Chapter 3
Union Competences

Introduction *

When the British Parliament legislates, it need not "justify" its acts. It is traditionally considered to enjoy a competence to do all things. This "omnipotence" is seen as inherent in the idea of a sovereign parliament in a "sovereign state". The European Union is neither "sovereign" nor a "state". Its powers are *not inherent* powers. They must be *conferred* by its foundational charter: the European Treaties. This constitutional principle is called the "principle of conferral". The Treaty on European Union defines it as follows:

> 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.

The Treaties employ the notion of competence in various provisions. Nevertheless, there is no positive definition of the concept. So what is a legislative competence? The best definition is this: a legislative competence is the *material field* within which an authority is entitled to legislate.

What are these material fields in which the Union is entitled to legislate? The Treaties do *not* enumerate the Union's "competences" in a single list. Instead,

* All footnotes omitted.

the Treaties pursue a different technique: they attribute legal competence for each and every Union activity in the respective Treaty title. Each policy area contains a provision – sometimes more than one – on which Union legislation can be based. The various "Union policies and internal actions" of the Union are set out in Part III of the Treaty on the Functioning of the European Union.

The Treaties thus present a picture of thematically limited competences in distinct policy areas. This picture is however – partly – misleading. Three legal developments have posed serious threats to the principle of conferral. First, the rise of teleological interpretation that will be discussed in Section 1 below. The Union's competences are interpreted in such a way that they potentially "spill over" into other policy areas. This "spillover" effect can be particularly observed with regard to a second development: the rise of the Union's general competences. For in addition to its thematic competences in specific areas, the Union enjoys two legal bases that horizontally cut across the various policy titles within the Treaties. These two competences are Articles 114 and 352 TFEU and will be discussed in Section 2. Lastly, there is a third development that would qualify the principle of conferral significantly: the doctrine of implied external powers (see Section 3 below).

What types of competences are recognized by the Treaties? The original Treaties did not specify the relationship between European and national competences. They betrayed no sign of a distinction between different competence categories. This has however changed. Different competence categories were "discovered" by the European Court of Justice, and the Lisbon Treaty has now codified them. These competence categories will be discussed in Section 4.