functioning of its decision making. What is immediately clear, however, is that by failing to simplify the Union's institutional framework, the TL represents another missed opportunity to remedy people's decreasing confidence in the European project.[125]

125 According to the Spring 2010 Eurobarometer poll, fewer than half of the EU citizens see their country's membership of the EU as a positive thing and just 42% say they trust the Union. See 'Europeans losing faith in the EU', *EurActiv*, 27 August 2010, available at: www.euractiv.com/en/pa/europeans-losing-faith-eu-news-497209.

2

Competence after Lisbon

The elusive search for bright lines

TAKIS TRIDIMAS*

1. Introduction

The division of competences between the European Community and the Member States began to cause controversy and entered the mainstream of political debate in the 1980s. Before then, issues of EC competence were largely the preserve of esoteric debates amongst specialist lawyers. The main reason for this shift of emphasis can be found in the evolution of the Community decision-making processes. Until the mid-1980s, the Council of Ministers decided mostly by unanimity.[1] In a supra-national organisation where national governments have the power of veto, the precise delineation of its powers is of limited importance, because any action by the organisation presupposes the agreement of all participating states. Why worry about the scope of EC competence if a national government can block its actions anyway?[2] But the gradual extension of majority

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1 Article 100 of the original European Economic Community Treaty (subsequently renumbered Article 94 EC by the Treaty of Amsterdam) provided a legal basis for the harmonisation of national laws with a view to achieving the common market. Such harmonisation was subject to a requirement of unanimity. Article 94 EC has now been replaced by Article 115 TFEU.

2 This is not to say that the power of veto renders any discussion on competence redundant. Even where decisions were taken by unanimity, it was relevant to ascertain the limits of EC competence both for legal and political reasons. For one thing, it was necessary to determine the limits of EC competence so as to comply with the rule of law and avoid a successful challenge to the validity of measure. For another, arguments on competence were invoked in political negotiations to support or counter the view that the EC could take action in a specific field. However, the delineation of EU competence was less material in that Member States had in the power of veto a very effective way of protecting their interests.

voting since the Singe European Act made it a reality that legislation could be passed without the agreement of all governments.[3] Every Member State could potentially find itself in the minority and have to amend its laws to align them with Community legislation despite its opposition at the negotiating table. It therefore became important to determine with more precision the outer boundaries of Community competence. The significance of the competence debate was countenanced by other developments. The extension of the European Parliament's powers through successive Treaty amendments and its determination to exercise them fully, often with the Commission's support, brought the Council to account for its choice of legal basis.[4] Furthermore, the perceived imbalance between the growing competence of the European Community on the one hand and its democratic deficit on the other put additional strain on the competence dynamic.

A major change made by the Treaty of Lisbon is that it contains express general provisions defining the competences of the European Union.[5] These are Article 5 TEU and Articles 2–6 TFEU. These provisions originate and are essentially the same as those contained in the aborted Constitutional Treaty. They serve mostly as a restatement of principles established by the case law but also incorporate some new elements. They do not in themselves increase the powers of the Union, but the EU acquires some

3 The Single European Act added to the EC Treaty Article 100a (later renumbered Article 95 EC by the Treaty of Amsterdam), which, by way of derogation from Article 100, provided for qualified majority voting in relation to harmonisation measures for the establishment and functioning of the internal market. Article 95 EC is now Article 114 TFEU.

4 Since the judgment in Case C-70/88 *Parliament v Council (Chernobyl case)* [1990] ECR I-2041, which held that the Parliament had the right to bring an action for the judicial review of EC measures in order to protect its prerogatives, the Parliament followed a tactical litigation policy. According to that policy, it would contest the validity of Council measures, which it considered should have been adopted under a procedure which provided for greater participation by the Parliament, even if it agreed with their substance. This strategy bore fruit as the ECJ annulled a number of measures on the ground that they had been adopted on the wrong legal basis. See e.g. Case C-295/90 *Parliament v Council (Students' Right of Residence Directive case)* [1992] ECR I-4193; Case C-65/90 *Parliament v Council (Cabotage case)* [1992] ECR I-4593.

5 For a discussion, see, amongst others, P. Craig, The Lisbon Treaty: Law, Politics and Treaty Reform, Oxford, 2010, pp. 155 *et seq*; M. Dougan, The Treaty of Lisbon 2007: Winning Minds, not Hearts (2008) 45 CMLRev 617; House of Lords EU Committee, The Treaty of Lisbon: An Impact Assessment, 10th Report of Session 2007–08, Vol. 1; G. Bermann, Competences of the Union in T. Tridimas and P. Nebbia (Eds), European Union law for the Twenty-First Century, Vol 1, Hart Publishing, 2004, at 65 *et seq*; See further, R. Schütze, Co-operative federalism constitutionalised: the emergence of complementary competences in the EC legal order (2006) 31 E.L.Rev 167; A. Dashwood, The Limits of European Community Powers, (1996) 21 ELRev 113.

new powers as a result of other provisions introduced in specific chapters of the TFEU. In general, the transfer of powers from the Member States to the Union effected by the Lisbon Treaty is considerably less than that effected by the Treaty of Maastricht, which remains the most important contributor to the integration paradigm.

This chapter seeks to evaluate the provisions of the Treaty of Lisbon on competence and proceeds as follows. It first discusses Article 5 TEU and Articles 2–6 TFEU. It then makes a more general assessment of the rules which govern the division of competences between the EU and the Member States examining, amongst others, the salient features of competence attribution rules, and the dormant competence of the EU. The analysis is selective rather than exhaustive.[6] It seeks to show that, although the inclusion of express provisions on competence is to be welcomed, it is of relative value and incapable, by itself, of capturing the dynamic of competence partition between the EU and its Member States. The competence narrative tells only part of the story. The Treaty of Lisbon does not create bright lines between EU and national competences, nor does it avoid intricate problems of interpretation. The division of powers between the EU and the Member States, as in any constitutional model, is inherently unstable. The pursuit of red lines that politicians crave so much and the search for impregnable bastions of national sovereignty remain elusive. This should not, however, be viewed as a failure of Lisbon. The success of legal provisions on competence should not be judged on whether they mark bright lines, but rather on whether they function effectively as part of a system of governance in accordance with the objectives of the Lisbon Treaty. In particular, their success should be judged on whether they provide a sustainable framework for facilitating the cooperation of national governments, enable decision making at multiple levels, and provide effective processes for the participation of various actors to political decision making.

2. Principles governing the division of competence

A. Competence, subsidiarity and proportionality

With the exception of the provisions on the EU institutions, the fundamental objective of the Lisbon Treaty is to clarify and consolidate rather than to reform. Nevertheless, it does make important changes to the

6 This chapter does not intend to discuss the residual power clause of Article 352 TFEU (ex Article 308 EC), Article 40 TEU (ex Article 47 TEU) and the issue of *competenz competenz*.

constitutional structure of the Union and some of the substantive policies of the EU. As a constitutional document, and in line with previous treaties on European integration, it is a product of the political elite. It takes a functional view of the Union[7] and, faithful to the legacy of the Laeken declaration and the aborted Constitutional Treaty, it seeks to bridge the perceived legitimacy gap of the EU.

The overarching provision on competence is that of Article 5 TEU which corresponds, with minor amendments, to the former Article 5 EC. Article 5 TEU lays down the principle of conferral or attribution of competence (Article 5(2)), the principle of subsidiarity (Article 5(3)), and the principle of proportionality (Article 5(4)). The last two principles govern not the existence of EU competence as such, but its exercise. We will examine briefly each of the three principles.

The principle of conferral means that the presumption of competence lies with the Member States. The EU has only those powers which are granted to it by the Treaty, and powers not so granted remain with the Member States. This is expressly provided in Article 4(1) TEU and confirmed by Article 5(2) TEU.[8] The principle of conferral is accompanied by another principle: Where the EU enjoys competence, such competence is shared with that of the Member States and is not exclusive. The presumption in favour of shared competence which was previously derived by implication from the nature of Community powers[9] is now expressly stated in Article 4(1) TFEU.

The principle of conferral, however, only gives part of the picture. For one thing, a glance through the provisions of the TFEU shows that the Union has powers virtually in all areas of economic regulation and in a

7 Article 1 TEU defines the European Union as an organisation on which the Member States confer competences to attain objectives they have in common. It is thus an instrument through which Member States exercise their sovereignty in common and not an organization which is itself bestowed with any sovereign powers.

8 Article 4(1) TEU states as follows, 'In accordance with Article 5, competences not conferred upon the Union in the Treaties, remain with the Member States'. Article 5(1) TEU provides that, 'Under the principle of conferral, the Union shall act 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'.

9 Two arguments have traditionally supported the presumption of shared competence. First, the powers granted to the EC by the Treaties are of a general nature and pursue vague objectives, and therefore cannot easily lead to the conclusion that they are exclusive. Secondly, exclusivity sits uneasily with the model of national sovereignty and the principle of attributed competences. See T. Tridimas and P. Eeckhout, 'The external competence of the Community and the case law of the European Court of Justice: principle versus pragmatism' (1994) 14 Yearbook of European Law, 143 at 154–155.

wide spectrum of social and political matters. For another, the doctrine of implied powers[10] and the residual clause of Article 352 TFEU[11] establish an objectives-oriented competence paradigm: Within the system and the policies provided by the Treaties, the EU institutions have extensive powers to introduce binding measures for the attainment of EU objectives. The end result is that the EU institutions enjoy wide discretionary power which is, in many respects, comparable to that possessed by the government of a sovereign state.

The principle of subsidiarity is provided in Article 5(3) TEU. That provision corresponds to Article 5(2) of the EC Treaty and, with minor textual improvements, incorporates the tests of scale and effectiveness. It expressly extends the principle to the sub-state level and confers on national Parliaments responsibility to ensure compliance with the principle.[12]

Finally, Article 5(4) TEU incorporates the principle of proportionality. That principle first received express reference in the Treaty on European Union which added Article 5(3) to the EC Treaty. In terms of substance, Article 5(3) did not add to the already established case law of the ECJ. It merely reiterated the importance of proportionality and expressly granted it constitutional status.[13] The only difference was one of emphasis. As a general principle of law, proportionality had traditionally been developed by the Court primarily with a view to protecting the individual from intrusive action by the Community institutions. Article 5(3), by contrast, was introduced as part of a system of provisions whose aim was to control the expansion of Community legislative action and sought to limit burdens on Member States rather than burdens on individuals.

10 According to the case law of the ECJ, the EU institutions have not only the powers which are expressly granted to them by the Treaties, but also powers which follow by implication from them and are necessary for the attainment of EU objectives. For a prime illustration of the doctrine of implied powers, see Case 22/70 *Commission* v *Council* ('*ERTA*') [1971] ECR 263.

11 See for a discussion, R. Schütze, Organised Change towards an "Ever Closer Union": Artice 308 EC and the Limits to the Community's Legislative Competence 22 (2003) Oxford Yearbook of European Law 79 and for a more recent account, T. Konstadinides, Between Circumvention and Gap-Filling: The conceptual limits around the Treaty's flexibility clause, (2012) Oxford Yearbook of European Law, forthcoming.

12 See below, pp. 53 *et seq.*

13 See K. Lenaerts and P. Van Ypersele, 'Le principe de subsidiarité et son contexte: Étude de l'article 3B du traité CE' (1994) 30 CDE 3, at p. 61; T.C. Hartley, *The Foundations of European Community Law* (5th Ed, Oxford 1994) p. 152; N. Emiliou, *The Principle of Proportionality in European Law* (Kluwer, 1996) at p. 401. But for a more nuanced view, see V. Constantinesco, R. Kovar, D. Simon, *Traité sur l'Union Européenne*, Economica, 1995, p. 113.

This was a change of emphasis rather than a change of substance. The protection of individual rights fell clearly within the scope of Article 5(3) EC. That provision (and now Article 5(4) TEU) was understood to mean that 'any burdens, whether financial or administrative, falling upon the Community, national governments, local authorities, economic operators and citizens, should be minimized and should be proportionate to the objectives to be achieved'.[14]

Article 5(4) TEU, as amended by Lisbon, now uses somewhat different formulation stating that the principle applies not only to the substance but also to the form of Union action.[15] This suggests that, where the EU takes action, the choice of legal instrument should not be more prescriptive than it is necessary and appropriate in the circumstances. It is unclear, however, to what extent, if any, Article 5(4) adds anything new. It is thus uncertain whether it will require the EU to provide specific justification for using regulations rather than directives or binding legislation rather than soft law. It is likely that it will not. The requisite degree of intensity depends on the objectives of the measure and the circumstances justifying EU intervention, and in fact, the choice of legal measure is already an integral part of the subsidiarity analysis. The new formulation of Article 5(4) appears to add little to the legal test of proportionality.

Proportionality is also incorporated by implication in the principle of subsidiarity. Article 5(3) TEU requires that the Union take action 'only if and in so far as' the objectives of the proposed action cannot sufficiently be achieved by the Member States. This is, in turn, exemplified by the dual test of scale and effectiveness. There are, however, differences between the two principles. First, subsidiarity comes into play at an earlier stage than proportionality.[16] It defines whether or not action must be taken at the EU level. Proportionality, by contrast, comes into play only once it is decided that Union action is necessary and seeks to define its scope. Secondly, under Article 5(3), subsidiarity applies only in cases where the competence of the Union is not exclusive, whereas, under Article 5(4),

14 European Council of Edinburgh, 11–12 December 1992, Presidency Conclusions, Annex 1 to Part I A, (Agence Europe, Special Ed., No. 5878BIS, 13/14 December 1992).

15 Article 5(4) TEU repeats the formulation of Article I-11(4) of the aborted Constitutional Treaty according to which, 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution'.

16 See Lenaerts and van Ypersele, *op. cit.*, para 100; G. Strozzi, 'Le principe de subsidiarité dans la perspective de l'intégration européenne: une énigme et beaucoup d'attentes', (1994) 30 RTDE 373, at 379. Those texts received judicial recognition by Léger AG in Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755 at 5783.

proportionality applies also where the EU enjoys exclusive competence. Indeed, it seems that the reason why an express reference to proportionality was originally added by the Treaty of European Union was to ensure that the Community respected the interests of Member States not only where it exercised shared competence, but also where it exercised exclusive competence.[17]

B. The role of national parliaments in monitoring compliance with subsidiarity and proportionality

A distinct feature of the Treaty of Lisbon is that it strengthens the role of national parliaments in monitoring compliance with subsidiarity and proportionality. This accords with one of the key original objectives of the Constitutional Convention, which was to increase democracy by enhancing 'the contribution of national Parliaments to the legitimacy of the European design'.[18] The procedure for doing so is set out in the Protocol on the application of the principles of subsidiarity and proportionality.[19]

The Protocol establishes a system of *ex ante* political control and *ex posto facto* legal control by national parliaments. It is similar with the system envisaged by the Constitutional Treaty except that, under Lisbon, political control is somewhat enhanced. Its core elements may be said to be consultation, justification and voting.[20] Political control is exercised collectively by all national parliaments acting through a voting system referred to as an 'early warning' or 'yellow card' system. Any national parliament – or, in the case of Member States which have a bicameral system, any parliamentary chamber – may object to a draft legislative act by submitting a reasoned opinion stating why it considers that the draft act does not comply with subsidiarity.[21] National parliaments may submit

17 Lenaerts and van Ypersele, *op. cit.*, p. 62.

18 See the Preface to Parts I and II of the draft Treaty establishing a Constitution for Europe as submitted to the President of the European Council meeting in Rome on 18 July 2003, CONV 850/03.

19 See Protocol 2 annexed to the Treaty on European Union, to the Treaty establishing the European Community, and/or the Treaty establishing the European Atomic Energy Community by the Final Act adopted by the Conference of the Representatives of the Governments of the Member States convened in Brussels on 23 July 2007, Brussels 3 December 2007, CIG 15/07.

20 For consultation, see, especially, Article 2 of the Protocol, which requires the Commission to consult widely before proposing legislative acts; for justification, see Article 5, which envisages the subsidiarity inquiry as a form of cost-effectiveness exercise; the voting system is explained in the main text.

21 See Article 6 of the Protocol.

their reasoned opinions within eight weeks from the date when the draft act is transmitted to them.[22]

Each national parliament has two votes shared out on the basis of the national parliamentary system. In the case of a bicameral parliament, each of the two chambers has one vote.[23] Where reasoned opinions against a draft legislative act represent at least one-third of the total number of votes allocated to national parliaments and their chambers, the Commission or the other body from which the act originates[24] is required to review its proposal.[25] After such a review, it may decide to maintain, amend or withdraw it, giving reasons for its decision.[26]

Although a detailed review of the monitoring process is beyond the scope of this paper, two points may be made in this context. First, although the national parliaments do not have a power to block a legislative proposal and can only trigger a review, one expects that an objection by a significant number of national parliaments will put heavy pressure on the institution from which the proposal originates to review it and address parliamentary concerns. At the very least, persistently ignoring national parliaments would be a high-risk strategy, if not politically unsustainable.[27] Secondly, the Lisbon Treaty has enhanced the control initially envisaged by the Constitutional Treaty in one important respect.[28] Where a legislative proposal is submitted under the ordinary legislative procedure and a simple majority of the votes allocated to national parliaments and their chambers is against its compatibility with the principle of subsidiarity, the Commission is under an obligation to review the proposal. If the Commission decides to maintain it, it will have to submit its own reasoned opinion explaining why it considers that it complies with subsidiarity. Then, the EU legislator (i.e. the Council and the Parliament) must decide, before

22 See Article 6. Under the Constitutional Treaty, the time limit was set at six weeks. This had been criticised as being too short. See, amongst others, Tridimas, The General Principles of EU Law, pp. 189–190.

23 See Article 7(1).

24 The monitoring process has comprehensive coverage and applies to proposals from the Commission, initiatives from a group of Member States, initiatives from the European Parliament, requests from the Court of Justice, recommendations from the European Central Bank and requests from the European Investment Bank for the adoption of a legislative act. See Article 3.

25 Article 7(2). The threshold of one-third is lowered to a one-quarter in the case of a draft legislative act submitted on the basis of Article 76 TFEU in the area of freedom, security and justice.

26 Article 7(2), last sub-paragraph.

27 See Dougan, op.cit., p. 657.

28 See Article 7(3) of the Protocol.

concluding the first reading, whether the proposal complies with the principle of subsidiarity. If, by a majority of 55 per cent of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal will not be given further consideration. This procedure enhances the monitoring powers of the national parliaments and provides elements of a dual democracy paradigm.

Political control is reinforced by judicial control as provided in Article 8 of the Protocol. This grants the Court jurisdiction to hear actions for judicial review on grounds of infringement of the principle of subsidiarity brought 'by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it'. Such actions can be brought against legislative acts of the Union in accordance with the rules of Article 263 TFEU (ex Article 230 EC). A similar right of action is granted to the Committee of the Regions as regards legislative acts for the adoption of which it must be consulted. Although the language of Article 8 does not make this clear, it is arguable that the provision requires Member States to make available the right of action to national parliaments and does not simply allow them to do so. The Praesidium notes attached to the equivalent Protocol accompanying the aborted Constitutional Treaty suggested that the national parliaments were given the right to challenge measures before the ECJ.[29] What is left to the Member States is to determine the arrangements for the exercise of that right, including the question whether it will be granted to each parliamentary chamber in states with a bicameral system. These arrangements can be made by ordinary law and need not have the status of constitutional rules.[30] It is notable, however, that so far the ECJ has shown little appetite in being involved in control of subsidiarity. Rather, it prefers to focus its inquiry on issues of competence and proportionality and treat subsidiarity only as an adjunct to its main argumentation.[31]

3. Types of competence

Article 2 TFEU recognises three distinct categories of EU competence, namely exclusive, shared and supporting. In addition, the Treaty refers to

29 CONV 724/1/03 REV 1, p. 144.

30 Ibid.

31 Case C-491/01 *The Queen v Secretary of State for health ex parte British American Tobacco Ltd* [2002] ECR I-11453.

competence in the field of CFSP[32] and EU presence (rather than competence) in the field of economic and employment policies.[33]

By contrast, the Treaties do not provide for a list of areas reserved to Member States. The reason for this may be found in the constitutional model of the EU. Because the presumption of competence lies with the Member States, the inclusion of a general reserve list appears less necessary. Such a list would not, in fact, be inconsistent with the model of conferred competences. The Treaties could provide for a list of areas which are exempted from EU intervention. This would then qualify and limit the scope of the provisions which establish EU competences. Such a list does not appear to have been under any serious consideration in the debates leading to the Constitutional Treaty or the Lisbon Treaty, and for good reason. Such a list would be unnecessary. It would be likely to create more problems of interpretation than it would resolve and would not be easy to agree on by the governments of the Member States. It would also be less in tune with the dynamic forward-looking process of integration and the enduring commitment to 'creating an ever closer union'.[34] The Treaties, by contrast, contain a number of specific

32 Article 2(4). CFSP is listed as a separate category of competence and is best to be viewed as *sui generis*. For a detailed analysis, see P. Koutrakos (Ed), European Foreign Policy, Legal and Political Perspectives, Hart, 2011.

33 Article 2(3) states that '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'. This is further exemplified by Article 5 which refers to Council action through guidelines for the coordination of national economic and employment policies. The exact scope of 'coordination' in this context remains uncertain, but it is clear that the Union does not have competence to provide for a common economic or employment policy. Special provisions apply to the Member States which belong to the Eurozone: see Article 5(1) TFEU. Coordination in the context of Article 2(3) envisages a degree of convergence which is much less than harmonisation as it is understood in areas of shared competence and also less that coordination in the fields where the EU has supporting competence. Article 5 envisages policy guidelines and not the adoption of binding EU rules which directly govern the economic policies of the Member States. Article 5(3) also states that the Union may undertake initiatives to ensure coordination of Member States' social policies. Article 5 employs nuanced language on the envisaged EU presence in the fields of economic, employment and social policy, respectively. Thus, it uses the peremptory 'shall' in relation to economic and employment policy and refers to 'broad guidelines' in the field of economic policy, albeit not in an exhaustive form. Its mandate is more aspirational in the field of social law where it refers simply to initiatives, using facilitatory language: see Article 5(3) which states that the Union 'may' take initiatives. In a way, this is a paradox, given that the exercise of EU competence in others areas – for example, internal market or anti-discrimination – impacts much more directly on national social policy than on national economic policy.

34 See TEU, Preamble, recital 13.

and general derogations[35] as well as obligations on the EU to respect certain national values or characteristics.[36] One of the few provisions of the Treaty which appears to reserve an area exclusively to the Member States is Article 4(2) TEU which states that national security remains the sole responsibility of the Member States. This means that the EU cannot legislate in this area under any legal basis. It does not, however, remove national security from the dormant competence of the EU. National measures which seek to maintain national security may not interfere with the fundamental freedoms and, insofar as they fall within the scope of EU law, must respect fundamental rights as understood in the EU legal order.

We proceed now to examine in more detail the exclusive, shared and supporting competence of the Union.

4. Exclusive competence

A. Meaning and categories

Article 2(2) TFEU states as follows: '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'.

It appears from this provision that exclusivity is understood as pre-emption. In the areas that fall within its exclusive competence, the EU occupies the field so that the Member States are, in principle, precluded from acting even in the absence of EU legislation. Exclusivity does not, however, necessitate complete absence of Member State action. First, Member States may intervene if so empowered by the Union. Subject to what is stated later in the chapter, such empowerment may take place only expressly. Secondly, exclusivity does not preclude the adoption of national legislation for the implementation of EU acts. Whether an EU measure may require implementation and whether any specific act adopted by a Member State for this purpose is compatible with EU law are a matter of

35 See e.g. Articles 36, 45(3), 52, 62, 65, 346, 347 TFEU. See also Article 276 TFEU.

36 Article 4(2) TEU states: 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State'.

interpretation of the EU rules in question. The need for implementation may arise not only where EU rules specifically allow Member States to do so, but also by implication, where implementing rules at the national level are necessary to enable the EU rules to produce their effects. For example, it may be necessary to adopt sanctions to ensure the enforcement of an EU regulation.

Article 2(2) appears to envisage the possibility of implementing action at national level only where the EU has adopted measures.[37] What happens if in an area (or part of an area) that falls within its exclusive competence, the EU has not adopted any measure? May the Member States never intervene? A rare glimpse of the way the ECJ has understood the effects of exclusivity is provided by *Commission* v *United Kingdom*,[38] an early case where the Court held that the competence of the Community under Article 102 of the Act of Accession of 1972 was exclusive.[39] The case concerned the compatibility with Community law of fishing measures introduced by the United Kingdom. The Court held that, since the expiration of the transitional period laid down by Article 102, power to adopt measures relating to the conservation of the resources of the sea belonged fully and definitively to the Community. Member States were therefore no longer entitled to exercise any power of their own. The adoption of such measures, with the restrictions which they implied as regards fishing activities, was a matter, as from that date, of Community law.[40] Notably, the Court also held that, because the transfer to the Community of powers in that field was total and definitive, the failure of the Council to adopt, within the required periods, the conservation measures referred to by Article 102 could not restore to the Member States the power and freedom to act unilaterally.[41] It followed that, in the absence of action on the part of the Council, the conservation measures which existed at the end of the transitional period were maintained as they were at that time. Member States had the right to make amendments to existing measures so as to take account of factual developments in the biological

37 Article 2(1) provides that, when the EU has exclusive competence, the Member States may legislate 'only . . . for the implementation of Union acts'.

38 Case 804/79 [1981] ECR 1045.

39 Article 102 states' 'From the sixth year after accession at the latest, the Council, acting on a proposal from the Commission, shall determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea'. The transitional period ended on 1 January 1979.

40 Case 804/79, op.cit., paras 17–18.

41 Op cit, para 20.

and technological sphere, but those amendments had to comply with strict conditions: they had to be limited in scope and could not involve a new conservation policy on the part of a Member State; they had to be based on the elements of Community law existing in that sphere; and, before adopting any such measures, Member States were required to seek approval of the Commission which had to be consulted at all stages in the procedure.[42] The Court stated that 'in a field reserved to the powers of the Community . . . Member States may . . . act only as trustees of the common interest'.[43] Thus, at least with regard to Article 102, the Court has followed a strict interpretation of the principle of exclusivity.[44]

Under Article 3(1) TFEU, the EU has exclusive competence in the following areas:

1. customs union;
2. the establishing of the competition rules necessary for the functioning of the internal market;
3. monetary policy for the Member States whose currency is the euro;
4. the conservation of marine biological resources under the common fisheries policy;
5. common commercial policy.

Furthermore, Article 3(2) TFEU deals with exclusivity in the field of external relations. It provides that the Union shall have exclusive competence for the conclusion of an international agreement in the following cases:

1. when the conclusion of an agreement is provided for in a legislative act of the Union;
2. when the conclusion of an agreement is necessary to enable the Union to exercise its internal competence; and
3. insofar as its conclusion may affect common rules or alter their scope.

The difficulties surrounding the scope and nature of EU external competence in the pre-Lisbon era are well documented.[45] It seems that the Lisbon Treaty far from eliminates those difficulties. Although a detailed

42 See Case 24/83 *Gewiese and Mehlich* v *Scolt Mackenzie* [1984] ECR 817.

43 Case 804/79, op cit, para 30.

44 See further Case 124/80 *Officier van lustitie* v *Van Dam* [1981] ECR 1447; Case 269/80 *Regina* v *Tymen* [1981] ECR 3079; Case 21/81 *Openbaar Ministerle* v *Bout* [1982] ECR 381; Case 87/82 *Rogers* v *Darthenay* [1983] ECR 1579; Case 223/86 *Pesca Valentia* v *Minister for Fisheries and Forestry* [1988] ECR 83.

45 See, among others, Tridimas and Eeckhout, above, n. 9, Dashwood and Hillion, below n. 52, and Cremona, below, n. 52.

examination of Article 3(2) is beyond the scope of this chapter, it is worth examining briefly each of the instances of exclusivity referred to therein.

B. Exclusivity arising from express power to conclude an international agreement

The language used by Article 3(2) appears to make exclusivity an attribute of empowerment. Where a legislative act authorizes the Union to conclude an international agreement, the EU acquires exclusive power to conclude that agreement. Because Article 3(2) is phrased in general terms and is not accompanied by any proviso, this appears to be the case even if the act in question is in a field of shared competence, e.g. financial law or environmental law. Also, exclusivity arises automatically even if the provision empowering the conclusion of the agreement does not specify the nature of EU external competence. Thus, the automatic effect of Article 3(2) appears to grant the EU exclusive external competence even in areas where its internal competence is only shared. It is not clear whether Article 3(2) lays down merely a presumption of exclusivity or whether it goes beyond that and forecloses the possibility of an EU legislative act providing for the conclusion of an international agreement but stating expressly that it will need to be concluded as a mixed agreement. The text of Article 3(2) supports the second interpretation. Still, the foreclosure effect is not as severe as it appears at first sight because external exclusivity only operates within the scope of application of the legislative act in question. It will therefore be a matter of determining the scope of application of the EU act and the scope of the respective international agreement. To the extent that the agreement might cover aspects beyond the EU act, the participation of Member States would be necessary if the EU cannot claim exclusivity over that aspect in some other way. Thus, although the scope of exclusivity appears broad, it is in fact a reflection of the normal foreclosure effect of EU law and the principle of parallelism. Just as the adoption of an EU act prohibits the Member States from adopting national rules incompatible with that act, it also prohibits them from concluding international agreements which are so incompatible. The test of incompatibility should be the same in the two cases.

As Craig observes, the a priori effect of Article 3(2) must also apply where a Treaty article provides for the conclusion of international agreement in a certain field. In such a case, the EU competence should also be exclusive unless there is a contrary indication in the Treaty provision in question.[46]

C. Exclusivity arising from the need to exercise internal competence

Under the second case envisaged by Article 3(2) TFEU, the EU acquires exclusive competence to conclude an international agreement where its conclusion is necessary to enable the Union to exercise its internal competence. This differs from the other two categories of external exclusivity in that it grants the EU exclusivity in the external sphere even where it has not exercised its internal competence. Also, it appears that, under this category, exclusive external competence may arise in an area where the EU has only shared competence and has not exercised it. The scope of application of this head of exclusivity, however, is significantly narrowed by the requirement that the conclusion of an international agreement must be necessary to enable the Union to exercise its internal competence. In accordance with previous case law, this instance appears to envisage the situation where the adoption of internal rules by the EU is not sufficient to attain an EU objective, and the only way of doing so is the conclusion by the EU of an international agreement. In such a case, the EU acquires exclusive external competence even if internal rules in the sphere in question have not been adopted.[47] For exclusivity to arise under this rule, the external aspects of the activity must be inextricably linked to the internal ones.[48] That occurs where the participation of third states for the effective regulation of an economic activity is a *sine qua non*.

D. Exclusivity arising from the blocking effect of the ERTA *doctrine*

The final instance of exclusivity mentioned in Article 3(2) TFEU is where the conclusion of an international agreement may affect common rules or

46 See Craig, op.cit., p. 166. Such an express reservation of shared competence appears in Article 209(2) TFEU in relation to development cooperation.

47 See Opinion 1/76 *draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] ECR 741.

48 Opinion 1/94 *Agreement establishing the WTO* [1994] ECR I-5267, para 86.

alter their scope. This derives from the seminal judgment in *ERTA* where the ECJ held as follows:[49]

> [E]ach time the Community, with a 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 . . . as and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal order; and . . . to the extent to which Community rules are adopted 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.

In the *ILO* Opinion, the Court held that the blocking effect of Community law ensues not only where the institutions have adopted rules within the framework of a common policy, as stated in *ERTA*, but any type of rules.[50] Further, in the *WTO* Opinion, the Court stated that the Community acquires exclusive external competence in a certain field not only where Community legislation covers the internal aspects of that field, but also where legislation has expressly conferred on the institutions power to negotiate with non-member countries.[51] That extension of the blocking effect was confirmed in the *OECD* Opinion and corresponds, in effect, to the first kind of exclusivity provided by Article 3(2) TFEU discussed earlier.

The crucial question is to determine when the conclusion of an international agreement may be inconsistent with EU rules – in other words, when it 'may affect common rules or alter their scope'. Whereas in earlier years the ECJ adopted a notion of inconsistency which was not too intrusive, more recent case law suggests a broader notion of inconsistency.[52]

49 See Case 22/70 *Commission* v *Council* ('*ERTA*') [1971] ECR 263, paras 16, 18 22, as summarised by the ECJ in Case C-266/03 *Commission v Luxembourg*, judgement of 2 June 2005, para 40.

50 Opinion 2/91 [1993] ECR I-1061.

51 Opinion 1/94 *WTO* [1994] ECR I-5267, para 95.

52 Compare, on the one hand, *WTO* and *ILO* and Tridimas, "The *WTO* and *OECD* Opinions" in Dashwood and Hillion, The General Law of EC External Relations, Sweet & Maxwell, 2000 at 58–59 and, on the other hand, more recently, the *Open Skies* rulings (See Case C-471/ 98 *Commission v Belgium* [2002] ECR I-9690; Case C-467/98 *Commission v Denmark* [2002] ECR I-9519; Case C-468/98 *Commission v Sweden* [2002] ECR I-9575; Case C-469/98 *Commission v Finland* [2002] ECR I-*9627;* Case C-472/98 *Commission v Luxembourg* [2002] ECR I- 9741; Case C-475/98 *Commission v Austria* [2002] ECR I-9797; Case C-476/98 *Commission v Germany* [2002] ECR I-9855) and the *inland waterway transport* cases: Case C-266/03 *Commission v Luxembourg*, judgment of 2 June 2005; Case C-433/03 *Commission v Germany*, judgment of 14 July 2005; for a further illustration of this pre-emptive effect, see Case C-45/07 *Commission v Greece*, judgement of 12 February 2009. See further Craig, pp. 165–167 and 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, CUP 2008, chapter 2 at p. 61.

The more general approach of the ECJ towards international law in recent years suggests that the Court is likely to adopt an interpretation of Article 2(3) favourable to EU competence – that is, to enhance the blocking effect of EU law. The Court appears risk-averse where it comes to national measures which might affect EU action even in the absence of an actual conflict.[53] All in all, in the field of external competence the Lisbon appears to fuse the existence of EU competence and its exclusivity reversing, in effect, the rule of priority of Article 4(2) TFEU: In the field of external competence, oddly the presumption lies with exclusive rather than shared competence.

5. Shared competence

Under Article 2(2) TFEU, when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area.[54] Thus, in areas which fall within shared competence, both the Union and the Member States may act, and Member State action is not excluded a priori. In principle, shared competence does not mean that the Member States may legislate concurrently with the Union. Article 2(2) expressly states that the Member States may exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising,[55] its competence. Exceptionally, in certain cases, the

53 See the *BIT* cases, n. 85 to this chapter.

54 Article 2(2) TFEU originated in Article I–12(2) of the Constitutional Treaty.

55 This occurs where the EU decides to repeal a Union act. The Treaty of Lisbon was accompanied by a Declaration (Declaration No 28 in relation to the delimitation of competences) which states that the Union may decide to repeal an act to ensure "constant respect" for the principles of subsidiarity and proportionality. It also states that the Council may, at the initiative of one or several of its members, request the Commission to submit proposals for repealing a legislative act. The Inter Governmental Conference welcomed the Commission political commitment to devote particular attention to such requests by the Council. Since 2007, the Commission has taken

Member States and the EU can exercise their competence concurrently. This applies in development cooperation and humanitarian aid,[56] as well as in the areas of research, technological development and space.[57] Save in those areas, shared competence is subject to the blocking effect of EU legislation. Under Article 2(2) TFEU, Member States may exercise their competence 'to the extent that the Union has not exercised its competence'. In the context of internal EU competence, the case law has not developed a general doctrine of pre-emption similar to that of the *ERTA* doctrine. The Court does not use the formula under which, to the extent that the EU has adopted common rules, Member States may not adopt measures which may affect those common rules or alter their scope. In fact, given how developed the principle of primacy is, it is surprising that the case law has not developed a coherent doctrine of pre-emption in the field of EU internal competence.[58]

How then do we determine the boundaries of EU competence under Article 2(2)? To ascertain the extent to which a specific measure adopted by the EU allows Member States to adopt legislation in related fields, one would need to carry out the following inquiry. First, one would need to determine whether the EU has competence to adopt that measure and, if so, whether it has validly exercised its competence – that is, it satisfies the principles of subsidiarity and proportionality. Secondly, it is necessary to determine the scope of application of the measure. If the measure, correctly interpreted, covers a particular area, the EU has exercised its competence over that area and there is a corresponding loss of Member State autonomy in that the Member States may not take action which expressly contradicts, runs counter or is otherwise liable to undermine the Community rules. The scope and intensity of this blocking effect is a matter of interpretation of the EU rules in question and may

some steps towards simplification of EU legislation (see e.g. the repeal of Directive 68/89/EEC on the classification of wood OJ English Sp. Ed., Series I Chapter 1968(I) p. 6 (http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/688), but there has been no wholesale withdrawal of EU law.

56 Article 4(4) TFEU.

57 Article 4(3) TFEU. Note, however, that the scope of EU competence in those areas differs. Whereas in the field of development cooperation and humanitarian aid, the EU has competence to carry out activities and conduct a common policy, in the field of research, technological development and space, the EU's competence is defined in more general terms, i.e. 'to carry out activities, in particular to define and implement programmes': see Article 4(3).

58 For a discussion, see R. Schütze, Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption (2006) 43 CMLRev 1023.

vary from case to case. The interpretation will be ultimately a matter for the ECJ and will take into account the objectives, the wording and the scheme and context of the measure in issue. It is helpful here to borrow Schütze's terminology of pre-emption.[59] Depending on the circumstances, the measure may be held to prohibit only national norms which establish an actual conflict (rule pre-emption). It may also be interpreted to have a broader pre-emptive effect because it has exhausted the field and thus allows no margin for intervention by the national legislature (field pre-emption). It could furthermore be interpreted to disallow national intervention on the ground that it inhibits the realization of the objectives of the EU measure (obstacle pre-emption). Under this latter concept, to borrow from the U.S. doctrine of pre-emption, EU norms will preclude any national norm which poses 'an obstacle to the accomplishment and execution of the full purpose and objectives' of the EU measure.[60] In practice, in a number of cases, the discussion turns on whether a given directive has provided for maximum harmonisation and, if not, the extent to which allows Member States to adopt rules.[61]

The Treaty of Lisbon is accompanied by a new Protocol on the exercise of shared competence[62] which intends to cast light on the meaning of Article 2(2) TFEU. According to the Protocol, when 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'. The purpose of this, somewhat inelegant, formulation appears to be to limit the field pre-emption effect of Union legislation. It means that, where the Union legislates in a certain field, the adoption of legislation does not automatically result in the EU occupying the whole field so that Member States are excluded from adopting any measure. They remain, in principle, free to act in the same area as long as they do not enact legislation that conflicts with EU law or principles.[63] The pre-emptive effect of an EU measure, however, will ultimately depend on its scope and is a matter of interpretation. The protocol introduces a presumption against field pre-emption but does not preclude it.

59 Op.cit., at 1038.

60 See *Pacific Gas & Electric Co v State Resources Conservation & Development Commission* 461 U.S. 190 (1983) at 204.

61 For the application of these three forms of pre-emption in the case law of the ECJ see Schütze, op.cit., pp. 1040 *et seq.*

62 See Protocol on the Exercise of Shared Competence.

63 See House of Lords Committee, op.cit., p. 24.

Because EU competence is by default shared rather than exclusive or supporting, the express reference to areas where the EU enjoys shared competence is indicative and not exhaustive. Article 4(2) TFEU states the principal areas of shared competence. These are the following:

1. internal market;
2. social policy, for the aspects defined in the TFEU;
3. economic, social and territorial cohesion;
4. agriculture and fisheries, excluding the conservation of marine biological resources;
5. environment;
6. consumer protection;
7. transport;
8. trans-European networks;
9. energy;
10. the area of freedom, security and justice; and
11. common safety concerns in public health matters, for the aspects defined in the TFEU.

In some ways, the inclusion of internal market in the areas of shared competence may appear surprising. The establishment of the internal market is par excellence an EU activity. Nevertheless, the classification of internal market as shared competence is perfectly consistent with the general scheme and objectives of the Treaties and reflects existing case law. It does not mean that Member States may regulate the interstate movement of goods or services unilaterally or set up another entity, outside the framework of the Treaties, which can regulate such interstate movement. In that respect, the competence of the Community, and now the EU, is clearly exclusive. Shared competence means, however, that, subject to the restrictive effect of EU law, as described earlier, Member States may adopt rules in the fields of economic and social regulation, which fall within the scope of the internal market. It also means that harmonisation legislation adopted by the EU is subject to the principle of subsidiarity. This had already been accepted by the Court before Lisbon.[64] In practical terms, in fact, this appears to be the most important effect of including the internal market in the field of shared competences. If competence over internal market were exclusive, it would follow that harmonisation legislation under Article 114 TFEU (ex Article 95 EC) would not be subject to subsidiarity control, which would deprive the principle of much of its intended effect.

64 See Case C-491/01 *The Queen v Secretary of State for Health ex parte British American Tobacco Ltd* [2002] ECR I-11453.

6. Supporting competence

The TFEU recognises a category of supporting EU competence. Under this, the Union has competence to carry out actions to support, coordinate or supplement the actions of the Member States without thereby superseding their competence in these areas.[65] Such supporting action exists in the fields of protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; and administrative cooperation.[66] In those areas, the EU may adopt binding acts, but these cannot entail the harmonisation of national laws.[67] This exemption, however, remains subject to the transversal nature of internal market legislation under Article 114 TFEU (ex Article 95 EC). To the extent that the conditions of Article 114 TFEU are fulfilled, the EU may be able to adopt harmonisation legislation in an area even if it impacts on the fields covered by supporting competence.[68] The delineation of the precise boundaries between internal market on the one hand and the areas of supporting competence on the other remains a matter of interpretation.

7. The unwritten competence dynamic

Although the inclusion of express competence provisions in the Lisbon Treaty is to be welcomed, it by no means resolves the uncertainties surrounding the division of competence between the EU and the Member States. The general provisions of Articles 2 to 6 TFEU are helpful in a procedural sense. They serve as recognition of the EU's distinct constitutional status. They form an integral part of the process towards formalisation

65 See Article 2(5) TFEU.

66 See Article 6 TFEU.

67 Article 2(5), second sub-paragraph, TFEU

68 Argument for this view can be derived from the standard approach of the ECJ to the interpretation of Article 95(1) EC (now Article 114 (1) TFEU). See e.g. Case C-376/98 *Germany v Parliament and Council (First Tobacco Advertisement Directive case)* [2000] ECR I-8419; Case C-380/03 *Germany v Parliament and Council*, judgement of 12 December 2006 *(Second Tobacco Advertisement Directive case)*; Case C-301/06 *Ireland v Parliament and Council*, judgement of 10 February 2009; Case C-58/08 *The Queen on the application of Vodafone Ltd v Secretary of State for Business*, judgement of 8 June 2010.

of EU law and provide a readily identifiable point of reference for the citizen, the politicians and the courts. They are welcome in so far as they go, but their value is relative. The following points may be made in this context.

The categorisation of competences as exclusive or shared is of relative value. On the one hand, as we have seen, the existence of exclusive EU competence does not preclude action by Member States. On the other hand, the fact that the EU may have only shared competence in a specific field does not preclude the possibility that it may legislate so heavily as to occupy it fully and preclude any meaningful policy input by the Member States. Depending on how competences are exercised in practice, the lines may become much less bright than a reading of the provisions would suggest. An example may be provided by comparing the EU presence in the fields of competition and financial law. Even though competition law falls within the exclusive competence of the EU, since 2003 its enforcement has been decentralised in such a way as to leave more discretion to national courts and national competition authorities.[69] By contrast, in the last ten years, financial and securities law has been so heavily colonised by detailed EU legislation, that we can properly refer to the emergence of an EU federal securities law. This trend has now been reinforced by the establishment of EU agencies whose powers extend the EU's presence beyond rulemaking to cover the fields of monitoring and enforcement.[70]

Furthermore, the general provisions on competence give only part of the picture. The true extent of EU competence can only be determined by looking at the specific provisions of the TFEU which can serve as legal basis for the adoption of binding measures: The devil is in the detail.[71] In this respect, the competences of the EU and the powers of the EU institutions are inextricably linked. As already stated, there appears to be a tension between, on the one hand, the principle of enumerated competences which gives the presumption of competence to the Member States and, on the other hand, the detailed provisions of the Treaty which in fact bestow the EU institutions with power to take action in wide and

69 See Council Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003 OJ L 1/1.

70 Following the financial crisis, the EU has established three new agencies. See Regulation No 1093/2010 establishing the European Banking Authority, [2010] OJ L331/12; Regulation No 1094/2010 establishing the European Insurance and Occupational Pensions Authority, [2010] OJ L 331/48; Regulation No 1095/2010 establishing a European Securities and Markets Authority, [2010] OJ L331/84.

71 See Bermann, op.cit., p. 66.

diverse areas of economic and social policy, and project them as rival regulators to the national governments.[72] The Treaty of Lisbon provides for new EU competences or extends the powers of the EU institutions in various fields. These include energy, tourism, civil protection, intellectual property, services of general economic interest, humanitarian aid, the common commercial policy, travel and residence documents, common safety concerns in health, diplomatic and consular protection, and administrative cooperation. It adds the objective of achieving a European Research Area in the field of research and technological development and space.[73] It also provides for a new solidarity clause[74] and for administrative cooperation.[75]

The Treaty also provides for new EU competences in the fields of sport and space. In relation to sport, the EU's competence is supporting and excludes harmonisation.[76] As for space, Article 4(3) TFEU may be taken to mean that it falls within shared competence, but a closer look suggests that it may stand somewhere between shared and supporting competence. Competence in this field may be exercised concurrently by the EU and the Member States,[77] and the EU's powers exclude harmonisation of national laws.[78] Furthermore, the TFEU grants to the Council a new residual power to adopt, by unanimity, measures concerning social security and social protection in order to facilitate the freedom of EU citizens to move and reside within the EU.[79]

The exact scope of EU powers in each of those fields remains to be ascertained. It will depend, amongst others, on the specific language used by the enabling Treaty provisions and the conduct of the various political

72 See above, pp. 50–51.

73 Article 179 TFEU.

74 See Article 222 TFEU which provides for EU coordinating action in case a Member State is the object of a terrorist attack or the victim of a disaster.

75 See Article 197 TFEU which mandates the EU to support the efforts of Member States to improve their administrative capacity to implement Union law. The EU may adopt binding measures to this effect, but this is subject to two caveats. The harmonisation of national laws is beyond the ambit of this legal basis, and the commitment of the Member States is optional in that they are not required to avail themselves of the EU's support. For strengthening of administrative cooperation specifically in the field of freedom, security and justice, see Article 76 TFEU.

76 Article 165(4) TFEU.

77 Article 4(3) TFEU.

78 See Article 189(2) TFEU.

79 Article 21 (4) TFEU. Note also that under Article 23 TFEU, the Council may adopt by means of directives the necessary measures to facilitate diplomatic and consular protection of EU citizens in third states. Cf Article 22 EC as in force before the Treaty of Lisbon.

and institutional actors involved in practice. There are, however, two areas, namely criminal law and common commercial policy, where the impact of Lisbon is set to be far-reaching.

In the field of criminal law, Article 83 TFEU provides two new legal bases for the approximation of national laws. Article 83(1) empowers the Council and the Parliament to establish minimum rules concerning the definition of criminal offences and sanctions in certain areas of particularly serious crime with a cross-border dimension. The areas of crime in question are stated in Article 83(1) but are defined in broad terms, and the list can be extended by unanimous decision of the Council.[80] Furthermore, Article 83(2), provides treaty footing to a hitherto 'common law' power. It allows for the adoption of directives harmonising the definition of criminal offences and sanctions if the approximation of national criminal laws is essential to ensure effective implementation of a Union policy in an area which has been subject to harmonisation measures. This provision endorses the harmonisation mandate recognised to the Community by the ECJ in the environmental criminal penalties cases.[81] Under both Article 83(1) and Article 83(2), approximation is pursued through directives which may provide only for minimum standards and are subject to the 'emergency brake mechanism'.[82] It is not clear whether Article 83(2) replaces and repeals the 'common law' power recognised by the ECJ in the environmental penalties cases to flow implicitly from the provisions of the EC Treaty. This issue is of practical importance: Whilst the scope and conditions of EU harmonising competence appear to be the same under Article 83(2) as under the ECJ's rulings, harmonisation of criminal laws under Article 83(2) is subject to the 'emergency braking mechanism' whereas the power to harmonise criminal law which flows implicitly from specific Treaty bases is not subject to any such limit.

80 See Article 83(1), third sub-paragraph. The areas of crime covered are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

81 See Case C-176/03 *Commission v Council* [2005] ECR I-7879; Case C-440/05 *Commission v Council*, judgment of 23 October 2007, paras 69–74.

82 See Article 83(3) TFEU. This procedure enables a Member State who considers that a draft directive would affect fundamental aspects of its criminal justice system to suspend the ordinary legislative procedure and refer the matter to the European Council who decides by consensus. This gives, in effect, to Member States a qualified power to opt out rather than a power of veto: In the absence of consensus at the European Council, if at least nine Member States wish to proceed with harmonisation in the area, they may do so through enhanced cooperation: see Article 83(3), sub-paragraph 2.

A further area where the Lisbon Treaty provides for a substantial increase in EU powers is the common commercial policy. Articles 206 and 207 TFEU increase the scope of the common commercial policy to include foreign direct investment.[83] This is a significant development, because direct investment now becomes part of exclusive EU competence and marks a sea change in the trade practices of Member States. Although the term 'direct investment' is not defined in the Treaty, it is in general understood broadly.[84] Currently, there are more than 1,200 bilateral investment treaties (BITs) concluded between Member States and third countries. Their compatibility with EU law has come under increasing attack on the ground that they contain provisions which are in breach of EU law.[85] The Commission has now proposed a regulation establishing

83 See Article 206 and Article 207(1). Note also that the role of the European Parliament in the negotiation and conclusion of trade agreements, which pre-Lisbon was minimal, is enhanced: Measures defining the framework for implementing the common commercial policy are to be taken by the Council and the European Parliament in accordance with the ordinary legislative procedure (Article 207(2)). The Commission must also inform the Parliament on the progress of negotiation (Article 207(3)). However, the initiative for the conclusion and negotiation of trade agreements is entrusted to the Council and the Commission (Article 207(3)). The negotiation and conclusion of agreements on foreign direct investments requires unanimity 'where such agreements include provisions for which unanimity is required for the adoption of internal rules' (Article 207(4)). Note, furthermore, that agreements relating to trade in cultural, audiovisual, educational, social and human health services, which pre-Lisbon fell within shared competence and had to be concluded by both the EC and the Member States (Article 133(6) EC), under Lisbon, are to be concluded by the Council acting by unanimity (See 207(4) TFEU).

84 See the definition of direct investment in Annex I(I-2) of the Council Directive 88/361 OJ 1998 L 178/5. In general, according to IMF and OECD definitions, direct investment refers to investment which is made to acquire a lasting interest in an undertaking which is resident in an economy other than that of the investor. The lasting link requirement implies a long-term relationship between the investor and the undertaking and a significant degree of influence in its management. For a detailed discussion, see the OECD Benchmark Definition of Foreign Direct Investment, Fourth Ed., 2008, available at http://www.oecd.org/dataoecd/26/50/40193734.pdf.

85 In a number of enforcement proceedings, the ECJ found that BITs concluded between Member States and third countries provided for unqualified free movement of capital and thus were potentially incompatible with EU law which, under exceptional circumstances, allows the EU institutions to introduce restrictions on free movement of capital vis-à-vis third countries. It held that the defendant Member States had breached their obligations under EU law by not taking steps to renegotiate such BITs. See Case C-205/06 *Commission v Austria* & Case C-249/06 *Commission v Sweden* [2009] ECR I-1335; Case C-118/07 *Commission v Finland* [2009] ECR I-10889.

Although the rulings of the ECJ are expressed in narrow terms and the finding of a procedural breach is correct, the judgments display a degree of mistrust towards arbitration proceedings and other dispute resolution mechanisms provided by international law.

transitional arrangements for such BITs.[86] Under the terms of the proposal, Member States must notify the Commission of all BITs that they have concluded. Article 3 of the proposal authorises the maintenance in force of all existing notified BITs but without prejudice to the obligations of Member States under EU law. The proposal provides also for a review procedure and empowers the Commission to withdraw authorisation where a BIT conflicts with EU law or overlaps, in part or in full, with an EU agreement in force with the third country in question. The proposal, and more generally the Commission's hostile attitude towards investment arbitration, has created controversy. The International Trade Committee of the European Parliament has sought to reduce the Commission's review powers of existing BITs as currently provided in the proposal.[87] This is certainly an area where much development is to be expected.

In addition to the points made previously, there are other factors which show that Articles 2–6 TFEU tell only part of the story. EU competence is broadened as a result of the interconnection between separate policy areas. A regulatory intervention in one aspect of economic or social life is likely to affect others so that it becomes difficult to create watertight boundaries in policy making. The interdependence of policy sectors creates a spillover effect as the more areas that the EU occupies, the more necessary it becomes for it to legislate in others areas. This competence dynamic makes the boundaries between economic and social regulation elusive. It is exacerbated by the fact that Treaty provisions which serve as legal basis are often phrased in broad terms so that, sometimes, legislative intervention can be justified on more than one legal basis – or to put it differently, a policy can be adjusted to fit the objectives of various legal bases. This is particularly the case with the horizontal harmonisation power granted by Article 114. In a nutshell, policy interdependence has worked, in general, to the advantage rather than to the disadvantage of EU policy making, with the EU asserting its presence in virtually all aspects of economic life.

Approaching competence solely from a strictly legal perspective is liable to give a misleading impression. A great deal depends on the behaviour of the various political and institutional actors – for example, the way the EU institutions perceive the limits to their powers, the extent to which the

86 See COM(2010)344 final, Brussels, 7.7.2010 (available at http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146308.pdf).

87 See http://www.europarl.europa.eu/en/pressroom/content/20110411IPR17422/html/Bilateral-investment-less-Commission-authority-easier-EU-level-agreements.

Member States may prefer to decide matters at the EU level rather at the national level, the way powers are actually exercised, and the vicissitudes of the political game. Critics of the EU ever-expanding competence forget that Member States often prefer to act at EU rather than national level even where EU competence is marginal.[88] Legal rules do not exhaust the competence dynamic. From a strictly formal viewpoint, competence is closely linked to validity. A measure which falls beyond the powers of the institutions risks being declared invalid by the ECJ. This, however, presupposes litigation. Whether such litigation will take place depends, in turn, on a number of factors, both legal – for example, the rules of standing and access to justice – and practical – for example, the existence of a willing plaintiff. With the transformation of the Parliament from victim to victor, it now falls mostly to the Member States to initiate litigation testing the boundaries of the EU.

Furthermore, the EU enjoys an important 'horizontal' power under Article 114 TFEU. No other provision of the Treaties provides a better yardstick of the way the EU lawmaking institutions understand the limits of their own powers, and the Court understands its role in reviewing the competence of the EU, than that provision. The competence of the European Union to legislate under Article 114 TFEU (Article 95 EC) is horizontal in two respects. First, it is not sector-specific and transverses specific areas of the economy. The EU institutions can adopt measures in any area where harmonisation is necessary to ensure the establishment or functioning of the internal market. Secondly, it is, to a significant extent, value-neutral. The EU's harmonisation power is activated where disparities in the laws of the Member States create impediments to free movement or substantial distortions in competition. Provided that that condition is fulfilled, the EU can pass harmonisation legislation and can choose amongst a huge range of possible policy options. Its policy discretion is, in fact, in every respect comparable to that of a national government.

The general rules about competence tell us little about the intensity of EU action. Whereas in earlier years in the development of EU law,

88 Note, for example, the imposition of economic sanctions in pursuance of UNSC resolutions following September 11. The Member States decided to have the sanctions regime implemented via Community regulations rather than national measures, even though the combined legal basis provided by Articles 301, 60 and 308 EC was not at all certain. Notably, following the annulment of the sanctions in Joined Cases C-402/05 P & C-415/05 P *Kadi & Al Barakaat International Foundation v Council and Commission*, judgment 3 September 2008, the Member States were keen to re-implement sanctions at EU level.

directives on the coordination of national laws followed a model of minimum harmonisation, allowing Member States to provide for additional or more stringent requirements to pursue the aims of directives, in recent years, the model of maximum harmonisation is preferred in several fields including, for example, consumer and financial services law.

Additionally, to appreciate the effect of EU law on the power of national governments, one must take into account not only the EU's power to legislate, but also its power to constrain the legislative power of the Member States. This negative or dormant EU competence is much wider than its positive competence and is discussed in more detail later.

Finally, it is important to recall the overwhelming presence of the ECJ, which has been a central actor in facilitating a transfer of competences from the Member States to the EU. Traditionally, the ECJ has interpreted the competence of the Community broadly. It has adopted a broad interpretation of the doctrine of implied powers[89] and also of the powers of the Community under Articles 95 EC (now Article 114 TFEU) and Article 308 (now 352 TFEU).[90] It has actively encouraged integration by being passive in its review of EU legislation. It has been very reluctant to annul measures on proportionality grounds, and the judicial role of subsidiarity remains largely subdued. By exercising expediency review,[91] the Court has allowed the Community institutions ample legislative discretion. It has also expanded Community competence by interpreting restrictively exceptions and derogations and by extending the scope of application of EC law.[92]

8. Dormant EU competence

A distinction may be drawn between legislative competence in a narrow sense and 'negative' competence in a broader sense. The first refers to

89 See e.g. Case 22/70 *Commission v Council (ERTA Case)* [1971] ECR 263.

90 For an example of broad interpretation, see the judgement in *Kadi*, op.cit.

91 For examples of expediency review, see e.g. *Ireland v Parliament and Council*, op.cit.,; *The Queen v Secretary of state for Health ex parte British Amercian Tobacco*, op.cit.; Case C–63/89 *Assurances du Credit v Council and Commission* [1991] ECR I–1799; Case 479/93 *Francovich v Italian Republic (Francovich II)* [1995] ECR I–4843. For a further illustration of broad interpretation of EU powers, see Case C-303/05 *Advocaten voor de Wereld VZW v Leden van de Ministerraad (European Arrest Warrant)* [2007] ECR I-3633.

92 See e.g. Case C-71/02 *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECR I-3025; Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

the areas where the EU can validly pass legislation and can be referred to positive competence. Negative competence, on the other hand, refers to the areas where, although the EU cannot pass legislation, the discretion of the national governments to do so is constrained by EU law. Borrowing from U.S. constitutional doctrine, this can be referred to as dormant EU competence.[93] This type of competence covers a much broader field. It makes for substantial inroads into the exercise of economic and social policy and may affect substantially the discretion of the state to allocate resources. The ECJ has held, in general, that powers retained by the Member States must be exercised consistently with Community law,[94] and that, in situations covered by EU law, the national rules concerned must have due regard to the latter. Areas where EU law has expressly been recognised to have such constraining effect include income tax law, monetary law before the introduction of the euro,[95] the rules for granting nationality to corporations,[96] vessels[97] and even natural persons,[98] criminal law and procedure,[99] the rules determining surnames,[100] and rules governing entitlement to vote in European Parliament elections.[101] Thus, according to established case law, although direct taxation falls within their competence, Member States must none the less exercise that

93 U.S. constitutional law draws a distinction between the commerce clause and the dormant commerce clause. The first is provided in Article I(8)(3) of the Constitution which grants Congress power to regulate commerce between the States. The second refers to the exclusionary effect that arises from that congressional power and 'the free trade value it symbolizes'. See Sullivan, Constitutional Law, p. 244. The granting of authority to the federal government to regulate interstate affairs is interpreted to incorporate also a restraining effect on the power of the states to interfere with interstate trade even where the Congress has not exercised its authority under Article I(8)(3).

94 Case C-221/89 *Factortame and others* [1991] ECR I-3905, para 14. For earlier dicta, see Case 57/86 *Hellenic Republic v Commission* [1988] ECR 2855, para 9, Case 127/87 *Commission v Hellenic Republic* [1988] ECR 3333, para 7.

95 See Case 57/86 *Hellenic Republic v Commission*, op.cit., Case 127/87 *Commission v Hellenic Republic*, op.cit., and on the same tenor Case 95/81 *Commission v Italy* [1982] ECR 2187.

96 See e.g. Case C-210/06 *Cartesio Oktató és Szolgáltató bt*, judgement of 16 December 2008.

97 Case C-221/89 *Factortame and others* [1991] ECR I-3905, para 14.

98 See Case C-369/90 *Micheletti and Others* [1992] ECR I-4239, para 10; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, para 37; Case C-135/08 *Rottmann v Freistaat Bayern*, judgement of 2 March 2010, para 39.

99 Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, para 17.

100 Case C-148/02 *Garcia Avello* [2003] ECR I-11613, para 25.

101 Case C-145/04 *Spain v United Kingdom* [2006] ECR I-7917, para 78.

competence consistently with Community law.[102] If one were to use a gardening analogy, the areas of EU dormant competence would be represented by parts of a garden where the EU cannot plant its own trees: These are reserved for the planting of trees by the nation-state. But the EU can nonetheless employ its landscapers and gardeners and even release its woodpeckers. The shape of the national trees is not without its input. The scope and intensity of such constraining effect depends on a number of factors. It is stronger in those areas where the EU Treaties provide for norms of negative integration, such as, for example, the prohibition of discriminatory or protective taxation or, more generally, the fundamental freedoms of goods, persons, services and capital. It will be softer where core aspects of national sovereignty are involved, such as matters of national security. Such constraining effect may arise not only from the provisions of the Treaty on free movement, but also as a result of the application of general principles of law and/or EU directives which concretize norms imposing negative obligations such as the principle of non-discrimination.[103] Three more specific points may be made in relation the dormant competence of the EU. First, the broader the Court understands free movement, the greater the scope of constraining effect. This is illustrated by *Carpenter*.[104] Secondly, dormant competence may pose a considerable restriction on a government's ability to implement social and economic policy. This is illustrated prominently by *Mangold* and *Kücükdeveci*.[105] Finally, in many cases the constraining effect depends on the specificity of the ruling delivered by the ECJ. In delivering a preliminary ruling, the ECJ enjoys discretion on how specific its response to the referring court might be. It may provide the referring court with a specific outcome, it may give guidelines or provide only a general ruling, effectively deferring to national law. Where the ECJ provides guidance, it promotes a form of cooperative federalism at the judicial level.

102 Case C-446/03 *Marks & Spencer v David Halsey (Her Majesty's Inspector of Taxes)*, judgement of 13 December 2005, para 29; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, para 37.

103 Prime examples are provided by the judgements in Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981 and Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG*, judgement of 19 January 2010.

104 Op.cit.

105 Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981; Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG*, judgment of 19 January 2010.

9. Conclusion

The inclusion of specific provisions on competence in the Treaty of Lisbon is to be welcomed, but their value is mostly procedural. They provide a readily identifiable point of reference for the citizen, the politicians and the courts. They recognise the EU's distinct constitutional status and form an integral part of the process towards formalisation of EU law. But they do not, nor could they be expected to, resolve the uncertainties surrounding the division of competence between the EU and the Member States. In the complex constitutional model of the EU, the search for bright lines in competence partition is a somewhat Sisyphean task. The competence narrative tells only part of the story. The classification of competence as exclusive or shared is of relative value. A lot depends on the interpretation of the specific provisions of the TFEU which serve as the legal basis of EU measures, on institutional practice, the attitude of the Member States and the response of the ECJ. Lisbon appears to make a difference, in particular in the area of criminal law and the common commercial policy. More broadly, there is little doubt that the regulatory presence of the EU continues to increase and such enhanced presence can be felt in many ways. EU legislation has expanded in scope. There is hardly an area of regulation where the EU does not have a presence. Furthermore, EU legislation has increased in terms of its intensity. There is a tendency towards maximum harmonisation in many areas such as, for example, financial regulation or consumer protection. Finally, EU presence has increased in terms of its effects. Whereas in earlier eras Community law was concerned mostly with granting rights and providing a legislative framework within which national law operated, it has now gone beyond regulation and begun to enter the field of supervision and enforcement, inter alia, through the establishment of EU agencies. The need for judicial oversight and effective accountability mechanisms is perhaps stronger than ever.