The EU Legal Order (I) – The Competences
INTRODUCTION

‘It has never been easy to specify with exactitude the division of competence between the EU and Member States’


- State sovereignty \(\rightarrow\) Member States grant powers to the EU
- The EU has attributed competences: the principle of attributed powers and the principle of conferral

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- At first, the EU policy was concentrated around the Common Market (four fundamental freedoms) and free competition.
- In the course of time, the competences expanded and new policies were attributed to the EU.
- Necessity to clearly divide competences between the EU and Member States.
The Lisbon Treaty Novelties

• Articles 4(1) and 5(1),(2) TEU → the principle of conferral. Competences not conferred upon the Union in the Treaties remain with the Member States. Thus, future change in the division of competences requires revision of the Treaties.

• Articles 2 – 6 TFEU → Catalogue determining the categories and the areas of EU competences.

• Five categories of competences:
  a) **exclusive** competences
  b) **shared** competences
  c) **supporting, coordinating, or complementary** competences
  d) Common Foreign and Security Policy
  e) coordination of economic and employment policies
Exclusive Competences. Articles 2(1) TFEU + 3 TFEU

• **Article 2(1) TFEU** → **Only** the EU may legislate and adopt legally binding acts. The Member States have no autonomous legislative competence.

- the Member States may legislate only if so empowered by the EU

• **Article 3(1) TFEU** → The areas that fall within the exclusive competences.

• Exhaustive list.
Shared Competences (I).
Article 2(2) TFEU

• The EU and the Member States may legislate and adopt legally binding acts.

• But, the Member States’ action is pre-empted where the EU has exercised its competence in an area of shared competences. If the EU ceases exercising its competence in an area, the competence reverts to the Member States.

• Pre-emption occurs to the extent that the EU has exercised its competence.

Pre-emption is strictly linked with
a) the primacy of EU law
b) the principle of sincere cooperation (Article 4(3) TEU)
Shared Competences (II).
Article 4 TFEU

• A **non-exhaustive** list that determines the areas that fall within the shared competences.

• In these areas, the powers held by the Member States may diminish or increase over time (because of the pre-emption effect).

• There is no one formula of power sharing in these areas. The precise configuration of power sharing depends on the detailed rules governing each area (because of the pre-emption effect).
Supporting, Coordinating or Complementary competences. 
Articles 2(5) TFEU + 6 TFEU

- **Article 2(5) TFEU →** The EU may pass legally binding acts; these acts **shall not entail harmonisation.**

- **Article 6 TFEU →** The areas that fall within the supporting, coordinating or complementary competences.

- Intervention through “persuasive soft law”, guidelines, incentive measures, exchange of best practices, monitoring and evaluation, etc.

- Eg: Erasmus program, Certification schemes like the Environmental Management Systems
Common Foreign and Security Policy.
Article 2(4) TFEU

• Special non-legislative competence.
• No pre-emption.
• This area is more intergovernmental and less supranational. The European Council and the Council are the most important institutions. Distinct legal instruments comparing to other competences.
• Detailed rules in **Title V TEU**.
Coordination of economic and employment policies.
Articles 2(3) + 5 TFEU

- A special head of competence, between the shared and the supporting, coordinating or complementary competences.
- No pre-emption.
- Distinct legal instruments. See, Open Method of Coordination: a process leading to the adoption of soft law measures which are binding on the Member States in varying degrees.
Certain issues (I) ...

1. It can be difficult to set the borderline between the different categories.
   • Eg. competition or internal market? = exclusive or shared competence?

2. The “flexibility clause” (Article 352 TFEU).
   • A wide regulatory competence that enables the EU to act beyond the powers conferred upon it by the Treaties if the objective pursued so requires.
   • Exceptional use of EU legislative power → a strict legislative procedure, requiring unanimity and consent by the European Parliament; national parliaments also have a role.
   • No harmonisation, no in Common Foreign and Security Policy issues.
Certain Issues (II) ...

3. The theory of implied powers (connected to the principle of effectiveness and to the principle of sincere cooperation)
   • The existence of a given power or objective implies the existence of any other power that is reasonably necessary for the exercise of the former.
   • Eg, combating serious environmental offences requires that the Commission may take measures relating to the criminal law or else EU law on environmental protection is not fully effective.
   • Implicit powers shall be recognised only exceptionally.

   • [Case law: Case 8/55; Case 281/85; Case T-240/04; Case T-143/06]
The exercise of competences  

When? principle of subsidiarity, Article 5(3) TFEU

• Not applicable in the areas the EU has exclusive competence = applicable in shared and supporting, coordinating or complementary competences.
• The bigger unit (EU) shall only act in case and to the extent that it is the only capable of achieving a result or attaining an objective. Thus, the default position is that the smaller unit (Member State) shall act.
• Protocol No 2 sets a procedure for the application of the principle of subsidiarity.
• The principle of subsidiarity has a political nature, but the CJEU has jurisdiction to consider infringement of subsidiarity under Article 263 TFEU. See cases C-233/94, paras 26-28; C-84/94, paras 46, 47, 55.
The exercise of competences (II).

How? → principle of proportionality, Article 5(4) TFEU.

• The EU shall use its powers without exceeding what is necessary to achieve its objectives.

• The proportionality review is three-fold:
  a) test of appropriateness → is the measure or decision appropriate/effective to attain the aims set?
  b) test of necessity → is the measure or decision necessary to attain the aim set? Are there any alternative and less intrusive means
  c) test of proportionality stricto sensu → is there a fair balance between the aims pursued and the interests harmed by the measure or decision?
Any questions?

• Thank you very much!

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