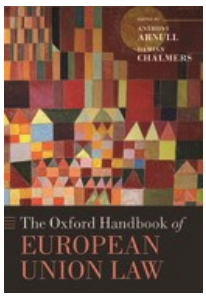

The Oxford Handbook of European Union Law

Damian Chalmers (ed.), Anthony Arnull (ed.)

https://doi.org/10.1093/oxfordhb/9780199672646.001.0001

Published: 06 January 2015 **Available in print:** 23 July 2015 **Online ISBN:** 9780191751431

Print ISBN: 9780199672646

CHAPTER

4 EU Competences: Existence and Exercise

Robert Schütze

https://doi.org/10.1093/oxfordhb/9780199672646.013.44 Pages 75–102

Published: 03 February 2015

Abstract

What constitutional principles govern Union competences? Article 5 TEU identifies three constitutional principles: conferral; subsidiarity; and proportionality. The principle of conferral concerns the (limited) existence of Union competences. These competences are limited in two ways. Quantitatively, they will be confined by a—limited—material scope; qualitatively, they might be limited to a particular type of intervention. In contrast to the principle of conferral, the principles of subsidiarity and proportionality do not concern the existence of legal competence but only limit its exercise. According to the principle of subsidiarity, the Union must show that it is better able to solve a social problem than the Member States; whereas the proportionality principle generally insists that Union action must not exceed what it necessary to achieve a Union objective. This chapter analyses each of the three constitutional principles governing Union competences and the conceptual relations between them.

Keywords: competence, teleological interpretation, competence-competence, competence categories, subsidiarity, proportionality

Subject: EU Law, Law

Series: Oxford Handbooks

Collection: Oxford Handbooks Online

I. Introduction

WHAT constitutional principles govern the existence and exercise of Union competences? Article 5 TEU specifies three such principles:

> The *limits* of Union competences are governed by the principle of *conferral*. The *use* of Union competences is governed by the principles of *subsidiarity* and *proportionality*.[1]

The first principle is the principle of conferral. It limits the existence of Union competences in two ways. Quantitatively, EU competences must have a limited material scope. Qualitatively, on the other hand, a particular competence type determines the legal ability of the Union to act within such a material field. These two constitutional limits to Union competences will be—respectively—discussed in Sections I and II.

Article 5 TEU however mentions two additional principles, namely, the principle of subsidiarity and the principle of proportionality—both of which limit the 'use' of Union competences. According to the principle of
p. 76 subsidiarity, the Union ↳ must act 'only if and in so far 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'.[2] The principle safeguards—like the principle of conferral—federal values. It determines which governmental level should exercise its competences, where both are equally competent. This contrasts with the third—and broader—principle of proportionality. The latter generally insists in Article 5(4) TEU that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. The proportionality principle's traditional function within the Union legal order has been to safeguard liberal values, but it has also received a federal dimension. The two constitutional principles of subsidiarity and proportionality will be—respectively—analysed in Sections III and IV.

II. Conferral I: Limiting Union Competences

Traditional international law considers states to be sovereign; and within a unitary state the government—in the broad sense of the term—is considered to be 'omni-competent'. When the British parliament legislates, it is thus regarded to enjoy a competence to do all things.[3] The European Union is however not a 'sovereign state'. It does not enjoy inherent—sovereign—powers. Its powers are *conferred* and limited powers. The constitutional principle that embodies this position is called the 'principle of conferral'. It can be found in Article 5(2) TEU, which states:

> Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.[4]

The formulation in Article 5(2) TEU suggests a picture in which the Union enjoys only those—limited—
p. 77 competences expressly conferred by the Treaties, whereas the ↳ Member States retain those competences *not* conferred upon the Union. This picture is however seriously misleading, and that in two ways. First, the Union has historically been able to significantly 'expand' its competences into policy areas that were not expressly mentioned in the Treaties. In particular, the rise of teleological interpretation and the extensive use of 'general competences' have meant that the Union has come to enjoy a (bounded) competence to expand its own competences (Section 1). Secondly, it is incorrect to assume that the Member States only retain those competences not conferred in the Treaties. For with the exception of one very limited category of Union competence, the Union and the Member States 'share' their competences in such a way that they may both act in a field in which the Union is competent to act (Section 2).

1. Interpreting Union Competences

(a) Teleological Interpretation in General

If the Union must act 'within the limits of the competences *conferred upon it by the Member States*',[5] should this not mean that the Member States are able to determine the scope of the Union' s competences?

A strict reading of the principle of conferral would indeed deny the Union the power autonomously to interpret its own competences. Yet this solution encounters serious practical problems. For how is the Union ever to work if every legislative bill were to need the consent of every Member State? (Classic international organizations solve this dilemma in the following way: they allow international organizations a degree of interpretative autonomy but insist that the interpretation of international treaties must be in line with the clear —historical—intentions of the Member States.[6] Legal competences must thus be interpreted restrictively.) By contrast, a soft principle of conferral allows the holder of a competence to interpret its own competences widely. Instead of looking at the historical will of the founders, the Union is here allowed to use teleological interpretation. The latter looks behind a legal text in search of a legal solution to a social problem that may not have been anticipated when the text was drafted. Teleological interpretation may thus sometimes constitute a 'small' amendment of the original provision.

Has the Union adopted the strict or the soft principle of conferral? After a brief period of following the international law logic,[7] the Union wholeheartedly embraced the constitutional method of teleological interpretation. This technique can—for example—been seen at work in the famous controversy surrounding
p. 78 the ↳ adoption of the (first) Working Time Directive.[8] The Directive had been based on a legal competence within Title X on 'Social Policy'. That specific competence in Article 153 TFEU here allowed the Union to 'encourage improvements, especially in the working environment, as regards the health and safety of workers'.[9] But did it entitle the Union to adopt legislation on the general organization of working time?[10] Protesting that such a reading would undermine the principle of conferral, the United Kingdom strongly contested this teleological reading. Insisting that there was no thematic link to health and safety, it claimed that the Union legislator had acted *ultra vires*. The Court, however, did not think so and fully backed the Union legislator. The Court's endorsement of the use of teleological reasoning by the Union legislator was as follows:

> There is nothing in the wording of Article [153 TFEU] to indicate that the concepts of 'working environment', 'safety' and 'health' as used in that provision should, in the absence of other indications, be interpreted restrictively, and not as embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment, including in particular certain aspects of the organisation of working time.[11]

This gave judicial permission to broad teleological interpretations of Union competences. In the past, the European Court has indeed accepted—almost[12]—every autonomous interpretation by the Union legislator.

(b) General Competences in Particular

The teleological 'elasticity' of Union competences is particularly high for the 'general' competences of the Union. These are competences that do not deal with a 'specific' policy area but rather grant the Union the power to act in the pursuit of a general Union aim.

p. 79 The two most general competences of the Union here are Article 114 and Article 352 TFEU. According to the former, the Union enjoys a horizontal competence to harmonize national laws so as to create the internal market. The latter allows the Union to act where it is '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'.[13] Article 352 TFEU can thereby be used in two ways. It can be employed to supplement a policy title in which the Union is already given a specific competence, but where the latter is deemed—despite teleological interpretation—insufficient to achieve the desired objective. However, and more importantly, the horizontal competence can also be used to legislate in a policy area that has no specific title within the Treaties. From the point of view of the principle of conferral, this second use of the competence is of course the more dangerous one. For it allows the Union to enter into policy areas that theoretically are outside the Treaties.

How should we characterize Article 352 TFEU? The competence is a borderline provision;[14] and many a label has been given to it.[15] But does Article 352 give the Union a 'competence-competence'? The concept of competence-competence refers to the—sovereign—power to grant itself 'new' competences.[16] Does Article 352 come close to this idea? The traditional answer offered by European constitutional theory is a resolute 'No': since the European Union is not a (sovereign) federal state, it cannot have the power to grant itself new competences. However, once we abandon the (sovereignist) pre-conceptions of classic constitutional thought, a more nuanced evaluation might be in order. For is it not 'the very purpose of [Article 352] to bridge the divide between the [Union] objectives and powers through an *expansion* of the competences of the [Union]'?[17] Does a competence to act where the Treaties have 'not provided the necessary powers' not exhibit *some* characteristics of a competence-competence?

Some authors have—mistakenly—tried to solve this disparity between constitutional theory and practice by
p. 80 distinguishing between a legislative and a ↳ judicial competence-competence of the Union.[18] But is the European Court not an institution of the *Union*; and has the Union judiciary not allowed the Union legislator—almost—complete freedom to interpret its own competences? Importantly, however, the Union legal order does accept some limits to the scope of its competence sphere.[19] The best label for Article 352 may therefore be *bounded* or partial competence-competence. This strange character of being a competence that is partly within and partly without the Treaty has been recognized by the German Constitutional Court;[20] and the 2011 British European Union Act equally insists that Article 352 should not be interpreted by the Council of Ministers—a Union institution—on its own and now requires prior ministerial authorization from the British Parliament.[21]
p. 81 From a national perspective, these procedural safeguards of federalism ↳ recognize that a Union measure adopted under Article 352 TFEU comes close to a small and informal Treaty amendment.

2. Constitutional Saving Clauses

All policy areas outside the scope of the Treaties remain within the exclusive competence of the Member States. Yet, as we saw above, the scope of the EU Treaties has been dramatically extended over the years. Can we nonetheless find matters that fall *within* the scope of the EU Treaties but are constitutionally guaranteed to remain within the exclusive competences of the Member States?

From the very beginning, certain provisions within the Treaties could— theoretically—be read as constitutional guarantees for national exclusive powers. One of the potential candidates is Article 36 TFEU. The provision allows Member States to justify a violation of the free movement of goods on grounds of public morality, public policy and public security. But had these policy fields remained within the exclusive powers of the states; or, was the Union here also entitled to legislate? The European Court clearly rejected the exclusive competence reading in *Simmenthal*.[22] Holding that Article 36 TFEU was 'not designed to reserve certain matters to the exclusive jurisdiction of Member States',[23] it found that the States could not insist on their stricter national standards where Union measures provided for the necessary protection of the interests mentioned in Article 36 TFEU.

Reacting to this early defeat, the Member States increasingly tried to use subsequent Treaty amendments to
p. 82 insert provisions within Union competences that ↳ aim to 'reserve' national powers within the Treaties. The insertion of such 'constitutional saving clauses' is well illustrated within the area of social policy, where Article 153(4) and (5) TFEU now state:

4. The provisions adopted pursuant to this Article:

   – shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof,

   – shall not prevent any Member State from maintaining or introducing more stringent protective

measures compatible with the Treaties.

5. The provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.

We find another illustration of general validity in Article 168 TFEU,[24] which commits the Union to 'respect the responsibilities of the Member States for the definition of their health policy and for the organisation and delivery of health services and medical care', and in particular excludes any Union measures affecting 'national provisions on the donation or medical use of organs and blood'.[25] This thematic exclusion is joined by a second constitutional exclusion. For the Union's public health competence only allows the Union legislator to adopt incentive measures 'excluding any harmonisation of the laws and regulations of the Member States'.[26]

What is the constitutional nature of these 'shall-not-affect' and 'excluding any harmonisation' clauses? Do they guarantee an exclusive competence to the Member States? The answer to this question depends on whether these 'savings clauses' only apply to the special competence within which they are placed; or whether they constitute a general constitutional limit to all the Union competences.

The Court seems to have expressed a strong inclination *against* the second— wider—view in *Germany v Parliament and Council (Tobacco Advertising)*.[27] The case involved a challenge to the adoption of the Tobacco Advertising Directive. Despite its public health aim,[28] the Directive had not been based on Article 168 but on
p. 83 Article 114 TFEU—the general harmonization competence ↳ of the Union. Germany objected to that competence and insisted—among other things—that the 'excluding any harmonisation' clause in Article 168(5) TFEU extended to Article 114. Could Article 168(5) TFEU negatively limit Article 114 TFEU? The Court disagreed. Article 168(5) TFEU did 'not mean that harmonising measures adopted on the basis of other provisions of the Treaty cannot have any impact on the protection of human health'.[29] '[T]he [Union] legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made.'[30] The constitutional saving clause in Article 168 could thus *not* operate to limit Article 114; and if that conclusion were to be generalized, it would mean that the Union's 'saving clauses' cannot go beyond the scope of the legal base of which they form part.

In conclusion: the Union legal order has traditionally not committed itself to safeguard a 'nucleus of sovereignty that the Member States can invoke, as such, against the [Union]'.[31] There is no express constitutional recognition of a list of exclusive Member State competences. (Even if Article 4(2) TEU, reserves *national* security questions to the 'sole responsibility of each Member State', there is of course a *Common* Foreign and *Security* Policy of the Union within which national security concerns may need to be evaluated.) However, with the Lisbon Treaty another attempt at safeguarding national powers has been made in the form of Article 4(2) TEU. The provision aims at protecting the 'constitutional identities' of the Member States and reads as follows:

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security.

The meaning of the clause is still highly controversial, and—despite some early pronouncements from the Court—it remains to be seen whether it will develop into a general external limit to all Union competences.[32]

p. 84

III. Conferral II: Classifying Union Competences

Why does the Union have different competence categories? The idea behind a typology of competences is to qualitatively limit a competence. Different types of competences constitutionally determine the 'degree' of power enjoyed within a particular policy field. An exclusive competence thus 'excludes' anyone else from acting within the same policy area. By contrast, a non-exclusive competence permits the co-existence of two legislators; yet it may limit one legislator to adopt supporting measures only.

What types of competences exist within the Union legal order? The original Treaties betrayed no sign of a distinction between different competence categories. Different categories of Union competence were only 'discovered' in the course of the 1970s.[33] The Treaties today distinguish between various categories of Union competences in Article 2 TFEU:

> 1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.
>
> 2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.
>
> 3. The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.
>
> 4. The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.
>
> 5. In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States' laws or regulations.

p. 85

The Treaties here expressly recognize four general competence categories: exclusive competences; shared competences; coordinating competences; and complementary competences. Articles 3–6 TFEU correlate the various Union policies to a particular competence type (Section 1). These four general competence categories are joined by a separate competence category for the Common Foreign and Security Policy under Article 2(4) TFEU. The latter is but one expression of the special competence rules applicable in the external relations field (Section 2).

1. Internal Competences: General Rules

(a) Exclusive Competences: Article 3 TFEU

Exclusive competences constitutionally guarantee that only one public authority is entitled to act autonomously. For the European legal order, exclusive competences are thus defined as areas, in which 'only the Union may legislate and adopt legally binding acts'. The Member States will here only be able to act 'if so empowered by the Union or for the implementation of Union acts'.[34]

What are the policy areas of constitutional exclusivity? In the past, the Court has judicially qualified very few competences as exclusive competences. The first exclusive competence was discovered in the context of the Common Commercial Policy (CCP).[35] A second area of exclusive competence was discovered in relation to the conservation of biological resources of the sea in *Commission v United Kingdom*.[36] Article 3 (1) TFEU now expressly mentions five policy areas: (a) the customs union; (b) the establishment of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; and (e) the common commercial policy.

In the past, the Court has interpreted these exclusive competences rather restrictively.[37]

(b) Shared Competences: Article 4 TFEU

Shared competences are the 'ordinary' competences of the European Union. Unless the Treaties expressly
p. 86 provide otherwise, a Union competence will be shared with ↳ the Member States.[38] Within a shared competence, 'the Union and the Member States may legislate';[39] yet, according to the formulation in Article 2(2) TFEU, both appear to be prohibited from acting at the same time: '[t]he Member States shall exercise their competence to the extent that the Union has not exercised its competence.' This formulation invokes the geometrical image of a divided field: the Member States may only legislate in that part which the European Union has not (yet) entered. Within one field, either the European Union or the Member States can exercise their shared competence.[40]

When viewed against the constitutional status quo, this is a misleading definition of shared competences. For in the past fifty years, shared competences have allowed the Union and the Member States to act *in the same field at the same time*. Indeed, depending on the political discretion of the Union legislator, the latter may decide to exercise its shared competences in three—typified—ways. Under rule preemption, the Union act will only outlaw those national norms that literally violate European law. Under obstacle preemption this is extended to national norms that violate the aim behind the Union act.[41] In both situations, Union and national law will however apply simultaneously in a given situation. By contrast, under field pre-emption the Union act excludes all national law within its field of application; and the formulation in Article 2 (2) TFEU appears to be exclusively based on that third pre-emption type. It seems to demand 'automatic [field] preemption of Member State action where the Union has exercised its power'.[42] However, this reading of Article 2(2) TFEU not only contradicts past constitutional practice,[43] it equally seems doubtful today, since the Treaties expressly mention the idea of minimum harmonization under shared competences.[44]

p. 87

(c) Coordinating Competences: Article 5 TFEU

Coordinating competences are defined in the third paragraph of Article 2 TFEU; and Article 5 TFEU places 'economic policy', 'employment policy' and 'social policy' within this category. (The inspiration for this third category appears to have been the absence of a political consensus among the Treaty-makers. Whereas one group wished to place economic and employment coordination within the category of shared competences, an opposing view advocated their classification as complementary competence.[45]) The constitutional character of coordinating competences remains largely undefined. Articles 2 and 5 TFEU only tell us that the Union has a competence to provide 'arrangements' for the Member States so as to allow them to exercise their competences in a coordinated manner. The Union's coordination effort will thus typically involve the adoption of 'guidelines' and 'initiatives to ensure coordination'.

(d) Complementary Competences: Article 6 TFEU

The term 'complementary competence' is not used in Article 2 (5) TFEU. However, it appears to be the best way generally to refer to 'actions to support, coordinate or supplement the actions of the Member States'.[46] Article 6 TFEU lists seven areas: the protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; and administrative cooperation. This should be an exhaustive list in light of the residual character of shared competences. The contours of this competence type are—again—largely unexplored but it appears to be a defining characteristic of complementary competences that they do 'not entail harmonization of Member States' laws or regulations'.[47]

2. External Competences: Special Rules

The Treaties do not generally distinguish between internal and external competences. (Within the areas of Union competences listed in Articles 3–6 TFEU, we do indeed find a number of external competences.[48]) There
p. 88 are however two ↳ exceptions to this rule. First, Article 2(4) TFEU specifically isolates the Common Foreign and Security Policy (CFSP) competence from the ordinary competence categories; and secondly, Article 3(2) TFEU provides a source of exclusivity for the conclusion of international agreements that goes beyond the competence areas listed in Article 3(1) TFEU.

Let us look at both special constitutional arrangements in turn.

(a) *The* Sui Generis *Nature of the CFSP Competence*

What is the nature of the Union's CFSP competence? This has been a question ever since its introduction by the 1992 Maastricht Treaty. According to one view, the CFSP competence was a 'classic' international law competence that would not allow the Union to adopt supranational European law.[49] A second view, by contrast, argued that the CFSP competence forms part of one and the same European legal order.[50] The Lisbon Treaty has adopted this second view. While recognizing that the CFSP 'is subject to specific rules and procedures',[51] CFSP law will 'have the same legal value' as ordinary EU law.[52]

The Treaties nonetheless treat the CFSP competence as a distinct competence category.[53] In what way does it differ from the 'ordinary' competences of the Union? We may find a first answer to this question in Article 24 TEU. The provision declares that '[t]he adoption of legislative acts shall be excluded' within the CFSP area. What will this mean? If the reference to 'legislative acts' here simply formally refers to acts adopted under a legislative procedure, then Article 24 TEU would state the obvious. (Neither the ordinary nor any of the special legislative procedures apply within the CFSP.) If the formulation were however given a material meaning, then Article 24 TEU would signal that the competence could not be used for the adoption of generally applicable norms.

A second key to the nature of CFSP competences might be found in Declaration 14 to the European Treaties. The latter states that the CFSP competence 'will not affect the existing legal basis, responsibilities, and powers of each Member State in relation to the formulation and conduct of its foreign policy, its national diplomatic
p. 89 service, relations with third countries and participation in international ↳ organisations'.[54] This formulation confirms the 'special' or 'sui generis' nature of the CFSP competence.[55]

(b) Article 3(2) TFEU: Subsequently Exclusive Treaty Powers

There exists a second exception to the 'ordinary' competence categories of the Union in the external relations field. It can be found in Article 3(2) TFEU, which concerns the Union's competence to conclude international agreements. It states:

> 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 in so far as its conclusion may affect common rules or alter their scope.

The provision breaks the logic of constitutionally fixed areas of exclusive competence in Article 3(1) TFEU. It acknowledges the dynamic growth of exclusive competences in the external sphere.[56] According to Article 3(2) TFEU, the Union may thus 'obtain' exclusive treaty-making power in one of three situations. These three situations aim to codify three famous judicial doctrines.

According to the first situation, the Union obtains an exclusive treaty-making power when the conclusion of an international agreement 'is provided for in a legislative act'. This formulation has been called the 'WTO Doctrine'. For in Opinion 1/94 on the compatibility of the WTO Agreement with the Treaties,[57] the Court held that '[w]henever the [Union] has concluded in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on the institutions powers to negotiate with non-member countries, *it acquires exclusive external competence in the spheres covered by those acts*'.[58] The second situation mentioned in Article 3(2) TFEU grants the Union an exclusive treaty power, where this 'is necessary to enable the Union to exercise its internal competence'. This appears to codify the 'Opinion 1/76 Doctrine',[59] albeit in a much less restrictive form. Finally, the third situation in Article 3(2) appears to refer to the Court's famous 'ERTA doctrine'.[60] According to the latter, each time the Union 'adopts provisions laying down common rules', 'the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules'.[61]

IV. Subsidiarity: Safeguarding Federal Values

p. 90

In political philosophy, the principle of subsidiarity has come to represent the idea 'that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level'.[62] The principle therefore has a positive and a negative aspect.[63] It positively encourages 'large associations' to assist smaller ones, where they need help; and it negatively discourages the assignment 'to a greater and higher association what lesser and subordinate organisations can do' (Quadragesimo Anno, §79). The Union legal order recognizes the subsidiarity principle as a general constitutional principle governing the exercise of Union competences.[64] It can be found in Article 5(3) TEU, which states:

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far 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.

This definition states that the subsidiarity principle will only apply to the Union's non-exclusive powers. Unlike the principle of conferral, it is thus not a principle governing all types of federalism but it will only apply within a legal order based on a philosophy of *cooperative* federalism.[65] (Within such a system, two legislators can act within the same sphere, whereas dual federalism is premised on the idea that the Union and the Member States can only act within mutually exclusive spheres.)

The wording of Article 5(3) TEU is undoubtedly a textual failure. The Treaty definition in Article 5(3) TEU indeed recognizes two subsidiarity tests. The first can be called the *national insufficiency test*. The Union is here allowed to act, where the objectives of the proposed action cannot—in absolute terms—be sufficiently achieved by the Member States. The second test is a *comparative efficiency test*, according to which the Union should not
p. 91 act unless it can—in relative ↳ terms—better achieve the objectives of the proposed action. (The unresolved question arising from a combination of these two tests thereby is this: is the Union entitled to act where it is—in relative terms—better able to tackle a social problem, but where the Member States could—in absolute terms—nonetheless achieve the desired result?) And to make matters worse, the formulation 'if and in so far' in Article 5(3) TEU potentially offers two versions of the subsidiarity principle. The first version concentrates on the 'if' question by asking *whether* the Union should act at all (subsidiarity in a *strict sense*). The second version, by contrast, concentrates on the 'in-so-far' question by asking *to what extent* the Union should act (subsidiarity in a *wide sense*).[66]

In light of these textual ambivalences, two approaches have evolved to give concrete meaning to the subsidiarity principle. The first approach focuses on subsidiarity as a judicial standard, while the second concentrates on subsidiarity as a political safeguard of federalism.

1. Subsidiarity: A Judicial Safeguard of Federalism

(a) In General: (Legislative) Subsidiarity

What is the judicial content of the subsidiarity principle in the Union legal order? The principle of subsidiarity has remained a subsidiary principle of European constitutionalism. The reason for this shadowy existence lies in the absence of clear conceptual contours. The European Court has here primarily been responsible, since the Court has made a few—bad—conceptual choices, which have driven the principle of subsidiarity into a constitutional corner.

The Court seems to have taken the wrong turn in *United Kingdom v Council (Working Time)*.[67] The United Kingdom had applied for the annulment of the Working Time Directive. Its argument was twofold. First, it claimed 'that the [Union] legislature neither fully considered nor adequately demonstrated whether there were transnational aspects which could not be satisfactorily regulated by national measures, whether such measures would conflict with the requirements of the [Treaties] or significantly damage the interests of Member States or, finally, whether action at [European] level would provide clear benefits compared with action at national level'. Secondly and substantively, Britain argued that the principle of subsidiarity should 'not allow the adoption of a directive in such wide and prescriptive terms as the contested directive, given that the extent and the nature of legislative regulation of working time vary very widely between Member States'.[68]

p. 92 How did the Court respond to both subsidiarity challenges? The Court offered an interpretation of subsidiarity that has structured the judicial vision of the principle ever since. It held:

> Once the Council has found that it is necessary to improve the existing level of protection as regards the health and safety of workers and to harmonise the conditions in this area while maintaining the

> improvements made, achievement of that objective through the imposition of minimum requirements necessarily presupposes [Union]-wide action, which otherwise, as in this case, leaves the enactment of the detailed implementing provisions required largely to the Member States. The argument that the Council could not properly adopt measures as general and mandatory as those forming the subject-matter of the directive will be examined below in the context of the plea alleging infringement of the principle of proportionality.[69]

This judicial definition contained two—fundamental—conceptual choices. First, the Court assumed that wherever the Union wished to 'harmonise' national laws, that objective could never be achieved by national action and thus necessarily required Union legislation. This view answers the national insufficiency test with a mistaken tautology: as only the Union can harmonize laws—*quaere*: what about international agreements harmonizing national laws?—the Union would pass the first subsidiarity test! However, had the Court now continued to adopt the broad subsidiarity version not much would have been lost. Yet this is where the Court took a second—bad—turn. For it decided against the idea of subsidiarity in a wider sense and relegated the review of the intensity of European legislation to the principle of proportionality under Article 5(4) TEU.[70] (And as we shall see below, it is there that the Court made a third important choice. In analysing the proportionality of the European law, it ruled that 'the Council must be allowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments'. The Court would thus apply a low standard of judicial scrutiny that will be further discussed in Section IV.)

(b) In Particular: Executive Subsidiarity

The wording of the subsidiarity principle in Article 5(3) TEU refers to any action by the Union. This does
p. 93 include *executive* action.[71] The principle of subsidiarity, ↳ when applied to the executive branch, asks whether the Member States or the European Union will better achieve the administration of European law. Executive subsidiarity thereby operates *independently* from the principle's application in the legislative sphere. Thus, even when *centralized legislative* action by the Union is justified under the subsidiarity principle, the latter may nonetheless mandate the *decentralized execution* of European legislation by the Member States.

What criteria have the European Courts developed to clarify the contours of executive subsidiarity? Are they, perhaps, clearer than in the legislative sphere? The issue arose in *France Télécom v Commission*.[72] The French undertaking had been subject to a Commission investigation under Regulation 1/2003 and challenged its legality on the ground that the French competition authority would have been better able to deal with the case. The Commission, on the other hand, insisted that Regulation 1/2003 'preserve[d] the Commission's power to act at any time against any infringement of Articles [101 and 102]'. Moreover, 'where the Commission has competence to apply the [FEU] Treaty directly in individual cases, the principle of subsidiarity cannot be interpreted in a manner that deprives it of such competence'.[73] In its judgment, the Court—rightly—distinguished the Commission (preliminary) power to undertake inspections from the formal initiation of proceedings for the purposes of Article 11(6) of the Regulation.[74] Yet, it—wrongly—held that the subsidiarity principle could never limit the Commission's power to enforce the competition rules.[75]

The General Court's judgment represented a serious blow to the idea of an independent judicial analysis of executive subsidiarity. The Court appears to leave executive subsidiarity completely in the hands of the European institutions. This reliance on the political safeguards of federalism is misplaced, especially in the context of the executive function. For while Article 291(3) TFEU envisages 'mechanisms for control by Member States' as a general rule, these may not apply in specific executive regimes—like competition law. Indeed, the idea of an independent subsidiarity analysis for the executive function has been reinforced under the Lisbon Treaty. According to Article 291 TFEU, the Commission should only possess implementing powers '[w]here
p. 94 uniform ↳ conditions for implementing legally binding acts are needed'. While this provision concerns the *competence* of the Commission to adopt executive acts, it betrays the clear intention to subject the executive

function to a subsidiarity rationale. This idea would be undermined if the European legislator could transfer wide implementing powers to the Commission, the exercise of which would not be subjected to an independent subsidiarity review.

2. Subsidiarity: A Political Safeguard of Federalism

Due to the lack of judicial enforcement of the subsidiarity principle, a second approach gradually gained prominence. It is the constitutional attempt to develop subsidiarity into a political safeguard of federalism. This second enforcement method is embodied in Protocol (No. 2) 'On the Application of the Principles of Subsidiarity and Proportionality'. Importantly, the Protocol only applies to 'draft *legislative* acts',[76] that is, acts to be adopted under the ordinary or a special legislative procedure. Unlike the judicial enforcement of subsidiarity that theoretically covers legislative, executive and external competences of the Union, this second approach is thus confined to the Union's *legislative* competences. For these legislative competences, the Protocol establishes 'a system of monitoring'. Each Union institution is called upon to ensure respect for the principle;[77] and this means in particular that they must forward draft legislative acts to national Parliaments.[78]

How have national parliaments been involved in the subsidiarity review? According to the Subsidiarity Protocol, each national parliament may, within eight weeks, produce a reasoned opinion stating why it considers that a European legislative draft does not comply with the principle of subsidiarity.[79] Each parliament will thereby have two votes.[80] Where these negative votes amount to one-third of all the votes allocated to the
p. 95 national parliaments, the European Union draft 'must be reviewed'.[81] ↳ This is called the 'yellow card' mechanism. For unlike a red card, the Union legislator 'may decide to maintain, amend or withdraw the draft'.[82] The yellow card mechanism is slightly strengthened in relation to proposals under the ordinary legislative procedure, albeit, here, only a majority of the votes allocated to the national parliaments will trigger it.[83] Under this 'orange card' mechanism, the Commission's justification for maintaining the proposal, as well as the reasoned opinions of the national parliaments, will be submitted to the Union legislator. The latter will then have to consider whether the proposal is compatible with the principle of subsidiarity. Where one of its chambers finds that the proposal violates the principle of subsidiarity, the proposal is rejected.[84]

With its adoption of the yellow (orange) card mechanism, the Lisbon Protocol has thus not followed the idea of a 'red card' mechanism. The rejection of a hard procedural solution has been bemoaned by some, who have argued that the chosen control method would 'add very little' to the political control of the Union legislator.[85] Others have—rightly—greeted the fact that the established mechanism leaves the political decision on subsidiarity ultimately to the European legislator. '[T]o give national parliaments what would amount to a veto over proposals would be incompatible with the Commission's constitutionally protected independence.'[86] Indeed, 'a veto power vested in national Parliaments would distort the proper distribution of power and responsibility in the EU's complex but remarkably successful system of transnational governance by conceding too much to State control'.[87] To have made national parliaments 'co-legislators' in the making of European law would have aggravated the 'political interweaving' of the European and the national level and thereby further deepened joint-decision traps.[88]

V. Proportionality: Safeguarding Liberal (and Federal) Values
p. 96

The principle of proportionality is one of the oldest constitutional principles of the Union legal order.[89] It began its career as an *unwritten* principle of Union law that prohibits the use of excessive power to achieve a desired end. The prohibition against the use of disproportionate power here applies to Union as well as Member State action. Since the 1992 Maastricht Treaty, the proportionality principle has been—partially—codified in Article 5(4) TEU. The provision states:

> 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.[90]

Unlike the unwritten general principle, the codified version is thus narrower: it only applies to *Union* measures —and not national measures.[91] The proportionality review of Union measures however covers—in contrast to a subsidiarity review—*all* Union actions and thus includes Union measures adopted under an exclusive competence. And unlike the principle of subsidiarity, the proportionality principle is conceived as a *judicial* safeguard that is not complemented by a political control mechanism.[92]

1. Proportionality Review: Two Constitutional Functions

(a) Protecting Liberal Values: Fundamental Rights

The traditional function of the proportionality principle in the review of Union acts has been to protect liberal values because the prohibition against the use of excessive public power principally developed in the context of
p. 97 European fundamental ↳ rights. The Union has here recognized that each restriction of a fundamental right must be 'proportionate' in relation to the public interest pursued.[93]

The application of the proportionality principle as a constitutional safeguard of liberalism emerged in *Internationale Handelsgesellschaft*.[94] The case involved the review of a Union measure that stipulated the forfeiture of a financial deposit for an import/export licence. Was this a disproportionate interference with the fundamental freedom of trade? The Court found that this was not the case. The intervention constituted a method that was 'both necessary and appropriate to enable the competent authorities to determine in the most effective manner their interventions on the market'; and the 'costs involved in the deposit [did] not constitute an amount *disproportionate* to the total value of the goods in question'.[95] Nonetheless, the Court had expressed a general principle: any Union act had to be proportionate in the light of affected private interests, and in particular, fundamental rights.[96]

This function of the proportionality principle as a constitutional safeguard of liberalism finds a special expression today in the EU Charter of Fundamental Rights. Article 52 of the Charter here states: 'Subject to the principle of proportionality, limitations [on the rights and freedoms recognized by this Charter] may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.'[97]

(b) Protecting Federal Values: National Autonomy

The Maastricht Treaty and the introduction of Article 5(4) TEU have been said to add a federal dimension to the proportionality principle.[98] Following this view, the proportionality inquiry within Article 5(4) TEU is—partly or even exclusively—concerned with limiting the intensity of Union intervention in order to protect *national* regulatory autonomy. Despite arguments to the contrary,[99] the Court indeed—often—analyses the second 'subsidiarity' aspect within the context of the proportionality principle.[100]

p. 98 According to Article 5(4) TEU, the degree of Union intervention may thereby be limited with regard to the 'content *or* form of Union action'.[101] The former refers to the substance of the act, while the latter refers to the legal instrument of Union intervention.

With regard to the *substantive* intensity of Union intervention, we saw above, in our discussion of the subsidiarity principle, that the Court generally offers the Union legislator a wide margin of appreciation for (discretionary) policy choices. 'Judicial review of the exercise of that discretion must therefore be limited to examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution

concerned has manifestly exceeded the limits of its discretion'.[102] This constitutional choice in favour of low judicial scrutiny has been confirmed in *Germany v Parliament & Council (Deposit Guarantees)*.[103] The plaintiff had here argued that a Union directive violated the principle of proportionality, as it did 'not leave any room for the Member States to adopt "different approaches" in regard to the application of the Directive'.[104] The Court bluntly rejected the argument by simply pointing to the political decision to establish a particular level of (minimum) harmonization within the Union.[105]

What about the *form* of Union intervention mentioned in Article 5(4) TEU? The general proportionality reference in Article 5(4) TEU now finds a specific expression in Article 296 TFEU, which states: 'Where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures *and with the principle of proportionality*.'[106] And while the proportionality principle is here theoretically free to operate as a liberal or federal safeguard, the federal aspect has dominated past discussions on the use of a 'proportionate' Union instrument.[107]

There is however little jurisprudence on the application of the proportionality principle with regard to the Union's choice of legal instrument. In *Portuguese Republic v Commission*,[108] a national decree had provided that
p. 99 certain airport charges were to ↳ be determined by a public undertaking on the basis of maximum take-off weight. The discriminatory pricing policy amounted to a state measure within the meaning of Article 106 TFEU and the Commission had issued a decision condemning the Portuguese system under Article 106(3) TFEU. Portugal brought an action for annulment of the State-addressed decision, alleging a violation of the principle of subsidiarity-proportionality: 'The Portuguese Republic contends that the Commission infringed the principle of proportionality laid down in [Article 5(4) TEU] by choosing from among the courses of action open to it that which was the least appropriate and the most onerous.'[109]

The Court was however not swayed. For it found that the Commission enjoyed a wide discretion in matters covered by Article 106 TFEU 'as regards both the action which it considers necessary to take and the means appropriate for that purpose'.[110] The following constitutional guidelines were nonetheless given for the choice between a directive and a decision:

> [T]he choice offered by [Article 106(3)] of the Treaty between a directive and a decision is not determined, as the Portuguese Republic contends, by the number of Member States which may be concerned. The choice depends on whether the Commission's objective is to specify in general terms the obligations arising under the Treaty, or to assess a specific situation in one or more Member States in the light of [Union] law and determine the consequences arising for the Member State or States concerned.[111]

These were indeed not very clear constitutional guidelines; and we shall have to wait for better criteria on the application of the proportionality principle with regard to the choice of legal instrument.

2. Proportionality Review: Test(s) and Standard(s)

The idea of proportionality presupposes the existence of a test and a standard. The proportionality test comprises a number of questions as to the balance of values behind the Union measure, while the review standard represents the degree of judicial 'curiosity' with which that balance is questioned. These two dimensions of the proportionality inquiry are—relatively—independent.[112]

What is the Union's proportionality test? In its most elaborate form, the Court has used a tripartite test.[113] It
p. 100 analyses the suitability, necessity, and proportionality ↳ (in the strict sense) of a Union act.[114] Within its suitability review, the Court explores whether the European measure was suitable for achieving a given objective. The measure must thus be in a 'causal' relationship with its desired aim. This is often straightforward.[115] The necessity test, on the other hand, is more demanding. The Union will here have to show

that the act adopted represents the *least restrictive means* to achieve a given Union objective. This second prong of the proportionality test thus examines the *formal* 'excessiveness' of a Union measure. For in accepting the substantive degree of Union intervention, it formally enquires only whether the Union end could have been achieved by a less restrictive means. The third part of the proportionality test finally scrutinizes the substantive degree of Union intervention by reviewing whether the Union disproportionately interferes with—say—fundamental rights of Union citizens. Proportionality in a strict sense thus asks whether the Union end imposes *substantively* excessive burdens on individuals.

What standard of scrutiny does the Court apply to these questions? A court's capacity to review the exercise of legislative or executive power ranges from classifying it as a non-justiciable (political) question to fully substituting a political compromise with a judicial solution.[116] In between these two extremes exists a number of distinct review standards for particular contexts, such as external relations. For the Union legal order, the European Courts have traditionally distinguished between a soft and a strict(er) review standard depending on whether the Union enjoys a sphere of discretion. The legality of a discretionary act will indeed only be affected, where its disproportionality is 'manifest'.[117] The 'manifestly inappropriate' standard thereby cuts across the entire proportionality test. This can be seen in *Fedesa*,[118] where the European Court was called to review the legality of a Directive prohibiting the use of hormonal substances in livestock farming. The latter was attacked as an unsuitable, unnecessary, and disproportionate Union act; and the Court examined each single element of the tripartite proportionality test against its manifestly inappropriate standard.

p. 101 Under the 'manifestly inappropriate' standard the European Court rarely finds a Union measure to be disproportionate. Yet we can find an illustration of such a disproportionate Union act—even in the context of external relations—in *Kadi*.[119] In its fight against international terrorism, the Union had adopted a Regulation freezing the assets of people suspected to be associated with Al-Qaeda. The applicant alleged, inter alia, that the Union act disproportionately restricted his right to property. Finding that 'the exercise of the right to property may be restricted', the Court nonetheless insisted that 'those restrictions in fact correspond to objectives of public interest pursued by the [Union] and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed'.[120] This required that 'a fair balance has been struck between the demands of the public interest and the interest of the individuals concerned'.[121] In the present case, this fair balance had not been struck for the applicant.[122]

VI. Conclusion

The European Union is not a sovereign state. Its competences are limited competences, which must be conferred on it by the Member States. This principle of conferral has nonetheless been dramatically softened in the Union legal order. For the Union is—within some political and constitutional limits—able to determine the scope of its competences itself. Teleological interpretation, in particular of its general competences, has thus provided it with a partial competence-competence. The erosion of the principle of conferral has however been partly compensated by the invention of various competence types that limit the Union's legal power—even if the precise constitutional contours of coordinating and complementary competence still need to be defined.

Article 5 TEU recognizes two additional constitutional principles that govern the *exercise* of Union power. The principle of subsidiarity is designed to limit the exercise of non-exclusive Union competences to situations where the Union can demonstrate to be better able to solve a social problem. The subsidiarity test provided in Article 5(3) TEU has however proven difficult to apply by the European Courts. In the absence of an objective
p. 102 definition, the Union legal order has tried ↳ to rely on the (subjective) political views of national parliaments. The principle of proportionality, by contrast, has had a distinctive judicial career. Designed as a judicial limit to excessive Union intervention, it has been developed into a constitutional safeguard of liberalism and federalism.

Bibliography

G. Berman, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 *Columbia Law Review* 331
Google Scholar WorldCat

A. von Bogdandy and J. Bast, 'The European Union's Vertical Order of Competences: The Current Law and Proposals for its Reform' (2002) 39 *Common Market Law Review* 227
Google Scholar WorldCat

C. Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* (1999)
Google Scholar Google Preview WorldCat COPAC

V. Constantinesco, *Compétences et pouvoirs dans les Communautés européennes: Contribution a l'étude de la nature juridique des Communautés* (1974)
Google Scholar Google Preview WorldCat COPAC

G. Davies, Subsidiarity: 'The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 *Common Market Law Review* 63
Google Scholar WorldCat

G. de Búrca, 'The Principle of Proportionality and its Application in EC Law' (1993) 13 *Yearbook of European Law* 105
Google Scholar WorldCat

E. Ellis (ed), '*The Principle of Proportionality in the Laws of Europe*' (1999)
Google Scholar Google Preview WorldCat COPAC

R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (2009)
Google Scholar Google Preview WorldCat COPAC

R. Schütze, *European Constitutional Law* (2012)
Google Scholar Google Preview WorldCat COPAC

A. Tizzano, 'The Powers of the Community' in Commission of the European Communities (ed), *Thirty Years of Community Law* (1981), 43
Google Scholar Google Preview WorldCat COPAC

T. Tridimas, *The General Principles of EU Law* (2006)
Google Scholar Google Preview WorldCat COPAC

Notes

* Thanks go to the editors, and the European Research Council. The research leading to this chapter received funding under the European Union's Seventh Framework Programme (FP/2007-2013) / ERC Grant Agreement n. 312304.

1 Art 5(1) TEU (emphasis added).

2 Art 5(3) TEU.

3 In the words of A. Dicey, *Introduction to the Study of the Law of the Constitution* (1982) 37–38: 'The principle of Parliamentary sovereignty means neither more nor less than this, namely that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever: and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.'

4 Art 5(2) TEU.

5 Art 5(2) TEU (emphasis added).

6 In international law, this principle is called the 'in dubio mitius' principle. In case of a doubt, the 'milder' interpretation

should be preferred.

7 See eg Case 8/55, *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*, [1955] ECR 245.

8 Case C-84/94, *United Kingdom of Great Britain and Northern Ireland v Council*, [1996] ECR I-5755.

9 Ex-Article 118a (1) EEC. This competence is today Art 153(1)(a) TFEU, which allows the Union to support and implement the activities of the Member States as regards the 'improvement in particular of the working environment to protect workers' health and safety'.

10 Section II of Directive 93/104 regulated the minimum rest periods. Member States were obliged to introduce national laws to ensure that every worker is entitled to a minimum daily rest period of eleven consecutive hours per twenty-four hour period (Art 3), and to a rest break where the working day is longer than six hours (Art 4). Art 5 granted a minimum uninterrupted rest period of twenty-four hours in each seven-day period, and determined that this period should in principle include Sunday. Art 6 established a maximum weekly working time of forty-eight hours. Finally, the Directive established a four weeks' paid annual leave (Art 7).

11 Case C-84/94 (supra n 8), para 15. The Court, however, annulled the second sentence of Art 5 of the Directive that had tried to protect, in principle, Sunday as a weekly rest period. In the opinion of the Court, the Council had 'failed to explain why Sunday, as a weekly rest day, is more closely connected with the health and safety of workers than any other day of the week' (para 37).

12 For an exception to the rule, see: Case C-376/98, *Germany v Parliament and Council (Tobacco Advertising)*, [2000] ECR I-8419. For a discussion of this case, see R. Schütze, *European Constitutional Law,* (2012), 158 et seq.

13 Art 352 TFEU (emphasis added).

14 The wording of the provision is already paradoxical as it speaks of giving the Union a power where 'the Treaties have not provided the necessary powers'—suggesting that the Article would somehow be 'outside' the Treaty framework, (cf D.W. Dorn, *Art. 235 EWGV—Prinzipien der Auslegung—Die Generalermächtigung zur Rechtsetzung im Verfassungssystem der Gemeinschaften* (1986), 40–41.

15 The provision has been—*inter alia*—described as a 'provision to expand competences' (cf BVerfGE 89, 155—*Maastricht*, 196: 'Kompetenzerweiterungsvorschrift'); '[an] instrument for extending [Union] powers', cf Tizzano, *The Powers of the Community,* in Commission of the European Communities (ed), *Thirty Years of Community Law* (1981) 43, 50); as well as an 'ad hoc procedure for granting new powers to the Community', cf A. Giardina, 'The Rule of Law and Implied Powers in the European Communities' (1975) *Italian Yearbook of International Law* 99 at 102).

16 On the emergence of the concept in German federal doctrine, see R. Schütze, *European Constitutional Law,* (supra n 12) 55–56.

17 L.-J. Constantinesco, *Das Recht der Europäischen Gemeinschaften* (1977) 278 (translation—RS).

18 J. Weiler, 'The Autonomy of the Community Legal Order: Through the Looking Glass' in J. Weiler, *The Constitution of Europe* (1999). Weiler's analysis is inconsistent in a number of ways. First, it is already hard to accept that 'the ECJ, in adopting its position on judicial *Kompetenz-Kompetenz*, was not following any constitutional foundation but rather an *orthodox* international law rationale' (290–1, emphasis added). But how can we square this statement with the following assertion—only a few pages later—that within an 'orthodox' international organization 'should there be a disagreement over the interpretation of a clause within a treaty, an agreement of all parties will normally be the final word as either an authentic interpretation or a de facto amendment' (293–4)? If *that* is the orthodox international law doctrine, then the Court's judgment in Case 43/75 *Defrenne v Sabena* [1976] ECR 455 followed a constitutional rationale in that it opted against the 'ordinary' international law doctrine that permitted States to interpret 'their' Treaty. Be that as it may, a serious inconsistency arises with Weiler's second claim (312): 'The assumption that a [Union] without a legislative *Kompetenz-Kompetenz* cannot contain a court without judicial *Kompetenz-Kompetenz* … is false.' How can that be? How can one grant judicial *Kompetenz-Kompetenz* as 'the competence to declare or to determine the limits of the competences of the [Union]' (288) and yet, deny that if there is no other legal authority to set limits to the scope of its legislative powers, the Union can determine the limits of its legislative competences?

19 Cf Opinion 2/94 (Accession by the European Community to the European Convention of Human Rights), [1996] ECR I-1759, esp. paras 29–30.

20 In its Lisbon Decision, the German Constitutional Court referred to the 'indefinite' scope of Art 352 TFEU, whose use—coming close to a Treaty amendment—required the consent of the German parliament, see BVerfGE 123, 267 (Lisbon), para 328: 'Because of the indefinite nature of future application of the flexibility clause, its use constitutionally requires ratification by the German *Bundestag* and the *Bundesrat* on the basis of Art 23.1 second and third sentence of the Basic Law. The German representative in the Council may not express formal approval on behalf of the Federal Republic of Germany of a corresponding lawmaking proposal of the Commission as long as these constitutionally required preconditions are not met.'

21 Cf European Union Act (2011), Part 1—Section 8 ('Decisions under Art 352 of TFEU'): '(1) A Minister of the Crown may not

vote in favour of or otherwise support an Art 352 decision unless one of subsections (3) to (5) is complied with in relation to the draft decision. (2) An Art 352 decision is a decision under the provision of Art 352 of TFEU that permits the adoption of measures to attain one of the objectives set out in the EU Treaties (but for which those Treaties have not provided the necessary powers). (3) This subsection is complied with if a draft decision is approved by Act of Parliament. (4) This subsection is complied with if—(a) in each House of Parliament a Minister of the Crown moves a motion that the House approves Her Majesty's Government's intention to support a specified draft decision and is of the opinion that the measure to which it relates is required as a matter of urgency, and; (b) each House agrees to the motion without amendment. (5) This subsection is complied with if a Minister of the Crown has laid before Parliament a statement specifying a draft decision and stating that in the opinion of the Minister the decision relates only to one or more exempt purposes. (6) The exempt purposes are—(a) to make provision equivalent to that made by a measure previously adopted under Art 352 of TFEU, other than an excepted measure; (b) to prolong or renew a measure previously adopted under that Article, other than an excepted measure; (c) to extend a measure previously adopted under that Article to another member State or other country; (d) to repeal existing measures adopted under that Article; (e) to consolidate existing measures adopted under that Article without any change of substance …'

22 Case 35/76, *Simmenthal v Italian Minister of Finance* [1977] ECR 1871; as well as Case 5/77, *Tedeschi v Denkavit* [1977] ECR 1555.

23 *Simmenthal* para 14. However, for a judicial 'slip of the tongue', see Case 265/95, *Commission v France* [1997] ECR 6959, paras 32–33: 'Article [34 TFEU] therefore requires the Member States not merely themselves to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Art [4(3) TEU], to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory. In the latter context, the Member States, which retain exclusive competence as regards the maintenance of public order and the safeguarding of internal security, unquestionably enjoy a margin of discretion in determining what measures are most appropriate to eliminate barriers to the importation of products in a given situation.'

24 The EU Treaties also acknowledge specific constitutional guarantees; see Protocol (No 35) 'On Art 40.3.3. of the Constitution of Ireland', which states: 'Nothing in the Treaties, or in the Treaty establishing the European Atomic Energy Community, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Art 40.3.3 of the Constitution of Ireland.' For an analysis of the 'Irish abortion' Protocol, see D. Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' [1993] 30 *CML Rev* 17, 47–49.

25 Art 168(7) TFEU.

26 Art 168(5) TFEU.

27 Case C-376/98, *Germany v Council (Tobacco Advertising)* [2000] ECR I-8419.

28 The Court freely admitted, '[t]he national measures *affected* [were] to a large extent inspired by public health policy objectives' (*Germany v Council (Tobacco Advertising*) (n 27) para 76 (emphasis added).

29 *Germany v Council (Tobacco Advertising)* (n 27) para 78.

30 *Germany v Council (Tobacco Advertising)* (n 27) para 88.

31 K Lenarts, 'Constitutionalism and the Many Faces of Federalism' [1990] *American Journal of Comparative Law* 205, 220.

32 For an excellent overview of the potential functions of the provision and the early case law see B. Guastaferro, 'Beyond the *Exceptionalism* of Constitutional Conflicts: The *Ordinary* Functions of the Identity Clause' (2012) 31 *Yearbook of European Law* 263. For a case referring to Art 4(2) TEU, see *Sayn-Wittgenstein v Landeshauptmann von Wien*, Case C-208/09, (2010) ECR I-13693.

33 On this development, see R. Schütze, 'The European Community's Federal Order of Competences: A Retrospective Analysis' in M. Dougan and S. Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (2009), 63.

34 Art 2 (1) TFEU.

35 Opinion 1/75 (Draft understanding on a local cost standard) [1975] ECR 1355.

36 Case 804/79, *Commission v United Kingdom*, [1981] ECR 1045.

37 With regard to the CCP, this has even led to some 'deformations', cf R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law,* (2009), 167ff. For a recent and restrictive definition of 'monetary policy', see *Pringle v Government of Ireland, Ireland and The Attorney General*, Case C-370/12, EU:C: 2012: 756, esp. paras 50 et seq.

38 Art 4 TFEU states that EU competences will be shared 'where the Treaties confer on it a competence which does not relate to the areas referred to in Art 3 and 6', that is, areas of exclusive or complementary EU competence.

39 Art 2(2) TFEU.

40 The Union may, however, decide to 'cease exercising its competence'. This reopening of legislative space arises 'when the relevant EU institutions decide to repeal a legislative act, in particular better to ensure constant respect for the principles of subsidiarity and proportionality'. See Declaration (No. 18) 'In relation to the delimitation of competences'.

41 R. Schütze, *European Constitutional Law,* (n 12), 363 et seq.

42 P. Craig, 'Competence: Clarity, Conferral, Containment and Consideration' [2004] 29 *EL Rev* 323, 334. The Treaties however

clarify that such field preemption would 'only' be in relation to the legislative act (see Protocol (No. 25) 'on the Exercise of Shared Competence': 'With reference to Art 2 of the Treaty on the Functioning of the European Union on shared competence, when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole [competence] area').

43 Cf R. Schütze, *From Dual to Cooperative Federalism* (n 37) Ch 4.

44 See Art 4 (2) (e) TFEU on the shared 'environment' competence.

45 Cf Convention Presidium CONV 724/03 (Annex 2), p. 68.

46 Art 2(5) TFEU.

47 Art 2(5) TFEU—second indent.

48 eg the common commercial policy is listed under the Union's exclusive competences (see Art 3(1)(e) TFEU), environmental policy is listed as a shared competence (see Art 191(4) TFEU: 'Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned'); and public health is listed as a complementary competence (see Art 6(a) TFEU, and Art 168(3) TFEU: 'The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of public health').

49 M. Pechstein and C. Koenig, *Die Europäische Union* (2000), 5ff. The thesis that Union law differed from Community law had gained support from ex-Art 47 (old) EU, and Case C-402/05P, *Kadi and Al Barakaat International Foundation v Council and Commission*, [2008] ECR I-6351, para 202: 'integrated but separate legal orders.'

50 K. Lenaerts and T. Corthaut, 'Of Birds and Hedges: the Role of Primacy in Invoking Norms of EU law' (2006) 31 *EL Rev* 287 at 288.

51 Art 24 (1) TEU.

52 Art 1 TEU and Art 1 TFEU.

53 Art 40 TEU makes a clear distinction between the CFSP competence and 'the Union competences referred to in Arts 3–6 of the Treaty on the Functioning of the European Union'.

54 Declaration (No. 14) concerning the Common Foreign and Security Policy.

55 M. Cremona, 'The Draft Constitutional Treaty: External Relations and External Action' [2003] *40 CML Rev* 1347 at 1354.

56 For a criticism of this dynamic view, see R. Schütze, *European Constitutional Law,* (supra n 12), 203 et seq.

57 Opinion 1/94 (WTO Agreement), [1994] ECR I-5267.

58 WTO Agreement (n 57) para 95 (emphasis added).

59 Opinion 1/76 (Laying-Up Fund), [1977] ECR 741.

60 Case 22/70, *Commission v Council (ERTA)*, [1971] ECR 263

61 *Commission v Council (ERTA*) (n 60) para 18—emphasis added.

62 Oxford English Dictionary: 'subsidiary' and 'subsidiarity'.

63 C. Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union,* (1999), 26.

64 From the—abundant—literature, see only: G. Berman, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' [1994] 94 *Columbia Law Review* 331; D. Z. Cass, 'The Word that Saves Maastricht? The Principle of Subsidiarity and the Division of Powers within the European Community' [1992] 29 *CML Rev* 1107; G. Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' [2006] 43 *CML Rev* 63; K. Lenaerts and P. van Ypersele, 'Le Principe de Subsidiarité et son Contexte: Étude de l'Article 3B du Traité CE' [1994] *30 Cahier de Droit Européen* 3.

65 On the meaning of that concept, see R. Schütze, *From Dual to Cooperative Federalism* (n 37), Introduction.

66 K. Lenaerts, 'The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism' [1994] 17 *Fordham International Law Journal* 846 at 875.

67 Case C-84/94 (n 8).

68 Case C-84/94 (n 8) para 46.

69 Case C-84/94 (n 8) para 47.

70 Admittedly, case law has remained somewhat ambivalent on this point. While in some cases it has incorporated the intensity question into its subsidiarity analysis (cf Case C-491/01 *The Queen v Secretary of State for Health, ex p British American Tobacco (Investments) Ltd and Tobacco et al.* [2002] ECR I-11453, as well as Case C-55/06, *Arcor v Germany*, [2008] ECR I-2931), other jurisprudence has kept the subsidiarity and the proportionality principles at arm's length (cf Case C-84/94, *United Kingdom v Council (Working Time Directive)* (supra n 8); as well as Case C-103/01 *Commission v Germany*, [2003] ECR I-5369).

71 C.D. Ehlermann, 'Quelques réflexions sur la communication de la Commission relative au principe de subsidiarité' (1992) *Revue du marché unique européen*, 215.

72 *France Télécom SA v Commission*, Case T-339/04, [2007] ECR II-521. The case is extensively discussed by F. Rizzuto, 'Parallel

Competence and the Power of the EC Commission under Regulation 1/2003 According to the Court of First Instance' [2008] *European Competition Law Review* 286.

73 *France Télécom SA v Commission* (n 72) paras 72–3.

74 A. Bardong, 'Article 11 of Regulation 1/2003' in G. Hirsch et al. (eds), *Competition Law: European Community Practice and Procedure* (2008), at 1645: 'As was the case under Art 9(3), Regulation 17/62, Art 11(6) is not triggered when the Commission merely initiates work on a case, or when it takes investigatory measures. It is clear that the Commission can exercise its powers of investigation before it formally opens proceedings.'

75 *France Télécom SA v Commission* (n 72) para 89.

76 Protocol (No. 2) 'On the Application of the Principles of Subsidiarity and Proportionality' Art 3 (emphasis added).

77 Protocol (No. 2) 'On the Application of the Principles of Subsidiarity and Proportionality' (n 76) Art 1.

78 Protocol (No. 2) 'On the Application of the Principles of Subsidiarity and Proportionality' (n 76) Art 4.

79 Protocol (No. 2) 'On the Application of the Principles of Subsidiarity and Proportionality' (n 76) Art 6.

80 Protocol (No. 2) 'On the Application of the Principles of Subsidiarity and Proportionality' (n 76) Art 7 (1).

81 For an analysis of the first activation of the yellow card mechanisms, see F. Fabbrini and K. Granat, ' "Yellow Card, but no Foul": The Role of the National Parliaments under the Subsidiary Protocol and the Commission Proposal for an EU Regulation on he Right to Strike' (2013) 50 *CML Rev* 115.

82 Protocol (No. 2) 'On the Application of the Principles of Subsidiarity and Proportionality' (n 76) Art 7(2). The threshold is lowered to a quarter for European laws in the area of freedom, security and justice.

83 Protocol (No. 2) 'On the Application of the Principles of Subsidiarity and Proportionality' (n 76) Art 7(3).

84 Protocol (No. 2) 'On the Application of the Principles of Subsidiarity and Proportionality' (n 76) Art 7(3)(b) 'if, by a majority of 55 per cent of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity, the legislative proposal shall not be given further consideration'.

85 Thirty-third Report of House of Commons European Scrutiny Committee: Subsidiarity, National Parliaments and the Lisbon Treaty (http://www.parliament.the-stationery-office.com/pa/cm200708/cmselect/cmeuleg/563/563.pdf), para 35).

86 A. Dashwood, 'The Relationship between the Member States and the European Union/Community' (2004) 41 *Common Market Law Review* 355 at 369.

87 S. Weatherill, 'Using National Parliaments to Improve Scrutiny of the Limits of EU Action' [2003] 28 *EL Rev* 909 at 912.

88 On the concept and shortfalls of *Politikverflechtung*, see F. W. Scharpf, 'The Joint-Decision Trap: Lessons from German Federalism and European Integration' (1988) 66 *Public Administration* 239.

89 An implicit acknowledgement of the proportionality principle can already be found in Case 8/55, *Fédération Charbonnière de Belgique v High Authority of the ECSC*, [1955] ECR (English Special Edition) 245 at 306: 'not exceed the limits of what is strictly necessary.'

90 The provision continues: '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.'

91 The review of national law against the principle of proportionality cannot be rooted in Art 5(4) TEU but must be found in the unwritten general principle. For an express exclusion of this unwritten principle to certain national actions, see Art 276 TFEU.

92 While the second indent of Art 5(4) TEU refers to the Protocol 'On the Application of the Principles of Subsidiarity and Proportionality', the *political* safeguards of federalism discussed above only apply to the subsidiarity principle—not the proportionality principle. On this point, see F. Fabrini and K. Kranat, 'Yellow Card, but no Foul' (n 81). The Protocol imposes a number of *justificatory* obligations on the Union institutions to explain the proportionality of the Union measure, yet, since these justificatory obligations are ultimately enforced by the Court, they are subject to judicial safeguards.

93 Case 44/79, *Hauer v Rheinland-Pfalz*, Case 44/79, [1979] ECR 3727, para 23.

94 Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermitte*l, [1970] ECR 1125.

95 *Internationale Handelsgesellschaft mbH* (n 94) paras 12–16 (emphasis added).

96 See also *Nold v Commission*, Case 4/73, [1974] 491, ECR para 14; and *Hauer v Rheinland-Pfalz* (supra n 93), para 23.

97 Art 52 (1) EU Charter.

98 T. Tridimas, *The General Principles of EU Law,* (2007), 138 and 176: 'Art 5[4] was included in the Treaty primarily with a view to protecting the interests of Member States rather than the interests of the individual … This is not to say that the protection of rights of the individual is excluded from the scope of Art 5[4].'

99 For my own arguments, see R. Schütze, *From Dual to Cooperative Federalism* (n 37), 263ff but see also: G. Davies, Subsidiarity: 'The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 *Common Market Law Review* 63.

100 Case C-84/94, *United Kingdom of Great Britain and Northern Ireland v Council* (n 8), para 47: 'The argument that the Council

could not properly adopt measures as general and mandatory as those forming the subject-matter of the directive will be examined below in the context of the plea alleging infringement of the principle of proportionality'.

101 Art 5(4) TEU (emphasis added).

102 Case C-84/94 (n 8), para 58.

103 Case C-233/94, *Germany v Parliament and Council* [1997] ECR 2405.

104 *Germany v Parliament and Council* (n 103) para 77.

105 *Germany v Parliament and Council* (n 103) paras 82–84.

106 Art 296 TFEU—first indent.

107 The federal aspect of the principle of proportionality was expressly acknowledged in the Amsterdam Protocol on Subsidiarity and Proportionality. The relevant Art 6–7 read: 'The [Union] shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures … Regarding the nature and the extent of [Union] action, [Union] measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting [Union] law, care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, [Union] measures should provide Member States with alternative ways to achieve the objectives of the measures.'

108 *Portuguese Republic v Commission*, Case 163/99, [2001] E.C.R. 2613.

109 *Portuguese Republic v Commission* (n 108) paras 16–17.

110 *Portuguese Republic v Commission* (n 108) para 20.

111 *Portuguese Republic v Commission* (n 108) para 28 (emphasis added).

112 After all, the fact that a student is asked three instead of two questions during an exam will tell us little about the rigour with which the separate answers are to be assessed.

113 See Case C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex p Fedesa and others* [1990] ECR I-4023, para 13: '[T]he principle of proportionality is one of the general principles of [Union] law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.'

114 However, the Court does not always distinguish between the second and third prong, cf Case C-233/94, *Germany v Parliament and Council (Deposit Guarantee Scheme)* (n 103) para 54.

115 For a rare example, where the test is not satisfied, see Case C-368/89, *Crispoltoni v Fattoria autonoma tabacchi di Città di Castello*, [1991] ECR I-3695, esp. para 20.

116 For the various review standards developed by the US Supreme Court, see Footnote 4 of *United States v Carolene Products Company*, 304 U.S. 144 (1938), as well as L. Lusky, 'Footnote Redux: A "Carolene Products" Reminiscence' (1982) 82 *Columbia Law Review* 1093.

117 See Case C-122/95, *Germany v Council (Bananas)*, [1998] ECR I-973, para 79.

118 Case C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex p Fedesa and others* [1990] ECR I-4023.

119 Case C-402/05P, Kadi Council and Commission (n 49).

120 Kadi Council and Commission (n 49) para 355.

121 Kadi Council and Commission (n 49) para 360.

122 Kadi Council and Commission (n 49) para 371.