

Strengthening the EU's actorness in view of global developments – legal competences and external representation

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TIME

Where Did Europe Go?

The E.U. needs to decide if it wants to be a world power

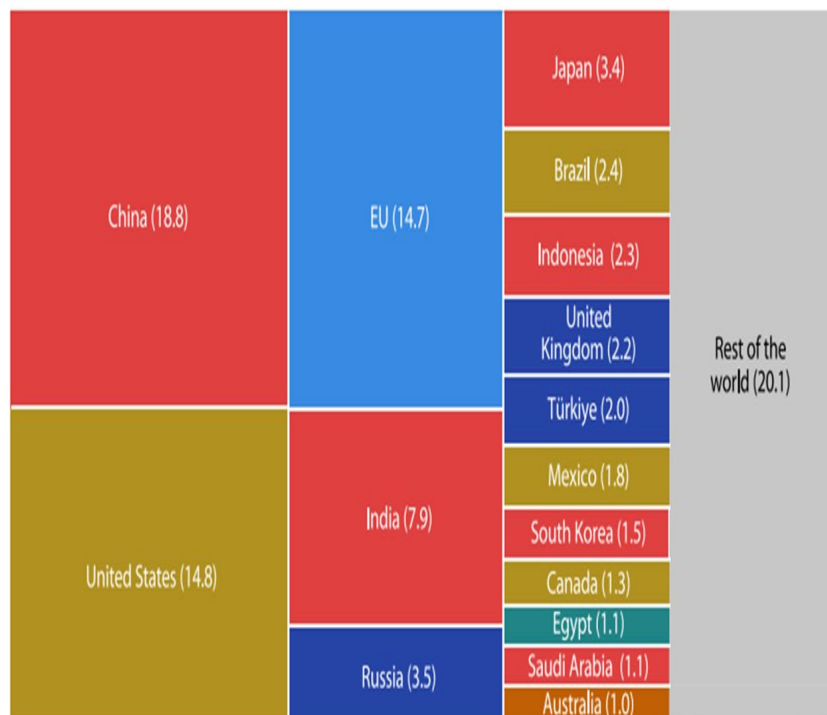
BY SIMON ROBINSON



The EU: A trade and development aid giant but a political-military dwarf?

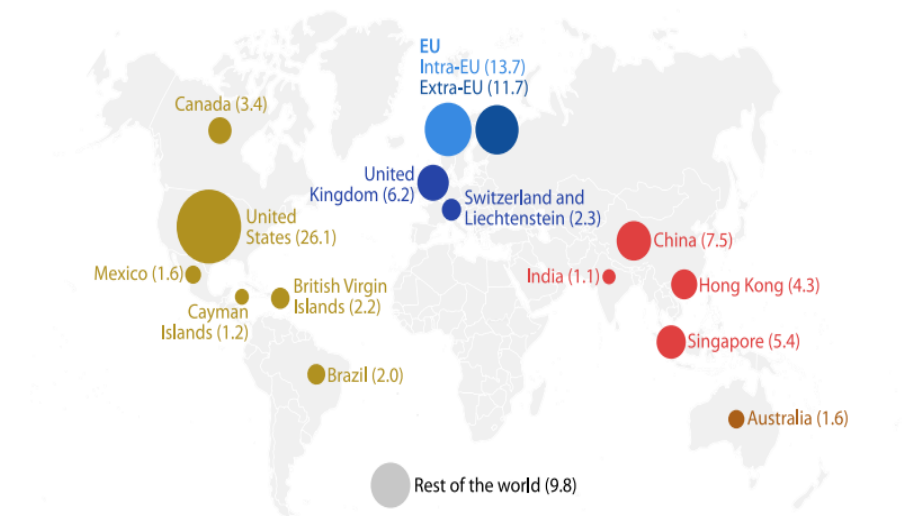
World gross domestic product (GDP)

(%, based on international USD, 2023)



Stocks of inward foreign direct investment

(% of world stocks, 2023)



Note: excluding investments of special purpose entities. Data are presented for the EU and non-EU countries with a share of at least 1.0% of world inward FDI stocks.

Source: Eurostat (online data code: [bop_fdi6_pos](#)) and [UNCTAD](#) (FDI/MNE database)

The EU as a global actor and power?

- The EU's autonomy and strategic autonomy

Von der Leyen on Trump: EU will be 'pragmatic' but protect its interests

Story by Jorge Liboreiro • 2d • 5 min read



WORLD > NEWS

France Rejects US Dependence In Defence, Calls For European Autonomy

22/01/2025 04:10 PM



EU actorness: competences and external representation

The EU as an global actor: EU international legal personality

Can the EU act internationally?

with states

With IOs

Can the EU act alone (without Member States)?

Question of EU competences and legal basis

EU actors acting on behalf of the Union (external representation)

Which EU actor acts on behalf of the Union?

Determined by the form of action, EU competences and policies

Outline

- Consolidation of competence: the friction between principles and road to codification
- Categories of competences
- How it started and the look back: The ERTA judgment
- Codification and criticism
- External representation and its different forms of action

A mix of recent examples

COUNCIL DECISION (EU) 2024/...

of ...

**on the conclusion, on behalf of the European Union,
of the United Nations Convention on Transparency
in Treaty-based Investor-State Arbitration**

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(4), first subparagraph, in conjunction with Article 218(6), second subparagraph, point (a), thereof,

Having regard to the proposal from the European Commission,

Having regard to the consent of the European Parliament¹,

Available languages: English

STATEMENT | Sep 26, 2024 | Brussels | 1 min read

Joint Statement by the European Union,
Australia, Canada, France, Germany, Italy,
Japan, Qatar, Saudi Arabia, United Arab
Emirates, the United Kingdom, the United
States

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Related topics

The situation between Lebanon and Israel since October 8th, 2023 is intolerable and presents an unacceptable risk of a broader regional escalation. This is in nobody's interest, neither of the people of Israel nor of the people of Lebanon.

Home > News >

Joint Statement by High Representative/Vice-President Kaja Kallas and Commissioner Marta Kos on Georgia's Foreign Agents Registration Act

NEWS ARTICLE | 31 May 2025 | Directorate-General for Enlargement and Eastern Neighbourhood | 1 min read

Joint Statement by High
Representative/Vice-President Kaja
Kallas and Commissioner Marta Kos on
Georgia's Foreign Agents Registration
Act

Council Decision (EU) 2023/2861 of 20 July 2023 on the signing, on behalf of the European Union, and provisional application of the Partnership Agreement between the European Union and its Member States, of the one part, and the Members of the Organisation of African, Caribbean and Pacific States, of the other part

ST/8371/2023/DCL/1

Consolidation and contestation: Two questions

Why do competences matter ?

Why does so much case law on EU competences exist?

The dilemma of the autonomous legal order

The friction between the conferral of powers and attaining the objectives of the EU (Art.5 TEU and 216 (1) TFEU)

Treaty text: conferral of powers/attaining the EU's objectives

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.

Article 216 TFEU

1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or **where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties**, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

Article 4 TEU

1. In accordance with Article 5, **competences not conferred upon the Union in the Treaties remain with the Member States.**

3. Pursuant to the **principle of sincere cooperation**, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take **any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.**

The Member States shall facilitate the **achievement of the Union's tasks** and refrain from any measure which could jeopardise the attainment of the Union's objectives.

Consolidation of competences: the road to codification by Lisbon (TEU/TFEU)

The road to the Lisbon Treaty competence codification

Delimitation of competences a top-priority: Competence catalogue

Growing amount of case law on existence, scope and nature of competences

Laeken Declaration 2001: To clarify, simplify and adjust the division of competences (see next slide)

- By defining competences forestalling creeping competences
- No Kompetenz-Kompetenz: attribution of competences, Art.5(1) TEU)

Implemented by Art.216 TFEU (see previous slides) and Art.2 to 6 TFEU (competence catalogue)

Art.216 TFEU (treaty-making power) and Art.3 (2) TFEU (exclusive competences)

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.**

Art.3 (2) TFEU: The Union shall also have exclusive competence for the conclusion of an international agreement when **its conclusion is provided for in a legislative act of the Union** or is necessary to enable the Union to exercise its internal competence, or **insofar as its conclusion may affect common rules or alter their scope.**

Categories of competences

Categories of competences

Competences

Exclusive

Shared

Complementary
or supporting

*CFSP
competence
sui
generis*

Categories of competences

Competences, Art.2 TFEU

Exclusive, Art.3 TFEU

- *A priori* exclusive (monetary policy countries with Euro currency, common commercial policy)
- By certain condition (Art.3 (2) TFEU)
- By *preemption(?)* (Art.2 (2) TFEU)

Shared, Art.4 TFEU

- Shared competences (internal market, environment i.a.)
- Parallel competences (development), pre-emption does not apply
- Not exhaustive Art.4 (1) TFEU

Complementary, Art.6 TFEU

- Harmonisation excluded
- Tourism, protection and improvement of public health, education

CFSP competence
sui generis,
Art.2(4) TFEU
*(pre-emption
does not apply)*

How it started and the look back: the ERTA case



A supranational entity and not an international organisation

- Art 5 TEU: attribution of competence
- When is a competence attributed?
 - explicit conferral
 - implicit (implied) conferral?

ICJ:

IN the *Reparation for Injuries* case⁶⁸ the Court said that: “Under international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”⁶⁹⁻⁷⁰

EU and Art.5 (2) TEU: 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**

ERTA or AETR case 1971: a constitutional moment in EU external relations law



Governmental & Military

AETR

means

European Agreement Concerning
the Work of Crews of Vehicles
Engaged in International Road
Transport

by acronyminslang.com

1971 Question in the ERTA case

- Can the EEC only act in EU external relations and conclude international agreement, conduct negotiations in the policy field of explicit external competences (trade and association) or also in an area which is covered by an internal competence (competition and transport)?

Example transport policy (ERTA case): solely internal competence

Article 90 TFEU (ex Article 70 TEC)

The **objectives of the Treaties** shall, in matters governed by this Title, be pursued **within the framework of a common transport policy**.

Article 91 TFEU (ex Article 71 TEC)

1. For the purpose of implementing Article 90, and taking into account the distinctive features of transport, **the European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, lay down:**

(a) **common 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;**

.....

ERTA: When does the EU have treaty-making power (and when are Member States excluded from acting)?

- Member States negotiate the ERTA (road transport) agreement with third countries, they discussed it **within the Council** with each other and agreed on a common negotiations position outside the EU framework. **At the same time already EU law adopted on this matter.**



ERTA doctrine: Two questions – treaty-making power and exclusive power

ERTA reasoning

- Effet utile + Art.4 (30 TEU principle applied)
- Parallelism of internal-external competences

1st question (existence of a competence)

- Can Treaty-making power (legal basis for action) derive only from express powers or can be based on other norms (primary and secondary law)?

2nd question (nature and scope of competence)

- Is this competence exclusive and MS prevented from acting?

ERTA doctrine (2nd question addressing exclusivity)

Common rules adopted - ERTA judgment (para.17 of judgment)

- Example: Common transport policy

And adoption of secondary law/harmonisation - ERTA judgment (para.28)

ERTA codification in the Treaty: Art.216 (1) TFEU and Art.3 (2) TFEU

Existence of competence: Art.216 (1) TFEU

- **1. Treaty provides for it**
 - Examples: Art.207 TFEU CCP, Art.191 (4) TFEU (environment), Art.78 (2) g TFEU (AFSJ)
- **2. Where conclusion of an agreement is necessary in order to to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties** (see ERTA case or COTIF I case)
- **3. Provided for in a legally binding act** (“empowering institutions to negotiate with third countries”), WTO opinion (1/94)
 - Example: legislation containing clauses in relation to third-country nationals or power transferred to institutions to negotiate with non-member countries
- **4. Likely to affect common rules or alter their scope (see Art. 3(2) (3.alternative))**

Is the competence exclusive (nature and scope of competence?)

- **A priori exclusive: Art.3.1 TFEU**
 - Customs union
 - Competition policy internal market
 - Monetary policy
 - Conservation of marine biological resources under the common fisheries policy
 - Common commercial policy
- **General conditions. Art.3.2 TFEU**
 - 1. Its conclusion is provided for in legislative act of the Union
 - 2. Necessary to enable the Union to exercise its internal competence
 - 3. Its conclusion may affect common rules or alter their scope

Codification and case law: Existence and nature of competence

Existence of EU external competence

- Explicit competence (Art.216 (1))
- Implied (implicit) competence
 - Parallelism between external/internal competence
 - ERTA doctrine and confirmed by COTIF I case (post-Lisbon)

Nature and scope of competence

- General scope: defined by Art.3 (2) TFEU
- A priori competence and its scope: such as CCP (Art.207 TFEU): Daiichi Sankyo case

Criticism: Lack of clarity and unfinished job?

Missing competences

- Association policy, Art.217 TFEU
- Combatting discrimination, Art.19 TFEU,

Hybrid policies (social policy, employment and economic policy)

- Social policy split up into three categories of competences, depending on the concrete norm (Art.151 -161 TFEU)

CFSP as a unique policy (Art.24 TEU)

Role of pre-emption, Art.2(2) TFEU in relations to exclusivity Art.3(2) TFEU

Remaining conflicts and resistance by Member States

Scope of (exclusive)competences

Implied (external) competence

Exclusive competence: How to define 'may affect common rules' in Art.3 (2) TFEU

Interpretation of Art.3(2) TFEU: “may affect common rules or alter their scope”

Less than complete harmonisation but more than minimum harmonisation

- Minimum harmonisation defined in case law as provisions of EU law and international convention in question lay down only minimum requirements

(Broadcasters, Case C-114/12), Marrakesh Treaty Opinion 3/15) confirmed by Singapore Opinion (2/15)

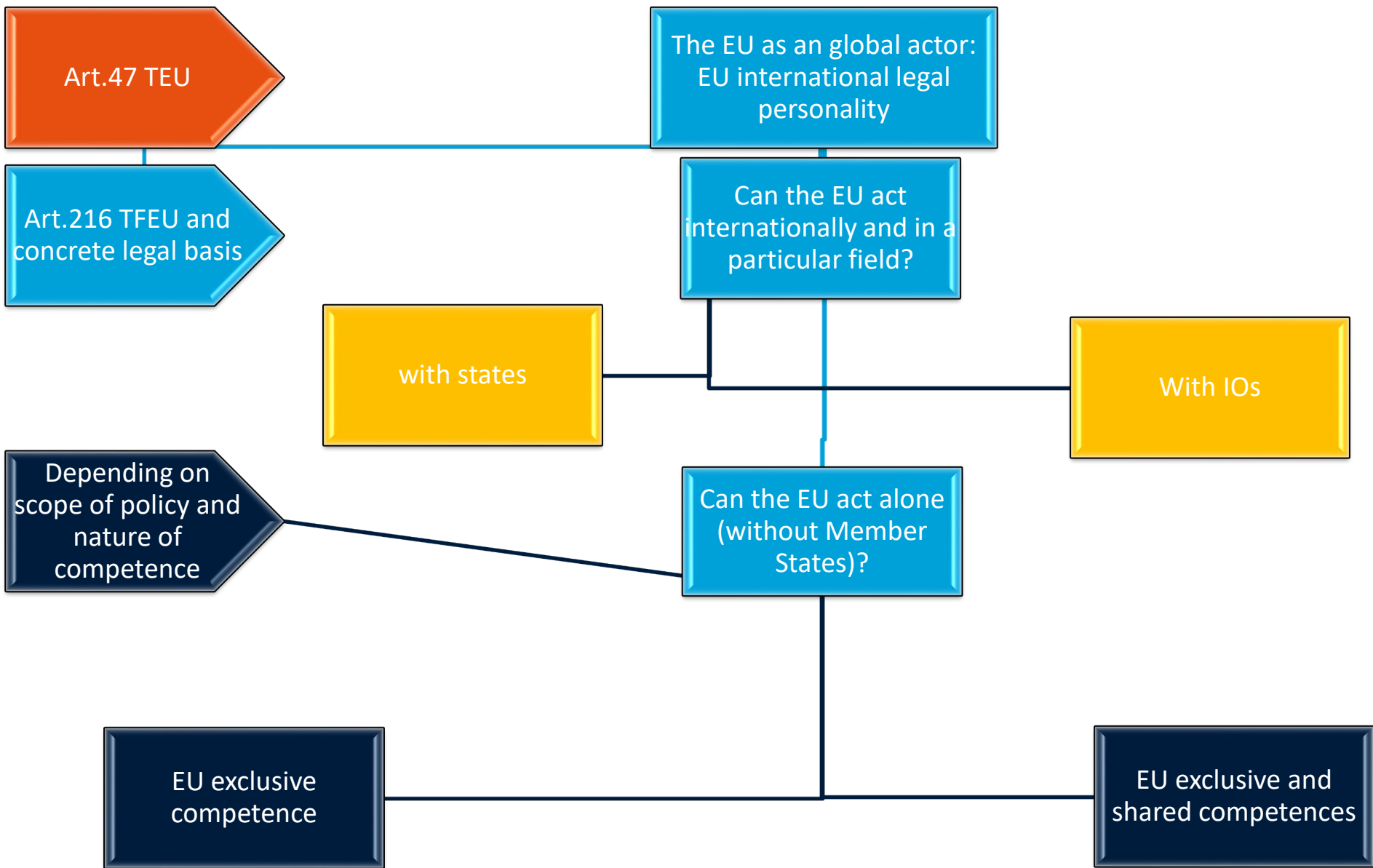
A risk assessment that common EU rules are affected by MS internat.commitments or whether the risk exists that EU rules are altered by those MSs commitments (broad assessment, future developments, meaning, scope)



Comparison between the EU's envisaged internat. agreement and existing or foreseeable EU secondary rules



Sufficient if area of international agreement is largely covered by EU rules



Conclusions competences

The politics of competences

- Competences and legal basis disputes are power struggles between institutions and EU v. MS (mixed agreements, see lecture Prof Chamon)

Failed competence clarification

- Failure by legal drafters and EU judges

Judicial attempts of consolidation

- Broad external powers v. sectoral internal powers
- Preference for one legal base and wide scope of express external competence and normalised CFSP competence

EU external representation: speaking with one voice?





Too many EU external actors and why ?

- Who acts on behalf of the EU externally?
- Which external actors are mentioned in the EU Treaties?
- Why do we have so many actors?



And what about these actors?



EU actors acting on behalf of the Union (external representation)

Which EU actor acts on behalf of the Union?

Determined by the form of action, EU competences and policies

Limited by Art.13(2) TEU, delegation of powers, and sincere cooperation (Art.4(3))

Example Treaty-making Art.218 TFEU

- Actors: Council and EP (except CFSP agreements information right)
- Supported by Com or High Representative
- Institutional balance determined by detailed Art.218 TFEU

EU non-treaties or informal arrangements



Example non-binding MoUs

- Art.218 TFEU? No
- Art.16 and 17 TEU but procedure?
- Practice and case law (MoU Switzerland case)
- Acting on behalf of the Union and policy-making (difference to administrative arrangements)
 - Non-CFSP policy field:
 - Com acts and endorsed by the Council
 - Practice: [pdf](#)
 - Problems: role of the EP, role of MS arrangements (EU-Turkey statement)

Other forms of actions: Conclusions, statements, decisions

- Actors
 - CFSP: HR, Council, President of the European Council
 - Non-CFSP: COM, Council
 - Other actors: EEAS, agencies, EP, ECB, Rotating presidency, Member States
- Provisions: Art.15 (6),16, 17, 18 (2), 26 (2), TEU

