

Call for Evidence questions on Subsidiarity, Proportionality, and Article 352 TFEU

Report on Article 352 TFEU ('flexibility clause')

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Introduction

This short paper will be circulated to the participants of the seminar for legal experts on the issues raised in the call for evidence as part of the evidence gathering process. It is provided as a handout to my presentation on the flexibility clause. The paper aims to i) introduce the relevant legal framework, ii) identify certain key legal issues, and identify areas and questions where legal consideration could be given to facilitate a wider discussion on the flexibility clause.

i) Legal Framework

The flexibility clause now inherent in Article 352 TFEU (former Article 235 EEC and then 308 EC) approaches its third decade of existence as an exceptional legislative tool. It provides that the powers specifically allocated to the EU may not prove to be adequate for the purpose of attaining the objectives expressly set by the Treaties. As such, to this day, the flexibility clause represents the most general power in the EU system of legislative competences. Its purpose is to enable the EU to react in unforeseen circumstances via the establishment of common EU policies.

Article 352 TFEU provides:

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,¹ it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.
2. Using the procedure for monitoring the **subsidiarity** principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw **national Parliaments'** attention to proposals based on this Article. Article 12 TEU and Protocol 2 of the ToL provide that a third of national chambers can raise an objection ('yellow card') on the basis of the violation of the principle

¹ Peers notes that 'there are about 30 cases of special legislative procedures set out in the Treaty. The idea of a special legislative procedure is that the Council and EP are still each involved in the adoption of legislation, but subject to different rules than those which govern the ordinary legislative procedure. In most cases, the special legislative procedure involves unanimity in Council and consultation of the EP (for instance, Article 89 TFEU, concerning cross-border police operations). In a few cases, it involves unanimity and consent of the EP (for instance, Article 86, concerning the European Public Prosecutor). There are also a few cases where the Council votes by QMV and the EP is only consulted, or where the EP takes the lead role and the Council approves the EP's measure. There is a sui generis special legislative procedure concerning the adoption of the annual EU budget; this entails a version of the ordinary procedure which is specially adapted to the particular features of the budget process (QMV in Council applies).' See 'Guide to EU decision-making and justice and home affairs after the Treaty of Lisbon', A Statewatch publication, 2010.

of subsidiarity. Therefore, the rejected Proposal must be reviewed by the Commission.

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 (CFSP)** 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.

Whenever Article 352 TFEU is, therefore, cited as the legal basis for a proposal, it is common practice in the Member States to check that:

- the proposal is necessary to attain one of the Treaty's objectives
- the Treaty has not provided the necessary power elsewhere.

The pre-Lisbon version of the flexibility clause mentioned that, inter alia, such legal basis shall only be used in the course of the operation of the common market. This is no more the case, which, at least in theory, makes the scope of Article 352 TFEU wider.

To this effect the EU through the ToL has added certain restrictions to the flexibility clause, most notably:

- Under Article 352 (2) TFEU a proposal shall be subsidiarity-proof according to national parliaments. In line with Article 5 (3) TEU, national parliaments shall ensure compliance with the principle of subsidiarity in accordance with the procedure set out in Protocol 12 ToL on the application of the principles of subsidiarity and proportionality.
- Under Article 352 (4) TFEU, the flexibility clause is inapplicable in the CFSP domain and any proposal citing it shall respect the limits of the non-affectation clause of Article 40 TEU.

Additionally, Member States have unilaterally taken a stance against an unprecedented use of Article 352 TFEU by introducing legislation which impacts on proposed legislation based on it:

In the UK, by virtue of the EU Act 2011 we have enhanced Parliamentary controls. In general, there is a requirement for Parliamentary approval in order to agree to any Treaty change, or the use of any passerelle or, in certain circumstances, the use of Article 352 TFEU.

This is not a novelty. Germany and Czech Republic also operate similar Parliamentary controls.

Section 8 of EU Act 2011, however, is controversial in that it requires parliamentary approval by Act of Parliament before the UK can agree to any future use of Article 352 TFEU whether it is used as part of the legal base or exclusively for a proposed EU measure.

Subject to a number of exemptions so as to reduce the legislative burden this might imply:

- Urgency procedure – requirement for primary legislation replaced by a requirement for approval of a motion in both Houses.
- Other exemptions include:

- Any proposal for extending the duration of an existing Article 352 TFEU measure without changing it.
- Any proposal to repeal an existing Article 352 TFEU measure; and
- Any proposal to combine or consolidate a number of Article 352 measures without adding any new provisions or changing their scope.

ii) Key legal issues

Today, recourse to Article 352 is not as frequent (13 legislative proposals since the ToL of which just a fraction has come into force).

Let us summarise the reasons for this change of circumstances.

- First, the former frequent use of the flexibility clause owed to the limited range of competences available in the Treaty. Since Maastricht, the Treaty has been enriched with a panoply of new specific legal bases (e.g. on environment, health, agriculture, internal trade, external matters, labour and social matters) and other more generic ones that require qualified majority (most notably what is now Article 114 TFEU with reference to the exercise of powers in the field of the internal market² and Article 216 (1) TFEU with reference to implied powers in the context of external relations³) which make resort to the general competence of Article 352 TFEU a remote possibility.
- Second, since its inception the use of the flexibility clause was inhibited not only by its residual nature (used only when the Treaty did not provide the necessary powers) but also by the requirement of unanimity voting in the Council.
- Third, as mentioned, the operational constraints to Article 352 TFEU are now tighter than ever following the coming into force of the ToL (See above: subsidiarity checks and non-CFSP application).
- Fourth, the CJEU's self-restraint in Opinions 1/94 and 2/94 as well as the powerful warnings issued by national courts and parliaments against an unprecedented use of EU residual competence have been influential on the future use of the flexibility clause.
- Fifth, limited resort to the flexibility clause owes to the EU's reorientation of targets. The 'common market' is no longer central in the EU agenda. The flanking policies designed to facilitate the common market have now been overshadowed by the more ambitious project of democratisation of the EU. Certainly the minimal role of the European Parliament in the adoption of legislation under former Articles 235 EEC and 308 EC amplified the then Community's democratic deficit over the past 20 years or so. Even though now Article 352 TFEU expressly provides for the consent of the European Parliament to be obtained, less recourse to the flexibility clause has historically implied more faith in the EU's democratic process.

² See Case C-217/04, *UK v. European Parliament and Council* [2006] ECR I -3771.

³ See T. Konstadinides 'EU Foreign Policy under the Doctrine of Implied Powers: Codification Drawbacks and Constitutional Limitations' (2014) *European Law Review* (forthcoming).

iii) Areas for discussion

The fact that this call for evidence includes the flexibility clause reflects that the nature of Article 352 TFEU is still to some extent controversial. Perhaps this is because the flexibility provision is a constant reminder that the notion of the EU's limited powers has been imperfect from its outset or perhaps only flawless when the EU institutions operate within the margins of the specific legal bases available in the TFEU.

As potential areas for discussion I have, therefore, listed below the questions raised in the original call for evidence. But before I attempt to address these questions we should bear in mind that the controversy surrounding the advance of EU competence beyond conferral through resort to the flexibility clause is predominantly historical. I have illustrated elsewhere the contours of growth and decline of such competence and its codification in the Treaties.⁴ Nonetheless, recent legislative proposals by the Commission have brought the policing of the use of the flexibility provision back to the fore.

- In your opinion, based on particular examples, is it useful to have a catch-all treaty base for EU action?

To provide a quick answer, it has indeed proved useful to maintain a flexibility clause in the Treaty. Although post-Maastricht there was a tendency between Member States to diminish its extent, the role of the Treaty's flexibility clause was still relatively robust during the 1990s (more than a hundred acts were adopted as opposed to more than two-hundred in the previous decade).⁵ The density of EU legislation emanating from former Article 308 EC demonstrates that resort to this 'catch-all' base bypassed the need to amend the Treaty.

Today, with the exception of Common Foreign and Security Policy (CFSP), Member States are still, in Article 352 TFEU, providing for an open door for EU institutions to legislate even in cases where EU competence is not expressly provided for. Yet, one cannot but notice that Article 352 TFEU has informed a much smaller number of legislative proposals (about 3-4 per year).

To provide some examples, Article 352 TFEU has been used for legislation:

- to recognise electronic versions of the EU's Official Journal as authentic and legally binding (Regulation)
- approving the framework of the EU Fundamental Rights Agency (Decision)
- a decision to give EU historical archives at the European University Institute in Florence (Regulation)
- a decision to adopt a "Europe for Citizens" programme (Regulation)

One can arrive to the conclusion that the use of Article 352 TFEU has been downgraded and, therefore, currently used for rather trivial proposals. A look at Commission's recent proposals, however, demonstrates that Article 352 TFEU can still be utilised to introduce far-reaching measures where there is the appropriate political will. Yet, given the limitations of the flexibility

⁴ T Konstadinides 'Drawing the line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause' (2012) 31 (1) Yearbook of European Law 227-262

⁵ See C-F Bergstrom and J Almer, 'The Residual Competence: Basic Statistics on Legislation with a Legal Basis in Article 308 EC' Sieps, 2004. Available at <<http://www.sieps.se/>>

clause such proposals can, at least in theory, be easily trumped by the UK. Such legislation includes:

- the placement on the market of food from animal clones (Directive)

Recently, the European Scrutiny Committee of the House of Commons expressed concerns over the use of the flexibility clause in this instant.

It produced a tripartite argument:

i) Subsidiarity breach

The Committee argued that the Commission had not been compelling in justifying the need for a measure designed to prohibit the marketing of food from animal clones in the EU. This is the case especially since the Commission in its Explanatory Memorandum acknowledged 'both the strong scientific evidence indicating the absence of any particular human health concerns (with the consumption of cloned material) and the existence of robust EU and national controls to protect the wellbeing of the animals concerned.'⁶

ii) Necessity within the framework of the Treaty

The Committee also contended that the Government's policy on the use of the flexibility clause appears to have shifted but is still vague. It argued that legislation on animal clones food amounts to 'EU competence creep' because action by the EU is not necessary in this area - its objective is not to protect animals but rather to address consumer perceptions of food derived from animal clones. The latter does not consist one of the objectives set out in the Treaties so as to legitimately trigger recourse to Article 352 TFEU.

iii) The Parliament's new power under EU Act 2011

The Committee noted that relying on Article 352 TFEU requires primary legislation pursuant to Section 8 of the EU Act 2011, and noted that the Government has a veto over the adoption of the proposed Directive which it should exercise. What is more, the Parliamentary Under Secretary of State for farming, food and marine environment was invited on 9 April to give oral evidence before the Committee about the use of Article 352 TFEU as a legal competence.

Other interesting proposals include legislation:

- to establish a facility for providing financial assistance for Member States whose currency is not the Euro - known as the EU Balance of Payments facility updating Regulation (EC) No 332/2002 (Regulation)

In this case pursuant to Article 352 of the Treaty on the Functioning of the European Union (TFEU), the Council, acting in accordance with a special legislative procedure, will adopt a regulation on establishing a facility for providing financial assistance for Member States whose currency is not the euro, acting unanimously, after obtaining the consent of Parliament. As with any proposal for legislation with a legal base of Article 352 TFEU, this proposal, as and when it proceeds, would require not only unanimous support from the Member States in the Council but also an Act of Parliament.

⁶ See the Committee's reasoned opinion at: <<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xxxii/8303.htm>>

There may be an argument here that since the Treaty makes no specific allowance for bank resolution, banking union measures should be based on the more specific Article 114 TFEU instead since they aim to improve the conditions for the establishment and functioning of the internal market (e.g. preserving Market integrity by ensuring the uniformity of resolution regimes).

- on the exercise of the right to take collective action within the context of freedom of establishment and services ('Monti II' Regulation).

The proposal was based on Article 352 TFEU because of the lack of explicit provisions in the Treaty conferring the EU with necessary powers on the right to take collective action. However, legislation was halted by national parliaments which utilised the so-called 'yellow card' procedure under Article 12 TEU and Protocol 2 attached to the ToL.

The above demonstrates that the preservation of the flexibility clause included in Article 352 TFEU:

- shows that the Treaty is still a framework to be filled out and complemented.
- it represents a corrective function against an orthodox understanding of the principle of conferral enshrined in Article 5 TEU.
- it highlights its limitations - some of them imposed by EU law and others imposed by national law (especially the role of national parliaments in restraining its use).

- **How appropriately has Article 352 been used?**

The flexibility clause reached its heyday in the 1970s and the 1980s.

- The Member States witnessed great latitude in the interpretation of the then Article 235 EEC.
- The EU actively engaged in regional and environmental policies at a time when these fields were not yet codified in the Treaties (Conclusion of international environmental agreements. See Council Decision 81/462 (Convention on air pollution) [1981] OJ L 171/11; Council Decision 77/586 (chemical pollution) [1977] OJ L 240/35; Council Decision 77/585 (sea pollution) [1977] OJ L 240/2; Council Decision 75/438 (marine pollution) [1975] OJ L 194/22).

Today, recourse to the flexibility clause by the Council is rather rare but can still be proved controversial when it is used as a legal basis.

For instance, in *European Parliament v. Council*⁷, it was held that the European Cooperative Society (SCE) was aimed, through the contested Regulation 1435/2003, to introduce a new legal form to complement (and not to approximate) the national forms of cooperative societies and therefore to leave unchanged the diverse national laws applicable to them. Hence, against the wishes of the Council, supported by amongst others the UK, the CJEU held that '[Article 114 TFEU] could not constitute an appropriate legal basis for the adoption of the contested regulation, which was correctly adopted on the basis of [Article 352 TFEU].'⁸

⁷ Case C-436/03, *European Parliament v. Council* [2006] ECR I-3733. The case concerned the adoption of a Regulation aimed at the improvement of the scope for establishing small and medium size companies in the Community and their competitive position.

⁸ Ibid at para 46.

What stems from this case is the proposition that the CJEU, in line with Opinion 1/94⁹, confirmed the role of Article 352 TFEU as a provision for the creation of new rights, superimposed on national rights, through the creation of new legal forms governed by EU law.¹⁰

- Which alternative approaches to the scope, interpretation and application of Article 352 might be beneficial?

Given the safeguards written into Article 352 TFEU, most of the problems are internal / political. For instance:

- It is important for the UK government to find ways to police Article 352 TFEU requirements proactively and at an early stage in the legislative process to avoid the risk of precedence setting and avoid any criticism about competence creep.¹¹
 - The law should not get mangled in either the putting or the answering of the questions of necessity / conferral and subsidiarity due to the desire of governments to be politically engaged in a dialogue with their counterparts.
 - The existence of safeguards at a late stage in the legislative process (unanimity and approval by an Act of Parliament under EU Act 2011) does not necessarily remedy a 'competence creep' and does not, therefore, relieve the government of its responsibility to scrutinise proposals early in the legislative process.
 - Last, there should be more guidance from the government with reference to 'how it intends to comply with the requirement under section 8 of the EU Act . . . for an Act of Parliament to be passed before final agreement is given in the Council'.¹²
- Are there any general points you wish to make on how well the current procedures and actors work to ensure that the EU only acts where it is appropriate to do so, and in a way which is limited to the EU's objectives, which are not captured above?**

The residual competence in Article 352 TFEU (the most general of all legal bases in the Treaty) has in times been considered even by academics as carrying the potential of devaluing the principle of conferral due to its functional breadth. Weatherill comments characteristically that Article 352 TFEU together with Article 114 TFEU 'were properly implicated by the Laeken Declaration in the crime of competence creep'.¹³ I have argued that although Article 114 TFEU retains its strength, Article 352 TFEU EC has lost its might.¹⁴ The fact that its use is constrained by unanimity voting in the Council (hence the argument that often *creeping* has occurred with the acceptance of national governments) is not new. Since Article 352 TFEU is only cited as the legal base for a proposal when the Treaty has not provided the necessary power elsewhere, its role as a *gap-filler* (to supplement both the areas of

⁹ Opinion 1/94 [1994] ECR I-5267. In this case the CJEU held that the Community had competence in the area of intellectual property under Articles 94 and 95 EC and that resort to Article 308 EC was justified in order to create new rights, such as the Community trademark.

¹⁰ The CJEU pointed to the creation of new intellectual property rights in addition to national rights in Case C-377/98, *Netherlands v. Parliament and Council* [2001] ECR I-7079, para 24.

¹¹ Animal Cloning: the use of Article 352 TFEU Witnesses (introduction by William Cash)
<<http://www.parliamentlive.tv/Main/Player.aspx?meetingId=15300>>

¹² See European Scrutiny Committee, 'European Private Company', Documents considered by the Committee on 19 July 2011. Available at: <<http://www.publications.parliament.uk>>.

¹³ S. Weatherill, 'Better Competence Monitoring' (2005) 30 (1) *European Law Review* 23, p.36.

¹⁴ T. Konstadinides, 'Drawing the line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause' (2012) 31 (1) *Yearbook of European Law* 227.

authorised EU activity and the powers conferred by specific legal bases) becomes redundant when more specific legal bases are available to enable the EU's objectives to be given effect.

In light of the above, I would like to emphasise that Article 114 TFEU and perhaps Article 216 (1) in the external realm are now the main culprits of competence creep. Surprisingly, there are no policing measures to monitor their use. However, this is a different topic altogether and, therefore, outside the scope of this report.

APPENDIX

Post-Lisbon Legislative Proposals under Article 352 TFEU

2013

1. Proposal for a COUNCIL DIRECTIVE on the placing on the market of food from animal clones
2. Proposal for a COUNCIL DECISION on a Tripartite Social Summit for Growth and Employment
3. Proposal for a COUNCIL DECISION on the repeal of Council Decision 2007/124/EC, Euratom
4. Proposal for a COUNCIL REGULATION amending Regulation (EEC/Euratom) No 354/83, as regards the deposit of the historical archives of the institutions at the European University Institute in Florence

2012

5. Proposal for a COUNCIL REGULATION establishing a facility for providing financial assistance for Member States whose currency is not the euro
6. Proposal for a COUNCIL REGULATION on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services
7. Proposal for a COUNCIL REGULATION on the Statute for a European Foundation

2011

8. Proposal for a COUNCIL REGULATION establishing for the period 2014-2020 the programme "Europe for Citizens"
9. Proposal for a COUNCIL DECISION establishing a Multiannual Framework for the European Union Agency for Fundamental Rights for 2013-2017
10. Proposal for a COUNCIL REGULATION on electronic publication of the Official Journal of the European Union

2010

11. Proposal for a COUNCIL DECISION on a Union position in the EU-the former Yugoslav Republic of Macedonia Stabilisation and Association Council on the participation of the former Yugoslav Republic of Macedonia, as an observer in the European Union Agency for Fundamental Rights' work and the respective modalities, within the framework set in Articles 4 and 5 of Council

Regulation (EC) No 168/2007, including provisions relating to participation in initiatives undertaken by the Agency, to the financial contribution and to staff

12. Proposal for a COUNCIL DECISION amending Decision (2008/203/EC) of 28 February 2008 implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012

13. Proposal for a COUNCIL REGULATION (EU) No .../... concerning the extension of the scope of Regulation (EU) of the European Parliament and of the Council No xx/yy on the professional cross-border transportation of euro cash by road between euro-area Member States