

AN INTRODUCTION TO EUROPEAN LAW

Chapter 3
Union Competences: Legislative Competences and Procedures;
External Competences

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Legislative competences and procedures

COMPETENCES

- The scope of Union competences
- Teleological interpretation
- The Union competences:
 - General competences
 - Categories
 - Five competences of the Union

PROCEDURES

- Ordinary procedures
 - Ordinary legislative procedure
- Special procedures
- The principle of subsidiarity

THE SCOPE OF UNION COMPETENCES

Legislation

- Art 289(3) TFEU: “Legal acts adopted by legislative procedure shall constitute legislative acts.”
- The scope of the EU’s legislative competences is **limited** as the EU is not a sovereign state.

Scope of Union Competences

- Under the **principle of conferral** the Union can only act within the limits of the competences conferred upon it by the Member States, see Art 5(2) TEU.
- A **legislative competence** is the material field within which an authority is entitled to legislate.
- Each legal competence for every Union Activity in the respective Treaty title.
- The treaties present a picture of thematically limited competences in distinct policy area



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TELEOLOGICAL INTERPRETATION

Now we turn to the ‘basics’ of discussing Union competences: the principle of conferral, which can be interpreted in two different ways, namely:

Strict...

would *deny* the Union the power to interpret its own competences. This comes with the practical problem that each legislative bill would need to gain the *consent of every national parliament*. (in *dubio mitius*; International method of interpretation in line with intention of member states.)

OR

Soft...

Allows for teleological interpretation of competences. This method asks what is the purpose of a rule. This can allow a small amendment to the original rule.

The EU adopts a **soft** teleological interpretation

See Case C-84/94 UK v Council [1996] ECR I-5755

European Court of Justice accepts a teleological interpretation of the Union competences and it also interprets Union legislation in a teleological manner as well.

See Case 9/74 Casagrande v Landeshauptstadt Munchen [1974] ECR 773

Teleological interpretation of the Union legislation allows the EU to apply legislation to areas that are within the Member State competences.

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THE GENERAL COMPETENCES OF THE UNION

The Treaties grant *special competences* within each policy area. (For example the Union's competence on environmental protection (*Art 192 TFEU*) is found in the Treaty's title dedicated to the environment. (*Title XX of Part III of the TFEU*))

The Harmonisation Competence; Article 114

- The EU is entitled to adopt measures for the approximation of national laws that relate to the internal market.
- *Case C-350/92 Spain v Council* [1995] ECR I-1985
- **Art 114 cannot be used to create new law**, European law should further the creation of a single internal market and it has to be harmonising pre-existing national laws.
- Constitutional limits of the Harmonisation principle confirmed in; *Case C-376/98 Tobacco Advertising* [2000] ECR I-8419; The law must harmonise national laws, a slight difference in law is not enough and the law must contribute to the elimination of obstacles.

The Residual Competence; Article 352

- If an action is deemed necessary to meet the EU objectives and the necessary powers aren't available the Council acting on a proposal from the Commission after obtaining the permission of Parliament to adopt the action.
- Can be used to develop an existing policy title or to develop a new one.
- Limitations; 1- Measures shall not entail the harmonisation, 2- Cannot be used in relation to Common Foreign & Security Policy.
- Big changes cannot happen through this Article. (Opinion 2/94 look at paragraph 29-30)

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THE CATEGORIES OF UNION COMPETENCES

- The original Treaties did not specify the relationship between European and national competences. (Louis, 1979)
- Two theories relating to competences;
 - I. Exclusive competences; Member states transferred their powers in relation to competences within the treaties.
 - II. Shared competences; Member states did not have exclusive rights to act within their territory as the Union shares in the exercise of public functions.
- Article 2 TFEU; Established there being 4 competences.



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THE FIVE COMPETENCES

Article 3

Exclusive Competences

- Only one governmental level is entitled to act autonomously.
- Exclusive competency areas; Article 5 TFEU-5 exclusive competency areas: 1- The Customs Union, 2- The establishment of the competition rules for the functioning of the internal market, 3- Monetary policy (states with the euro), 4- Conservation of marine biology (common fisheries policy), 5- The Common Commercial Policy,

Article 4

Shared Competences

- Ordinary competences of the EU. Within one field either the EU or the Member State can exercise their shared competence.
- In relation to technological development, space, development co-operation and humanitarian aid both Member States and the EU can legislate upon rather than 'either, or;' (parallel competence)
- Minimum standard competences; limits the Union to the adoption of a common minimum. Member states can introduce more stringent protective measures that exceed the minimum.
- See *Fornasar v Sante Chiaracosso* [2000] ECR I-4785 in regards of whether a soft or hard constitutional solution should be found for minimum standard competences.

Article 5

Co-ordinating Competences

- Competences in which the EU and member states work together on.
- Economic policy, Employment policy, Social policy.
- Adoption of guidelines and initiatives organised by the EU to co-ordinate member state approaches in relation of the three policy areas.

Article 6

Complimentary Competences

- Complementary areas; the protection & improvement of human health, industry, culture, tourism, education, vocational training, youth & sport, civil protection & urban disaster co-operation.
- Does not entail harmonisation of Member States laws or regulations.

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ORDINARY AND SPECIAL PROCEDURES

Article 289 TFEU:
*1; “The **ordinary legislative procedure** shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission.”*
*2; “In the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council or by the latter with the participation of the European Parliament, shall constitute a **special legislative procedure**.”*

Ordinary Legislative Procedure

Parliament

Council

Co-Legislation

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Special Legislative Procedures

Parliament

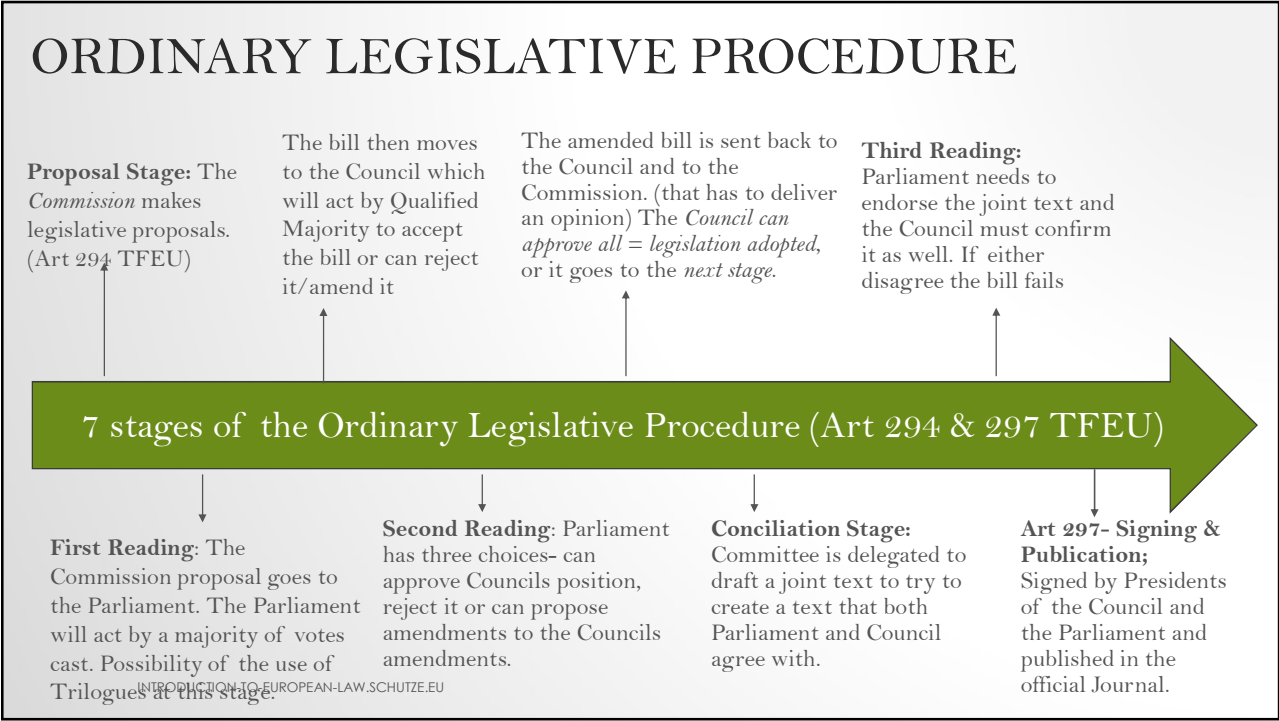
Council

Parliamentary Legislation

Parliament

Council

Council Legislation



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SPECIAL LEGISLATIVE PROCEDURE


- Parliamentary legislation & Council legislation both require consent of the other generally. (Art 289(2) TFEU)
- Sometimes consultation of the other institution will be required.
- Consent is less than co-decision; one institution is required to consent to the other's legislation. Veto power is stronger than consultation power.
- Consultation is considered a formality and opinion does not need to be taken into consideration. If consent is not required the opinion of the other institution can be ignored.




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PRINCIPLE OF SUBSIDIARITY


Yellow card mechanism:
Union legislator capable of amending or withdrawing draft legislation if national parliaments vote that it is incompatible with the principle.



Orange Card Mechanism:
If the Commission justifies the proposal after the national parliament vote; the union legislator will have to consider its compatibility- if incompatible it will reject it.



Red Card Mechanism?
Hard legislative solution has been rejected by the Protocol. National parliaments should not have a veto power.



- The principle of subsidiarity concerns the idea that a central authority should have a subsidiary function, performing tasks which cannot be performed effectively at a local level.
- It became a general principle of the EU Constitution via *Article 5 of the TEU*.
- **National insufficiency test;** The Union can only act where the objectives could not be sufficiently be achieved by the Member States.
- **Comparative efficiency test;** The Union should not act unless it can better achieve the objectives of the proposed action.
- Safeguard of federalism
- *Protocol no 2 On the Application of the Principles of Subsidiarity & Proportionality* monitors the application of the Principle in relation to draft legislation.
- This monitoring is completed by national parliaments and the European Court.

SUBSIDIARITY AS A JUDICIAL SAFEGUARD?

Case C-84/94 UK v Council (Working Time) [1996] ECR I-5755

The argument was that the principle of subsidiarity would “*not allow the adoption of a directive in such a wide and prescriptive terms as the contested directive, given that the extent and the nature of legislative regulation of working time varied widely between states.*” The court assumed that where the Union decides to harmonise national laws that objective presupposed Union legislation. The Court chose to examine the Principle of subsidiarity in relation to the principle of proportionality. In doing so it ruled; “*The Council must be allowed a wide discretion in an area [that] involves the legislature in making social policy choices.*” Judicial review is limited to examining whether the institution concerned, has manifestly exceeded the limits of its discretion. (para 47, 58)

Germany v Parliament & Council (Deposit Guarantee Scheme)[1997] ECR I-2405

The German Government claimed that the Union act *violated the procedural obligation to states reasons*. The Directive did not indicate how the actions could not be achieved at a Member State level. The Court indicated that all was required is a *low explanatory threshold* and as the Legislator had found it indispensable to ensure a harmonised minimum level. Focus on *national insufficiency test* rather than the comparative efficiency test.

COMPETENCES

- The Union is not a sovereign state. Its legislative competences are “conferred” by the treaties.
- The Union legislator has a wide use of powers by interpreting them teleologically.
- Competences are separated into categories; exclusive, shared, coordinating and complementary.
- These categories however do not make it clear what the EU’s federal order of competences are.
- Ordinary Legislative Procedure/Special Legislative Procedure
- How does this square with the Principle of Subsidiarity?



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- Internal competences vs external competences
- In this section, we focus specifically on external competences
 - What are they?
 - Common Foreign and Security Policy (CFSP)
 - The Union’s special external powers
 - European Road Transport Agreement (ERTA)
 - The CFSP and special competences
 - Nature of external competences
 - Procedures in the EU’s external competences
 - CFSP decision-making
 - Ordinary treaty-making procedure
 - Conclusion

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INTERNAL VS EXTERNAL COMPETENCES

- John Locke categorised all external competences under the heading; federative power.
- External competences include the power of war and peace, leagues and alliances and all the transactions with all persons and communities with the Union. (Locke, 1988)
- Internal competences, on the other hand, relate to the internal functioning of the Union.
- Foreign affairs extends to international trade and regulatory agreements.
- The TEU acknowledges the internal personality that Union law holds (see Art 47 TEU)



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EXTERNAL COMPETENCES

- The principle of conferral is still applicable to Article 21 (Art 5(2) TEU)
- All of the Unions external actions are guided by the objectives in Article 21.
- The competences of the Union in relation to foreign affairs can be found in Title V of the TEU.
- Part V of the TFEU enumerates various external policies within which the Union is entitled to act.

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ARTICLE 21 TEU OBJECTIVES

- a) safeguard its values, fundamental interests, security, independence and integrity;
- (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
- (c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, including those relating to external borders;
- (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty;
- (e) encourage the integration of all countries into the world economy,
- (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources
- (g) assist populations, countries and regions confronting natural or man-made disasters; and
- (h) promote an international system based on stronger multilateral cooperation and good global governance.

THE COMMON FOREIGN AND SECURITY POLICY

Article 24 of Chapter 2, Title V of the TEU grants the Union a general competence regarding the Common Foreign and Security Policy (CFSP):

“The Union’s general competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy that might lead to a common defence.”

- The Common Security and Defence Policy (CSDP) is an integral part of the CFSP.
- The CSDP is an operational policy to be applied for the strengthening of international security.
- *Article 42 of the TEU* provides a constitutional guarantee to not infringe upon any member states neutrality.

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THE UNION’S SPECIAL EXTERNAL POWERS

- *Art 205 TFEU* confirms the common principles and objectives of the Union’s external action.
- *Part V of the TFEU* contains 7 titles:
 - 3 of the Titles deal with the special external policies of the EU
 - 2 of the Titles contain institutional matters
 - 1 of the Title establishes a “Solidarity Clause.”



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Title II; Common Commercial Policy

- External expression of the internal market. Key task is to continue the harmonious development of world trade. Covers all matters of trade, intellectual property and foreign direct investment.

Title III; Humanitarian aid, Development Cooperation & Assisting Third World Countries

- The union can provide *ad hoc* assistance to those countries in order to meet humanitarian needs.

Title IV; Economic Sanctions

- Article 215 TFEU: the Union is not entitled to act upon this competence alone. CFSP competence must be enacted first.

EUROPEAN ROAD TRANSPORT AGREEMENT (ERTA)

- The Rome Treaty originally only granted the EU two express treaty-making powers, i.e. CCP & Association Agreements.
- The concept of ***implied external powers*** was accepted in the ERTA.
- A wide teleological interpretation was applied to Art 91 TFEU by the Commission in relation to the need for an additional policy instrument to implement its objectives under the Unions transport competence.
- However, the Council opposed this interpretation. The CJEU agreed with the Commission relating to the Union's powers to adopt any other appropriate provision, which they interpreted as creating the legal power to enter into international treaties.
- Article 216 TFEU has attempted to codify the concept of implied external powers.



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CFSP & SPECIAL COMPETENCES

- CFSP is principally governed by an **intergovernmental regime** whilst the Union's special external powers are **supranational** in power.
- Despite this, there is controversy regarding the borderline between the two regimes, which is governed by Article 40 TFEU.
 - This Article protects the Union's supranational procedures and powers by preventing the European Council from using the Union's CFSP competences.
- ECOWAS [2008] established a **centre of gravity test**.
- CFSP is a subsidiary competence similar to Article 352 TFEU as a result of its characterisation as a *lex generalis* competence.

The *Sui Generis* Nature of the CFSP Competence

- Nature of CFSP competence is part of the European legal order as can be determined from Article 24(1) TEU.
- However unlike ordinary Union Law, the direct effect of CFSP is exceptional.
- Why is it exceptional?
 1. Article 24 TEU suggests that neither ordinary or special legislative procedures apply.
 2. Declaration 14 of the European Treaties suggests that CFSP is a special competence.

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NATURE OF EXTERNAL COMPETENCES

Article 3(2) TFEU:

- *exclusive treaty powers*
- there are *3 lines of exclusivity*



- Subsequent exclusivity developed by the Union should be done via (ordinary) Treaty Amendments.
- The nature of a competence is not constitutionally fixed as can be seen in *Opinion 2/91 (ILO)* [1993].
- Scope of Union competences is a constitutional question; theoretically it should only be extendable via constitutional amendment.
- Constitutional and legislative exclusivity should be examined separately.
- Article 3(2) TFEU would have been better expressed in accordance with legislative pre-emption rather than exclusivity of competences.

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- Exclusive treaty making power when the conclusion of an international agreement “is provided for in a legislative act.”
- *Opinion 1/94 WTO Doctrine* [1994] > codified via Article 3(2)

2

- Exclusive treaty making power where this “is necessary to enable the Union to exercise its internal competence.”
- *Opinion 1/76 Doctrine* [1977] > codified via Article 3(2)
- More open definition than the ruling however.

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- *ERTA doctrine* [1971]; Member States are deprived of their treaty making power when the exercise of those powers affects internal European Law.
- If a Common Rule is laid down by the Union, Member States cannot take actions with third countries that affect these rules.

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EXTERNAL DECISION-MAKING PROCEDURES

- The Union’s external actions and the procedures used depends on the type of Act adopted: *Unilateral External Acts vs. International Agreements* (both instruments are used.)
- Constitutional regime for unilateral acts differs from that between CFSP and specialised TFEU external policies- same procedure.
 - CFSP procedure
 - Ordinary Treaty Making Procedure
- It is key to remember that the European Council, per Article 22 TEU, is the Union’s formal and informal guide and peacemaker for all of its external actions.



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SPECIFICITY OF CFSP DECISION MAKING



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- The decision-making procedure for unilateral CFSP acts are specific to the CFSP. (*Article 24(1) TEU*)
- Complex international arrangements exist regarding CFSP;
- The central policy maker is the European Council which acts on recommendations from the Council (Article 22(1) & 26(1) TEU)
- External representations are made by the President of the European Council. (Article 15(6) TEU)
- Other Union institutions *may* be involved in CFSP as well which complicates matters.
- Voting rules for the Council as the central decision-maker can be found in Article 31 TEU (Qualified Majority Voting)
- Any Member State may, for vital and stated reasons of national policy, declare that it opposes a decision to be taken by QMV via the Luxembourg compromise.

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OVERVIEW OF ORDINARY TREATY MAKING PROCEDURE

- *Article 218 TFEU*
- Central institution is the Council who acts by QMV and unanimous voting in only 4 particular circumstances under *Article 218(8) TFEU*.
- Generally initiated and conducted by the Commission under *Article 218(3) TFEU*.
- On recommendation, the Council decides whether to negotiate on the matter and can choose its negotiator.
- Parliament has little involvement in negotiations. (*Article 218(10) TFEU*)
- Union institutions and Member States can judicially challenge the constitutionality of an agreement before it is concluded. (*Article 218(11) TFEU*)
- The Council concludes any agreement with active involvement from the Parliament (unless it exclusively relates to CFSP) (*Article 218(6) TFEU*)
- Parliament needs to formally consent to the negotiated treaty. (*Article 218(6)(a) TFEU*)
- Doctrine of functional succession is applied when the Union succeeds to international agreements of Member States. (*International Fruits [1972]*)

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SHARING EXTERNAL POWER

- States are sovereign subjects of international law. This means they enjoy full external powers. **However**, this is not the case in relation to the Union, as external powers are shared. (we call this **duality**)
- Mixed agreements are used by the Union in order to involve Member States and the Union in any international agreements that involve them both. This mechanism is widely used and successful.
- Member States also have the duty to co-operate with the Union as well. (Article 4(3) TFEU) In external affairs this duty to co-operate means Member States must co-ordinate their international powers under a mixed agreement. Member States can also be viewed as being the trustees of the Union as well. (*Opinion 2/91 (ILO)* [1993])
- Reversed subsidiarity exists to limit Member States power in order to ensure the effectiveness of the Union in making agreements. (*Commission vs. Luxembourg* [2005])



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CONCLUSION

- The European Union has international personality.
- The External competences are conferred competences.
- CFSP is seen as sui generis competence.
- Exclusive treaty making competence is also separate from the Union's general legislative competence.
- The external competences of the Union can be difficult due to the sovereignty of Member States and their individual involvement in the international arena.
- Member States are involved through Mixed Agreements but they are prevented from exercising their shared competence in order to prevent, "*splitting the international representation of the Union.*" (*Commission vs. Sweden* [2010])



EU CHAMBER OF COMMERCE
in Canada West

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