Draft 2nd edn. A.Ott, in RA Wessel and J.Larik, EU external relations law, forthcoming

3. EU External Competence

1 Central issues

- As indicated in the previous Chapters, the European Union possesses international 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 TFEU, 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. Second, 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. Article 216 TFEU remains a general competence for the EU to conclude international agreements, a concrete and substantive legal basis is still required in line with the principle of conferral (Article 5 TEU).
- 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 their interpretation. From the outset, the CJEU has played a decisive role as final arbiter between the institutional actors and Member States in establishing the specific EU competences and their respective scope. While the integrationist agenda is visible in the first rulings establishing the *ERTA* doctrine, the judges have been more careful in subsequent meticulous rulings on competences. These rulings have, on the one hand, contributed to the careful balancing of interests but also contributed to the complex web of competences and conditions for their use. These complexities have not diminished since the Lisbon codification
- The Court of Justice provides an integrationist and constitutional reading of the EU's exclusive external competence and applies an integrated centre of gravity test for CFSP and non-CFSP policies. The broad notion of external policies and the integrated application of the absorption theory contributes to the consolidation of EU action through legal acts and international agreements. Nevertheless, the judicial recognition of a political choice remaining in case of EU exclusive and shared competences enables the Union to opt for mixed agreements but can countervail this consolidation.

2. Current state of affairs in EU external competences

2.1 Treaty-making power of the European Union

As we will see in the following Chapter, 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 qcapacity 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 the *Costa v Enel* (1963)[3] and *ERTA* (1971) cases.[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.

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

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* Credits are due to Bruno De Witte, Rebecca Poort, Simona Popan, Jonah Thompson, and Yannick Weber for their valuable comments. The usual disclaimer applies.

[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, 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.

to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope.

2.2 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. These categories are *exclusive* competences (only the Union may act or empower the Member States), *shared* competences (the Union and the Member States may act together under specific conditions), and 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]

The codification of the treaty-making power and competences combined three aims of coherence, containment and clarification[7]: 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 potential competence creep by clarifying the competence division between the EU and its Member States;[8] and finally, the codification of important case law, and 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.[9]

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[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* (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] K St Clair Bradley, The exclusive competences of the European Union: Some random jottings, 173 (186) in S Garben and I Govaere (eds), *The division of competences between the EU and Member States revisited*, (Oxford, Hart Publishing, 2017).

[8] 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.

[9] 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-

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.[10] 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.[11] 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.[12] It takes the Court, nevertheless, five pages in the *Lugano* Convention Opinion to unravel the conditions of existence and especially exclusivity of competences.[13] 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 remains important to always return to the case law.

Opinion 1/03 (*Lugano*), 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.

This important distinction between the existence and nature of external competences, emphasised in the *Lugano Convention* case, 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

600/14 *Germany v Council* (*COTIF*), ECLI:EU:C:2017:935; Cases C-626/15 and C-659/16 (AMP Antarctique), ECLI:EU:C:2018:925.

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, 2006).

[10] 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, 'Competences: codification and contestation', 60; 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.

[11] 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.

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

[13] Opinion 1/03 (*Lugano*), ECLI:EU:C:2006:81, paras 114–133.

EU exclusive competence.[14] 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 [emphases added]

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.

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*.

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 only in two cases had an express mandate to conclude international agreements: in the Common Commercial Policy and the Association Policy. The *ERTA* doctrine extended the Union's treaty-making

[14] 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; ECLI:EU:C:1975:145; Opinion 1/76 (*European layer-up funds for inland waterway* vessels), ECLI:EU:C:1977:63.

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

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 in 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[15] 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.[16] 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.[17] 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'.[18] The first judgments on external competences (*ERTA* case, Opinion 1/76 and *Kramer* judgment)[19] 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 requiring the conclusion of international agreements with these third countries.[20] So could the Rhine navigation between some of the EU Member States only be effectively regulated by an

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[15] See, Schermers and Blokker, *International Institutional Law*, para 209.

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

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

[18] 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) 116–140.

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

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

international agreement, including the third state Switzerland as a Rhine riparian country.[21] 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.[22]

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, however, 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,[23] and the CJEU reaffirms itself in its decisive role as the final arbiter on competences.[24] 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.[25] This 'integrated' approach is

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[21] 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, *International Institutional Law*, para 631.

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

[23] See critically on this fine pattern of rules, B de Witte, 'Too Much Constitutional Law in The European Union's Foreign Relations?' in Cremona and de Witte.

[24] 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.

[25] 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.

displayed in the Opinion 1/13 (*Hague Convention*) which refers to the *Lugano* Convention Opinion (Opinion 1/03) and *ERTA* case, as if no codification had taken place.

Opinion 1/13 of the Court (*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).*

In addition to the critical reception the codification of the rules on existence and nature of a competence received by scholars,[26] 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.[27] 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.

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

[26] 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) 166–167; D Thym, 'Foreign Affairs' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional law*, 2nd edn (Oxford, Hart Publishing, 2011) 318.

[27] Claes and De Witte, 'Competences: codification and contestation', 56–60.

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.[28] 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 provisions explain.[29] 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 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

[28] Case C-24/20 *(Geneva Act)*, ECLI:EU:C:2022:404, para.99.
[29] See for example, Art 167 (3) TFEU.

form of concurrent or parallel competence.[30] 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.[31] 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.[32] 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'.[33]

Finally, the list of shared competences (Article 4(2) TFEU) are the 'principal areas' and constitute a non-exhaustive list.[34] This is emphasised by such missing competences as the Association and

[30] 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*), 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.

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

[32] 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, 2013) 21.

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

[34] Opinion 2/15 (*Singapore*), ECLI:EU:C:2016:992, Opinion of AG Sharpston, 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.

Neighbourhood Policy (Articles 217 TFEU and 8 TEU) and the flexibility clause under Article 352 TFEU.[35] 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).[36]

3. 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. This provision does not provide for a general treaty-making power but needs to be linked to a concrete legal basis in the substantive Union policies.[37] 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 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 (3.1 to 3.4) will address the four different alternatives laid down in Article 216(1) TFEU and explain them in greater detail.

3.1 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),

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[35] 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.

[36] Timmermans, 'CJEU Doctrines on Competences' 162; Claes and De Witte, 'Competences: codification and contestation', 56–57.

[37] M Cremona, 'External Relations and External competence of the European Union: The emergence of an integrated policy', in P Craig and G de Búrca (eds), *The Evolution of EU law* (Oxford University Press, 3rd edn 2021), 437; F Erlbacher, Art.216 para.4, in M Kellerbauer, M Klamert and J Tomkin, *The EU Treaties and the EU Treaties and the Charter of Fundamental rights: A commentary,* (Oxford University Press 2n edn 2024).

association policy (Article 217 TFEU) or development policy (Article 209(2) TFEU).[38] 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 on the basis of 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.'[39] 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.[40]

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.

Lastly, Article 219 TFEU needs to be singled out. This provision covers the conclusion of monetary agreements with third countries.[41] Similar to its 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 have to follow.

3.2 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

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

[39] 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.

[40] See also I Macleod, I Henry and S Hyett, *The External Relations of the European Communities*, 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.

[41] 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.

referred to in the Treaties'). The wording finds its origin in the reasoning applied in the *Open Skies* judgments.[42] 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.[43] 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.[44] 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.[45] 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.[46] The Draft agreement on a European Layers-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.[47] Therefore these objectives could not be established by establishing autonomous common rules in the internal sphere but only by integrating the third country of Switzerland and concluding a multilateral international agreement.

Opinion 1/76 of the Court *(European Laying-Up Fund*), ECLI:EU:C:1977:63, para 4 [emphasis added]

This is particularly so in all cases in which internal power has already been used in order 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*.

[42] 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.'

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

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

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

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

[47] Switzerland has been involved in the international organisation Central Commission for Navigation on the Rhine since 1920.

Article 216(1) TFEU refers to objectives in the Treaties and does not mention the purpose of attaining a specific Treaty objective.[48] 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).[49] In Opinion 2/92 (*OECD*), the Court explained that this relates to a situation where the conclusion of an international agreement is necessary in order to achieve Treaty objectives which cannot be attained by the adoption of secondary rules. [50]

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.[51] 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.[52] 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.[53] In later pre-Lisbon case law both aspects were even merged in the Court's argumentation.[54] 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.[55]

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[48] Macleod, Henry and Hyett, *The External Relations of the European Communities*, 51.

[49] Another comparable example is competition policy and the legal basis in Art 103 TFEU.

[50] Opinion 2/92 of the Court (*OECD*), ECLI:EU:C:1994:116, para 32.

[51] Craig, *The Lisbon Treaty,* 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.

[52] See in this regard, Schermers and Blokker, *International Institutional Law*, para 1754.

[53] 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

[54] See Opinion 2/92 of the Court (*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.

[55] 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.

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

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*.

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) …

3.3 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.[56] 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.'[57] 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.[58] This is clearly rebutted by, again, the *COTIF* case.

Case C-600/14 *Germany v Council* (*COTIF*) [2017] ECLI:EU:C:2017:935, para 50 [emphasis added]

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*.

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 rather, 'when its conclusion is provided in a legislative act of the Union.' This difference might be 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 covers a CFSP decision, a legally binding act that is not adopted based

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

[57] 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.

[58] On this point see, Castillo de la Torre, 'The Court of Justice and external competences after Lisbon', 140.

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).[59] 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.[60]

3.4 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 once again can 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 at 3.2, is also fulfilled.

3.5 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'.[61] It was used, before the relevant specific legal bases had been introduced into the Treaties, for financial instruments and bilateral agreements concerning third country aid and development policy.[62] The Court acknowledged a gap-filling function under very strict conditions[63] but denied that an *exclusive* power could be derived from it.[64] The role of this norm has further diminished and its limits are now clearly reflected in Article 352 TFEU:[65]

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[59] See for example, for the conclusion of financial framework partnership agreements and sectoral agreements Art 5 of the Commission Implementing Regulation 2021/2236 on the specific rules for implementing Regulation (EU) 2021/1529 of the European Parliament and of the Council establishing an Instrument for Pre-accession Assistance (IPA III), [2021] OJ L 450/10–20 or a facility agreement (Art 9) under the Regulation of 14 May 2024 on establishing the Reform and Growth Facility for the Western Balkans OJ L, 2024/1449, 24.5.2024.Another example is an international agreement to be concluded based on Article 141 of the Association Agreement with Moldova and Article 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.

[60] Art 131 of the EU Financial Regulation 2024/2509 OJ L, 2024/2509, 26.9.2024.

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

[62] 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.

[63] Opinion 2/94 of the Court (*ECHR*), ECLI:EU:C:1996:140, para 28–30.

[64] Opinion 1/94 of the Court (WTO), ECLI:EU:C:1994:384, para .

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

Article 352 TFEU [emphasis added]

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.

4. 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.

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 original exclusive on the basis of 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 exclusive 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.[66] 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).[67] 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.[68]

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

[66] See with reference to the decentralisation through Council Regulation 1/2003, Craig, *The Lisbon Treaty,* 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.

[67] On the reasons see, Craig, *The Lisbon Treaty,* 160.

[68] Joined Cases 3/76, 4/76 and 6/76 *Kramer and others*, ECLI:EU:C:1976:114, paras 44–45; Opinion 1/75, ECLI:EU:C:1975:145 1363.

situation, for instance, occurred when the Member States negotiated the multilateral Arms Trade Treaty (ATT) under the UN regime.[69] 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'.[70] However, the Court stressed that the decision to empower Member States is a political choice taken by Commission under Article 17 TEU in line with the Union's general interest.[71]

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 policies and the unity of the internal market.[72] 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 of these examples have been codified in Treaty law. This will be now analysed in greater detail.

4.1 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.'[73] 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 has to be interpreted more narrowly as the Union cannot

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[69] 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.

[70] 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.

[71] Case C-24/20 *Commission v Council (Geneva Act)*, ECLI:EU:C:2022:911 paras.102-104.

[72] 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 121–122.

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

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.[74]

4.2 Necessary to enable to exercise its internal competence

This condition of necessity is decisively connected to exclusivity in the pre-Lisbon case law. It can be traced back to the Opinion 1/76 (European Laying-up Fund). However, the Opinion remains vague whether it primarily focussed on the power to act, as discussed above at point 3.2, or also at the same time argued for exclusivity. The Court has upheld the latter interpretation since the WTO Opinion.[75] It appears that a higher threshold is required for exclusivity in such cases, often coined as an inextricable link between internal policy objectives and the conclusion of an international agreement.[76] In practice, no examples can be provided with the exemption of the unique situation in the Opinion 1/76 (European Laying-up Fund) in which the participation in the regional organisation on the Rhine navigation could be only achieved by including Switzerland in the agreement but where internal rules could not have achieved the aim. Also one step further, it also can be argued that the necessity test has no self-standing role in the question of exclusivity in relation to the other alternative covered in point 4.3. 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.[77]

4.3 Affecting common rules or altering their scope

Post-Lisbon this is the only condition the Court analysed in case of exclusive competences. 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.[82] 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 [emphases added]

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[74] G De Baere, 'External action', 807, in C Barnard and S Peers (eds), *European Union law*, 4th edn (Oxford, Oxford University Press, 2023); M Klamert, *The Principle of Loyalty in EU Law* (Oxford, Oxford University Press, 2017) 153.

[75] Opinion 1/94 (*WTO*), ECLI:EU:C:1994:384, OECD Opinion, para.32, see further A Rosas, EU external competence in the absence of internal rules, and the sleeping beauty: Opinion 1/76, p.103 in G Butler and R A Wessel, EU External relations law, The cases in context (Hart Publishing 2022).

[76] Klamert, Art.3 TFEU, para.21, in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Treaties and the Charter of Fundamental rights: A commentary*, (Oxford University Press 2n edn 2024).

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

[82] Opinion 1/03 (*Lugano Convention*), ECLI:EU:C:2006:81, paras 116–118, with reference to Opinion 2/91 of the Court (*ILO Convention*), ECLI:EU:C:1993:106.

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***.**

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.*

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;[83] 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 [emphases added]

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).

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

[83] 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.

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)

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.[84]

Joined cases C-626/15 and C-659/16 *AMP Antarctique*, ECLI:EU:C:2018:925

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.

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.[85]

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 are found in 'longhand' form in paragraph 74 of Opinion 1/13 (with reference to the *Lugano Opinion*, see above),[86] '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*.[87]

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.

[84] Joined Cases C-626/15 and C-659/16, *Commission v Council* (*AMP Antarctique*), ECLI:EU:C:2018:925.
[85] Opinion 3/15 (*Marrakesh Treaty*), ECLI:EU:C:2016:657, paras 105–107.
[86] Opinion 1/03 (*Lugano Convention*), ECLI:EU:C:2006:81, para 133.
[87] 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.

- 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 can only be secondary rules, as highlighted above.[88] Consequently common rules are not primary rules but secondary rules and also international agreements concluded by the Union.[89]

In the same ruling, Opinion 2/15 (Singapore), 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.[90] 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.[91] 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.[92] 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.[93] This assessment only changes if it concerns institutional norms which include dispute settlement provisions removing disputes from Member States' courts.[94] The limited scope argument is introduced by the Court as settled case law in 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.[95]

Article 2(2) TFEU

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

[88] Opinion 2/15 (*Singapore*), ECLI:EU:C:2017:376.
[89] See Klamert, Art.3 para.26, 2024 with reference to the Singapore Opinion, para.235.
[90] Ibid, paras 216–217.
[91] Opinion 1/94 (*WTO*), ECLI:EU:C:1994:384; Opinion 1/08 (*GATS*), ECLI:EU:C:2009:739.
[92] Opinion 1/94 (*WTO*), ECLI:EU:C:1994:384, para 67.
[93] Opinion 2/15 (*Singapore*), ECLI:EU:C:2017:376, para 276.
[94] Ibid, para 292.
[95] 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).

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.

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 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 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 lined to the need to preserve the integrity and functioning of the internal acquis.

5. 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 remain closely linked.[96] 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.[97] 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 intending to conclude a mixed agreement (see further Chapter 4).

5.1 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).[98] In addition, 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).

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

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

[97] 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'.

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

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 determining the correct legal basis for a EU legal measure: namely (1) that it is necessary to identify the *main aim* and *content* of the measure at hand; (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.[99]

Case C-180/20 *Commission v. Council* (*PCA Armenia*), ECLI:EU:C:2021:658

32 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 (judgment of 4 September 2018, Commission v Council (Agreement with Kazakhstan), C-244/17, EU:C:2018:662, paragraph 36 and the case-law cited).

33 In that regard, contrary to the submissions made in essence by the Council, and as the Advocate General observed in points 28 and 29 of his Opinion, it does not follow from the case-law of the Court that one of those criteria prevails over the other. Indeed, it is by having regard to all the objectively identifiable factors pertaining to one or to the other of those criteria that, in each specific case, the field covered by the act must be determined.

34 If examination of a European Union measure reveals that it pursues a twofold purpose 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. It is only exceptionally, where it is established that the measure simultaneously pursues a number of objectives or has several components that are inextricably linked, without one being incidental in relation to the other, that such a measure must be founded on the various corresponding legal bases (see, to that effect, judgment of 4 September 2018, Commission v Council (Agreement with Kazakhstan), C-244/17, EU:C:2018:662, paragraph 37 and the case-law cited). The use of two legal bases is not possible, however, where the procedures laid down for each legal basis are incompatible with one another (see, to that effect, judgment of 6 November 2008, Parliament v Council, C-155/07, EU:C:2008:605, paragraph 37).

5.1.1 Identifying the centre of gravity: an objective test amenable to legal review?

The legal basis follows the predominant 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.[101]

[99] 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) 210–211.

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

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.'[102] 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.'[103]

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 or legal 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 have become even more visible in recent, more complex international agreements. While the EU cooperates with third countries in sectoral agreements (on fisheries, air transport or energy) with a specific aim and limited purpose, 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.[104] In these agreements, the legislator or treaty-making institutions can consider several legal bases. Also the concept of strategic autonomy and the EU's 'geopolitical awakening' have broadened the objectives of classical unilateral trade instruments into tools to achieve EU security aims and foreign policy aims, as exemplified by the Anti-coercion instrument or the foreign direct investment screening regulation.[105] Article 21 TEU might be a sufficient link to broaden the EU's classical unilateral external instruments into versatile instruments but at the same time this practice emphasises the underlying political component of the choice of a legal basis, meaning that the choice of legal basis is influenced by political considerations

5.1.2 Several legal bases and compatibility of procedures

Exceptionally two or more legal bases for a legislative act or an international agreement can be chosen if several objectives are inseparately linked without being one secondary and indirect in relation to the other.[106] In such a case, the legal procedures of these two or more legal bases have to be compatible. This compatibility is assessed on the basis of the respective legal bases in Treaty norms and the procedures indicated in Article 218(6) and (8) TFEU.[107] These norms determine the voting procedure

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[102] 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, (Brill Nijhoff Leiden, 2004) 156–158.

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

[104] 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.

[105] See further: F Hoffmeister, 'Strategic autonomy in the European Union's external relations law', *Common Market Law Review* 2023, 667 and V Szep, 'The legislative history of the EU's anti-coercion instrument', *ERA Forum* 2024, 127-139.

[106] *Philippines*, para.34.

[107] Case C-130/10 *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.

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, unclear whether both procedural conditions have to 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 intergovernmental and supranational pillar. This was prohibited by reference to Article 47 TEU (pre-Lisbon) and the supranational pillar took precedence over the intergovernmental one. 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.[108] However, on the question of when the procedures are incompatible in other situations, the Court has not always been consistent.[109] 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,[110] a later judgment accepted this 'inconsistency' as long as the Council would act unanimously.[111]

In the *Smart Sanctions* case, a grand chamber ruling, the Court for the first time addressed the question of procedures involving CFSP and TFEU legal bases under the current TFEU and TEU for a unilateral act and concluded on their incompatibility.[112] 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 to unilateral instruments, for international agreements Article 218(6) TFEU reveals one treaty-making procedure – 'a single procedure of general application'[113] for TEU and TFEU legal bases. 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 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 (see further below).

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

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

110 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.

111 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.

112 Case C-130/10 *Smart Sanctions*, ECLI:EU:C:2012:472.

113 *Kazakhstan*, para.21; *Armenia*, para.27.

5.2 The centre of gravity test and the scope of external 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.[114] The preamble forms a decisive factor in determining the predominant aim and purpose of a legislative act. However, in the case of bilateral and multilateral agreements, the provisions and preamble often indicate multiple objectives.

In addition to the aim's and content's role in identifying the predominant legal basis, experts have argued that the context of the measure is increasingly taken into account by the Court.[116] Some opinions of Advocate Generals inspire this view,[117] but the Court has only exceptionally referred explicitly to the context criterion.[118] Generally speaking, the context or background has clearly played a determinant role in a few rulings, but in different situations, namely for an agreement to explain the background of the international agreement and its existence,[119] to explain the scope of the EU development policy[120] and when decisions are at stake within a broader framework of an international agreement or international body.[121] So, context could be related to defining the scope of an EU policy or to linking the legal basis of an act to the implementing or related act at stake. This remains a case-by-case approach.

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. To establish the centre of gravity or identify whether several interlinked objectives are pursued in an international agreement, the scope of individual policies forms a determinant factor. However, as Cremona has emphasized that in contrast to internal EU policies, EU external policies are more open-ended.[122] Also the chapeau clause in Article 21 TEU reinforces that other aims can be pursued, so allowing for interlinked objectives. The Court's case law has carved out the general line is that EU policies can cover aims and

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

[116] See for this argument: P Van Elsuwege, Judicial review and the Common Foreign and Security Policy: Limits to the gap-filling role of the Court of Justice, CMLRev 2021, 1731, 1743; M Chamon, The use of Art.122 TFEU, Study for the EP 2023, https://www.europarl.europa.eu/RegData/etudes/STUD/2023/753307/IPOL_STU(2023)753307_EN.pdf; M Dougan, 'EU competences in an age of complexity and crisis: Challenges and tensions in the system of attributed powers', *Common Market Law Review* 2024, 98-99; contra or at least not seeing it a separate and standing criteria or rule: A Dashwood, 'EU acts and Member States acts in the negotiation, conclusion, and implementation of international agreements', 189, 210, in M Cremona and C Kilpatrick (eds) *EU legal acts* (Oxford University Press, 2018).

[117] Especially AG Kokott in C-94/03, para.32; ECLI:EU:C:2005:308; Commission v Council (*Rotterdam Convention)*; Joined cases C-626/15 and C-659/16, ECLI:EU:C:2018:362, para.76; AG Pitruzzella C-180/20 *(Armenia),* para.30.

[118] See, however, Joined cases C-626/15 and C-659/16, ECLI:EU:C:2018:925, para.76; C-656/11 UK v Council, ECLI:EU:C:2014, 97, para.50; Case C-431/11 UK v Council, ECLI:EU:C:2013:589, para.48; Case C-81/13 UK v Council, ECLI:EU:C:2014:2449, para.38 ('context may be relevant').

[119] In *Tanzania* the CFSP Atalanta action determined that the Pirate Transfer agreements were CFSP based.

[120] In the *Philippines* case it was relevant to justify the broad notion of the EU development policy reference to the European Consensus on development and EU secondary law was made, paras.42-43-

[121] UK cases on the coordination of social security systems with Switzerland, the EEA countries and Turkey. Antarctica case on a decision approving the submission of a reflection paper to an international body, Cases C-626 and C-659/16.

[122] See on this M Cremona, 'Structural principles and their role in EU external relations law', 5-6, in M Cremona (ed) *Structural principles in EU external relations law* (Oxford, Bloomsbury Publisher, 2018).

objectives from other policies as long as these other policies do not change the characterization of the agreement and the other objectives do not include specific or distinct obligations.

Furthermore, the Court has provided directions when it comes to the scope of the EU trade, development and association policies. In the *Daiichi Sankyo* case concerning the trade policy, 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.'[123] Also other objectives, such as sustainable development, can be covered by the trade policy norm if the provisions in the international agreement are not intended 'to regulate the levels of social and environmental protection in the Parties' respective territory'.[124]

In the development policy and the *Philippines* case, the Court finetuned the centre of gravity test by focussing on the content of the non-development norms. So addressing the question whether other objectives tip the balance to another objective that cannot be absorbed by the development policy. Primarily, development, endowed with broad objectives[125] or a broad 'notion'[126] incorporates other objectives under Article 21 TEU and can absorb them as long as these other policies and their norms in the international agreement do not contain 'obligations so extensive that they constitute distinct objectives that neither are secondary nor indirect to the objectives of development cooperation'[127] (see Chapter 8).

In this *Philippines* case the Council decided to add legal bases for migration, environment and transport to the development and trade legal basis of 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. As such, the Commission specifically relied on the pre-Lisbon case *Portugal v Council* (Case C-268/94) on the legal basis for a development cooperation agreement with India.

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

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*

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

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

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

[126] Case C-377/12 *Commission v Council* (*PCA Philippines*), ECLI:EU:C:2014:1903, para 43. The Advocate General Mengozzi defined it as multi-facetted, see, Case C-377/12 (*PCA Philippines*), Opinion of AG Mengozzi ECLI:EU:C:2014:29, para 40. The court speaks for the first time of a parallel competence in Case C-15/22 *Finanzamt G*, ECLI:EU:C:2023:636**,** para.55.

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

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.

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

Case C-377/12 *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 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 the 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.'[128] 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 specific and extensive legal obligations that constitute distinct objectives separate from development policy. Accordingly, individual provisions will be investigated for their legal content. Norms have to prove that they create direct and distinct obligations to justify a separate legal basis.

These findings can be also extended to the association policy. Association Agreements comprehensively cover cooperation throughout all EU policies and Article 217 TFEU can absorb other legal bases in line with the *Philippines* case.[129]

Case C-479/21PPU (Governor of Colverhill Prison)

63 It should be added that a requirement to add a specific legal basis under Title V of Part Three of the TFEU to the legal bases of the provisions of an association agreement which fall under the

[128] Case C-377/12 *Philippines*, ECLI:EU:C:2014:1903, para 59.

[129] Case C-479/21 *PPU (Governor of Colverhill Prison)*, ECLI:EU:C:2021:929, paras.64-65.

EU competence covered by that title also cannot be inferred from the Court's case-law according to which, exceptionally, measures which simultaneously pursue a number of objectives or have several components that are inextricably linked, without one's being incidental in relation to the other, must be founded on the various corresponding legal bases (see, to that effect, judgment of 2 September 2021, *Commission* v *Council (Agreement with Armenia)*, C-180/20, EU:C:2021:658, paragraph 34 and the case-law cited).

64 In that regard, the Court has held, in relation to development cooperation agreements, that to require that such an agreement also be based on a provision other than its generic legal basis whenever the agreement touches on a specific area would, in practice, be liable to render the competence and procedure set out in that legal basis devoid of substance (see, to that effect, judgment of 2 September 2021, *Commission* v *Council (Agreement with Armenia)*, C-180/20, EU:C:2021:658, paragraph 51 and the case-law cited).6 Those considerations also apply *mutatis mutandis* to association agreements whose objectives are designed in a broad manner, in the sense that the measures required in order to pursue those objectives concern a wide range of areas of EU competence.

Another comparable broad policy is the CFSP, which is unique due to its intergovernmental set-up and the non-contamination clause of Article 40 TEU and Article 24 TEU, emphasising the otherness[130] of CFSP and non-CFSP policies. In practice, the inclusion of a CFSP legal base in international agreements is inconsistent. A number of TFEU-based horizontal agreements (association agreements and framework partnership and cooperation agreements) have a CFSP legal basis next to an association policy, development and common commercial policy, other horizontal agreements exclude a CFSP legal basis.[131] For instance, the Association Agreement with Central America includes no CFSP legal base next to Article 217 TFEU but covers political dialogue in provisions Articles 12 to 16. In contrast, the Association Agreement with Kosovo, which covers also political dialogue (Articles 11–15) is based on Articles 31, 37 TEU and Article 217 TFEU.[132] The latter practice is enabled with the compatible voting procedure, the CFSP and association agreement legal basis require unanimous voting (Article 218 (8) subparagraph two). The participation of the EP remains the same despite including a CFSP legal base because it does not concern a CFSP-only agreement. 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[133] 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,

[130] P J Cardwell, 'On 'ring-fencing' the Common Foreign and Security Policy in the legal order of the European Union', Northern Ireland Legal Quarterly, 2013, 445;

[131] See the overview with P Van Elsuwege and G Van der Loo, 'Legal basis litigation in relation to international agreements: *Commission* v *Council* (Enhanced Partnership and Cooperation Agreement with Kazakhstan)' *Common Market Law Review* 2019, 1333, 1348-1349.

[132] 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.

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

small and light arms and combatting terrorism.[134] The Council decision on the signing of the agreement, however, does not refer to Articles 31 and 37 TEU as legal bases.[135] This is contrary to the Framework agreements with Afghanistan or New Zealand which include similar political provisions and a reference to Article 37 TEU.[136]

The reasoning behind such a flexibility (or inconsistency) by the Council is more political than legal. The Council adds legal bases for procedural purposes and to address Member States' concerns about competences. Voting inconsistencies in the Council are overcome by voting unanimously, as the example of the accession of the EU the Treaty of Amity and Cooperation in Southeast Asia demonstrates.[137] The act refers to Articles 37 and 31 (1) TEU as well as Articles 209 and 212 in conjunction with Articles 218(6) and 218(8), second subparagraph TFEU.[138] This indicated that the Council held the position that the differences in the voting could be reconciled by voting unanimously.[139]

The Commission has criticised these practices 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.[143] The Commission tested in selected cases the legality of adding a CFSP legal basis. In the case of the Association Agreement with Ukraine this could not be done

[134] 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.

[135] 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.

[136] Council Decision 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 L 67/1-2; Council Decision 2022/1007(EU) on the conclusion on behalf of the Union of the Partnership Agreement on Relations and Cooperation between the European Union and its Member States, of the one part, and New Zealand, of the other part, [2022], OJ L 171/1–2.

[137] It refers to Articles 37 and 31(1) TEU as well as Articles 209 and 212 in conjunction with Articles 218(6) and 218(8), second subparagraph TFEU, 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, 'Use of CFSP legal basis for EU international agreements', 403-408.

[138] Naert, 'Use of CFSP legal basis for EU international agreements', 403-408.

[139] See, however, the Cooperation agreement with Afghanistan where Article 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.

[143] 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 Article 218 TFEU to intergovernmental unanimity.

for political reasons but its legal bases remained highly problematic. The authorisation to sign of the agreement was based on three Council Decisions.[144] The first Council Decision found its legal basis in Articles 31 (1), and 37 TEU for the CFSP aspects,[145] the second Council Decision is founded on Article 217 TFEU but excludes rights under Article 17 Association Agreement with Ukraine which covers equal treatment of workers.[146] This provision was adopted by a separate third Council Decision finding its legal basis in Article 79 (2) (b).[147] 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.[148] These Protocols explain the opt-out of these countries and allow them to decide for themselves whether they wish to be bound by this provision of the agreement.[149] 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 contrast, the Court addressed in the *Kazakhstan* and *Armenia* rulings the practice of adding a CFSP legal basis in bilateral agreements to the broad development and trade policies. The judges emphasised a quantitative and qualitative test based on their findings in the *Philippines* case. In the first case, 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 Arts 37 and 31(1) TEU and Arts 91, 100(2) and 207 and 209 TFEU (see also Chapter 9).[150] Whereas the Commission did not

[144] This number is excluding the separate Council decision approving the conclusion of Euratom based on Article 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 L 278/8 (Council Decision approving the conclusion for Euratom).

[145] 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.

[146] Council Decision (EU) 2014/668 of 23 June 2014, 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.

[147] 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.

[148] 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', 52.

[149] 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, Dashwood, 'EU and Member State Acts in the negotiation, conclusion, and implementation of International Agreements', 217.

[150] 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,

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 has to be assessed to determine the voting procedure for paragraph 9.[151] In the second case *Armenia*, the Council, after its defeat, decided to separate the CFSP provisions and enact two decisions, one decision based on the TFEU legal bases and the other one on the CFSP legal base.[152]

The rulings confirm the centre of gravity for multi-aimed or horizontal agreements. These agreements do not require legal bases of other 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 and are not distinct enough to justify a separate CFSP legal base. However, the qualitative condition is not unproblematic because CFSP-related provisions cannot qua nature determine concrete obligations in detail. Also Articles 40 TEU is not mentioned in these disputes and is overall marginalized and even made redundant.[156]

P Van Elsuwege, 'Judicial Review and the Common Foreign and Security Policy: Limits to the gap-filling role of the Court of Justice, *Common Market Law Review* 2021, 1743

In other words, the Court does not proceed from a fundamental division between CFSP and non-CFSP competences, but horizontally applies general constitutional principles (the EU's institutional balance) and mechanisms (the centre of gravity test) to tackle conflicts in relation to the choice of legal basis in the field of EU external action.

In result, these judgments confirm the normalisation of the CFSP[159] and the unified nature of EU legal order.[160]

KS and KD Joined Cases C-29/22 P and C-44/22 P

68 Accordingly, it must be held, as the Advocate General observed in points 77, 79 and 80 of her Opinion, that the inclusion of the CFSP in the EU constitutional framework means that the basic principles of the EU legal order also apply in the context of that policy.

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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.

151 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 Article 48 TFEU and adopted in the context of an association agreement was intended not to supplement or amend the institutional framework of that agreement.

152 Case C-180/20 *Commission v. Council* (*PCA Armenia*), ECLI:EU:C:2021:658.

156 I Bosse-Platière, 'À propos de la mise en oeuvre de l'Accord de partenariat et de coopération (APC) avec le Kazakhstan, la Cour confirme la banalisation du contentieux de la base juridique PESC', *RTDEur* 2019, 119-123.

159 RA Wessel, 'Legality in EU Common Foreign and Security Policy: The Choice of the Appropriate Legal Basis', in C. Kilpatrick and J. Scott (eds.), *Contemporary Challenges to EU Legality* (Collected Courses of the Academy of European Law) (Oxford University Press, 2021), 71.

160 Van Elsuwege, *Common Market Law Review* 2021, 1744.

72 Furthermore, it must be recalled that the principles of conferral and of institutional balance also apply in the area of the CFSP.

The threshold to add a CFSP legal basis has become very high. The practice of including CFSP legal bases in horizontal agreements could, possibly, exceptionally prevail if an agreement fulfils the quantitative and qualitative conditions set out above (see further Chapter 9).[161] The Council could possibly either not execute the CFSP competence or could insist on mixed agreements that secure the participation of Member States and can introduce an intergovernmental common accord to secure that all Member States ratify the international agreement.[163]

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.

The judicial consolidation of EU external action in the field of competences and legal basis is, however, not without flaws. While the Court has reinforced its reading of exclusive competences since *ERTA*, engaged in a broad interpretation of the scope of policies and an integrated reading of the centre of gravity, the Court allows for the political choice of mixed agreements in cases of shared competences.[165] And often, the Council will choose in the case of facultative mixity for a mixed agreement in place of an EU-only agreement and so far no constitutional limits have been found to

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[161] 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.

[163] The Court does not prohibit as long as forms no hybrid and merged decision with the Decision under Art.218 (8) and it does not form a requirement when it concerns the EU competences, see the Istanbul Convention Opinion.

[165] C-600/14 *Germany* v *Council* (*COTIF I),* paragraph 66), and C-626/15 and C-659/16 , *Commission* v *Council (Antarctic MPAs*), EU:C:2018:925, paragraph 126.

restrain this choice.[166] So, in practice, the signing of the Enhanced Partnership and Cooperation Agreement with the Kyrgyz Republic was based on Articles 207 and 209 TFEU. In light of the above case law and in light of the exclusive and parallel competence nature of these policy areas, the Commission argued for an EU only agreement.[167] This was rebutted by the Council and the international agreement was signed in 2024 as a mixed agreement.[168]

7. 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'[169] 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.[170] And indeed, the so-called *ERTA* effect can contribute to the Member States' unwillingness to legislate internally,[171] 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

[166] See further: M Chamon, 'Constitutional limits to the political choice for mixity' in E Neframi and M Gatti (eds), *Constitutional issues of EU external relations law* (Baden-Baden, Nomos, 2018) 137-165; G Kuebek, *EU Trade and Investment treaty-making post-Lisbon: Moving beyond mixity*, (Oxford, Hart, 2024), 163.
[167] 'It is noted that the Agreement does not include areas falling within the competence of the Member States, and therefore does not require the EU Member States to become a Party to this Agreement.' Proposal for a Council Decision on the signing, on behalf of the European Union, of the Enhanced Partnership and Cooperation Agreement between the European Union, of the one part, and the Kyrgyz Republic, of the other part, Brussels, 13.6.2022 COM(2022) 276 final.
[168] And see the Council Decision on signing this agreement, 9 February 2024, 10659/22.
[169] Joined Cases C-626/15 and C-659/16 *Commission v Council* (*AMP Antarctique*), Opinion of AG Kokott ECLI:EU:C:2018:362, para 6.
[170] Case 22/70 *Commission v Council* (*ERTA*), Opinion of AG Dutheillet de Lamothe, ECLI:EU:C:1971:23, paras 291–292.
[171] See also on this, PJ Kuijper 'Of "Mixity" and "Double-hatting", EU External Relations Law Explained', Inaugural Lecture (Amsterdam, Vossiuspers UvA, 2008) 8.

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 intricate case law of the CJEU and will remain a focus to understand the competences divide and legal bases.

The broad assessment of exclusive competences and integrated application of the absorption principle or centre of gravity test, allow the broad external policies of trade, development and association policies to absorb other legal bases and therefore could infuse more unity in the EU's external action. In practice, however, still the political choice of Council and Member States interferes to insist on mixity in international agreements covering EU shared competences.

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