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Competence, Categories, and Control

It has never been easy to specify with exactitude the division of competence between the EU and Member States.[1] Concerns about the scope of EU power had been voiced for some time, and it was therefore unsurprising that it was an issue identified for further inquiry after the Nice Treaty 2000. The Constitutional Treaty addressed this issue and many of the provisions have been taken over into the Lisbon Treaty.

The discussion begins by considering the nature of the competence problem, and the objectives that the framers of the Laeken Declaration sought to attain via Treaty reform. This will be followed by analysis of the principal heads of EU competence set out in the Lisbon Treaty. They will be considered against the criteria of clarity and containment, which bear the meanings described below. It will be argued that while 'definitional categorization' of the kind undertaken in the Lisbon Treaty has value, there are nonetheless limits as to what can be achieved by this method of delimiting competence. The discussion of the Lisbon Treaty will therefore be set against other existing techniques, legal and political, that are designed to ensure that the EU remains within the remit of its powers.

[1] V Constantinesco, *Compétences et pouvoirs dans les Communautés européennes: contribution à l'étude de la nature juridique des communautés* (Librairie générale de droit et de jurisprudence, 1974); A Dashwood, 'The Limits of European Community Powers' (1996) 21 ELRev 113; *The Division of Competences in the European Union*, Directorate-General for Research, Working Paper, Political Series W 26 (1997); I Pernice, 'Kompetenzabgrenzung im europäischen Verfassungsverbund' (2000) JZ 866; F Mayer, 'Die drei Dimensionen der europäischen Kompetenzdebatte' (2001) 61 ZaöRV 577; G de Búrca, 'Setting Limits to EU Competences?' Francisco Lucas Pires Working paper 2001/02; U di Fabio, 'Some Remarks on the Allocation of Competences between the European Union and its Member States' (2002) 39 CMLRev 1289; A von Bogdandy and J Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform' (2002) 39 CMLRev 227; V Michel, 'Le Défi de la Repartition des Compétences' (2003) 38 CDE 17; D Hanf and T Baumé, 'Vers une Clarification de la Répartition des Compétences entre l'Union et ses Etats Membres?' (2003) 38 CDE 135; P Craig, 'Competence: Clarity, Conferral, Containment and Consideration' (2004) 29 ELRev 323; S Weatherill, 'Better Competence Monitoring' (2005) 30 ELRev 23; F Mayer, 'Competences—Reloaded? The Vertical Division of Powers in the EU and the New European Constitution' (2005) 3 I-CON 493; V Vadapalas, 'La répartition des compétences entre l'Union européenne et les Etats membres' in C Kaddous and A Auer (eds), *Les principes fondamentaux de la Constitution européenne* (Helbing & Lichtenhahn, Bruylant, LGDJ, 2006) 135–145; R Schutze, *From Dual to Cooperative Federalism, The Changing Structure of European Law* (Oxford University Press, 2009).

The Lisbon Treaty. Paul Craig.

1. The Nature of the 'Competence Problem'

The issue of competence is central to the relationship between the EU and the Member States. It was one of the key issues singled out for further investigation after the Nice Treaty in 2000.[2]

It is important at the outset to understand the nature of the 'competence problem'. The EU has always had attributed competence. It could only operate within the powers granted to it by the Member States, as made clear by the first paragraph of Article 5 EC and Article 7(1) EC. A predominant concern was that Article 5 provided scant protection for State rights, and little safeguard against an ever-increasing shift of power from the States to the EU, notwithstanding the strictures about subsidiarity and proportionality contained in the second paragraph of Article 5 EC. This was the rationale for the inclusion of competence as an issue to be addressed after the Nice Treaty.

This view of the 'competence problem', however, is based on implicit assumptions as to how the EU acquires competence. The inarticulate premise is that the shift in power upward towards the EU is the result primarily of some unwarranted arrogation of power by the EU to the detriment of States' rights, which Article 5 EC has been powerless to prevent. This is an over-simplistic view of how and why the EU has acquired its current range of power. The matter is more complex and more interesting.

The reality is that EU competence has resulted from the symbiotic interaction of four variables: Member State choice as to the scope of EU competence, as expressed in Treaty revisions; Member State, and since the Single European Act 1986 (SEA), European Parliament acceptance of legislation that has fleshed out the Treaty articles; the jurisprudence of the Community courts; and decisions taken by the institutions as to how to interpret, deploy, and prioritize the power accorded to the EU.[3]

Thus, the judicial contribution to the expansion of competence has been but one factor in the distribution of power between Member States and the EU. Political choice by the Member States to grant the EU competence in areas such as the environment, culture, health, consumer protection, employment, and vocational training expressed through Treaty revision after extensive discussion in successive intergovernmental conferences (IGCs) has been equally important; so, too, has political choice embodied in Community legislation, accepted by the Member States in the Council, and in many instances after the SEA also by the

[2] Treaty of Nice, Declaration 23 [2001] OJ C80/1.

[3] P Craig, 'Competence and Member State Autonomy: Causality, Consequence and Legitimacy' in B de Witte and H Micklitz (eds), *The European Court of Justice and the Autonomy of Member States* (Intersentia, 2010) ch 1.

European Parliament. The action of Community institutions in deciding how to use the power formally accorded to them is also of real significance.

This does not mean that there is no competence problem in the EU. It does mean that we should avoid mistaken and simplistic premises that the problem is all reducible to some unwarranted arrogation of power by some reified entity called the EU. We should also be wary of analogies with other systems where judicial interpretation of open-textured constitutional provisions concerning the divide between federal and State power has been the sole or principal factor in delimiting competence.

2. The Aims of the Laeken Declaration

It is axiomatic that any view concerning the provisions on competences in the Lisbon Treaty will necessarily be affected by perceptions as to the aims that those provisions were designed to serve. We cannot judge the success or failure of the enterprise without some understanding as to the objectives.

The Laeken Declaration[4] specified in greater detail the nature of the inquiry into competence that had been left open after the Nice Treaty 2000. There were four more particular issues addressed under the heading of 'a better of division and definition of competence in the European Union'. These were the need to make the division of competence clearer and more transparent; the need to ensure that the Union had the powers required to perform the tasks conferred on it by the Member States, thereby ensuring that the European dynamic did not come to a halt; the need to ensure that there was not a 'creeping expansion' of EU competence or its encroachment upon areas left exclusively to the Member States; and the desirability of considering whether there should be some reorganization of competence between the EU and the Member States.

There were then four principal forces driving the reform process: clarity, conferral, containment, and consideration. The desire for *clarity* reflected the sense that the Treaty provisions on competences were unclear, jumbled, and unprincipled. The idea of *conferral* captured not only the idea that the EU should act within the limits of the powers attributed to it, but also carried the more positive connotation that the EU should be accorded the powers necessary to fulfil the tasks assigned to it by the enabling Treaties. The desire for *containment* reflected the concern, voiced by the German *Länder* as well as some Member States, that the EU had too much power, and that it should be substantively limited.[5] This argument must nonetheless be kept in perspective, since a significant factor in the distribution of competence has been the conscious decision of

[4] European Council, 14–15 December 2001, 21–22.
[5] Mayer, 'Competences' (n 1) 504–505.

the Member States to grant new spheres of competence to the EU. This is where the fourth factor came into play, *consideration* of whether the EU should continue to have the powers that it had been given in the past, a re-thinking of the areas in which the EU should be able to act.

The reality is that there was little systematic re-thinking of the areas in which the EU should be able to act. The Convention on the Future of Europe did not conduct any root and branch re-consideration of all heads of EU competence.[6] Nor would this realistically have been possible within the time available. The strategy was, in general terms, to take the existing heads of competence as given. The emphasis was on clarity, conferral, and containment. When consideration was given to the areas in which the EU should be able to act, and the degree of its competence within those areas, the general tendency was to reinforce EU power, not to 'repatriate' it to the Member States. This is exemplified by the Treaty provisions on economic policy, and by those on foreign policy and defence.

3. Categories and Consequences

The provisions on competence in the Lisbon Treaty repeat with some minor modifications those in the Constitutional Treaty, although the organization of the relevant provisions was a good deal clearer in the latter. The general approach is to delineate different categories of competence for different subject matter areas and to specify the legal consequences for the EU and Member States of this categorization.

The provisions are contained in the Treaty on European Union (TEU) and in the Treaty on the Functioning of the European Union (TFEU). Thus Article 4 TEU states that competences not conferred on the Union remain with the Member States. Article 5 TEU stipulates that the limits of Union competences are governed by the principle of conferral, under which the Union shall act only within the limits of competence conferred by the Member States, and repeats once again that competences not conferred on the Union remain with the Member States. The Lisbon Treaty thereby reaffirms the central principle that the EU operates on the basis of attributed competence. The use of Union competences is governed by the principles of subsidiarity and proportionality, which are dealt with in the remainder of Article 5 TEU. The revised TEU therefore tells us little about the existence of competence and is unnecessarily repetitious in the little that it does say.

It is to the TFEU, Articles 2 to 6, that we must look to find the substantive provisions concerned with competence. These Articles replicate with minor

[6] Economic governance was one of the limited substantive areas where the Convention did take stock of the limits of existing EU powers, and the desirability of reinforcing them so as to enable the EU to be able to perform its tasks properly within this area, CONV 357/02, Brussels 21 October 2002.

modification those found in the Constitutional Treaty. There are categories of competence that apply to specified subject matter areas, and concrete legal consequences flow from such categorization. The categories therefore matter, since the categorization has consequences, in terms of the possession and retention of power to legislate and make legally binding acts.

The principal categories are where the EU's competence is exclusive, where it is shared with the Member States, where the EU is limited to supporting/coordinating action, with special categories for EU action in the sphere of economic and employment policy, and Common Foreign and Security Policy (CFSP). The divide between these categories was the subject of intense debate within the Convention on the Future of Europe. The 'walls' between the categories shifted significantly.

4. Exclusive Competence

(a) Basic principles: meaning and scope

Article 2(1) TFEU establishes the category of exclusive competence, which carries the consequence that only the Union can legislate and adopt legally binding acts, the Member States being able to do so only if so empowered by the Union or for the implementation of Union acts.

The subject matter areas that fall within exclusive competence are set out in Article 3(1) TFEU: customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; and the common commercial policy. Article 3(2) TFEU states that the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.

(b) Area exclusivity: demarcation and delimitation

Article 3(1) TFEU lists a limited number of areas that are regarded as always falling within the EU's exclusive competence. These areas are in that sense to be regarded as *a priori* within the EU's exclusive competence, without the need for further inquiry. The areas thus listed are limited and relatively discrete. We have seen that a pressing concern in the Laeken Declaration and the Convention on the Future of Europe was to contain EU power. The domain of *a priori* exclusive competence fares pretty well when judged by this criterion, given that the areas that come within this category are relatively discrete and the overall list is small.

This is important because the consequences of inclusion within this category are severe: the Member States have no autonomous legislative competence and they cannot adopt any legally binding act. They can neither legislate, nor make any legally binding non-legislative act. A broad concept of exclusive competence would therefore have had the opposite effect of containment, since it would have enhanced the power of the centre at the expense of the Member States.

The importance of this point can be seen from earlier formulations of this category. The original text produced by the Convention included the four freedoms within the sphere of exclusive competence, but they were then re-assigned to the category of shared competence. The formal reason given for this change was the creation of a specific provision dealing directly with the four freedoms,[7] which was said to make their legal and political importance more visible than hitherto, and to underline the fact that they are directly applicable. While it might be felt to be desirable for political reasons to emphasize the centrality of the four freedoms, the argument based on direct applicability was odd to say the least, given that many other Treaty provisions have this quality. The real reason for the excision of the four freedoms from exclusive competence was rather different. If they had remained within this category, Member States would have had no legislative capacity in these areas, nor could they have adopted any legally binding non-legislative act. Taken literally, this would have meant that a Member State would have been precluded from enacting legislation that, for example, liberalized trade in postal services, unless it had been empowered by the Union or the Member State action was implementing Union acts. Thus, Member State action which was 'ahead' of EU action would have been precluded even though it might have been in accord with the overall aims of the EU, and even though it might well have been the catalyst for EU action in such areas.

The very creation of categories of competence nonetheless inevitably means that there will be problems of demarcating borderlines between the different categories. Such problems can arise in demarcating the line between exclusive and shared competence.

There are, for example, some ambiguities about the relationship between the competition rules, which are a species of exclusive competence, and the internal market, which is shared competence. It is clear that the basic competition rules in Articles 101 and 102 TFEU dealing with cartels and abuse of a dominant position fall within the domain of exclusive competence. The EU's exclusive competence relates only to the 'establishment' of these rules, and not their 'application'. This is in recognition of the new reality in competition law, whereby national courts have full competence to apply the entirety of Articles 101 and 102 TFEU.[8] The key issue is whether, subject to that caveat, the EU's

[7] Art I-4 CT.

[8] Council Regulation 1/2003 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty [2003] OJ L1/1.

exclusive competence applies not just to Articles 101 and 102 TFEU, but also to instances where the competition rules have an impact outside of this 'immediate area', such as Article 106 TFEU, which deals with the extent to which public undertakings are subject to the ordinary norms of Articles 101 and 102.

It is unclear whether this aspect of the competition rules also falls within the domain of exclusive competence, or whether it is to be dealt with through shared competence, which covers, *inter alia*, the internal market. The wording of Article 3(1) TFEU is important in this respect. It provides that the EU has exclusive competence in the 'establishing of the competition rules necessary for the functioning of the internal market'. This indicates that the exclusive competence attaches not only to the establishment of the basic competition rules in Articles 101 and 102 TFEU, but also to Article 106 TFEU, given that this concerns the relationship between public undertakings and the competition rules in the overall functioning of the internal market.

This conclusion is reinforced by the structure and content of this Part of the TFEU. Part III, Title VII, deals with competition, with the basic rules about cartels and abuse of a dominant position contained in Articles 101 and 102 TFEU, while the rules on public undertakings are found in Article 106 TFEU. This is one of the Titles dealing with 'Union Policies and Internal Actions'. It is therefore rational to conclude that the wording of Article 3(1) TFEU, which accords the EU exclusive competence in the 'establishing of the competition rules necessary for the functioning of the internal market' covers all competition rules relating to undertakings in the internal market, including as they apply within the context of Article 106 TFEU.

There may also be difficult borderline problems between provisions relating to the customs union, and other aspects of the internal market, since the customs union falls within exclusive competence, while the internal market is shared competence. There can be difficulties, however, in deciding whether a case is concerned with the customs union, tariffs, quotas and the like, or whether it is really 'about' discriminatory taxation.[9] There may also be 'categorization difficulties' in relation to the divide between tariffs/quotas and other quantitative measures that might limit imports.[10] The fact that the customs union falls within the domain of exclusive competence, while the other issues come within shared competence, renders such divisions more significant.

(c) Conditional exclusivity: demarcation and delimitation

The EU is also accorded exclusive competence to conclude an international agreement, provided that the conditions in Article 3(2) are met. The scope of

[9] P Craig and G de Búrca, *EU Law, Text, Cases and Materials* (Oxford University Press, 4th edn, 2007) ch 18.
[10] ibid chs 18–19.

the EU's exclusive competence in relation to such external matters is problematic. Article 3(2) TFEU provides that:

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

The case law on the scope of the EU's external competence, and the extent to which it is exclusive or parallel with that of the Member States, is complex.[11] Article 3(2) TFEU stipulates three instances in which the EU has exclusive external competence: where the conclusion of such an agreement is provided for in a legislative act of the Union; where it is necessary to enable the Union to exercise its competence internally; or where it affects an internal Union act.

The interpretation of this provision is by no means easy,[12] and the reason is not hard to divine. The very complexity of the case law in this area necessarily means that embodying the principles in a Treaty Article was always going to be difficult. It was almost inevitable that the translation of complex jurisprudence into a Treaty Article would lead to some change, since the limits of Treaty drafting render it difficult to capture all the nuances from that jurisprudence. This is especially manifest in the way in which Article 3(2) read together with Article 216 TFEU in effect elides the EU's power to act via an international agreement with the exclusivity of that power, an issue which pre-occupied much of the case law in this area.

The content of Article 3(2) TFEU is in contrast to the more cautious recommendations of Working Group VII on External Action. The Working Group consciously disaggregated the existence of EU competence to conclude an international agreement and the impact that this would have on the delimitation of competence between the EU and the Member States, and thus distinguished between the existence of external competence and exclusivity.[13]

[11] T Tridimas and P Eeckhout, 'The External Competence of the Community and the Case-Law of the Court of Justice: Principle versus Pragmatism' (1994) 14 YBEL 143; M Cremona, 'External Relations and External Competence: the Emergence of an Integrated Policy' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, 1999) ch 4; A Dashwood and C Hillion (eds), *The General Law of EC External Relations* (Sweet & Maxwell, 2000); P Eeckhout, *External Relations of the European Union: Legal and Constitutional Foundations* (Oxford University Press, 2004); M Cremona, 'The Draft Constitutional Treaty: External Relations and External Action' (2003) 40 CMLRev 1347; P Koutrakos, *EU International Relations Law* (Hart, 2006); Craig and de Búrca (n 9) 95–100, and ch 6; P Koutrakos, 'Legal Basis and Delimitation of Competence in EU External Relations' in M Cremona and B de Witte (eds), *EU Foreign Relations Law, Constitutional Fundamentals* (Hart, 2008) ch 6; M Cremona, 'Defining Competence in EU External Relations: Lessons from the Treaty Reform Process' in A Dashwood and M Maresceau (eds), *Law and Practice of EU External Relations, Salient Features of a Changing Landscape* (Cambridge University Press, 2008) ch 2.

[12] Cremona, 'Draft Constitutional Treaty' (n 11); Craig (n 1).

[13] CONV 459/02, Final Report of Working Group VII on External Action, Brussels 16 December 2002, 4, 16.

(i) External competence and exclusivity: pre-Lisbon

We need therefore to take a brief step back to the pre-Lisbon case law to understand the significance of Article 3(2) TFEU. The European Court of Justice (ECJ) had for some considerable time recognized Community competence to conclude an international agreement where this was necessary to effectuate its internal competence, even where there was no express external competence.[14] The issue of whether this implied external power was exclusive, however, was treated as distinct from the existence of such power. Implied external competence could be exclusive or shared.[15] While it was clear that the EC's implied external competence could be shared with the Member States, the ECJ also held that this implied external power could be exclusive. However, the precise circumstances where this would be so were not entirely clear,[16] although the formulations used by the ECJ as to when exclusivity could arise were far-reaching.

Thus in *ERTA* the ECJ held that when the Community acted to implement a common policy pursuant to the Treaty, the Member States no longer had the right to take external action where this would affect the rules thus established or distort their scope.[17] This position was modified in *Kramer*.[18] The ECJ held that the EC could possess implied external powers even though it had not taken internal measures to implement the relevant policy, but that until the EC duly exercised its internal power the Member States retained competence to act, provided that their action was compatible with Community objectives. The scope of exclusivity was thrown into doubt in the *Inland Waterways* case,[19] where the ECJ held that the EC could have exclusive external competence, even though it had not exercised its internal powers, if Member State action could place in jeopardy the Community objective sought to be attained.

The ECJ, however, pulled back from the very broad reading of exclusivity contained in the *Inland Waterways* case in *Opinion 1/94 on the WTO Agreement*.[20] It held that exclusive external competence was in general dependent on

[14] (N 11); Case 22/70 *Commission v Council* [1971] ECR 263; Cases 3, 4, and 6/76 *Kramer* [1976] ECR 1279; Opinion 1/76 *On the Draft Agreement Establishing a Laying-up Fund for Inland Waterway Vessels* [1977] ECR 741; Opinion 2/91 *Re the ILO Convention 170 on Chemicals at Work* [1993] ECR I-1061; Opinion 2/94 *Accession of the Community to the European Human Rights Convention* [1996] ECR I-1759.

[15] Opinion 1/03 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2006] ECR I-1145, [114]–[117].

[16] Cremona, 'External Relations' (n 11); A Dashwood and J Heliskoski, 'The Classic Authorities Revisited' in Dashwood and Hillion (n 11) 3.

[17] Case 22/70 *Commission v Council* (n 14).

[18] Cases 3, 4, and 6/76 *Kramer* (n 14).

[19] Opinion 1/76 *Inland Waterways* (n 14).

[20] Opinion 1/94 *Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property, WTO* [1994] ECR I-5267.

actual exercise of internal powers and not their mere existence.[21] The *Inland Waterways* case was distinguished on the ground that the EC's internal objective could not be attained without the making of an international agreement and internal EC rules could not realistically be made prior to the conclusion of such an agreement.[22] This rationale was held not to apply to the subject matter of the *WTO* case.[23] This reasoning has been followed in later decisions.[24]

Subsequent jurisprudence nonetheless revealed that the ECJ would construe broadly the idea of the EC having exercised its powers internally, and that the ECJ was also prepared to give a wide interpretation to the circumstances in which this gave rise to exclusive external competence for the EC. This was apparent from the 'open skies' litigation, involving Commission actions against a number of Member States.[25] The Commission brought actions under what was Article 226 EC, alleging that Member States had infringed the Treaty by concluding bilateral 'open skies' agreements with the USA, on the ground that the EC had exclusive external competence in this area. It argued, *inter alia*, that the EC had exclusive external competence in line with the *ERTA* ruling, because it had exercised its internal competence to some degree within the relevant area. The ECJ accepted this argument. The Council had adopted a package of legislation based on Article 80(2) EC. The ECJ held that the *ERTA* ruling could apply to internal power exercised in this manner and therefore the EC had an implied external competence. It followed that when the EC made common rules pursuant to this power, the Member States no longer had the right, acting individually or collectively, to undertake obligations towards non-Member States, which affected those rules or distorted their scope.

The importance of the judgment lies in its confirmation of the broad reading given to the phrase 'affected those rules or distorted their scope', since it was this that transformed external competence into exclusive external competence. The ECJ, in accordance with prior case law, held that this would be so where the international agreement fell within the scope of the common rules, or within an area that was already largely covered by such rules, and this was so in the latter case even if there was no contradiction between the international commitments and the internal rules. EC legislative provisions relating to the treatment of non-Member State nationals, or expressly conferring power to negotiate with non-Member States, gave the EC exclusive external competence. This was so even in the absence

[21] ibid [88]–[89]. [22] ibid [85]–[86]. [23] ibid [86], [99], [100], [105].

[24] See, eg, Opinion 2/92 *Competence of the Community or one of its Institutions to Participate in the Third Revised Decision of the OECD on National Treatment* [1995] ECR I-521.

[25] Case C-466/98 *Commission v United Kingdom* [2002] ECR I-9427; 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-471/98 *Commission v Belgium* [2002] ECR I-9681; Case C-472/98 *Commission* v *Luxembourg* [2002] ECR I-9741; Case C-475/98 *Commission v Austria* [2002] ECR I-9797.

of express provision authorizing the EC to negotiate with non-Member States in areas where the EC had achieved complete harmonization, since if Member States were able to conclude international agreements individually it would affect the common rules thus made. Distortion in the flow of services in the internal market that might arise as a result of the bilateral agreement did not, by way of contrast, affect the common rules adopted in the area.

The same general message emerged from the *Lugano* Opinion:[26] implied external competence could be exclusive or shared, but where the EC had exercised its powers internally, then the ECJ would be inclined to conclude that this gave rise to exclusive external competence, whenever such exclusive competence was needed to 'preserve the effectiveness of Community law and the proper functioning of the systems established by its rules'.[27]

(ii) External competence and exclusivity: post-Lisbon

It is important, before considering the meaning of Article 3(2) TFEU, to be mindful of Article 216 TFEU. Article 216 is concerned with whether the EU has competence to conclude an international agreement. Article 3(2) deals with the related, but distinct, issue as to whether that competence is exclusive or not. Article 216 TFEU reads as follows.

1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.
2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States

The catalyst for Article 216 TFEU was the report of the Working Group on External Action. Prior to the Lisbon Treaty the EC Treaty accorded express power to make international agreements in certain limited instances,[28] and this was supplemented by the ECJ's jurisprudence delineating the circumstances in which there could be an implied external competence to make an international agreement. The Working Group recommended that there should be a Treaty provision that reflected this case law.[29] This was embodied in the Constitutional Treaty,[30] and taken over into the Lisbon Treaty as Article 216 TFEU. The breadth of Article 216 is readily apparent, and the reality is that it will be rare, if ever, for the EU to lack power to conclude an international agreement. The scope of this Article and its relationship with Article 3(2) TFEU are considered in a

[26] Opinion 1/03 *Lugano* (n 15) [114]–[115].
[27] ibid [131].
[28] Arts 111, 133, 174(4), 181, 310 EC.
[29] Final Report of Working Group VII (n 13) [18].
[30] Art III-323 CT.

later chapter, to which reference should be made.[31] The present focus is Article 3 (2) TFEU and examination of the three situations in which the EU has exclusive external competence.

The first is where the conclusion of an international agreement is provided for by a legislative act of the Union. The wording is significant. Article 3(2) TFEU does not state that the Union shall have exclusive external competence where a Union legislative act says that this shall be so. Nor does it state that the EU shall have such exclusive external competence only in the areas in which it has an exclusive internal competence. It states that where the conclusion of an international agreement is provided for in a legislative act, the Union will have exclusive external competence in this regard. The consequence is that express external empowerment to conclude an international agreement is taken to mean exclusive external competence, with the corollary that Member States are pre-empted from concluding any such agreement independently, from legislating or adopting any legally binding act. The same reasoning would seem to apply *a fortiori* where a Treaty article, as opposed to a legislative act, accords the Union power to conclude an international agreement, unless there is some indication in the Treaty article to the contrary,[32] but there is no mention of this in Article 3(2) TFEU.

The same elision of external power and exclusive external power is evident in the second of the situations listed in Article 3(2) TFEU. There is, as we have seen, well-known ECJ jurisprudence that accords the EU competence to conclude an international agreement where this is necessary to effectuate its internal competence, even where there is no express external competence.[33] The effect of Article 3(2) TFEU is nonetheless that the EU has exclusive external competence to conclude an international agreement where it is necessary to enable the Union to exercise its competence internally, and this is so irrespective of the type of internal competence possessed by the EU. Taken literally this means that exclusive external competence to conclude an international agreement resides with the Union if this is necessary for the exercise of internal competence, where the internal competence is shared, and where the EU can only take supporting or coordinating action. This conclusion could be limited by fastening on the word 'necessary' and arguing that the conclusion of the international agreement did not fulfil this pre-condition. The conclusion might also be limited by arguing that any EU external competence to make an international agreement must be bounded by the nature of its internal competence in the relevant area. This would mean that the EU could not make such an agreement if the content thereof were to take the EU beyond, for example, supporting or coordinating action in an area where its internal competence was thus limited. Even if this qualification were to be accepted, the effect of Article 3(2) TFEU would still be that the EU would have exclusive external competence to conclude an international agreement that was necessary to enable the EU to exercise an internal competence, even where

[31] Ch 10. [32] See, eg, Art 209(2) TFEU. [33] (N 14).

the internal competence only allowed supporting action, provided that the international agreement did not contain provisions that went beyond this type of action.

The third of the situations mentioned in Article 3(2) TFEU is that the EU shall have exclusive competence insofar as the conclusion of an international agreement 'may affect common rules or alter their scope'. This is in accord with the ECJ's case law considered above. The reality is, as we have seen, that this phrase has been interpreted broadly by the ECJ, such that in most instances where the EU has exercised its power internally it will be held to have an exclusive external competence.

Cremona has argued convincingly that Article 3(2) 'conflates the two separate questions of the existence of implied external competence and the exclusivity of that competence',[34] and that the combination of this Article when read with Article 216 TFEU is that implied shared competence could disappear. This does indeed seem to be the outcome from the Treaty provisions, subject to the caveats mentioned above, and it is, as Cremona states, one that is hard to defend in policy terms.[35]

There may well be a more general lesson here. The translation of highly complex case law into the form of a Treaty article is always difficult. The almost inevitable tendency is to shed certain of the nuances from that jurisprudence in order to be able to put something down on paper in manageable form.

5. Shared Competence

(a) Basic principles: meaning and scope

Article 2(2) TFEU defines shared competence. The wording is important and Article 2(2) states that:

> When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

The categories of shared competence are delineated in Article 4 TFEU. It is clear from Article 4(1) TFEU that shared competence is the general residual category, since it provides that the Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the

[34] Cremona 'Defining Competence' (n 11) 61.

[35] ibid 62. See also, A Dashwood, 'Mixity in the Era of the Treaty of Lisbon' in C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited, The EU and its Member States in the World* (Hart, 2010) ch 18.

categories referred to in Articles 3 and 6 TFEU, which deal respectively with exclusive competence, and that where the Union is restricted to taking action to support, coordinate, or supplement the action of the Member States. This follows also from Article 4(2), which states that shared competence applies in the principal areas listed, implying thereby that the list is not necessarily exhaustive.

Article 4(2) TFEU specifies the more particular areas that are subject to shared competence. They are: the internal market; social policy, for the aspects defined in the TFEU; economic, social, and territorial cohesion; agriculture and fisheries, excluding the conservation of marine biological resources; the environment; consumer protection; transport; trans-European networks; energy; the area of freedom, security, and justice; and common safety concerns in public health matters, for the aspects defined in the TFEU.

Article 4(3) then stipulates that in the areas of research, technological development, and space, the Union shall have competence to carry out activities, in particular to define and implement programmes, but that the exercise of that competence shall not result in Member States being prevented from exercising theirs.

In a similar vein, Article 4(4) states that in the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy, but that the exercise of that competence shall not result in Member States being prevented from exercising theirs.

The idea that shared competence is the default position must nonetheless be read subject to the special category of competence dealing with economic and employment policy, Article 5 TFEU, and that dealing with foreign and security policy, Article 2(4) TFEU, Title V TEU. The rationale for these separate categories will be considered below. It is true that in some general sense the regime that operates in these areas can loosely be regarded as one of shared power. It is clear, however, that the very existence of these categories is indicative that they are not to be regarded as ordinary examples of shared power. It is clear, moreover, that the legal consequences of inclusion within the general category of shared competence, set out in Article 2(2) TFEU, do not capture the reality of the divide between EU and Member State power in economic and employment policy, and the CFSP, as is apparent from the detailed provisions on these areas in the Lisbon Treaty.

In the Convention on the Future of Europe, Working Group V on Complementary Competencies was rather vague about the nature of the divide between exclusive and shared competence, and concluded that the respective areas should be defined in accordance with the ECJ's jurisprudence.[36] This ambivalent approach to the divide between exclusive and shared power would not have enhanced clarity. Nor would recourse to the case law have been conclusive,

[36] CONV 375/1/02, Final Report of Working Group V on Complementary Competencies, Brussels 4 November 2002, 6–7.

since it does not embody clear principles in this regard, as exemplified by the fact that the jurisprudence failed to provide a definitive answer to the meaning of exclusive competence for the purposes of applying subsidiarity. The general approach in the Constitutional Treaty and the Lisbon Treaty is therefore to be preferred.

(b) Shared competence: demarcation and delimitation

We saw in the discussion of exclusive competence the boundary problems that might arise between that category and shared competence. We shall see below that there can be analogous problems concerning the divide between shared competence and the category of supporting, coordinating, or complementary action.

The difficulties can be exemplified in relation to social policy. Article 4(2)(b) TFEU provides that social policy comes within the area of shared competence 'for the aspects defined in this Treaty'. Article 151 TFEU sets out the general objectives of EU social policy, which include promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment, and the combating of exclusion. The Article mentions harmonization, but in guarded tones: the promotion of employment and improved living and working conditions is to 'make possible their harmonization while the improvement is being made'. However, other more specific Treaty articles on social policy expressly preclude harmonization.[37] The remaining Treaty provisions on social policy are specified in Articles 152 to 161 TFEU and the reality is that they do not provide explicit guidance as to which areas fall within shared competence, and which do not. Insofar as the Lisbon Treaty provisions on competence were intended to be conducive to greater clarity as to categories of competence the result in this area is unsatisfactory. The nature of the competence can only be divined through close reading of the individual Treaty provisions and interpreting them in the light of the previous jurisprudence.

When approached in this manner it would seem that Article 156 TFEU, which encourages the Commission to foster cooperation and coordination between the Member States in broad areas of social policy, does not come within shared competence, but is covered rather by the special category of competence dealing with economic, employment, and social policy,[38] or perhaps by that dealing with supporting, coordinating, and supplementing Member State action.[39] By way of contrast Article 157 TFEU, which deals with gender discrimination and equal pay, would seem to come within shared competence, with the consequences that flow for the balance between EU and Member State power.

[37] Art 153(2)(a) TFEU. [38] Art 5 TFEU.
[39] Art 6 TFEU. However social policy is not included in the list in Art 6.

Article 153 TFEU falls betwixt and between. It is framed in terms of EU action to complement and coordinate the activities of the Member States in a wide variety of fields,[40] in order to attain the objectives of EU social policy in Article 151 TFEU. It would therefore seem to fall more naturally within the scope of competence to support, coordinate, and supplement Member State action considered below, although it does not come within the relevant list in Article 6 TFEU. The language of Article 153 TFEU couched in terms of complementing and coordinating Member State action does not fit naturally with shared competence. However, the EU is empowered to enact directives imposing 'minimum requirements for gradual implementation' in relation to many of these areas,[41] and it is not clear whether in this respect social policy is deemed to be within shared competence.[42]

The Treaty provisions on shared competence reveal moreover a further, somewhat different dimension to the demarcation problem. Shared competence is, as we have seen, the default position in the Lisbon Treaty. The area of research, technological development, and space, and that of development cooperation and humanitarian aid are not among those expressly listed as falling within shared competence in Article 4(2). They are, however, clearly regarded as falling within shared competence, subject to the special treatment accorded to them under Articles 4(3) and 4(4) TFEU. Moreover, they are not listed as areas coming within the category of supporting, coordinating, and supplementing Member State action.

There is nothing untoward in this, given that the list in Article 4(2) is non-exhaustive. These areas nonetheless reveal in more general terms the difficulties of deciding whether to assign a particular area to that of shared competence, or to place it within the category of supporting, coordinating, and supplementing Member State action, considered below. This is because inspection of the detailed provisions relating to the area of research, technological development, and space, and that of development cooperation and humanitarian aid, reveals that many of the provisions are indeed couched explicitly or implicitly in the language of supporting and complementary action.[43] These would seem to make them a more natural fit with the category of supporting, coordinating, and supplementing Member State action.

[40] Improvement in particular of the working environment to protect workers' health and safety; working conditions; social security and social protection of workers; protection of workers where their employment contract is terminated; the information and consultation of workers; representation and collective defence of the interests of workers and employers, including co-determination; conditions of employment for third-country nationals legally residing in Union territory; the integration of persons excluded from the labour market, without prejudice to Art 166 TFEU; equality between men and women with regard to labour market opportunities and treatment at work; the combating of social exclusion; the modernization of social protection systems.

[41] Art 153(2)(b) TFEU.

[42] Art 153(2)(a) TFEU expressly precludes harmonization.

[43] Arts 179(2), 180, 181, 208, 210, 214(1), 214(6) TFEU.

It is unclear why this option was not chosen. It is certainly true that the EU is allowed to make legally binding decisions in these areas, and the implication of the wording of Articles 4(3) and 4(4) TFEU seems to be that it is the legal capacity to define and implement such programmes, or conduct a policy, that is felt to bring the areas within the sphere of shared competence. However, this does not fit with the Treaty language, since legally binding acts are not prohibited within the category of supporting etc action, which only bars harmonization measures.[44] Whatsoever was the reason as to why these areas were regarded as falling within shared competence, it demonstrates the absence of fit between this categorization and the reality of the provisions that govern these topics.

(c) Shared competence: EU action and pre-emption

Shared competence was always central to the EU and remains so in the reformed Treaty provisions. We should nonetheless be mindful of the legal implications of the new provisions on the divide between EU and Member State competence. Article 2(2) TFEU stipulates that the Member State can only exercise competence to the extent that the Union has not exercised or has decided to cease to exercise its competence within any such area.

Taken literally this looks like automatic pre-emption of Member State action where the Union has exercised its competence. The consequence is that the amount of shared power held by the Member State in these areas will diminish over time. Power sharing would on this view be a one-way bet, subject to the possibility that the EU decided not to exercise its competence within a specific area. If containment is a concern, then there is little here to give comfort to supporters of States' rights. This conclusion as to the import of Article 2(2) TFEU must, however, be qualified in four ways.

First, Member States will only lose their competence within the regime of shared power to the extent that the Union has exercised *its* competence. Precisely what the EU's competence actually is within these areas can, as will be seen below, only be divined by considering the detailed provisions that divide power in areas as diverse as social policy, energy, the internal market, and consumer protection. The upshot is that the real limits on Union competence must be found in the detailed provisions which delineate what the EU can do in the diverse areas where power is shared. It is these provisions, the judicial interpretation thereof, and the way that the EU decides to legislate within these areas, which will determine the practical divide between Member State and EU competence. This is in reality what we have always had to do in order to determine the boundaries between State and EU power.

[44] Art 2(5) TFEU.

Second, the pre-emption will only occur *to the extent* that the EU has exercised its competence in the relevant area. There are different ways in which the EU can intervene in a particular area.[45] The EU may choose to make uniform regulations, it may harmonize national laws, it may engage in minimum harmonization, or it may impose requirements of mutual recognition. Thus, for example, where the EU chooses minimum harmonization, Member States will have room for action in the relevant area. The Member States were nonetheless sufficiently concerned as to the possible pre-emptive impact of Article 2(2) TFEU to press for the inclusion of the Protocol on Shared Competence,[46] which seeks to reinforce the point made above. It provides in effect that where the Union has taken action in an area governed by shared competence, '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'.[47] It should nonetheless be recognized that notwithstanding the Protocol it would be possible for Union acts to cover the entire area subject to shared power, provided that the EU was able to do so under the relevant Treaty provisions.

Third, Article 2(2) TFEU expressly provides for the possibility that the EU will cease to exercise competence in an area subject to shared competence, the consequence being that competence then reverts to the Member States. A Declaration attached to Treaty[48] specifies different ways in which this might occur. The EU might decide to repeal a legislative act, because of subsidiarity and proportionality. The Council could, in accordance with Article 241 TFEU, request the Commission to submit proposals for repealing a legislative act. There could moreover be a Treaty amendment to increase or to reduce the competences conferred on the EU.

The final qualification concerns Article 4(3) and Article 4(4) TFEU. The essence of both Treaty provisions is to make clear that the Member States can continue to exercise power even if the EU has exercised its competence within these areas. Thus even if the EU has defined and implemented programmes relating to research, technological development, and space, this does not preclude Member States from exercising their competence in such areas. The same reasoning is applied in the context of development cooperation and humanitarian aid.

[45] S Weatherill, 'Beyond Preemption? Shared Competence and Constitutional Change in the European Community' in D O' Keefe and P Twomey (eds), *Legal Issues of the Maastricht Treaty* (Chancery Law Publishing, 1994) ch 2; M Dougan, 'Minimum Harmonization and the Internal Market' (2000) 37 CMLRev 853; M Dougan, 'Vive la Difference? Exploring the Legal Framework for Reflexive Harmonisation within the Single Market' (2002) 1 Annual of German and European Law 13; CONV 375/1/02, Final Report of Working Group V (n 36) 12–13.

[46] Protocol (No 25). [47] See also, Declaration 18. [48] Declaration 18.

(d) Shared competence: variation and specification

Shared competence may, subject to what was said above, constitute the default position in relation to the division of competence within the Lisbon Treaty, but that does not mean that the precise modality of the sharing will be the same in all the areas to which shared competence applies. The legal as well as the political reality is that shared competence is simply an umbrella term, with the consequence that there is significant variation as to the division of competence in different areas of EU law. It follows that the precise configuration of power sharing in areas such as the internal market, consumer protection, energy, social policy, the environment, and the like can only be determined by considering the detailed rules that govern these areas, which are found in the relevant provisions of the TFEU.

The sharing of power in relation to, for example, the four freedoms is very different from the complex world of power sharing that operates within the area of freedom, security, and justice. There are indeed significant variations of power sharing that operate within the overall area of freedom, security, and justice.[49] There is nothing in the provisions on 'Categories and Areas of Union Competence' that will help the interested onlooker to work this out, nor is there any magic formula that applies to all areas of shared power that determines the precise delineation of power in any specific area.

This is not a criticism as such. It is rather the consequence of the fact that the EU has been attributed competence in different areas through successive Treaty amendments, coupled with the fact that the precise degree of power it has been accorded differs as between these areas. This is recognized by Article 2(6) TFEU, which states that 'the scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area'.

6. Supporting, Coordinating, or Supplementary Action

(a) Basic principles: meaning and scope

The third general category of competence allows the EU to take action to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas, and without entailing harmonization of Member State laws', Article 2(5) TFEU. While the EU cannot harmonize the law in these areas, it can pass legally binding acts on the basis of the provisions specific to them, and the Member States will be constrained to the extent stipulated by such acts. The meaning of supporting etc action, and hence

[49] Ch 9.

the precise extent of EU power, varies somewhat in the different areas listed, but it is clear that the EU has a significant degree of power in these areas, albeit falling short of harmonization.[50]

The areas that fall within such competence are set out in Article 6 TFEU: protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; and administrative cooperation. A bare reading of Article 6 TFEU gives the impression that the list is finite. This impression is reinforced by the wording of the Article, since the listed areas are not regarded as examples, but as the totality of this category. This impression is however belied when reading the TFEU as a whole. It then becomes clear that there are other important areas in which the EU is limited, prima facie at least, to supporting etc action, notably in respect to some aspects of social policy,[51] and certain facets of employment policy.[52]

We shall consider below why the EU chose to deal with these policies within a different head of EU competence, rather than include them within Article 6 TFEU. Suffice it to say for the present that the underlying rationale was an unwillingness to be tied in these areas to the legal consequences, in terms of the limits of EU action, specified in Article 2(5) TFEU.

(b) Supporting, coordinating, or supplementing: demarcation and delimitation

The creation of categories of competence inevitably means that there will be boundary problems as between them, as is apparent from the discussion thus far. Such problems may be especially prevalent between this category and that of shared competence.

This was acknowledged in the Praesidium's comment in the Convention, where it accepted that, for example, regulation of the media might come under the internal market, which is shared competence, or it might be regarded as falling within culture, where only supporting etc action is allowed.[53] We have seen, moreover, the difficulties of deciding which aspects of social policy fall within shared competence, and which come within this category.[54]

(c) Supporting, coordinating, or supplementing: scope and variation

It is important to press further to understand the scope of EU power for areas that fall within this category. The meaning of EU action supporting, coordinating,

[50] See, eg, Art 167 TFEU, culture; Art 168 TFEU, public health; Art 173 TFEU, industry.
[51] Art 153 TFEU. [52] Art 147 TFEU.
[53] CONV 724/03, Brussels 26 May 2003, 82. [54] pp 169–171.

or supplementing action by the Member States varies somewhat in the different areas listed, but the general approach is as follows.

Each substantive area begins with a provision setting out the objectives of Union action. Thus in relation to public health Article 168 TFEU lists, *inter alia*, the improvement of public health, prevention of illness, and the obviation of dangers to health. The EU is to complement national action on these topics. Member States have an obligation to coordinate their policies on such matters, in liaison with the Commission.[55] The Commission can coordinate action on such matters by, *inter alia*, exchanges of best practice, periodic monitoring, and evaluation.[56] The EU can also pass laws to establish 'incentive measures' designed to protect human health, and combat cross-border health scourges, subject to the mantra that this shall not entail harmonization.[57] Thus while harmonization is ruled out, the EU still has significant room for intervention through 'persuasive soft law', in the form of guidelines on best practice, monitoring and the like, and through 'legal incentive measures'.[58]

The same combination of soft law and legal incentive measures falling short of harmonization can be found in the other areas within this category.[59] The relative scope of EU power within these areas should not, however, be underestimated. The standard approach under the Lisbon Treaty is for the EU to be empowered to take measures to attain the objectives listed concerning that area. The language of the empowerment varies. It is sometimes framed in terms of taking 'incentive measures',[60] on other occasions the language is in terms of 'necessary measures',[61] in yet other instances the terminology is 'specific measures'.[62]

The salient point for present purposes is that whatsoever the precise terminology, these measures constitute legally binding acts, normally passed in accordance with the ordinary legislative procedure. The boundary of this EU legislative competence is that such legal acts must be designed to achieve the objectives listed for EU involvement in the area. These objectives are, however, normally set at a relatively high level of generality, with the consequence that the EU is legally empowered to take binding measures provided that they fall within the remit of these broadly defined objectives and do not constitute harmonization of national laws. This is evident in relation to all areas that fall within this category of competence, and can be exemplified in relation to civil protection and industry.

[55] Art 168(2) TFEU. [56] Art 168(2) TFEU. [57] Art 168(5) TFEU.

[58] There are also aspects of public health that come within the shared power, where the scope for EU intervention is greater, Art 4(2)(k), Art 168(4) TFEU.

[59] Art 165(4), Art 166(4) TFEU, education and vocational training; Art 167 TFEU, culture; Arts 173(2)–(3) TFEU, industry; Art 195 TFEU, tourism; Art 196 TFEU civil protection.

[60] Art 165(4), Art 166(4) TFEU, education and vocational training; Art 167(5) TFEU, culture; Art 168(5) TFEU, public health.

[61] Art 196(2) TFEU, civil protection.

[62] Art 195(2) TFEU, tourism; Art 173(3) TFEU, industry.

Thus in the context of civil protection Article 196 TFEU provides that the EU shall encourage cooperation among Member States to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters. EU action shall aim to support and complement Member States' action at national, regional, and local level in risk prevention, in preparing their civil-protection personnel, and in responding to natural or man-made disasters within the Union; promote swift, effective operational cooperation within the Union between national civil-protection services; and promote consistency in international civil-protection work. The EU can use the ordinary legislative procedure to establish the measures necessary to achieve these objectives, subject to the caveat that they do not constitute harmonization of national laws.[63]

The provisions relating to industry follow the same conceptual pattern. Article 173(1) TFEU provides that the Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union's industry exist. Their action must be aimed at speeding up the adjustment of industry to structural changes; encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings; encouraging an environment favourable to cooperation between undertakings; and fostering better exploitation of the industrial potential of policies of innovation, research, and technological development. The EU is then empowered to take legally binding acts to achieve these objectives in support of action taken in the Member States, subject once again to the caveat that they must not harmonize national laws.

The scope of EU legislative activity within these areas will of course be bounded by what is acceptable to the Member States in the Council and the European Parliament. It will doubtless be influenced by the very fact that the EU action is designed to support, coordinate, or supplement the action of the Member States. This can be acknowledged, but does not alter the force of the point being made here. The legal reality is that the scope of EU competence within these areas is broader than might initially have been thought, and leaves ample room for the passage of legally binding acts across a broad terrain. This is more especially so given that the meaning of harmonization, and hence the scope of the caveat to EU competence, is unclear, as will be seen below.

(d) Tensions: legal acts and Member State competence

There are limits to what the EU can do in the areas listed in Article 6 TFEU. That is, after all, the very purpose of the category. The EU nonetheless has more competence in these areas than might be thought, and there is a tension in the framing of the Treaty provisions. This tension has been present since the relevant

[63] Art 196(2) TFEU.

provisions were devised in the Convention deliberations[64] and it remains in the Lisbon Treaty.

Article 2(5) TFEU provides that EU action designed to support, coordinate, or supplement Member State action does not supersede Member State competence. It also states that legally binding acts of the Union adopted on the basis of the provisions specific to these areas cannot entail harmonization of Member State laws. Thus while the EU cannot harmonize the law in these areas, it can pass legally binding acts on the basis of the provisions specific to these areas.

Where, however, the EU does enact such legal acts they will bind the Member States and the competence of the Member States will be constrained to the extent stipulated by the legally binding act. Thus while Member State competence is not per se superseded merely because the EU has enacted legally binding acts, it will perforce be constrained to the degree entailed by the EU legal act. The degree of this constraint will depend on the nature of the EU legal act passed. It is, however, clear that the EU is not prevented from enacting legally binding acts, which includes legislative acts, within the listed areas, provided that they do not entail harmonization and provided that there is foundation for the passage of such laws in the detailed provisions of the TFEU.

(e) Tensions: legal acts and harmonization

This naturally leads to consideration of a related issue, which is the very meaning of harmonization. This will be of increased importance post-Lisbon, since it defines the outer limits of what can be undertaken by the EU in areas that fall within this overall category.

It can be acknowledged that the proscription on adoption of harmonization measures for areas that fall within this category means that legally binding acts cannot be adopted pursuant to Article 114 TFEU. This is the successor provision to Article 95 EC, and will continue to be the principal Treaty Article through which harmonization measures designed to attain the objectives of the internal market will be enacted. A legally binding act made in an area where the EU only has competence to support, coordinate, or supplement Member State action could not therefore be made pursuant to Article 114, since this would by its very nature be an admission that the objective was to harmonize national law, which is the very thing prohibited by Article 2(5) TFEU.

This, however, only takes us so far. The EU may enact a legally binding act in one of the areas covered by this category of competence, which is based on the relevant Treaty article authorizing the making of such acts. It may then be argued that the enacted measure is tantamount to harmonization of national laws or regulations, even though it does not bear this imprint on the face of the measure. The scope of the EU's power to make legally binding acts was considered above,

[64] Art I-12(5) CT.

and its breadth means that disputes as to whether a particular legal act is in effect harmonization may well arise.

It would then be for the ECJ to decide whether in substance the contested measure constituted harmonization and was therefore caught by the limit in Article 2(5) TFEU. This could well give rise to difficult cases for the ECJ, since harmonization measures have assumed various forms. The EC hitherto enacted maximum and minimum harmonization measures, and it was not always clear from the face of the measure which form of harmonization was in issue.[65] In such instances it was for the ECJ to interpret the measure and decide whether it established both a floor and a ceiling, or only the former. Article 2(5) TFEU precludes all forms of harmonization measure for areas covered by this category of competence, and hence it should preclude minimum and maximum harmonization or any other variant thereof. The line between a legitimate legally binding act that advances the objectives of the areas covered by this category of competence, and illegitimate harmonization of national laws, may nonetheless be a fine one in a particular case.

It should not be assumed, moreover, that the consequences for the Member States of enactment of legally binding acts in these areas will necessarily be less far-reaching than harmonization. The assumption behind Article 2(5) TFEU is that harmonization of national laws is by its very nature more intrusive for Member States than other EU legal norms. This then is the rationale for precluding its use within the category of supporting, coordinating, or supplementing action.

This rationale may hold true, but it may not. It depends on the nature of the particular harmonization measure and the non-harmonization legally binding act. The assumption in Article 2(5) that legally binding acts in this category do not supersede Member State competence, by way of contrast to harmonization, is equally difficult to sustain. Thus harmonization may not always supersede the entirety of Member State competence. More important for these purposes is that acts enacted in this category of competence will by virtue of being legally binding constrain what Member States can do with a competence that continues to reside with them.

7. Economic, Employment, and Social Policy

(a) Basic principles: meaning and scope

There is symmetry to the categories of competence discussed thus far. A division between exclusive, shared, and supporting competence can be understood, notwithstanding the difficulties mentioned above. The creation of a particular

[65] (N 45).

head of competence to deal with economic and employment policy, however, does little to enhance the symmetry of the new scheme. The Lisbon Treaty, following the Constitutional Treaty, has a separate category of competence for these matters, Article 2(3) TFEU 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'. The detailed rules are then set out in Article 5 TFEU.

1. The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.

   Specific provisions shall apply to those Member States whose currency is the euro.

2. The Union shall take measures to ensure coordination of the employment policies of the Member States, in particular by defining guidelines for these policies.
3. The Union may take initiatives to ensure coordination of Member States' social policies.

It should be noted at the outset that the 'fit' between Article 2(3) and Article 5 TFEU is not perfect, insofar as the former refers to economic and employment policy, while the latter also covers social policy. There is moreover a difference in language, in that the EU is enjoined in mandatory language to coordinate economic and employment policy, whereas it is accorded discretion in relation to social policy.

The existence of this category was controversial in the Convention on the Future of Europe, with some members calling for these areas to come within shared competence, while others argued for the inclusion of employment and social policy, as well as economic policy, within this separate category.[66] The Praesidium felt that the category should remain distinct because the specific nature of coordination of economic and employment policy merited separate treatment.[67] This Delphic utterance provides little by way of reasoned justification.

The real explanation for the separate category was political. There would have been significant opposition to the inclusion of these areas within the head of shared competence. The very depiction of economic policy as an area of shared competence, with the consequence of pre-emption of State action when the EU had exercised power within this area, would have been potentially explosive in some quarters at least. It is equally clear that there were those who felt that the category of supporting, coordinating, and supplementary action was too weak. This was the explanation for the creation of a separate category, and its placement

[66] The same tensions were evident in CONV 357/02 (n 6) Final Report of Working Group VI on Economic Governance, Brussels 21 October 2002, 2.

[67] CONV 724/03 (n 53) 68.

after shared power, but before the category of supporting, coordinating, and supplementary action.

(b) Social policy: demarcation and delimitation

The boundary problems that we have seen in the preceding discussion are evident here too, particularly in relation to social policy. The difficulties in this area are especially marked, since certain aspects of social policy fall within shared competence, although it is not clear which;[68] other aspects appear to fall within the category of supporting, coordinating, and supplementary action, even though they are not within the relevant list;[69] and there is in addition separate provision for social policy in the category being considered here.

The reach of Article 5(3) TFEU and its relationship with the more detailed Treaty provisions on social policy is not clear. The most natural 'linkage' would seem to be Article 156 TFEU, which empowers the Commission to encourage cooperation between Member States and facilitate coordination of their action in all fields of social policy,[70] albeit through soft law measures. Assuming this to be so, the wording of the respective provisions does not fit, since Article 5(3) is framed in discretionary terms, 'the Union may take initiatives', while Article 156 TFEU is drafted in mandatory language, to the effect that the 'Commission shall' encourage the relevant cooperation and coordination.

(c) Economic, employment, and social policy: category and consequence

The Treaty schema for competence in Article 2 TFEU is in general premised on the ascription of legal consequences for EU and Member State power as the result of coming within a particular category. Thus, as we have seen, Member States cannot take legally binding action for matters that fall within the EU's exclusive competence, unless empowered by the EU or for the implementation of EU acts. In the sphere of shared competence the EU and Member States can both make legally binding acts, subject to the caveat that the Member States cannot do so where the EU has exercised its competence. Legal consequences are also spelt out for the category of supporting, coordinating, and supplementary action.

Article 5 TFEU is an exception in this respect, since Article 2(3) TFEU does not spell out the legal consequences of inclusion within this category. It simply provides that the 'Member States shall co-ordinate their economic and employment policies

[68] pp 169–171. [69] pp 169–171.

[70] The particular areas listed are: employment; labour law and working conditions; basic and advanced vocational training; social security; prevention of occupational accidents and diseases; occupational hygiene; the right of association and collective bargaining between employers and workers.

within the arrangements as determined by this Treaty, which the Union shall have competence to provide'. The legal consequences of inclusion within this category can therefore only be divined by considering the language of Article 5 TFEU, which is couched largely in terms of coordination, and by considering the detailed provisions that apply to these areas.

(d) Economic policy: power and limits

We have seen that the rationale for creating this category was the political fear of placing such matters in the category of shared competence, balanced by an unwillingness to limit EU power by placing these areas in the category of supporting, coordinating, and supplementing Member State action. We have seen also that the legal consequences of this category for the division of power between the EU and the Member States are unclear, and can only be divined by placing close attention to the more specific provisions of the TFEU. These propositions can be exemplified by considering economic policy.[71]

The detailed provisions concerning economic policy are to be found in Chapter 1 of Title VIII of Part 3 of the Lisbon Treaty. It is clear that the EU has a range of powers that would not easily be accommodated in the category of competence concerning supporting, co-ordinating, or supplementing action. The EU's powers over economic policy allow it to take dispositive and peremptory action in certain circumstances. The powers can be regarded as relating to the 'coordination' of economic policy for the purposes of Article 2(3) TFEU, but it should be recognized that this is a broad reading of that language.

Thus Article 121(6) TFEU empowers the EU to enact regulations laying down detailed rules for the multilateral surveillance procedure, which is central to the strategy concerning broad guidelines of the economic policies of the Member States. Article 122(1) TFEU allows the Council to adopt a decision laying down measures appropriate to an economic situation, in particular if severe difficulties arise in the supply of certain products. Article 123 TFEU prohibits overdraft facilities by Union or State bodies with the ECB or national central banks, and Article 124 TFEU bans privileged access by Union or State bodies to financial institutions. The complex rules designed to control excessive budgetary deficits by Member States are ultimately backed up by the power to make binding decisions, which can lead to the imposition of fines and other disadvantageous consequences, Article 126(7)–(11) TFEU. It is clear moreover that the possession of these powers by the EU was felt to be even more important in the light of enlargement.

[71] See Ch 8 for more detailed discussion.

8. Common Foreign and Security Policy and Defence

The three-pillar structure that characterized the previous EU Treaty has not been preserved in the Lisbon Treaty. There are nonetheless distinct rules that apply in the context of foreign and security policy, and this warrants a separate head of competence for this area. It is set out in Article 2(4) TFEU.

> The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.

The rules concerning the common foreign and security policy (CFSP) are set out in Title V TEU. Decision making in this area continues to be more intergovernmental and less supranational by way of comparison with other areas of Union competence.[72] The European Council and the Council dominate decision making, and the legal instruments applicable to CFSP are distinct from those generally applicable for the attainment of Union objectives. There will be detailed consideration of these provisions in a later chapter.[73]

Suffice it to say for the present that Article 2(4) does not specify which type of competence applies in the context of the CFSP. In truth none of the categories is a good fit. It is clearly not within exclusive competence, since it is not listed in Article 3 TFEU, and in any event the substance of the CFSP simply does not accord with the idea of exclusive EU competence. Nor is it mentioned in the list of those areas that are subject to supporting, coordinating, or supplementing Member State action in Article 6 TFEU. This would seem to imply that it falls within the default category of shared competence in Article 4 TFEU, even though not mentioned in the non-exhaustive list. The reality is, however, that the world of the CFSP may not readily fit within the frame of shared administration, insofar as this connotes strict pre-emption of Member State action when the EU exercised its power in the area, nor does this idea cohere with Declarations appended to the Lisbon Treaty.[74] If the CFSP is regarded as within shared administration, the point made earlier concerning the need for close examination of the respective powers of the EU and Member States, in order to be clear about the nature of the power sharing, is of especial significance.

9. The 'Flexibility' Clause

Article 308 EC has long been viewed with suspicion by those calling for a clearer delimitation of Community competences and in particular by the German

[72] Cremona (n 11). [73] Ch 10.
[74] Declarations 13 and 14 on the common foreign and security policy.

Länder. Various calls for reform were made before and during IGCs. This issue was placed on the post-Nice and Laeken agenda for reform of the EU. The Laeken Declaration expressly asked whether Article 308 EC ought to be reviewed, in light of the twin challenges of preventing the 'creeping expansion of competences' from encroaching on national and regional powers, and yet allowing the EU to 'continue to be able to react to fresh challenges and developments and . . . to explore new policy areas'.[75] The Working Group on Complementary Competences recognized the concerns about the use of Article 308. The Group nonetheless recommended the retention of the Article in order that it could provide for flexibility in limited instances.[76] The flexibility clause is now enshrined in Article 352 TFEU.

1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.
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.
3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.
4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.

Article 352(1) TFEU is framed broadly in terms of the 'policies defined in the Treaties', with the exception of the CFSP. It can therefore serve as the basis for competence in almost all areas of EU law. The unanimity requirement means, however, that it will be more difficult to use this power in an enlarged EU, and Article 352 TFEU also requires the consent of the European Parliament, as opposed to mere consultation, as was previously the case under Article 308 EC. The need for recourse to this power will also diminish, given that the Lisbon Treaty has created a legal basis for action in the areas where Article 308 EC had previously been used.[77] The German Federal Constitutional Court was nonetheless concerned about the scope of Article 352 and stipulated that the

[75] Laeken Declaration (n 4) 22.
[76] Final Report of Working Group V (n 36) 14–18.
[77] See, eg, Energy, Art 194(2) TFEU; Civil Protection, Art 195(2) TFEU; Economic Aid to Third Countries, Art 209(1), 212(2) TFEU.

exercise of any such competence constitutionally required ratification by the German legislature.[78]

The conditions in Article 352(2)–(4) are novel. The import of Article 352(2) is not entirely clear. Weatherill has argued that uniquely within the Lisbon Treaty it provides national parliaments with the opportunity to contest the existence of competence when legislative action is based on the flexibility clause, as opposed to other contexts where national parliaments can simply challenge on grounds of subsidiarity.[79] This may be so. It does not, however, sit comfortably with the wording of Article 352(2), which is framed in terms of subsidiarity and is not suggestive of national parliamentary power to challenge the existence of competence. The more natural interpretation is that because the flexibility clause entails an exceptional use of EU legislative power, the quid pro quo is that the Commission has an additional obligation, viz to draw this to the attention of national parliaments, in order that they might contest it on the grounds of subsidiarity.

10. Subsidiarity, Proportionality, and the Role of National Parliaments

The Lisbon Treaty distinguishes between the existence of competence and the use of such competence, which is determined by subsidiarity and proportionality.[80] The relevant principles are now embodied in Article 5(3)–(4) TEU.[81]

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

   The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

[78] Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, [326]–[328], available at <http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html>. English translation available at <http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html>.

[79] Weatherill (n 1).

[80] Art 5(1) TEU.

[81] J-V Louis, 'National Parliaments and the Principle of Subsidiarity—Legal Options and Practical Limits' in I Pernice and E Tanchev (eds), *Ceci n'est pas une Constitution—Constitutionalization without a Constitution?* (Nomos, 2009) 131–154; G Bermann, 'National Parliaments and Subsidiarity: An Outsider's View' ibid 155–161; J Peters, 'National Parliaments and Subsidiarity: Think Twice' (2005) European Constitutional L Rev 68.

> The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

The Protocol on the Application of the Principles of Subsidiarity and Proportionality should be read in tandem with the Protocol on the Role of National Parliaments in the EU.[82] It should be noted at the outset that the Subsidiarity Protocol only applies to draft legislative acts,[83] and does not cover delegated or implementing acts. It is certainly possible that a detailed delegated act might be felt to infringe subsidiarity, but the Protocol provides no mechanism for checks by national Parliaments on such measures.

The Subsidiarity Protocol imposes an obligation on the Commission to consult widely before proposing legislative acts.[84] The Commission must provide a detailed statement concerning proposed legislation so that compliance with subsidiarity and proportionality can be appraised. The statement must contain some assessment of the financial impact of the proposals, and there should be qualitative and, wherever possible, quantitative indicators to substantiate the conclusion that the objective can be better attained at Union level.[85] The Commission must submit an annual report on the application of subsidiarity to the European Council, the European Parliament, the Council, and to national parliaments.[86] The ECJ has jurisdiction to consider infringement of subsidiarity under Article 263 TFEU, brought by the Member State, or 'notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it'.[87]

The most important innovation in the Protocol on Subsidiarity is the enhanced role accorded to national parliaments. The Commission must send all legislative proposals to the national parliaments at the same time as to the Union institutions.[88] A national parliament or Chamber thereof, may, within eight weeks, send the Presidents of the Commission, European Parliament, and Council a reasoned opinion as to why it considers that the proposal does not comply with subsidiarity.[89] The European Parliament, Council, and Commission must take this opinion into account.[90] Where non-compliance with subsidiarity is expressed by national parliaments that represent one-third of all the votes allocated to such parliaments, the Commission must review its proposal.[91]

[82] Protocol (No 1). See above, p 46.
[83] Protocol (No 2) On the Application of the Principles of Subsidiarity and Proportionality, Art 3.
[84] ibid Art 2.
[85] ibid Art 5.
[86] ibid Art 9.
[87] ibid Art 8.
[88] ibid Art 4. The national Parliaments must also be provided with legislative resolutions of the EP, and common positions adopted by the Council.
[89] ibid Art 6.
[90] ibid Art 7(1).
[91] ibid Art 7(2). This threshold is lowered to one-quarter in cases of acts concerning the area of freedom, justice, and security that are based on Art 76 TFEU.

The Commission, after such review, may decide to maintain, amend, or withdraw the proposal, giving reasons for the decision.[92] Where a measure is made in accordance with the ordinary legislative procedure, and at least a simple majority of votes given to national parliaments signal non-compliance with subsidiarity, then the proposal must once again be reviewed, and, although the Commission can decide not to amend it, the Commission must provide a reasoned opinion on the matter and this can, in effect, be overridden by the European Parliament or the Council.[93]

It should, however, be noted that while the Protocol imposes obligations on the Commission to ensure compliance with the principles of subsidiarity and proportionality, national parliaments are afforded a role only in relation to the former and not the latter. The reasoned opinion submitted by the national parliament must relate to subsidiarity. This is regrettable, as Weatherill rightly notes,[94] since it is difficult to disaggregate the two principles, and insofar as one can do so there is little reason why national parliaments should not be able to proffer a reasoned opinion on proportionality as well as subsidiarity.

It remains to be seen how subsidiarity operates in practice. It is clear that there will continue to be many areas in which the comparative efficiency calculus in Article 5(3) TFEU favours Union action, more especially in an enlarged Union. It is equally clear that subsidiarity has had an impact on the existence and form of EU action. If Union action is required, the Commission will often proceed through directives rather than regulations, and there has been a greater use of guidelines and codes of conduct.

Time will tell how far the new provisions in the Protocol according greater power to national parliaments affect the incidence and nature of EU legislation. Much will depend on the willingness of national parliaments to devote the requisite time and energy to the matter. The national parliament has to submit a reasoned opinion as to why it believes that the measure infringes subsidiarity. It will have to present reasoned argument as to why the Commission's comparative efficiency calculus is defective. This may not be easy. It will be even more difficult for the requisite number of national parliaments to present reasoned opinions in relation to the same Union measure so as to compel the Commission to review the proposal. The Commission is nonetheless likely to take seriously any such reasoned opinion, particularly if it emanates from the parliament of a larger Member State.

There is the possibility of recourse to the ECJ for infringement of subsidiarity under Article 263 TFEU, brought by the Member State, or notified by the State on behalf of the national parliament. It remains to be seen whether this is used and if so how it works. There may well be instances where the Member State has agreed in the Council to the EU measure which the national parliament then regards as infringing subsidiarity. This is the rationale for the provision allowing

[92] ibid Art 7(2). [93] ibid Art 7(3). [94] Weatherill (n 1).

the Member State to notify the action on behalf of its parliament. This still leaves open interesting questions as to how such a case will be argued. If the Member State has voted for the legislative act in the Council it will be odd for it then to contend before the Court that the measure violates subsidiarity.[95] If the legal action is to be a reality the Member State will not simply have to notify the action on behalf of its Parliament, but also allow the Parliament through its chosen legal advocate to advance its arguments about the fact that the measure does not comply with subsidiarity, even if the Member State does not agree with those arguments.

11. Conclusion

(a) Clarity: aim and realization

We saw at the inception of this chapter that a principal aim of the Treaty reform was to attain greater clarity as to the division of competence between the EU and Member States. It is therefore important by way of conclusion to assess how far this aim has been realized.

The basic tripartite division introduced by the Constitutional Treaty and taken over into the Lisbon Treaty has gone some way towards greater clarity. The categories of exclusive competence, shared competence, and competence to support, coordinate, or supplement Member State action are helpful in this respect. So too is the fact that the Lisbon Treaty specifies the legal consequences of assignment of a subject matter area to a particular category.

The preceding discussion has, however, also revealed the limits of what can be achieved through categorization. This is not a critique of the Lisbon Treaty as such. It is rather testimony to the inherent limitations of categorization in clearly demarcating the boundaries of competence between the EU and Member States. The difficulty of dividing power between different levels of government is an endemic problem within any non-unitary polity.[96] The principal difficulties in relation to clarity are nonetheless as follows.

First, any regime of categorization will perforce generate problems of demarcating the boundaries of each category. This is inevitable, as evidenced by the preceding analysis. The scale of the problem will be affected by the complexity of the legal provisions that apply in any particular area, and the extent to which the Treaty does or does not specify with greater exactitude which of those provisions fall into which category of competence. This is exemplified most acutely in relation to social policy.

[95] I am grateful for this point to a participant in a Conference on the Lisbon Treaty held in Brussels.

[96] E Young, 'Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism' (2002) 77 NYULRev 1612.

Second, shared competence is the default position both formally and substantively in the Lisbon Treaty. This is to be expected given the nature of the EU and the range of areas over which it has some degree of authority. The broad range of areas that fall within shared competence nonetheless has inevitable consequences in terms of the clarity of the divide between EU and Member State competence. It means that the informed observer can only determine the reality of this divide by looking at the detailed Treaty provisions that govern the relevant area, and the nature of the divide will differ, often significantly, as between different areas that fall within the remit of shared competence. It also means that the informed observer who wishes to understand what the Member State is allowed to do in any such area will have to be acutely aware of whether and how the EU has exercised its power, since the Member States lose their competence to the extent that the EU has exercised its competence. This necessarily requires close attention to the legal norms made by the EU within any such area. The devil is always in the detail.

Third, analogous problems are apparent in relation to the category of competence whereby the EU supports, coordinates, or supplements Member State action. The Lisbon Treaty places boundaries on EU competence in these areas, through the proscription on harmonization. We have seen, however, that the specific provisions in the TFEU governing the areas that fall within this head of competence allow persuasive soft law and binding hard law to achieve the objectives spelt out for each area. The formal message from the Lisbon Treaty is that such measures, including the hard law, do not supersede Member State competence. The choice of this verb was either finely judged or fortuitous. The legal reality in any event is that such legally binding acts made by the EU will constrain Member State competence, and, as we have seen, the scope for such legal norms is broader than one might have expected. The informed observer who wishes to understand the division between EU competence and that of the Member States will therefore once again have to be cognizant of the specific Treaty provisions that govern each of these areas, and of any EU legislation made pursuant thereto.

(b) Containment: aim and realization

The Laeken Declaration and subsequent discussion of Treaty reform was also premised on the need to contain EU power. There were concerns voiced about 'competence creep', more especially in relation to two of the most 'general' Treaty provisions, Articles 95 and 308 EC. These concerns were echoed by academic literature discussing 'competence creep'.[97] It is therefore important

[97] M Pollack, 'Creeping Competence: The Expanding Agenda of the European Community' (1994) 14 Journal of Public Policy 95; S Weatherill, 'Competence Creep and Competence Control' (2004) 23 YEL.

to consider how far the Lisbon reforms have addressed this issue. The answer is that they have done so to some extent, but problems still remain.

The Lisbon Treaty will render 'competence creep' based on Article 352 TFEU, the successor to 308 EC, less likely in the future for the reasons given above. Article 352 TFEU requires unanimity in the Council, which will not be easy to achieve in a Union of 27 Member States. It now demands consent from the European Parliament, and national parliaments are specifically alerted to use of this provision. Equally important is the fact that the EU has been given specific legislative competence in the areas where Article 308 EC had been used in the past, and hence recourse to this provision will be obviated for the future.

The Lisbon Treaty will, by way of contrast, do little if anything to alleviate problems of 'competence creep' in the terrain covered by Article 114 TFEU, the successor to Article 95 EC. The reason is not hard to divine. Article 114 TFEU replicates Article 95 EC. Concerns about over-extensive use of this legislative competence arose because it was felt that the EU was too readily assuming power to harmonize national laws based on mere national divergence, with scant attention being given to the impact, if any, of that divergence on the functioning of the internal market.[98] The ECJ's ruling in the *Tobacco Advertising* case[99] appeared to signal some tightening up in this respect, by stating that mere divergence in national laws was insufficient to warrant EU regulatory competence under Article 95 EC, it being necessary to show some more discrete impact on the functioning of the internal market. Subsequent case law[100] has, however, revealed at the very least some softening of the ECJ's position on this issue.[101] It is now more willing to find that regulatory competence exists because divergent national laws constitute an impediment to the functioning of the internal market and EU harmonization contributes to the elimination of obstacles to the free movement of goods or to the freedom to provide services, or to the removal of distortions of competition.

There are, however, other techniques for dealing with this problem. The new subsidiarity provisions will provide one mechanism for checks concerning use of Article 114 TFEU. It is unlikely, however, that subsidiarity could ever serve as the principal control device in this respect. The EU did not, however, cease to function during the period when Treaty reform featured prominently on the

[98] Weatherill (n 1); Weatherill (n 97).

[99] Case C-376/98 *Germany v European Parliament and Council*.

[100] Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079; Case C-491/01 *The Queen v Secretary of State for Health, ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453; Case C-210/03 *R* v *Secretary of State for Health, ex p Swedish Match* [2004] ECR I-11893; Case C-380/03 *Germany v European Parliament and Council* [2006] ECR I-11573.

[101] D Wyatt, 'Community Competence to Regulate the Internal Market' in M Dougan and S Currie (eds), *50 Years of the European Treaties, Looking Back and Thinking Forward* (Hart, 2009) ch 5.

agenda. To the contrary, the first decade of the new millennium saw the passage of major legislative initiatives across a variety of fields.[102]

The development of Impact Assessment is especially important in this context. It began in earnest in the new millennium,[103] and has developed significantly since then.[104] Impact assessment is a set of steps to be followed when policy proposals are prepared, alerting political decision makers to the advantages and disadvantages of policy options by assessing their potential impacts. The results of this process are summarized and presented in an Impact Assessment Report.[105] The lead department within the Commission in the relevant area will be responsible for the Impact Assessment, and there is an Impact Assessment Board which controls the quality of such Impact Assessments, and provides support and advice. The Impact Assessment work is seen as a key element in the development of Commission proposals, which is taken into account by the College of Commissioners when making decisions. The Impact Assessment Report does not, however, replace decision making and the adoption of a policy proposal remains a political decision made by the College.

A typical Impact Assessment will address a range of issues including: the nature and scale of the problem, how is it evolving, and who is most affected by it; the views of the stakeholders concerned; should the Union be involved; if so, what objectives should it set to address the problem; the main policy options for reaching these objectives; the likely economic, social, and environmental impacts of those options; a comparison of the main options in terms of effectiveness, efficiency, and coherence in solving the problems; and the organization of future monitoring.

Impact Assessment developed as part of the Better Regulation strategy. The Impact Assessment Reports are regarded as an important component of this strategy. They help the EU to design better laws; facilitate better-informed decision making throughout the legislative process; take into account input from external stakeholders; foster coherence of Commission policies and consistency with Treaty objectives such as the respect for Fundamental Rights; improve the quality of policy proposals by revealing the costs and benefits of different policy options; and help to ensure that the principles of subsidiarity and proportionality are respected.[106]

The Commission initiatives subject to Impact Assessment are decided each year by the Secretariat General, Impact Assessment Board, and the departments concerned. They are in general used for the most important Commission initiatives and those with most far-reaching impact. This includes a broad range

[102] Craig (n 3).
[103] Impact Assessment, COM(2002) 276 final; Impact Assessment—Next Steps, SEC(2004) 1377; Better Regulation and Enhanced Impact Assessment, SEC(2007) 926.
[104] Impact Assessment Guidelines, SEC(2009) 92.
[105] ibid 1.1. [106] ibid 1.2.

of initiatives:[107] all legislative proposals in the Commission's Legislative and Work Programme (CLWP); all non-CLWP legislative proposals with clearly identifiable economic, social, and environmental impacts; non-legislative initiatives, such as White Papers, action plans, and expenditure programmes, which define future policies; and certain Comitology implementing measures that are likely to have significant impacts.

The Impact Assessment strategy is not some panacea that will magically dispel concerns as to 'competence creep' or 'competence anxiety'. It is nonetheless central to addressing these concerns. The Impact Assessment Report considers the very issues that are pertinent to our inquiry. This includes the justification for EU action in terms of, for example, the need for harmonization because of the impact of diverse national laws on the functioning of the internal market. It also includes the subsidiarity calculus, which is an explicit step in the overall Impact Assessment process,[108] with a specific section devoted to verification of the EU's right of action and justification thereof in terms of subsidiarity.[109] It is acknowledged in the documentation that assessment of subsidiarity can evolve over time, such that EU action may be scaled back if it is no longer justified, or it may be expanded if circumstances so require. In the latter instance there should be the 'clearest possible justification'[110] in terms of subsidiarity and proportionality.[111]

The Impact Assessment strategy therefore constitutes a framework within which to address concerns as to competence anxiety. The strategy is not perfect, but it has been improved since its inception and assessments, both official[112] and academic,[113] have generally been positive. The strategy looks set to stay, providing the justificatory foundation for EU action and verification of the subsidiarity calculus. If the data in a particular Impact Assessment Report are felt to be wanting in these respects, then we should press for further improvement and not be satisfied with exiguous or laconic argument. The very fact that there is a framework within which these issues are now considered is, however, a positive step, which facilitates scrutiny as to the nature of the justificatory arguments and their adequacy.

This should in turn facilitate judicial review. The ECJ should be willing to consider the adequacy of the reasoning for EU legislative action, and to look behind the formal legislative preamble to the arguments that underpin it derived from the Impact Assessment. The ECJ should be properly mindful of the

[107] ibid 1.4. [108] ibid 2.1, 2.3.
[109] ibid 5.2. [110] ibid 5.2. [111] ibid 7.2.
[112] Evaluation of the Commission's Impact Assessment System, Final Report–Executive Summary (April 2007, Secretariat General of the Commission); Impact Assessment Board Report for 2008, SEC(2009) 55.
[113] European Policy Forum, *Reducing the Regulatory Burden: The Arrival of Meaningful Regulatory Impact Analysis* (City Research Series No 2, 2004); C Radaelli and F de Francesco, *Regulatory Quality in Europe, Concepts, Measures and Policy Processes* (Manchester University Press, 2007); C Cecot, R Hahn, A Renda, L Schrefler, 'An Evaluation of the Quality of Impact Assessment in the European Union with Lessons for the US and the EU' (2008) 2 Regulation & Governance 405.

Commission's expertise as evinced in the Impact Assessment. It should also be fully cognizant of the precepts in the Treaty, which in the case of Article 114 TFEU condition EU intervention on proof that approximation of laws is necessary for the functioning of the internal market. If the justificatory reasoning to this effect in the Impact Assessment is wanting then the ECJ should invalidate the relevant instrument, and thereby signal to the political institutions that the precepts in the Treaty are to be taken seriously. This is equally the case in relation to subsidiarity. If the verification or justification for EU action contained in the Impact Assessment appear merely formal, scant, or exiguous then the ECJ should not hesitate to so conclude,[114] thereby indicating that the enhanced role accorded to subsidiarity in the Lisbon Treaty will be taken seriously.

[114] The Community courts have generally not engaged in intensive review of subsidiarity, Case C-84/94 *United Kingdom v Council* [1996] ECR I-5755; Case C-233/94 *Germany v European Parliament and Council* [1997] ECR I-2405; Case C-377/98 *Netherlands* (n 100); Cases C-154–155/04 *The Queen, on the application of Alliance for Natural Health and Nutri-Link Ltd v Secretary of State for Health* [2005] ECR I-6451, [99]–[108]; Case C-491/01 *British American Tobacco* (n 100) [177]–[185]; Case C-103/01 *Commission v Germany* [2003] ECR I-5369 [46]–[47].