLI:EU:C:1996:140, para 24.

[3] Case 6/64 *Costa v ENEL*, ECLI:EU:C:1964:66, para 3: 'By creating a Community of unlimited duration, having its own institutions, its own legal capacity and capacity of representation on the international plane'; Case 22/70 *Commission v Council* (*ERTA*), ECLI:EU:C:1971:32, para 15: 'To determine in a particular case the Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty and no less than to its substantive provisions.'

[4] Case 22/70 *Commission v Council* (*ERTA*), ECLI:EU:C:1971:32. The case is also known in English under its French abbreviation: AETR.

Article 216(1) TFEU does not only codify the so-called *ERTA* doctrine but captures the essence of dozens of CJEU cases spanning more than half a century. This body of case law addresses two aspects, namely: (1) the *existence* and (2) the *nature* and *scope* of external competences. As will be further developed below, *existence* refers to the question of whether the EU is competent at all; *nature* deals with the question of whether the Union can act on its own; and *scope* asks the question of what is and is not covered by a certain legal basis. The first aspect is incorporated in Article 216(1) TFEU, which addresses the general conditions under which the EU has the mandate to conclude international agreements (the existence of an external competence). The nature and scope of external competences is addressed in Article 3(2) TFEU by explaining when such power becomes exclusive for the Union.

Article 3 TFEU

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

B. The Competence Catalogue and the *ERTA* Codification

The clarification and codification of competences were one of the major aims of the failed Draft Constitutional Treaty and the subsequent Lisbon Treaty. The EU intended to 'clarify, simplify and adjust the division of competence between the Union and the Member States'.[5] To this end, Articles 216 TFEU and 3 TFEU are complemented by a competence catalogue listing the categories of EU competences (mainly exclusive or shared) in Articles 2 to 6 TFEU, ranging from *exclusive* competences (only the Union may act or empower the Member States), to *shared* competences (the Union and the Member States may act together under specific conditions), to supporting, coordinating or supplementing competences. This codification was not only an important step in the consolidation of power under EU law but also held important implications for EU external relations law. Its management and implementation were burdened by a growing amount of detailed CJEU cases on (external) competences. CJEU judgments on external competences were often submerged in case-specific technicalities, with judges meticulously comparing international agreement norms with secondary EU law rules. CJEU judges provided specific examples for exclusive competences but the general conditions of treaty-making power and exclusive competences remained more obscure.[6]

[5] See the Laeken Declaration on the Future of the European Union, Annexes to the Presidency Conclusions – Laeken, European Council meeting in Laeken, 14–15 December 2001, SN 300/1/01 REV 1, 21.

[6] Claes and De Witte speak of 'pointillist case law' in M Claes and B De Witte 'Competences: Codification and Contestation' in A Łazowski and S Blockmans (eds) *Research Handbook on EU Institutional Law*

The codification of the treaty-making power and competences combined three aims: the strengthening of the EU as a global actor by reinforcing and creating more coherence and visibility of EU external action; the prevention at the same time of a further competence creep by clarifying the competence division between the EU and its Member States;[7] and finally, the codification of important case law, especially the *ERTA* doctrine. However, judging by the number of cases brought before the Court post-Lisbon on the issue of competences, the codification failed to serve the purposes outlined above.[8]

This recurring constitutional conflict on competences can be primarily explained by the unfortunate and incomplete wording of Articles 216(1) and 3(2) TFEU with unnecessary and misleading overlaps.[9] Articles 216(1) TFEU and 3(2) TFEU codify in two sentences fundamental elements of the case law on (external) competences, dating back from dozens of cases between the *ERTA* case (1971) until the *Open Skies* judgments (2002). It is, however, also a judge-made failure. These judgments on external competences by different generations of judges argue against the backdrop of the evolution of external relations. More dynamic rulings in the 1970s interchanged with a more cautious approach in the 1990s.[10] Decisively, the CJEU judges only took the opportunity with the *Lugano Convention* Opinion in 2006 to restate its intricate case law in a more structured and complete way.[11] Nevertheless, it takes the Court five pages in the *Lugano Convention* Opinion to unravel the conditions of existence and especially exclusivity of competences.[12] Consequently, any codification would probably fail to grasp the full dimension of the Court's assessment of the politically sensitive issue of EU (exclusive) competences. This is why it is important to always return to the case law.

(Cheltenham, Edward Elgar Publishing, 2016) 66. See also, PJ Kuijper, 'Fifty Years of EC/EU External Relations: Continuity and the Dialogue Between Judges and Member States as Constitutional Legislators' (2007) 31 *Fordham International Law Review* 1571, 1588; Pescatore describes 'microscopic arguments' in P Pescatore, 'Opinion 1/94 on Conclusion of The WTO Agreement: Is There an Escape From a Programmed Disaster?' (1999) *Common Market Law Review* 387, 395.

[7] See on this: A von Bogdandy and J Bast, 'The Vertical Order of Competences' in A von Bogdandy and J Bast (eds) *Principles of European Constitutional Law*, 2nd edn (Oxford, Hart Publishing, 2011) 276.

[8] All of the cases decided in post-Lisbon since 2013 are grand chamber rulings: Case C-414/11 *Daiichi Sankyo v DEMO*, ECLI:EU:C:2013:520; Case C-137/12 *Commission v Council* (*Services*), ECLI:EU:C:2013:675; Case C-114/12 *Commission v Council* (*Broadcasters*), ECLI:EU:C:2014:2151; Opinion 1/13 (*Hague Convention*), ECLI:EU:C:2014:2303; Case C-66/13 *Green Network v Autorità per l'energia elettrica e il gas*, ECLI:EU:C:2014:2399; Opinion 3/15 (*Marrakesh Treaty*), ECLI:EU:C:2016:657; Opinion 2/15 (*Singapore*), ECLI:EU:C:2017:376; Case C-600/14 *Germany v Council* (*COTIF*), ECLI:EU:C:2017:935. See also in this regard F Castillo de la Torre, 'The Court of Justice and External Competences after Lisbon: Some Reflections on the Latest Case Law' in P Eeckhout and M López-Escudero (eds) *The European Union's External Action in Times of Crisis* (Oxford, Hart Publishing, 2016).

[9] Criticised by 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, Cambridge University Press, 2008) 59–63; Claes and De Witte, (n 6); B De Witte, 'Too Much Constitutional Law in the European Union's Foreign Relations?' in M Cremona and B De Witte (eds) *EU Foreign Relations Law* (Oxford, Hart Publishing, 2008) 11.

[10] See, for example, P Mengozzi, 'The EC External Competencies: From ERTA Case to the Opinion in the Lugano Convention' in L Azoulai and M P Maduro (eds) *The Past and Future of EU Law: The Classics of EU Law Revised on the 50th Anniversary of the Rome Treaty* (Oxford, Hart Publishing, 2010) 127.

[11] This clarification came after the finalisation of the Draft Constitutional Treaty in May 2003. Opinion 1/03 (*Lugano Convention*), ECLI:EU:C:2006:81. See also on this point, P Eeckhout, *EU External Relations Law*, 2nd edn (Oxford, Oxford University Press, 2011) 113.

[12] Opinion 1/03 (*Lugano Convention*), ECLI:EU:C:2006:81, paras 114–33.

Opinion 1/03 (*Lugano Convention*), ECLI:EU:C:2006:81

Competence of the Community to conclude international agreements

114 The competence of the Community to conclude international agreements may arise not only from an express conferment by the Treaty but may equally flow implicitly from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions (see ERTA, paragraph 16).

115 *That competence of the Community may be exclusive or shared with the Member States*. [emphasis added]

This important distinction between the existence and nature of external competences, emphasised in *Lugano*, was less prominent in the early case law. The first cases on external competences not only confirmed an external competence but also concluded that this resulted in an EU exclusive competence.[13] This (misleading) interconnection between existence and exclusivity of external competences is already visible in the *ERTA* case. The *ERTA* (or *AETR* according to its French abbreviation) judgment addressed the power of the Member States to participate in an international agreement on European Road Transport (*ERTA*). In this area, the EU has and had no express competence to conclude international agreements. Instead, the policy provisions on transport in Articles 95 and 100 TFEU only cover the right of Union institutions to enact *internal* legislation in the field of transport. This, however, did not hinder the judges in arguing the following:

Case C-22/70 *Commission v Council* (*ERTA*), ECLI:EU:C:1971:32

15 To determine in a particular case the Community's authority to enter into international agreements, regard must be had to *the whole scheme of the Treaty no less than its substantive provisions*.

16 Such authority arises not only from an express conferment by the Treaty – as in the case with Articles 113 and 114 for tariff and trade agreements and with Article 238 for association agreements – *but may equally flow from other provisions of the Treaty and from measures adopted*, within the framework of those provisions, by the Community institutions. [emphasis added]

[13] Case 22/70 *Commission v Council* (*ERTA*); ECLI:EU:C:1971:32, paras 27–29, 31; Joined Cases 3/76, 4/76 and 6/76 *Kramer and others*; ECLI:EU:C:1976:114, para 40; Opinion 1/75 *(Re Understanding on a Local Costs Standard)*, ECLI:EU:C:1975:145; Opinion 1/76 (*European laying-up fund*), ECLI:EU:C:1977:63.

In the *ERTA* case, the CJEU also defined for the first time one condition of exclusive competences of the Union (now codified in Article 3(2) TEU).

> 17 In particular, each time the Community, with the view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, *the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules*.
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> 21 Under Article 5, the Member States are required on the one hand to take all appropriate measures to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions and, on the other hand, *to abstain from any measure which might jeopardise the attainment of the objectives of the Treaty*.
>
> 22 If these provisions are read in conjunction, it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, *the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope.* [emphasis added]

The so-called 'parallelism' between internal and external competences consolidated and broadened the external powers of the European Communities in the 1970s. At the time of the *ERTA* ruling (and as emphasised in that ruling in para 16), the Community had an express mandate to conclude international agreements in only two cases: the Common Commercial Policy and the Association Policy. The *ERTA* doctrine extended the Union's treaty-making power to any field of internal policy and legislation, potentially leading, depending on the individual circumstances, to an exclusive competence.

> **JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2405, 2416**
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> The significance of this ruling goes beyond the issue of treaty-making power. With this decision, subsequently replicated in different contexts, the European Court added another rung to its constitutional ladder: powers would be implied in favour of the Community where they are necessary to serve legitimate ends pursued by it. Beyond its enormous practical ramifications, the critical point was the willingness of the Court to sidestep the presumptive rule of interpretation typical in international law, that treaties must be interpreted in a manner that minimises encroachment on state sovereignty. The Court favoured a teleological, purposive rule drawn from the book of constitutional interpretation.

The judge-rapporteur in the *ERTA* case, Pierre Pescatore, explained this *constitutional interpretation* with the special nature of the supranational legal order. He differentiated the restrictive principle of explicitly attributed powers applying to international organisations such as the United Nations[14] from principles developed for the supranational entity in the form of sincere cooperation to be respected by the Member States and influenced by the principle of *effet utile* to attain the common objectives effectively in practice.[15] The 'sincere cooperation principle' (see Chapter 2), in particular, features prominently in the *ERTA* judgment, obliging Member States to take all measures or abstain from action for the attainment of the Treaty objectives (the *ERTA* judgment refers to the former Article 5 EEC Treaty in paragraphs 21 and 22, mentioned above (now Article 4(3) TEU)).

Applying a parallelism between internal and external competences was a bold act of judicial engineering. This synchronised the Community external action with the other two supranational Treaties Euratom and ECSC.[16] The *ERTA* judgment took inspiration from the more open-ended norm in the ECSC Treaty. The former Article 6 ECSC Treaty stipulated that the Community could act if required to 'perform its functions and attain its objectives'.[17] The first judgments on external competences (*ERTA* case, Opinion 1/76 and *Kramer* judgment)[18] demonstrated that external policies were and are a vehicle to achieve internal policies. An effective common transport and fishery policy of the initially six Member States in the 1970s could only be shaped if third countries were included in legal regimes and thus required the conclusion of international agreements with these third countries.[19] So could the Rhine navigation between some of the EU Member States only be effectively regulated by an international agreement, including the third state Switzerland as a Rhine riparian country.[20] This logic of an implied connectivity between internal and external action also springs from the wording of the common transport norm in Article 91(1)(a) TFEU. The EU has a legislative mandate to achieve a common transport policy by laying down rules 'applicable to international transport to or from the territory of a Member State or passing across the territory of one or more Member States'. From this wording the Court concluded that the power to enter into international agreements to bring these common rules into effect is 'necessarily vested' in the EU.[21]

[14] See, Schermers and Blokker (n 1) at para 209.

[15] P Pescatore, *The Law of Integration* (Leiden, Sijthoff International Publishing, 1974) 37–44.

[16] I MacLeod, ID Henry and S Hyett, *The External Relations of the European Communities* (Oxford, Clarendon Press, 1996) 48.

[17] See P Pescatore, 'External Relations in the Case Law of the CJEU' (1979) 16 *Common Market Law Review* 615, 618 who admits that the justification for ERTA derives from Paul Reuter and his writing on the ECSC Treaty in P Reuter, *La Communauté Européenne du charbon et de l'acier* (Paris, LGDJ, 1953) 116–40.

[18] Joined Cases 3/76, 4/76 and 6/76 *Kramer and others*, ECLI:EU:C:1976:114.

[19] See also JHH Weiler, 'The Transformation of Europe' in JHH Weiler (ed) *The Constitution of Europe* (Cambridge, Cambridge University Press, 1999) 22.

[20] The Rhine navigation is managed by one of the oldest regional international organisations, the Central Commission for the Navigation of the Rhine. See Schermers and Blokker (n 1) para 631.

[21] Case 22/70 *Commission v Council* (*ERTA*), ECLI:EU:C:1971:32, para 28.

The Union is enabled by this case law and its codification in Article 216(1) TFEU to conclude international agreements which are 'necessary' to achieve Treaty objectives. As we have seen in the previous chapter, this built-in flexibility is limited by the more static principle of conferral in Article 5(2) TEU.

Article 5 TEU

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.
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 [emphasis added].

The *ERTA* doctrine and its follow-up case law, especially the restatement of the principles in the *Lugano Convention* Opinion, still play a role in the interpretation of the current norms. Hence, the relevance of pre-Lisbon case law in the post-Lisbon judgments is decisively explained by the deficiencies of the codification and the Court's structuring exercise in the *Lugano* Opinion, occurring *after* the codification. At the same time, this judicial exercise undermines the value of the codification[22] and the CJEU reaffirms itself in its decisive role as the final arbiter on competences.[23] In the first judgments post-Lisbon, the judges explain in great detail the conditions and circumstances of the exercise and nature of external competences in light of *ERTA* and the subsequent case law.[24] This 'integrated' approach is displayed in Opinion 1/13 (*Hague Convention*) which refers to the *Lugano* Opinion (Opinion 1/03) and *ERTA* case, as if no codification had taken place.

[22] See critically on this fine pattern of rules, De Witte, 'Too Much Constitutional Law in The European Union's Foreign Relations?' (n 9).

[23] Case C-114/12 *Commission v Council* (*Broadcasters*), ECLI:EU:C:2014:2151, paras 67–68; Opinion 1/13 (*Hague Convention*), ECLI:EU:C:2014:2303, paras 71–72.

[24] Case C-114/12 *Commission v Council* (*Broadcasters*), ECLI:EU:C:2014:2151, paras 66–67 and subsequently, Case C-66/13 *Green Network v Autorità per l'energia elettrica e il gas*, ECLI:EU:C:2014:2399; Opinion 1/13 (*Hague Convention*), ECLI:EU:C:2014:2303; Opinion 3/15 (*Marrakesh Treaty*), ECLI:EU:C:2016:657; Opinion 2/15 (*Singapore*), ECLI:EU:C:2017:376; Case C-600/14 *Germany v Council* (*COTIF*), ECLI:EU:C:2017:935. See generally, C Timmermans, 'The Competence Divide of the Lisbon Treaty Six Years After' in S Garben and I Govaere (eds) *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Oxford, Hart Publishing, 2017) 19.

Opinion 1/13 (*Hague Convention*), ECLI:EU:C:2014:23

The existence of EU competence

67 The competence of the EU to conclude international agreements may arise not only from an express conferment by the Treaties but may equally flow implicitly from other provisions of the Treaties and from measures adopted, within the framework of those provisions, by the EU institutions. In particular, whenever EU law creates for those institutions powers within its internal system for the purpose of attaining a specific objective, the EU has authority to undertake international commitments necessary for the attainment of that objective even in the absence of an express provision to that effect (*Opinion 1/03, ECLI:EU:C:2006:81, paragraph 114 and the case-law cited*). The last-mentioned possibility is also referred to in Article 216(1) TFEU.

The nature of the competence

69 The FEU Treaty specifies, in particular in Article 3(2), the circumstances in which the EU has exclusive external competence.

71 … *(see, to that effect, judgments in Commission v Council ('ERTA'), 22/70, ECLI:EU:C:1971:32, paragraph 30; Commission v Denmark, C-467/98, ECLI:EU:C:2002:625, paragraph 82; and Commission v Council, C-114/12, ECLI:EU:C:2014:2151, paragraphs 66 to 68).* [emphasis added]

In addition to the critical reception the codification of the rules on existence and nature of a competence received by scholars,[25] the literature perceives the competence catalogue as an unfinished job and a mismatch between the typology and the concrete legal basis found in the respective Chapters of the TFEU.[26] The competence catalogue categorises competences into exclusive, shared and supporting or complementary.

Article 2 TFEU

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 acts of the Union.

[25] M Cremona, 'The Draft Constitutional Treaty: External Relations and External Action' (2003) 40 *Common Market Law Review* 1347; P Craig, *The Lisbon Treaty* (Oxford, Oxford University Press, 2010) 166–67; D Thym, 'Foreign Affairs' in A von Bogdandy and J Bast (eds) *Principles of European Constitutional Law*, 2nd edn (Oxford, Hart Publishing, 2011) 318.

[26] Claes and De Witte (n 6) 56–60.

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 exercise their competence again 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 in 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.

Exclusive Union competences prevent the Member States from acting internally and externally. A shared competence might pre-empt Member States action (Article 2(2) TFEU). And supporting competences are competences in which the EU only complements the Member States action without replacing it (Article 6 TFEU). Supporting competences such as human health protection or education and training exclude the harmonisation of Member States rules, as their policy chapters explain.[27] However, a further subcategory exists within shared competences for the parallel competences development and research. These competences do not fall under the pre-emption norm in Article 2(2) TFEU. In these policy areas, shared competences cannot become exclusive by exercise of the EU competence, thus allowing Member States to engage in parallel actions. In addition, the CFSP competence is briefly mentioned in the competence catalogue but it is a hybrid competence which falls outside the categories listed above. Although it is clearly presented as a Union competence in both Articles 2(4) TFEU and Article 24(1) TEU, it is generally assumed that Member States are not

[27] See for example, Art 167(3) TFEU.

pre-empted from acting once the Union has done so. The CFSP competence can thus be compared with the parallel competences of development and humanitarian aid (see more extensively Chapter 9).

A closer look at the competence catalogue and its categories reveal that the clear-cut categorisation is challenged by the underlying complexity that competences are to be linked to the respective policy field and the legal bases found in the policy chapters of the TFEU (and exceptionally in the TEU). For instance, Article 3(2) TFEU and the case law stipulate exclusivity by nature where the Union adopts common rules and harmonises a certain field of EU acquis. However, minimum harmonisation allows for stricter rules of Member States in the policy field of the internal market or environmental law (in the category of shared competences). Consequently, in this case, the EU might legislate internally but Member State rule-making is not pre-empted, consequently preventing exclusivity and resulting in the form of concurrent or parallel competence.[28] On the other hand, a discrepancy between internal and external exclusivity might exist. Internally, a non-exclusive competence might nevertheless lead to an exclusive competence externally if the conclusion of an international agreement is foreseen in a legislative act or is necessary to enable the Union to exercise its internal competence.

Article 3 TFEU

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.

Only one of the a priori exclusive competences listed in Article 3(1) TFEU coincides with the policy fields presented by the TFEU, namely the common commercial policy (Article 207 TFEU). The other areas concern a limited field within a broader policy chapter of the Treaty, such as the conservation of marine biological resources under the common fisheries policy, which forms part of the common agricultural policy.[29]

[28] See also, R Schütze, 'Classifying EU Competences: German Constitutional Lessons?' in S Garben and I Govaere (eds) *The Division of Competences between the EU and the Member States* (Oxford, Hart Publishing, 2017) 33. See also the pre-Lisbon case law, Opinion 2/91 (*ILO Convention No. 170*), ECLI:EU:C:1993:106, the Court held that the European Union did not have exclusive competence because both the provisions of EU law and those of the international convention in question laid down minimum requirements.

[29] This was established in Joined Cases 3/76, 4/76 and 6/76 *Kramer and others*, ECLI:EU:C:1976:114.

In addition, while the competence in regard to the Euro currency is exclusive, the specific provisions addressing treaty-making in Article 219 TFEU and external representation in Article 138 TFEU establish doubts about a priori unified external representation.[30] Protocol No. 25 annexed to the Lisbon Treaty on the exercise of shared competences clarifies that if the Union has taken action in a certain area, 'the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area'.[31]

Finally, the list of shared competences (Article 4(2) TFEU) are the 'principal areas' and constitute a non-exhaustive list.[32] This is emphasised by such missing competences as the Association and Neighbourhood Policy (Articles 217 TFEU and 8 TEU) and the flexibility clause under Article 352 TFEU.[33] Some competences escape clear categorisation. The field of the Union's social policy falls into shared competences for the aspects defined in this Treaty (Article 4(1)(b) TFEU) but provide the EU only with a role of coordination for the Member States' social policies (Article 5(3) TFEU).[34]

II. The Existence of an External Competence

Article 216(1) TFEU carves out four situations under which the Union is assigned treaty-making powers to conclude international agreements. These external competences can basically be divided into an express and implicit (internal) EU power to act externally. For instance, Article 207(1) TFEU refers to the conclusion of bilateral trade agreements with third countries ('the conclusion of tariff and trade agreement'). This constitutes an express power to act as it is clearly laid down in the Treaty. The Union, however, is also endowed with the power to conclude an agreement on air transport or competition law with a third country or an international organisation. This external competence is not expressly spelled-out in the Treaty, but international agreements in that area can be based on the internal legal base (Article 95 TFEU for transport or Article 103 TFEU on competition law) – the so-called implicit or internal competence.

Article 216 TFEU addresses the express competence with the words 'where the Treaty so provides'. The implicit competence is covered by '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'. The third and fourth alternatives

[30] A Rosas, 'Exclusive, Shared and National Competence in the Context of EU External Relations: Do Such Distinctions Matter?' in I Govaere, E Lannon, P van Elsuwege and S Adam (eds) *The European Union in the World* (Leiden, Brill/Nijhoff, 2013) 21.

[31] Protocol No 25 on the exercise of shared competences [2008] OJ C 115/*307*.

[32] Opinion 2/15 (*Singapore*), Opinion of AG Sharpston, ECLI:EU:C:2016:992, para 59; R Gosalbo-Bono and F Naert, 'The Reluctant (Lisbon) Treaty and its implementation in the practice of the Council' in P Eeckhout and M Lopez-Escudero (eds) *The European Union's External Action in Times of Crisis* (Oxford, Hart Publishing, 2016) 20.

[33] C Timmermans, 'CJEU Doctrines on Competences' in L Azoulai (ed) *The Question of Competence in the European Union* (Oxford, Oxford University Press, 2014) 161. See also, Declaration No 41 on Article 352 TFEU [2012] OJ C326/352.

[34] Timmermans, ibid, 162; Claes and De Witte (n 6) 56–57.

in Article 216(1) TFEU cover situations where the EU is provided with treaty-making competence 'by a legally binding Union act' or 'is likely to affect common rules or alter their scope'. However, the interpretation of these two latter alternatives is burdened by the overlap between Article 216 TFEU and Article 3(2) TFEU and the difficult task of disentangling the conditions of exercise and scope of competences in the case law. The following parts (A to D) will address the four different alternatives laid down in Article 216(1) TFEU and explain them in greater detail.

A. Express External Powers Based on Primary Law

Express powers (also referred to as explicit powers) in the Treaties are legal norms which refer to the treaty-making power of the Union in the policy chapters of the TEU and the TFEU; these powers can be exclusive or shared. Hence, Article 216 TFEU (on the conclusion of international agreements) does not determine whether the EU competence is exclusive, this can be only be judged by Article 3(1) or (2) TFEU. Examples of such express (exclusive and shared) competences are trade (Article 207 TFEU), association policy (Article 217 TFEU) or development policy (Article 209(2) TFEU).[35] These norms have in common that they state explicitly that the EU can conclude international agreements with third countries and international organisations.

Furthermore, some internal policy areas with an external dimension include an express legal base to conclude international agreements. According to Article 79(3) TFEU, the Union may conclude readmission agreements with third countries. However, international agreements can also be concluded based on Article 186 (research, technological development and space); or Article 191(4) TFEU (environment). In other policy fields, namely education and training (Article 165(3)), culture (Article 167(3) TFEU), or public health (Article 168(3) TFEU) the norms merely state that 'the Union and the Member States shall foster cooperation with third countries and the competent international organisations'.[36] Subsequently, this leads to the question of whether these provisions also can be considered an express competence to conclude international agreements in those areas. This can be confirmed but, at the same time, the EU's scope of action is limited by the wording and the nature of these competences as supporting and coordinating powers in accordance with Article 6 TFEU.[37]

Furthermore, legal dispute arises whether Article 220 TFEU – on the cooperation with international organisations – contains a mandate for the European Commission and the High Representative to agree on legally binding international agreements on organisational matters with international organisations. This issue will be further dealt with in Chapter 6.

[35] Further norms are Art 37 TEU (CFSP); Arts 212(3), 214(4) TFEU.

[36] In the case of Art 171(3) TFEU on trans-European networks, the norm stipulates that the Union may decide to cooperate with third countries to promote projects of mutual interest.

[37] See also Macleod, Henry and Hyett (n 16) 47. See to the contrary, A Dashwood, M Dougan et al, *Wyatt and Dashwood's European Union law*, 6th edn (Oxford, Hart Publishing, 2011) 919.

Lastly, Article 219 TFEU needs to be singled out. This provision covers the conclusion of monetary agreements with third countries.[38] Similar to the predecessor norm Article 218 TFEU before Lisbon, it combines procedure and competence norm in one single provision. The provision explains which agreements can be concluded (formal agreements on an exchange-rate system for the euro in relation to the currencies of third states and agreements concerning monetary and exchange regime matters) and it outlines the procedure monetary agreements must follow.

B. Implied External Power Necessary to Attain Treaty Objectives

Implied external powers and their conditions result in most of the debates surrounding competences and persistent misunderstandings prevail. The subtleties and ramifications of the pre-Lisbon case law are insufficiently captured by the wording in Article 216 TFEU ('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'). The wording finds its origin in the reasoning applied in the *Open Skies* judgments.[39] The *Open Skies* judgments stressed that implied powers could derive from an internal Treaty norm upon which secondary rules have been adopted or where these internal rules are only adopted on the occasion of the conclusion and implementation of an international agreement.[40] These two forms of implied powers were for the first time circumscribed in *ERTA* but also played a decisive role in the *Kramer* judgment and Opinion 1/76 (*European Laying-up Fund*). These rulings concerned the internal policies of common transport and common fisheries, both of which address the organisation of common policies among Member States with no reference to an explicit mandate for the Union to conclude international agreements.[41] In the *ERTA* and *Kramer* cases, EU internal common rules were already adopted. In *Kramer*, to have effective and equitable rules on the conservation of fishing resources, it required to cover vessels of EU and non-EU members and thus necessitating external competence.[42] This *effet utile* reading of secondary law ('the very duties and powers', *Kramer* judgment, paragraph 33) was further unpacked in Opinion 1/76 (*European Laying-up Fund*). In this case, however, no internal measures were yet adopted, but external action was nevertheless considered necessary for the attainment of a specific Treaty objective.[43] The Draft

[38] Such agreements have been concluded with the micro-states Monaco, Andorra, San Marino and Vatican City. See for instance, Art 3 of Council Decision (EC) 2009/904 of 26 November 2009 on the position to be taken by the European Community regarding the renegotiations of the Monetary Agreement with the Republic of San Marino [2009] OJ L322/12; Monetary Agreement between the European Union and the Republic of San Marino [2012] OJ C121/5.

[39] Case C-469/98 *Commission v Finland* (*Open Skies*), ECLI:EU:C:2002:627, para 57: 'thus, the competence to bind the Community in relation to non-member countries may arise by implication from the Treaty provisions establishing internal competence, provided that participation of the Community in the international agreement is necessary for attaining one of the Community's objectives'.

[40] For instance, Case C-469/98 *Commission v Finland* (*Open Skies*), ECLI:EU:C:2002:627, para 57.

[41] Though Art 91(1)(a) TFEU refers in its objectives to common rules applicable to international transport.

[42] Joined Cases 3/76, 4/76 and 6/76 *Kramer and others*, ECLI:EU:C:1976:114, para 30/33.

[43] Opinion 1/76 (*European layer-up funds for inland waterway vessels*), ECLI:EU:C:1977:63, para 3.

agreement on a European Laying-up fund produced a unique situation. This draft agreement aimed to improve the inland waterway freight market within the Dutch and German waterways of Rhine and Moselle, foreseeing a compensation system in case of periods of excess capacity. Crucially, such regimes had under international law traditionally involved Switzerland and covered Swiss vessels.[44] Therefore this objective of establishing autonomous common rules in the internal sphere could only be established by integrating the third country of Switzerland by concluding a multilateral international agreement.

Opinion 1/76 (*European Laying-Up Fund*), ECLI:EU:C:1977:63, para 4

This is particularly so in all cases in which internal power has already been used to adopt measures which come within the attainment of common policies. It is, however, not limited to that eventuality. Although the internal Community measures are only adopted when the international agreement is concluded and made enforceable, as is envisaged in the present case by the proposal for a regulation to be submitted by the Commission *the power to bind the Community vis-à-vis third countries nevertheless flows by implication from the provisions of the Treaty creating the internal power and in so far as the participation of the Community in the international agreement is, as here, necessary for the attainment of one of the objectives of the Community*. [emphasis added]

Article 216(1) TFEU refers to objectives in the Treaties and does not mention the purpose of attaining a specific Treaty objective.[45] It is not clear how the condition of Article 216 TFEU 'necessary in order to achieve one of the objectives referred to in the Treaties' relates to or differentiates from the Article 3(2) TFEU condition 'necessary to enable the Union to exercise its internal competence'. In addition, it can be questioned whether a lighter test regarding the necessity of action is applied if the international agreement is based on the internal primary norm and EU internal rules have already been adopted. Hence, the necessity test appears to be stricter if the secondary law measures have not yet been adopted and the international agreement can only be based on an internal power (such as, eg, the common agricultural policy and its internal legal basis in Article 43 TFEU).[46] In Opinion 2/92 (*OECD*), the Court explained that this relates to a situation where the conclusion of an international agreement is necessary to achieve Treaty objectives which cannot be attained by the adoption of secondary rules.[47]

[44] Switzerland has been involved in the international organisation Central Commission for Navigation on the Rhine since 1920.
[45] Macleod, Henry and Hyett (n 16) 51.
[46] Another comparable example is competition policy and the legal basis in Art 103 TFEU.
[47] Opinion 2/92 (*OECD*), ECLI:EU:C:1994:116, para 32.

This incomplete incorporation of case law has led to two misconceptions. One is the argument that Article 216 TFEU broadens the power to act within the purpose of achieving objectives mentioned under Article 3 TEU and Article 21 TEU. These latter provisions, however, differ in nature to Article 216 TFEU as they refer generally to the objectives of the EU and of EU external action, not all of which are reflected in a specific policy norm and concrete legal bases.[48] Therefore this observation lacks both practical relevance and support in the post-Lisbon case law. The above-mentioned Opinion 1/13 (*Hague Convention*) stresses that a competence exists 'whenever EU law creates for those institutions *powers* within its internal system for the purpose of attaining a specific objective'. The objectives found in Article 3 and 21 TEU do not create such institutional *powers* and consequently cannot extend external action beyond powers granted to the Union by, for instance, primary or secondary legal bases.

The second misconception is that an implied power always results in an exclusive power.[49] This confusion stems not only from the overlaps in the wording of Articles 216 TFEU and 3(2) TFEU but also from the above highlighted judgments of the Court where an implied power in those specific cases did indeed lead to an exclusive power.[50] In later pre-Lisbon case law both aspects were even merged in the Court's argumentation.[51] Post-Lisbon, the Court took the opportunity in the grand chamber *COTIF* ruling (and before in Opinion 2/15 (*Singapore*)), to clarify the relation between internal and external competences in underlining that the existence of an external European Union competence is not dependent on the prior Union exercise of its internal legislative competences.[52]

Case C-600/14 *Germany v Council* (*COTIF*), ECLI:EU:C:2017:935

49 It follows from the very wording of that provision [Article 216], in which no distinction is made according to whether the European Union's external competence is exclusive or shared, that the Union possesses such a competence in four situations. … *the scenario in which the conclusion of an agreement is liable to affect common rules or to alter their scope, a scenario where the Union competence is, under Article 3(2) TFEU, exclusive, constitutes only one of those situations*.

[48] Craig (n 25) 399; M Cremona, 'EU External Relations: Unity and Conferral of Powers' in L Azoulai (ed) *The Question of Competence in the European Union* (Oxford, Oxford University Press, 2014) 73–74.

[49] See, in this regard, Schermers and Blokker (n 1) para 1754.

[50] See, Joined Cases 3/76, 4/76 and 6/76 *Kramer and others*, ECLI:EU:C:1976:114, paras 44/45; Case 22/70 *Commission v Council* (*ERTA*), ECLI:EU:C:1971:32, para 22.

[51] See Opinion 2/92 (*OECD*), ECLI:EU:C:1994:116, para 32; Opinion 1/94 (*WTO*), ECLI:EU:C:1994:384, para 85; Case C-469/98 *Commission v Finland* (*Open Skies*), ECLI:EU:C:2002:627, para 77; and especially, Opinion 1/03 (*Lugano Convention*), ECLI:EU:C:2006:81, para 115.

[52] Case C-600/14 *Germany v Council* (*COTIF*), ECLI:EU:C:2017:935, para 67; Opinion 2/15 (*Singapore*), ECLI:EU:C:2017:376, para 243.

> 67 The fact *that the existence of an external European Union competence is not, in any event, dependent on the prior exercise, by the Union, of its internal legislative competence* in the area concerned is also apparent from paragraph 243 of Opinion 2/15 (*Free Trade Agreement with Singapore*) of 16 May 2017 (EU:C:2017:376) … [emphasis added]

C. Provided for in a Legally Binding Act

The third option, covered by Article 216(1) TFEU, is that a legally binding act assigns a treaty-making power to the European Union. This alternative was already mentioned in the *ERTA* judgment, namely that EU secondary law grants the Union institutions the power to enter into negotiations with third countries.[53] It is decisively illustrated in Opinion 1/94 (*WTO*) with the example that 'the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries'.[54] Notably, in Opinion 1/94 this is explained by the judges in such a way as to indicate an exclusive competence. Such judicial analysis has resulted in the wrong assumption, as highlighted above, either that the existence of a competence and its exclusivity are one and the same or that only an exclusive competence provides for the power to make an international agreement.[55] This is clearly rebutted by, again, the *COTIF* case.

> **Case C-600/14 *Germany v Council* (*COTIF*), ECLI:EU:C:2017:935, para 50**
>
> Moreover, it is clear from a comparison of the respective wording of Article 216(1) TFEU and Article 3(2) TFEU *that the situations in which the Union has an external competence*, in accordance with the former provision, *are not limited to the various scenarios set out in the latter provision, where the Union has exclusive external competence*. [emphasis added]

It is remarkable that the wording of the Article 216 TFEU condition of a 'legally binding act' is similar but not identical to Article 3(2) TFEU which states 'when its conclusion is provided in a legislative act of the Union'. This difference might be

[53] Case 22/70 *Commission v Council* (*ERTA*), ECLI:EU:C:1971:32, para 29.

[54] Opinion 1/94 (*WTO*), ECLI:EU:C:1994:384, para 95; Case C-467/98 *Commission v Denmark (Open Skies)*, ECLI:EU:C:2002:625, para 85.

[55] On this point see, Castillo de la Torre, 'The Court of Justice and External Competences after Lisbon' (n 8) 140.

explained by the fact that the Chapter in which Article 216 TFEU appears combines the treaty-making functions under the TEU and TFEU. This becomes clear when considering the treaty-making procedure in Article 218 TFEU. In effect, this broader wording within Article 216 TFEU could also cover a CFSP decision, a legally binding act that is not adopted based on the legislative procedure. As such, a CFSP legal act can also provide for powers to conclude international agreements (see Chapter 9).

Legal acts which empower the Union to act can be legislative acts, legal acts under Articles 290 and 291 TFEU and Article 25 TEU or international agreements (adopted through a Council Decision).[56] The latter is especially highlighted by other examples of specific – delegated – treaty-making competences where the Commission was mandated to conclude financial, technical and cooperation agreements with international organisations and third countries. The mandate then primarily flows from secondary law, but it might also be derived from international agreements and, exceptionally, primary rules.[57]

D. Likely to Affect Common Rules or Alter their Scope

The last situation, namely that common rules are affected, has been covered by the case law only in relation to the exclusivity of the competence. A parallel can once again be drawn with Article 3(2) TFEU, which almost exactly repeats Article 216 TFEU in one of its conditions for exclusivity ('in so far as its conclusion may affect common rules or alter their scope').

It holds no separate importance in relation to the other alternatives mandating the conclusion of international agreements. If common rules are adopted in certain fields of Union law internally, the second condition establishing implied powers, discussed in section IIIB, is also fulfilled.

E. The Function of the Flexibility Clause, Article 352 TFEU

Pre-Lisbon, the flexibility clause has been considered as a potential legal basis for action to conclude an international agreement; 'in absence of express or implied power for this purpose'.[58] It was used, before the relevant specific legal bases had been introduced into the Treaties, for financial instruments and bilateral agreements concerning

[56] See, for example, for the conclusion framework and subsidiary agreements Art 8 of Council Regulation (EU) No 231/2014 of 11 March 2014 establishing an Instrument for Pre-accession Assistance [2014] OJ L77/11 (IPA II Regulation), which is further specified in Art 5 of the IPA II Commission Implementing Regulation [2014] OJ L 132/32. Another example is an international agreement such as Art 141 of the Association Agreement with Moldova and Art 5 of the annexed Protocol I which set out the terms and conditions of an international agreement regarding the participation of Moldova in particular EU programmes.

[57] Art 8 of Council Regulation (EU) No 231/2014 of 11 March 2014 establishing an Instrument for Pre-accession Assistance [2014] OJ L77/11 (IPA II Regulation); and Arts 58, 60(5) and 184(2)(b) and 58 of Regulation (EU) No 966/2012 [2012] OJ L298/1 (Euratom Regulation).

[58] Opinion 2/94 (*ECHR*), ECLI:EU:C:1996:140, para 28.

third country aid and development policy.[59] The Court acknowledged a gap-filling function under very strict conditions[60] but denied that an *exclusive* power could be derived from it.[61] The role of this norm has further diminished and its limits are now clearly reflected in Article 352 TFEU:[62]

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.
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. [emphasis added]

III. The Nature and Scope of EU External Competences: The Question of Exclusivity

As highlighted above, the discussion of the *existence* of a competence is continuously and unfortunately intertwined with the question on *exclusivity*. This leads to the question of how to differentiate Article 3(2) from Article 216(1) TFEU in light of their overlaps. The areas in which either case law or Treaty drafters agreed on a priori exclusivity are listed under Article 3(1) TFEU. These areas address internal as well as external policy fields and only the Union can legislate and conclude international agreements.

[59] For instance, pre-accession financial support PHARE for CEEC countries was based on this norm. See Council Regulation (EEC) No 3906/89 of 18 December 1989 on economic aid to the Republic of Hungary and the Polish People's Republic [1989] OJ L375/11.

[60] Opinion 2/94 (*ECHR*), ECLI:EU:C:1996:140, paras 28–30.

[61] Opinion 2/94 (*OECD*), ECLI:EU:C:1994:116, para 36.

[62] See also Declaration No 41 on Article 352 TFEU [2012] OJ C326/352.

Thus, the customs union (Article 3(1)(a) and Articles 31 and 32 TFEU) and monetary policy for the Member States whose currency is the euro (Article 3(1)(c) TFEU) are exclusive based on primary law. Article 3(1)(b) TFEU only covers competition policy in so far as it is necessary for the functioning of the internal market. The EU's exclusively competence is limited to the establishment of rules in line with Articles 101 and 102 TFEU and does not concern the application which falls under Member States' responsibilities.[63] Originally, the first draft version of the Constitutional Treaty also included internal market as an exclusive competence. However, Member States finally insisted it is a shared competence (now listed in Article 4(a) TFEU).[64] The conservation of marine biological resources under the common fisheries policy and common commercial policy have been confirmed by case law as exclusive competences and have only later been codified as such.[65]

Exclusivity does not entail that the Member States are fully excluded from acting. The Union can empower the Member States to act in an area of exclusive competence (Article 2(1) TFEU). This situation, for instance, occurred when the Member States negotiated the multilateral Arms Trade Treaty (ATT) under the UN regime.[66] While the EU contributed actively to the negotiations, it could not ratify the ATT, though parts of the subject fell under the exclusive CCP. Council Decision 2013/269/CFSP stipulated in Article 1 that 'with respect to those matters falling under the exclusive competence of the Union, Member States are hereby authorised to sign the Arms Trade Treaty in the interests of the Union'.[67]

Article 3(2) TFEU establishes three abstract conditions under which an area can become exclusive, (a) when the conclusion of international agreement is provided for in a legislative act of the Union, (b) it is necessary to enable the Union to exercise its internal competence or (c) in so far as the conclusion of the EU international agreement may affect common rules or alter their scope.

Comparing Article 3(2) TFEU with the *Lugano Convention* Opinion, it becomes clear that this wording cannot capture the evolution of exclusive competences since *ERTA* and has several flaws. It may appear from the wording of Article 3(2) TFEU that an assessment only takes place between the EU envisaged international agreement and adopted EU legislation. However, case law reveals that a decisive part of the assessment concerns whether the Member States' (potential) action interferes with EU law. The starting point of the Court's argumentation was always that the Member States are prevented from acting externally when they could obstruct EU common

[63] See, with reference to the decentralisation through Council Regulation 1/2003, Craig (n 25) 160. Van Cleynenbruegel speaks of *de facto* shared power, sharing powers within exclusive competences in P van Cleynenbruegel, 'Rethinking EU Antitrust Law Enforcement' (2016) 12 *Croatian Yearbook of European Law & Policy* 49, 54.

[64] On the reasons see, Craig (n 25) 160.

[65] Joined Cases 3/76, 4/76 and 6/76 *Kramer and others*, ECLI:EU:C:1976:114, paras 44–45; Opinion 1/75 *(Re Understanding on a Local Costs Standard)*, ECLI:EU:C:1975:145 1363.

[66] For other examples, A Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' (2011) 34 *Fordham International Law Journal* 1304, 1307.

[67] Council Decision (CFSP) 2013/269 authorising Member States to sign, in the interests of the European Union, the Arms Trade Treaty [2013] OJ L155/9.

policies and the unity of the internal market.[68] Moreover, the risk that Member States could affect the uniform application of Union law or interfere with the nature of the existing Union provisions has proven to be relevant. Finally, the pre-Lisbon case law alternates between general conditions of exclusivity (incompatibility with the unity of the common market, complete or almost complete harmonisation of a particular issue) and concrete examples (legislative measures containing clauses relating to the treatment of third-country nationals). Some, but not all, examples have been codified in Treaty law. This will be now analysed in greater detail.

A. Provided for in a Legislative Act

The condition 'provided in a legislative act' was for the first time taken up in Opinion 1/94 on the accession of the Community to the WTO. Whenever the Union has included 'in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires exclusive external competence in the spheres covered by those acts'.[69] The codification in Articles 216 and 3(2) TFEU give the misleading impression that this has been split up and that Article 216 TFEU covers part of it (provided in a legally binding act) and Article 3(2) TFEU the other part of this *WTO* Opinion. It has been argued by scholars that this codification must be interpreted more narrowly as the Union cannot assign itself more competences than awarded by the Treaties. Equally, the EU cannot obtain exclusive competences in an area of shared or complementary competences by simply adopting legislative acts.[70]

B. Necessary to Enable to Exercise its Internal Competence

As explained above, this condition is decisively connected to exclusivity in the past case law. However, the *necessity* test has no self-standing role for the question of exclusivity in relations to the other alternative covered in point III.C. In all the cases pre-Lisbon, the *necessity* to exclude the individual action of the Member States was related to the situation that it either concerned the common policy or the unity of the internal market. Hence, the area was largely covered by EU rules or completely harmonised.[71]

In Opinion 1/94 on the WTO agreements *an inextricable link* between an internal and external aspect was required in case no internal legislation had been adopted

[68] See for instance, Case 22/70 *Commission v Council* (*ERTA*), ECLI:EU:C:1971:32, paras 16–19; Opinion 2/92 (*OECD*), ECLI:EU:C:1994:116, para 31; Opinion 1/03 (*Lugano Convention*), ECLI:EU:C:2006:81, paras 121–22.

[69] Opinion 1/94 (*WTO*), ECLI:EU:C:1994:384, para 95.

[70] G De Baere, 'External Action' in C Barnard and S Peers (eds) *European Union Law*, 2nd edn (Oxford, Oxford University Press, 2017); M Klamert, *The Principle of Loyalty in EU Law* (Oxford, Oxford University Press, 2017) 153.

[71] Case C-469/98 *Commission v Finland* (*Open Skies*), ECLI:EU:C:2002:627, paras 81–82.

before the conclusion of an international agreement.[72] In that Opinion, such an *inextricable link* between external and internal rules was not found concerning the rules on freedom of establishment and the treatment of nationals of non-Member States,[73] nor was it found for the common air aviation rules in the *Open Skies* judgments.[74] In addition, in the ruling of the *Lugano Convention* Opinion, *necessity* only played a role in as far as it was argued that any agreement by the Member States under these conditions would *necessarily* affect the Union rules.[75] Post-Lisbon this criteria have been so far not been analysed and a lot speaks for the argument that it holds no separate role next to other conditions in Article 3(2) TFEU.

C. Affecting Common Rules or Altering their Scope

In all the cases post-Lisbon addressing exclusive competences, the Court has analysed this condition. This is explained by the fact that it abbreviates the extensive conditions established in the evolving case law pre-Lisbon in an insufficient way. The Court established early on in its case law that the adoption of common rules prevents Member States from acting collectively or individually. Exclusivity is, however, also established if the EU adopts within a certain policy or parts of it, particular rules which result in harmonisation.[76] The question of whether common rules only equate internal secondary EU rules or also could refer to EU international agreements or primary law has been settled by the *Singapore* Opinion.

Opinion 2/15 (*Singapore*), ECLI:EU:C:2017:376

234 Regard would not be had to the reasoning inherent in the rule as to exclusive internal competence contained in the judgment of 31 March 1971, *Commission* v *Council* (22/70, ECLI:EU:C:1971:32), a judgment confirmed by the Court's subsequent case-law (see, *inter alia*, judgment of 5 November 2002, *Commission* v *Denmark*, C-467/98, ECLI:EU:C:2002:625, paragraphs 77 to 80), *if the scope of that rule, currently laid down in the final limb of Article 3(2) TFEU, were extended to a situation which, as in the present instance, concerns not rules of secondary law laid down by the European Union in the exercise of an internal competence that has been conferred upon it by the Treaties, but a rule of primary EU law adopted by the framers of those Treaties*.

[72] Opinion 1/94 (*WTO*), ECLI:EU:C:1994:384, para 85.
[73] Opinion 1/94 (*WTO*), ECLI:EU:C:1994:384.
[74] Case C-469/98 *Commission v Finland* (*Open Skies*), ECLI:EU:C:2002:627, paras 58–59.
[75] Opinion 1/03 (*Lugano Convention*), ECLI:EU:C:2006:81, para 122.
[76] Ibid, paras 116–18, with reference to Opinion 2/91 (*ILO Convention No. 170*), ECLI:EU:C:1993:106.

235 Secondly, in the light of the primacy of the EU and FEU Treaties over acts adopted on their basis, those acts, including agreements concluded by the European Union with third States, derive their legitimacy from those Treaties and cannot, on the other hand, have an impact on the meaning or scope of the Treaties' provisions. *Those agreements accordingly cannot 'affect' rules of primary EU law or 'alter their scope', within the meaning of Article 3 (2) TFEU.* [emphasis added]

The different perspectives, above already highlighted and reflected in the pre-Lisbon case law in assessing exclusivity, are not sufficiently reflected in Article 3(2) TFEU. This Treaty provision states that exclusivity is triggered by the conclusion of *an international agreement affecting EU common rules or altering their scope.* Article 3(2) is thus limited to the conclusion of international agreements *by the EU.* However, the starting point for exclusivity since *ERTA* is that the *Member States* affect with their action and international commitments the EU common regime and rules;[77] a criterion that does not return in Article 3(2), but that has been underlined in the case law:

Opinion 1/13 (*Hague Convention*), ECLI:EU:C:2014:23

71 The question as to whether that condition is met must be examined in the light of the Court's case-law according to which *there is a risk that common EU rules may be adversely affected by international commitments undertaken by the Member States, or that the scope of those rules may be altered, which is such as to justify an exclusive external competence of the EU, where those commitments fall within the scope of those rules.*

72 A finding that there is such a risk does not presuppose that the areas covered by the international commitments and those covered by the EU rules coincide fully (see Opinion 1/03, ECLI:EU:C:2006:81, paragraph 126, and judgment in *Commission v Council*, ECLI:EU:C:2014:2151, paragraph 69).

73 In particular, the scope of EU rules may be affected or altered by international commitments where such commitments are concerned *with an area which is already covered to a large extent by such rules* (see, to that effect, Opinion 2/91, ECLI:EU:C:1993:106, paragraphs 25 and 26).

[77] Case 22/70 *Commission v Council* (*ERTA*), ECLI:EU:C:1971:32, para 31; Case C-469/98 *Commission v Finland* (*Open Skies*), ECLI:EU:C:2002:627, para 77.

> 74 That said, since the EU has only conferred powers, *any competence, especially where it is exclusive, must have its basis in conclusions drawn from a comprehensive and detailed analysis of the relationship between the envisaged international agreement and the EU law in force.* That analysis must take into account the areas covered by the EU rules and by the provisions of the agreement envisaged, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish (see Opinion 1/03, ECLI:EU:C:2006:81, paragraphs 126, 128 and 133, and judgment in *Commission v Council*, ECLI:EU:C:2014:2151, paragraph 74). [emphasis added]

In addition, Article 3(2) TFEU takes effect not only at the conclusion of an agreement, but also before at negotiation and later in the implementation phase.[78]

> **Joined Cases C-626/15 and C-659/16 *Antarctique*, ECLI:EU:C:2018:925**
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> 112 In the light of that objective, Article 3(2) TFEU must therefore be interpreted, in order to preserve its practical effect, as meaning that, although its wording refers solely to the conclusion of an international agreement, *it also applies, at an earlier stage, when such an agreement is being negotiated and, at a later stage, when a body established by the agreement is called upon to adopt measures implementing it*.
>
> 114 Furthermore, such a risk of common EU rules being affected may be found to exist where the international commitments at issue, without necessarily conflicting with those rules, may have an effect on their meaning, scope and effectiveness. [emphasis added]

Thus, the condition 'may affect common rules or alter their scope' is assessed by determining whether the risk exists that EU common rules are adversely affected or altered by Member States' international commitments. A broad risk assessment thus takes place. International commitments by the Member States and EU rules do not have to overlap fully and a coverage to a large extent is sufficient.[79]

These considerations – reflected already in the *ERTA* findings – are all left unmentioned by Article 3(2) TFEU. Instead it abbreviates the conditions in Article 3(2) which

[78] Joined Cases C-626/15 and C-659/16 *Antarctique*, ECLI:EU:C:2018:925.
[79] Opinion 3/15 (*Marrakesh Treaty*), ECLI:EU:C:2016:657, paras 105–7.

are found in 'longhand' form in paragraph 74 of Opinion 1/13 (with reference to the *Lugano* Opinion, see above),[80] 'since the EU has only conferred powers', a comprehensive and detailed analysis is conducted comparing *the EU's envisaged international agreement and the EU law in force and the latter's foreseeable future development*.[81]

In sum, in establishing exclusivity, the following two aspects find consideration:

- A risk assessment of whether common rules are affected by the Member States' international commitments or whether the risk exists that EU rules are altered by those Member States commitments. The risk assessment is broad; considering future developments and the effect on EU rules, their meaning, scope and effectiveness, is sufficient, no conflict needs to be established.
- To determine this risk and define the scope of analysis, a comparison needs to be drawn between the EU's envisaged international agreement field of application and existing or foreseeable EU secondary rules. This analysis compares the areas covered by the current or foreseeable EU rules with the provisions of the agreement envisaged. It is sufficient if an area of the international agreement is largely covered by EU rules and the nature and content of the international commitment effects EU rules.

This comprehensive risk assessment for current and future EU rules, which are capable of undermining EU rules and the proper functioning of the system, necessitates an elaborate and technical review. It also invites the Court's assessment back in to illustrate the conditions through examples, as demonstrated since the beginning. In Opinion 2/15 (*Singapore*) the Court specified the limiting factor that common rules are only secondary rules, as highlighted above.[82] In the same ruling, the Court also confirmed a more diffuse exception. Provisions that are extremely limited in scope do not have to be considered when assessing the competence divide between EU and Member States.[83] In other words: an exclusive competence to conclude an international agreement is not per se affected by the inclusion in that agreement of a minor non-exclusive element. This 'limited scope' argument is inspired by previous case law.[84] In the *WTO* Opinion 1/94, the Commission argued that secondary provisions could be affected in the area of intellectual property rights but the Court countered with the explanation that they were limited in their scope of application under EU law.[85] In the *Singapore* Opinion this argument was for the first time applied not against a Union competence, but in its favour. The Court held that institutional norms are of ancillary nature in regard to the substantive norms.[86] This assessment only changes if it concerns institutional norms which include dispute settlement provisions removing disputes from Member States' courts.[87] The limited scope argument is introduced by the Court as settled case law in

[80] Opinion 1/03 (*Lugano Convention*), ECLI:EU:C:2006:81, para 133.
[81] Opinion 1/13 *(Hague Convention)*, ECLI:EU:C:2014:23; and Case C-114/12 *Commission v Council* (*Broadcasters*), ECLI:EU:C:2014:2151, para 74.
[82] Opinion 2/15 (*Singapore*), ECLI:EU:C:2017:376.
[83] Ibid, paras 216–17.
[84] Opinion 1/94 (*WTO*), ECLI:EU:C:1994:384; Opinion 1/08 (*GATS*), ECLI:EU:C:2009:739.
[85] Opinion 1/94, ECLI:EU:C:1994:384, para 67.
[86] Opinion 2/15 (*Singapore*), ECLI:EU:C:2017:376, para 276.
[87] Ibid, para 292.

the *Singapore* Opinion. However, when a norm is of limited scope, it must be assessed in the framework of the choice of a legal basis and not in relations to competences. This criterion, instead, introduces an element of unpredictability for future conflicts (see further Chapter 4 on mixed agreements).

Another unresolved interpretation question is the relationship between Article 3(2) and Article 2(2) TFEU – the relationship between pre-emption and exclusivity.[88]

Article 2(2) TFEU

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 exercise their competence again to the extent that the Union has decided to cease exercising its competence.

C Timmermans, 'ECJ Doctrines on competences' in L Azoulai (ed) *The Question of Competence in the European Union* (Oxford, Oxford University Press, 2014) 159 and 163

As far as EU law is concerned, it seems to me that the concept of pre-emption may be useful to distinguish with regard to shared competences between two, entirely different approaches:

1. The exercise of Union competence is considered to block the exercise of national competence. Member States may not at all act unilaterally anymore in the field in which, and to the extent to which, the Union has exercised its competence. Whether or not the national measure can be considered in conflict with Union rules, is completely irrelevant. Each national measure, whatever its contents, will be invalid. This approach establishes a rule of competence; it solves a conflict of competences, not of norms. Here the notion of pre-emption seems useful.
2. In the second approach national competences as such remain unaffected. Member States may continue to exercise their competence in spite of the exercise of Union competences, provided that they respect Union rules. We have to do here with a rule, not of competence, per se, but of conflict. I do not think that applying to this approach the concept of pre-emption has

[88] M Cremona, 'EU External Competence – Rationales for Exclusivity' in S Garben and I Govaere, *The Division of Competences between the EU and its Member States* (Oxford, Hart Publishing, 2017).

> any added value. Where a conflict of norms arises, applying the principle of primacy of Union law will be sufficient to solve it.

… I might draw attention to the relationship between Articles 2(2) (blocking effect in case of exercise of shared competences) and 3(2) TFEU. According to the latter provision, external competences become exclusive in three particular situations, well-known from the case law, related to the exercise of internal competences amongst which the *ERTA* situation. So, no blocking effect but exclusivity. This raises the question of whether Article 2(2) TFEU is at all applicable to the exercise of non-exclusive external competences. There should be no doubt about that. But then it is interesting to note that only the exercise of internal competences may make an external competence exclusive, not the exercise of the external competence itself. The latter may only entail the blocking effect of Article 2(2) TFEU, which, as already mentioned, is not the same as exclusivity.

This distinction between the two norms can be demonstrated with the EU competence in Article 79(3) TFEU to conclude readmission agreements with third countries. This competence is shared under the area of freedom, security and justice, but at the same time pre-empts Member States from acting, without resulting necessarily in an exclusive competence.

M Cremona, 'EU External Competence' in S Garben and I Govaere (eds) *The Division of Competences between the EU and the Member States*, (Oxford, Hart Publishing, 2017) 150

Exclusivity thus carries different connotations in the case of express and implied external powers. In the case of powers expressly granted for the purpose of external action (in particular CCP, the common foreign and security policy, development co-operation and association agreements), the breadth and open-ended nature of these powers mean that competence carries with it the power to shape external policy, to define the scope of EU international action. In most cases this is not a power which excludes the Member States, but when it does (in the case of the CCP) its boundaries will of course be contested.

Where implied external powers are linked to internal policy fields, they need to demonstrate either the AETR *(aka ERTA)* or the *effet utile rationale*, as now expressed in Article 216(1) TFEU, and will tend to be sectoral in nature, tied to the Treaty-based objectives of those specific policies. In such cases exclusivity is internally oriented; it is aligned to the need to preserve the integrity and functioning of the internal acquis.

IV. The Choice of a Legal Basis and the Scope of Specific Policies

The competence categories (Articles 3 to 6 TFEU) do not include specific legal bases; concrete legal bases are primarily found in the policy chapters of the Treaties. Also, Article 21 TEU cannot create competences in external action but merely contains a list of objectives guiding the Union's external action. The extent of the EU's competences in external action thus depends on the areas covered in the policies chapters. Article 216 TFEU offers a general competence for the EU to conclude international agreements, but a concrete and substantive legal basis is still required in line with the principle of conferral (Article 5 TEU). Competences and legal basis disputes are closely linked.[89] The competence question addresses the scope of a competence or policy while the legal basis addresses the existence of legal basis and competence.

As we have seen, in Opinion 2/15 (*Singapore*), a correlation appears between the scope of a policy legal basis and the nature of the competence in such a way that no provisions have to be taken into account which are extremely limited in scope – so in being ancillary. However, the choice of legal basis impacts the nature of the competence: exclusive or shared.[90] This also explains the tendency of the Council to add legal bases to an international agreement to secure that parts of international agreements fall into a shared competence, often with the intention of creating a mixed agreement (see further Chapter 4).

A. The Criteria for the Choice of a Legal Basis

Under the principle of conferral, the adoption of an international agreement or a legislative/legal act requires a concrete legal basis or several legal bases. A legal basis is found in the policy norms of the Treaty (TFEU or exceptionally the TEU).[91] Furthermore, legal bases can be further specified in EU secondary law and international agreements as delegated legislation/treaty-making (see further on this Chapter 4). A concrete legal basis refers to the procedure under which the legislating institutions act. In the case of the conclusion of international agreements, the detailed procedure is found in Article 218(6) TFEU (see Chapters 4 and 5).

[89] Opinion 1/08 (*GATS*), ECLI:EU:C:2009:739, para 111.

[90] In Opinion 2/00 (*Cartagena*), ECLI:EU:C:2001:664, para 41, the Court stressed that 'the practical difficulties associated with the implementation of mixed agreements … cannot be accepted as relevant when selecting the legal basis for a Community measure'.

[91] For instance, Art 45(2) TEU for the establishment of the European Defence Agency.

Case C-263/14 *Parliament v Council* (*Tanzania*), ECLI:EU:C:2016:435, para 42

The choice of the appropriate legal basis of a European Union act has constitutional significance, since to proceed on an incorrect legal basis is liable to invalidate such an act, particularly where the appropriate legal basis lays down a procedure for adopting acts that is different from that which has in fact been followed.

The Court has developed two criteria for determining the correct legal basis when a legislative act is enacted: namely (1) that it is necessary to identify the main aim and content of the measure at hand; and (2) and that exceptionally two or more legal bases can be combined if several objectives of a legislative act are inseparably linked, no hierarchy between the norms exist and they are compatible in their respective legislative procedure.[92] For international agreements, the Court has added in the *Tanzania* case that also the context of the agreement must be considered.[93]

Case C-244/17 *Commission v Council* (*Kazakhstan*), ECLI:EU:C:2018:662

36 According to settled case-law, the choice of the legal basis for an EU measure must rest on objective factors amenable to judicial review, which include the aim and content of that measure.

37 If examination of an EU measure reveals that it pursues two purposes or that it comprises two components and if one of these is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component. Exceptionally, if it is established, on the other hand, that the measure simultaneously pursues a number of objectives, or has several components, which are inextricably linked without one being incidental to the other, so that various provisions of the Treaty are applicable, the measure must be founded on the various corresponding legal bases.

[92] A Dashwood, 'EU and Member State Acts in the Negotiation, Conclusion, and Implementation of International Agreements' in M Cremona and C Kilpatrick (eds) *EU Legal Acts* (Oxford, Oxford University Press, 2018) 210–11.
[93] Case C-263/14 *Parliament v Council (Tanzania)*, ECLI:EU:C:2016:435, paras 48–50.

(i) Identifying the Centre of Gravity: An Objective Test Amenable to Legal Review?

The legal basis follows the predominate aim and purpose of a measure at hand – the centre of gravity. According to case law, the centre of gravity test implies that if one policy is predominant and the other incidental, the choice will be made for the predominant norm.[94]

Literature has defined this as an absorption theory: '… the dominant objective 'absorbs' the possible other substantive legal bases which are pursuing objectives of a subsidiary or ancillary nature'.[95] The choice of predominant objective 'does not follow from its author's conviction alone, but must rest on objective factors which are amenable to judicial review'.[96]

This centre of gravity test helps to identify the just and correct legal basis, but the EU legislator can steer this choice by emphasising certain aims in the preamble of a legislative instrument.

P Koutrakos, 'Legal Basis and Delimitation of Competence' in M Cremona and B De Witte (eds) *EU Foreign Relations Law* (Oxford, Hart Publishing, 2008) 184

A degree of uncertainty is inevitable in the process underpinning the choice of a legal basis. In a legal order where the institutional balance is ill-defined and, at times, incrementally redefined, the choice of legal basis is, in any case, a potentially politicised matter.

These uncertainties become even more visible in recent more complex and elaborate international agreements. While the EU cooperates with third countries in sectoral agreements (on fisheries, air transport or energy) with a specific aim and limited purposes, association agreements or development and trade agreements – so-called horizontal agreements – are multi-aimed and include cooperation in several policies and objectives ranging from political to trade cooperation.[97] In these agreements, several legal bases can be considered by the treaty-making institutions.

(ii) Several Legal Bases

Exceptionally two or more legal bases for a legislative act or an international agreement can be chosen if the legal procedures applied are compatible. This compatibility

[94] Case C-338/01 *Commission v Council*, ECLI:EU:C:2004:253, paras 54–55.

[95] P Van Elsuwege, 'The Potential for Inter-institutional Conflicts before the Court of Justice: Impact of the Lisbon Treaty' 117 in M Cremona and A Thies (eds) *The European Court of Justice and External Relations Law* (Oxford, Hart Publishing, 2014) with reference to M Maresceau, *Bilateral Agreements Concluded by the European Community, Collected Courses of the Hague Academy of International Law* (Leiden, Brill/Nijhoff, 2004) 156–58.

[96] Opinion 2/00 (*Cartagena*), ECLI:EU:C:2001:664, paras 22–23.

[97] F Naert, 'Use of CFSP Legal Basis for EU International Agreements' in J Czuczai and F Naert (eds) *The EU as a Global Actor Bridging Legal Theory and Practice* (Leiden, Brill/Nijhoff, 2017) 409.

is assessed on the basis of the respective legal bases in Treaty norms and the procedures indicated in Article 218(6) and (8) TFEU.[98] These norms determine the voting procedure in the Council (unanimous or qualified majority voting) and the participation of the European Parliament for a legislative act or an international agreement. It is, however, not clear whether both procedural conditions must be in line with each other or one incompatibility (such as the voting in the Council) can be reconciled when more than one legal basis is chosen.

Before the Lisbon reform, it was undisputed that it was incompatible to combine procedures deriving from the different EU 'pillars'. This was prohibited by reference to Article 47 TEU (pre-Lisbon) and the supranational 'Community' pillar took precedence over the more intergovernmental pillars. For this not only the *ECOWAS* case bears witness but also the CJEU's *Kadi* judgment, with its emphasis on integrated but separated legal orders.[99] However, on the question of when the procedures are incompatible in other situations, the Court has not always been consistent.[100] While the CJEU held in one case, pre-Lisbon, that Treaty Articles providing unanimity and a qualified majority vote in the Council could not be applied conjointly,[101] a later judgment accepted this 'inconsistency' as long as the Council would act unanimously.[102]

In the *Smart Sanctions* case, a grand chamber ruling, the Court for the first time addressed the question of procedures under CFSP and TFEU legal bases under the current TFEU and TEU for a unilateral act and concluded on their incompatibility.[103] This judgment left open whether differences in the Council's decision-making procedures (so unanimous voting and qualified majority voting) can be reconciled, but confirms that differences in both procedural aspects – the legislation-making and, especially, the involvement of the European Parliament – cannot be overcome or reconciled.

In contrast, for international agreements, Article 218(6) TFEU reveals one treaty-making procedure only. Except when agreements are exclusively related to CFSP, the participatory right of the European Parliament is determined by paragraph 6(a) and (b) and manifests itself – as a rule – in a consent right of the European Parliament (see Chapter 9). The voting in the Council follows Article 218(8) TFEU where, as a rule, the Council votes by qualified majority voting – with a few exceptions such as when

[98] Case C-130/10 *Parliament v Council* (*Smart Sanctions*), ECLI:EU:C:2012:472; Joined Cases C-164/97 and C-165/97 *Parliament v Council*, ECLI:EU:C:1999:99, para 14.

[99] Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat International Foundation v Council and Commission*, ECLI:EU:C:2008:461.

[100] See also, K St Clair Bradley, 'Powers and Procedures in the EU Constitution' in G de Búrca and P Craig (eds) *The Evolution of EU Law*, 2nd edn (Oxford, Oxford University Press, 2011) 92–93.

[101] Case C-338/01 *Commission v Council*, ECLI:EU:C:2004:253, para 58. Though in the judgment the Court seemed to rely more on a more specific norm argument which gets preference over the other (former Art 95 [now Art 114 TFEU] states 'save where otherwise provided in the Treaty' than on this argument mentioned above (para 60). However, in Case C-178/03 *Commission v European Parliament and Council*, ECLI:EU:C:2006:4, it seemed again of relevance, as already before in Case C-300/89 *Commission v Council* (*Titanium Dioxide*), ECLI:EU:C:1991:244, para 19. Case C-300/89 *Commission v Council*, ECLI:EU:C:1991:244.

[102] Case C-166/07 *European Parliament v Council*, ECLI:EU:C:2009:499, para 69; Case C-178/03 *Commission v European Parliament and Council*, ECLI:EU:C:2006:4.

[103] Case C-130/10 *Parliament v Council (Smart Sanctions)*, ECLI:EU:C:2012:472.

concluding association agreements. Different voting procedures for this single procedure can become an issue when the international agreement relies on two legal bases with one requiring unanimous voting and the other qualified majority voting.

B. The Centre of Gravity Test and the Scope of Policies

To determine whether a policy is dominant, the Court will look at the aim and content of the piece of legislation or international agreement at stake.[104] For determining the predominant aim and purpose, the preamble forms a decisive factor in a legislative act.[105] However, the choice of the correct legal basis encounters two problems. One problem is that this choice is not necessarily a neutral one as it defines the role of the institutions and the Member States, as explained above. In addition, the scope of the individual policies and their relation have an influence. A possible hierarchy between norms could help to establish the best suited legal basis. However, no hierarchy between the policies in EU external relations can be identified. Article 21(2) TEU lists principles and objectives of EU external relations and these objectives are streamlined with each other in specific policies.

Especially the exclusive competence of trade is investigated regarding its scope. In *Daiichi Sankyo*, the Court argued 'a European Union act falls within the common commercial policy if it relates specifically to international trade in that it is essentially intended to promote, facilitate or govern trade and has direct and immediate effects on trade'.[106] Also other objectives, such as sustainable development, can be covered by trade if the provisions in the international agreement are not intended 'to regulate the levels of social and environmental protection in the Parties' respective territory'.[107] In the development policy, characterised as a parallel competence, the Court turns the test around by focusing on the content of the non-development norms. However, development, endowed with broad objectives[108] or a broad 'notion'[109] incorporates other objectives and can absorb them as long as these other policies and their norms in the international agreement do not contain 'distinct objectives that neither are secondary nor indirect to the objectives of development cooperation'[110] (see Chapter 8).

In the case of international agreements, the centre of gravity remains an issue but multiple CFSP and TFEU legal bases could be reconciled in their procedure. Article 218 TFEU serves as single treaty-making procedure and paragraphs 6 and 8

[104] See for instance Case C-300/89 *Commission v Council* (*Titanium Dioxide*), ECLI:EU:C:1991:244, para 10.

[105] P Leino, 'The Institutional Politics of Objective Choice: Competence as a Framework for Argumentation' in S Garben and I Govaere (eds) *The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future* (Oxford, Hart Publishing, 2017) 227.

[106] Case C-414/11 *Daiichi Sankyo v DEMO*, ECLI:EU:C:2013:520, para 51.

[107] Opinion 2/15 (*Singapore*), ECLI:EU:C:2017:376, paras 147 and 166.

[108] Case C-268/94 *Portugal v Council*, ECLI:EU:C:1996:461, para 7.

[109] Case C-377/12 *Commission v Council* (*Philippines*), ECLI:EU:C:2014:1903, para 43. The Advocate General Mengozzi defined it as multi-faceted, see, Case C-377/12 *Commission v Council* (*Philippines*), Opinion of AG Mengozzi ECLI:EU:C:2014:29, para 40.

[110] Case C-377/12 *Commission v Council* (*Philippines*), ECLI:EU:C:2014:1903.

determine the voting procedure. Article 37 TEU confirms that the EU can conclude a CFSP international agreement and the procedure is solely determined by Article 218 TFEU. However, if the agreement is exclusively CFSP, Article 218(6) does not apply. The participation of the EP through consultation or consent is then excluded and limited to an information right (Article 218(10) TFEU) (see Chapter 9).

In practice, several TFEU-based horizontal agreements (association agreements and framework partnership and cooperation agreements) include CFSP provisions but not all of these agreements have a CFSP legal base. This is the case, for example, for the Association Agreement with Kosovo, which covers political dialogue (Articles 11–15). The agreement is based on Articles 31, 37 TEU and Article 217 TFEU.[111] In this case, the association agreement requires unanimously voting according to Article 218(8)(2). Hence, the primarily non-CFSP agreement has the same voting requirement in the Council and the participation of the EP remains the same despite including a CFSP legal base. This situation, however, changes decisively when the legal basis is found in the trade and/or development policy. For these legal bases, the Council decides by qualified majority voting. All new and comprehensive FTAs[112] are linked to a separate partnership and cooperation agreement. The Framework Agreement on Comprehensive Partnership and Cooperation between the EU (and its Member States) and Vietnam also addresses in Articles 8 to 10 political provisions covering the prohibition of the proliferation of weapons of mass destruction, small and light arms and combatting terrorism.[113] The Council decision on the signing of the agreement, however, does not refer to Articles 31 and 37 TEU as legal bases.[114]

With regard to the choice of a legal basis, the Council demonstrates a flexibility (or inconsistency) which is more a political than a legal choice. For instance, the Council has exceptionally based its adopting measure on two legal bases with different voting requirements. The accession of the EU to the Treaty of Amity and Cooperation in Southeast Asia refers to Articles 37 and 31(1) TEU as well as Articles 209 and 212 in conjunction with Articles 218(6) and 218(8)(2) TFEU.[115] This indicated that the Council held the position that the differences in the voting could be reconciled by

[111] Council Decision (EU) 2015/1988 of 22 October 2015 on the signing, on behalf of the Union, of the Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo, of the other part [2015] OJ L290/4.

[112] In reaction to the *Singapore* Opinion, the new approach of the Council is that a separate Investments Agreement (IPA) will be negotiated next to an FTA. Draft Council Conclusions on the negotiation and conclusion of EU trade agreements, Brussels, 8 May 2018, 8622/18.

[113] Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part [2016] OJ L329/8.

[114] Instead the following legal bases apply: 'Articles 79(3), 91, 100, 207 and 209 in conjunction with Article 218(5)', Council Decision (EU) 2012/279 of 14 May 2012 on the signing, on behalf of the Union, of the Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part [2012] OJ L137/1.

[115] Council Decision (CFSP) 2012/308 of 26 April 2012 on the accession of the European Union to the Treaty of Amity and Cooperation in Southeast Asia [2012] OJ L154/1. At the stage of the signature and conclusion, the CFSP legal base was dropped. See on this and another example, Agreement continuing the International Science and Technology Centre [2017] OJ L37/3; Naert (n 97) 403–8.

voting unanimously.[116] In addition, the Council is open to the addition of legal bases for procedural purposes and in addressing Member States' concerns about competences.[117] These practices have been attacked by the Commission for contaminating supranational procedures and derailing the centre of gravity test by compromising legal certainty – similar to the illegal practice of hybrid acts in case of mixed agreements.[118] In the case of the Association Agreement with Ukraine, the authorisation to sign of the agreement was based on three Council decisions.[119] The first found its legal basis in Articles 31(1), and 37 TEU for the CFSP aspects,[120] the second is founded on Article 217 TFEU but excludes rights under Article 17 of the Association Agreement with Ukraine which covers equal treatment of workers.[121] This provision was adopted by a separate third Council decision finding its legal basis in Article 79 (2)(b).[122] The inclusion of a separate Council decision based on the legal base from Title V of Part Three of the TFEU (Area of Freedom, Security and Justice) was thought to be necessary because these legal bases trigger the application of Protocol 21 to the benefit of Ireland and UK and Protocol 22 to the benefit of Denmark.[123] These Protocols explain the opt-out of these countries and allow them to decide for themselves whether

[116] See, however, the Cooperation agreement with Afghanistan where Art 37 is mentioned in the Council Decision (next to Arts 207 and 209 TFEU) but only forms a procedural and not a substantial legal base): Council Decision (EU) 2017/434 of 13 February 2017 on the signing, on behalf of the Union, and provisional application of the Cooperation Agreement on Partnership and Development between the European Union and its Member States, of the one part, and the Islamic Republic of Afghanistan, of the other part [2017] OJ L67/1.

[117] On this motivation and dropping CFSP legal bases and leaving it for the Member States to exercise it as part of their national competences in the framework of a mixed agreement, Gosalbo-Bono and Naert (n 32) 28–29.

[118] Case C-28/12 *Commission v Council* (*Hybrid Act*), ECLI:EU:C:2015:282, concerning Decision (EU) 2011/708 of the Council and of the Representatives of the Governments of the Member States of the European Union [2011] OJ L283/1 adopted in one hybrid supranational and intergovernmental act an international agreement for EU and Member States (signing and provisional application of the agreement), which stated expressly that the Council and the representative of the governments of the EU Member states adopted this decision in a meeting within the Council. This consequently changed the voting rules for this decision from qualified majority voting foreseen in Art 218 TFEU to intergovernmental unanimity.

[119] This number is excluding the separate Council decision approving the conclusion of Euratom based on Art 101 Euratom: Council Decision (EU) 2014/670 of 23 June 2014 approving the conclusion, by the European Commission, on behalf of the European Atomic Energy Community, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part [2014] OJ L278/8 (Council Decision Approving The Conclusion Of Euratom).

[120] Council Decision (EU) 2014/295 of 17 March 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part [2014] OJ L161/1.

[121] Council Decision (EU) 2014/668 of 23 June 2014 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part [2014] OJ L 278/1.

[122] Council Decision (EU) 2014/669 of 23 June 2014 on the signing, on behalf of the European Union, of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the provisions relating to the treatment of third-country nationals legally employed as workers in the territory of the other party [2014] OJ L 278/6.

[123] For other examples of an inconsistent practice see, Gosalbo-Bono and Naert, 'The Reluctant (Lisbon) Treaty and its implementation in the practice of the Council' (n 32) 52.

they wish to be bound by this provision of the agreement.[124] However, this practice is only justifiable for sectoral readmission agreements but, in this case, contradicts the principle that the procedure has to follow the legal base and not the other way around.

In addition to the Council's tendency to add legal bases for political and pragmatic reasons, the question arises of how the centre of gravity test can apply when policies are inherently multi-aimed as in these so-called horizontal trade or association agreements. All EU external relations policies can pursue multiple aims as highlighted by the chapeau clauses in Article 21 TEU and Article 205 TFEU. As far as this practice has reached the Court of Justice (PCAs with *Philippines* and *Kazakhstan* cases) it confirms a strict centre of gravity test and the absorption of other policies and potential other legal bases under certain conditions.

In the *Philippines* case, the Council added separate legal bases for migration, environment and transport next to development and trade for the Partnership and Cooperation Agreement with the Philippines. The Commission disputed these additions and argued that this was covered by development policy and its legal and political instruments. In such, the Commission specifically relied on the pre-Lisbon case *Portugal v Council* (Case C-268/94) on the qualification as a development agreement with India.

Case C-268/94 *Portugal v Council*, ECLI:EU:C:1996:461

7 In order to qualify as a development cooperation agreement for the purposes of Article 130y of the Treaty, an agreement must pursue the objectives referred to in Article 130u. Article 130u(1) in particular makes it clear that those are broad objectives in the sense that it must be possible for the measures required for their pursuit to concern a variety of specific matters.

39 It must therefore be held that the fact that a development cooperation agreement contains clauses concerning various specific matters cannot alter the characterization of the agreement, *which must be determined having regard to its essential object and not in terms of individual clauses, provided that those clauses do not impose such extensive obligations concerning the specific matters referred to that those obligations in fact constitute objectives distinct from those of development cooperation*. [emphasis added]

Analysing the objective and content of each of the provisions in the fields of energy, tourism, culture, drug abuse control and protection of intellectual property, the Court concluded that the provisions were not distinct from those of development cooperation. In the *Philippines* case, the Court added that, for a development and trade

[124] See a comparable situation with the social security and Switzerland, EEA and Turkey Agreement and the UK's initiated annulment proceeding, for instance: Case C-431/11 *United Kingdom of Great Britain and Northern Ireland v Council*, ECLI:EU:C:2013:589; see also on this, Dashwood, 'EU and Member State Acts in the Negotiation, Conclusion, and Implementation of International Agreements' (n 92) 217.

agreement, the centre of gravity is assessed by reviewing the provisions in the agreement and assessing whether these provisions include specific obligation changing the character of the development agreement.

Case C-377/12 *Commission v Council (Philippines)*, ECLI:EU:C:2014:1903

35 In this instance, it must be determined whether, among the provisions of the Framework Agreement, those relating to the readmission of nationals of the contracting parties, to transport and to the environment also fall within development cooperation policy or whether they go beyond the framework of that policy and therefore require the contested decision to be founded on additional legal bases.

48 In light of all those considerations, it is necessary, for the purposes of the determination specified in paragraph 35 of the present judgment, to examine whether the provisions of the Framework Agreement relating to readmission of nationals of the contracting parties, to transport and to the environment also contribute to the pursuit of the objectives of development cooperation and, if so, whether those provisions do not nevertheless contain obligations so extensive that they constitute distinct objectives that are neither secondary nor indirect in relation to the objectives of development cooperation.

The Court could not deny that the provision of readmission of nationals of the contracting parties, Article 26(3) of the Framework Agreement, contained specific obligations. However, they were not considered extensive enough to 'constitute objectives distinct from those of development cooperation that are neither secondary nor indirect in relation to the latter objectives'.[125] This finding was based on the argument that the readmission of nationals still necessitates the separate conclusion of an international readmission agreement.

The *Philippines* case enabled the multifaceted development policy to absorb other policies with the limitation that they may not cover separate and extensive legal obligations that constitute distinct objectives separate from development policy. Accordingly, individual provisions will be investigated for their legal content. Norms must prove that they create direct and distinct obligations to justify a separate legal basis. However, if the definition of a policy is based on its context found in policy documents and its inherent objectives of the international agreement, other 'multifaceted' policies next to development policy can be identified.

Especially association policy has a broad notion and Association Agreements comprehensively cover cooperation throughout all EU policies. Consequently, similar

[125] Case C-377/12 *Commission v Council (Philippines)*, ECLI:EU:C:2014:1903, para 59.

conclusions should be drawn and Article 217 TFEU can absorb other legal bases in line with the *Philippines* case. However, do these findings also extend to the CFSP norms found in Association Agreements or partnership and cooperation agreements or is the distinct nature of CFSP norms (Article 40 TEU) to be honoured by including a CFSP legal base?

The addition of a CFSP legal basis was tested with the Enhanced Partnership and Cooperation Agreement with Kazakhstan, the signing and provisional application found its legal basis in Articles 37 and 31(1) TEU and Articles 91, 100(2) and 207 and 209 TFEU (see also Chapter 9).[126] Whereas the Commission did not challenge these legal bases, it did attack the Council decision on the position to be adopted on behalf of the EU in the Cooperation Council established under the Partnership Agreement based on Article 218(9) TFEU to which Article 31(1) TEU was added and the unanimous voting procedure in the Council applied. The Court concluded that in this specific case, the substantive legal basis must be assessed to determine the voting procedure for paragraph 9.[127]

The *Kazakhstan* ruling confirms the centre of gravity for multi-aim or horizontal agreements. These agreements do not require other legal bases of different sectoral policies for quantitative and qualitative reasons. Quantitative because the majority of the provisions fall into one main horizontal policy and qualitative because the other provisions, such as CFSP-related provisions, are not concrete enough in their obligation nor distinct enough to justify a separate CFSP legal base. This ruling is, however, not unproblematic because CFSP-related provisions cannot *qua* nature determine in detail concrete obligations. Secondly, the Court did not address how to do justice to Article 40 TEU and to respect the specific nature of CFSP. The Council could possibly either not execute the CFSP competence or decide to 'outsource' the CFSP cooperation into sectoral CFSP agreements and separate from the Partnership and Cooperation Agreements or Association Agreements. The practice of including CFSP legal bases in horizontal agreements could, however, exceptionally prevail if the agreement has two components and a strong CFSP aim (see further Chapter 9).[128]

[126] Council Decision (EU) 2016/123 of 26 October 2015 on the signing, on behalf of the European Union, and provisional application of the Enhanced Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Kazakhstan, of the other part [2016] OJ L 29/1. See also for the same legal bases, Council Decision (EU) 2018/1552 of 28 September 2018 on the position to be taken, on behalf of the European Union, within the Cooperation Council established by the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, with regard to the adoption of the EU-Azerbaijan Partnership Priorities [2018] OJ L260/20.

[127] And in difference to the Case C-81/13 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, ECLI:EU:C:2014:2449 where the decision falling within the field covered in Art 48 TFEU and adopted in the context of an association agreement was intended not to supplement or amend the institutional framework of that agreement.

[128] Examples of this practice are the so-called Strategic Partnership Agreements, as for instance, the one with Japan, where the political and security element is an important component. Legal bases were Arts 37 TEU and 212 TFEU, Council Decision (EU) 2018/1197 of 26 June 2018 on the signing on behalf of the European Union, and provisional application of the Strategic Partnership Agreement between the European Union and its Member States, of the one part, and Japan, of the other part [2018] OJ L216/1.

M Cremona, 'The Principle of Conferral and Express and Implied External Competences' in E Neframi and M Gatti (eds) *Constitutional Issues of EU External Relations Law* (Baden-Baden, Nomos, 2018) 33–34

The prevailing impression is that … external competence is still highly fragmented. Certainly, there are many different potential legal bases in the Treaties, express and implied, and disagreements about the appropriate legal basis for international action have not diminished. But if we examine the reality of practice over the last few years we can identify a different trend, towards a consolidation of EU external action …

Two factors have certainly contributed to this trend. The first is the distinct preference on the part of the Court for choosing a single legal basis for a Union act, whether an autonomous measure or the decision concluding an international agreement … The second factor is the wide scope of the EU's express external competences, and in particular to certain central external policy fields: the Common Foreign and Security Policy (CFSP), the Common Commercial Policy (CCP), development cooperation policy and Association Agreements.

V. The Broader Picture of EU External Relations Law

The relationship between EU and Member States competences is an intricate issue touching upon fundamental issues of the EU's external action. It also one of the most disputed fields between the EU and its Member States. EU competences and the choice of a legal basis, at first sight, appear to be based on extensive legal rules and principles developed over many years but at the same time cannot be detached from political struggles and choices of EU external actors and Member States. The 'complex mosaic of the external competences of the Union and its Member States'[129] has evolved over many years of jurisdiction and proceeds despite the attempt of its codification. At the same time, competence conflicts and the principles surrounding them have remained surprisingly 'frozen in time'. The *ERTA* case law from 1971 and its TFEU codification still dominate the academic and judicial discussion. The Advocate General in the *ERTA* case at the time argued in favour of a more restrictive approach to EU external competences. He denied (and contrary to the evolutionary verdict of the judges) a parallelism between internal and external competences with the arguments that it would contribute to legal ambiguity and might hamper the development of Union law.[130] And indeed, the so-called *ERTA* effect can contribute to the Member States'

[129] Joined Cases C-626/15 and C-659/16 *Antarctique*, Opinion of AG Kokott ECLI:EU:C:2018:362, para 6.
[130] Case 22/70 *Commission v Council* (*ERTA*), Opinion of AG Dutheillet de Lamothe, ECLI:EU:C:1971:23, paras 291–92.

unwillingness to legislate internally[131] and legal ambiguity has accompanied the evolution of implied external competences. The debate did not come to a standstill with the introduction of Article 3(2) TFEU and, in contrast, has gained pace. The lack of a proper distinction between the existence of an external power and its possible exclusivity, and the inapt codification (in light of the intricate case law rulings) have contributed to an avalanche of grand chamber rulings by the CJEU since Lisbon. Especially, the scope of policy of external policies and the combination of exclusive competences in form of trade and common fisheries policies with shared competences such as environment or CFSP resulted in legal conflicts.

The divisions between Council and Member States, and Commission and European Parliament run deep because competences, as much as the choice of the legal basis, influence the standing of the EU as a global actor but at the same time limit the room of international action for the individual Member States or specific institutions. The Court ends up in an ambivalent situation of becoming the final arbiter in political conflicts and reaffirming its meticulous pre-Lisbon case law as decisive for the codification and interpretation post-Lisbon. Consequently, the Treaty can only be understood under the backdrop of the complex case law of the CJEU and will remain a focus to understand the competences divide and legal bases. The undergrowth of procedural rules and principles created through external relations case law require sincere cooperation and an interinstitutional agreement between all external actors.

VI. Sources and Further Reading

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[131] See also on this, PJ Kuijper 'Of "Mixity" and "Double-hatting", EU External Relations Law Explained', Inaugural Lecture (Amsterdam, Vossiuspers UvA, 2008) 8.

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