

# Competence Creep Revisited\*

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## Abstract

How is it that regardless of the reforms introduced by the Lisbon Treaty to better contain European integration in areas of core state powers, ‘competence creep’ can continue? What is the underlying cause? And why is it problematic? This article proposes answers to these questions through a systematic (re-)conceptualization of the problem of ‘competence creep’, arguing that it results from the cross-cutting governance that is the legal Leitmotif of European integration as well as from ‘two-level games’ of national governments, and that it is problematic from the viewpoint of democratic legitimacy. However, it argues that the one form of competence creep that is most commonly understood as the core problem, and on which most reforms have focused, namely indirect legislation in areas of Member State competence, is actually the least worrying type of covert integration; negative and parallel integration, soft law and co-ordination are all far more problematic.

**Keywords:** competence creep; democratic legitimacy; indirect legislation; soft law; negative integration

## Introduction

The phenomenon of ‘competence creep’, whereby the EU somehow manages to legislate and/or otherwise act in areas where it has not been conferred a specific competence (Weatherill, 2004), has occupied scholars, practitioners and politicians for a long time. Still, no single consensus has been reached as to its precise manifestations, causes and solutions. The actions undertaken at political level to address this ‘competence problem’ (Craig, 2004) have mainly taken the form of Treaty revisions aimed at delimiting the EU’s legislative competences. In particular the Lisbon Treaty has endeavoured to achieve such enhanced containment, *inter alia* by introducing a check on the exercise of EU competence by national parliaments and strict competence categories (Swenden, 2004). A range of sensitive areas, such as education, health and culture have been categorized as ‘complementary competence’ where the harmonization of national laws is precluded and Union action shall not ‘supersede’ national competence. Furthermore, it reiterates that powers that have not been explicitly conferred on the EU remain exclusively with the Member States (Article 4(1) and 5(2) TFEU). However, this ‘competence constellation’ still fails at effectively limiting European integration precisely where it purports that it does (Garben, 2015). Regardless of all the Treaty reforms, areas of Member States’ competence can be deeply integrated at European level.

\*I would like to thank three anonymous referees for their useful comments. The findings presented in the article partially draw and build on those set out in Garben (2017). The views expressed are entirely personal and do not necessarily reflect the official position of the European Commission.

This article explains how this is possible, and why it is problematic. It thereby attempts to provide a meaningful contribution to the rich and perennial debate about the limits to European integration, by proposing a systematic (re-)conceptualization of the problem of competence creep. In definitional terms, it will be made clear that the phenomenon is not limited to the adoption of EU legislation (or over-regulation), but includes a range of other modes of integration beyond EU law *stricto sensu*. As to its causes, it will be demonstrated that the source of competence creep is not confined to (an over-use of) the EU's functional powers, even if this is indeed an important factor. Instead, the paper will explain that effective, cross-cutting governance is the EU's legal and political *Leitmotif*, meaning that realistically no single area or issue can be hermetically sealed from European integration. On a normative level, it will be argued that the problem with competence creep is not just a federal one (that is in legal terms, the tension with the principle of conferral and in political terms, the lack of respect for national autonomy), but ultimately one of democratic legitimacy and the preservation of regulatory power at either level of government. This integrated, comprehensive understanding of the problem will hopefully provide an improved theoretical basis upon which to elaborate further reforms.

## I. The Various Manifestations of Competence Creep

There are various interpretations of competence creep. Following its most narrow understanding, it refers to the adoption of EU legislation in areas where no specific legislative competence has been conferred on the EU.<sup>1</sup> The EU's functional powers under Articles 114 (internal market) and 352 (flexibility clause) TFEU are often the focal point in this regard. However, in addition to such legislative powers, the EU's negative competences are equally relevant. Member State action can be constrained by the Court's application of the prohibitions of restrictions on free movement and of distortions of competition (Davies, 2017), and of general principles of law (Prechal, 2010). In similar ways, negative integration can occur through the EU's conclusion of international (trade) agreements (Ramalho, 2011). Furthermore, other methods of intervention by the EU may be included, such as the use of soft law instruments, financial incentives, co-ordination, and the development of policies (Prechal, 2010). Finally, in its broadest form, competence creep includes parallel integration in areas of Member State competence outside the EU's institutional framework, through international Treaties or co-operation (Garben, 2011).

If one is to capture the full complexity of the phenomenon's dynamics, a broad definition and discussion is appropriate including all those variations of European integration, particularly because they are interlinked. They can be alternatives, causally related or co-dependent. Awareness of this interconnection is not only of theoretical interest, but bears high practical relevance. Reforms aimed at containing European integration should be careful to take all forms of integration into account, if such reforms are to be effective. After all, the limitation of one form may encourage the use of another. Equally, such reform should be mindful of the interaction between various forms of integration to avoid unintended consequences. For instance, limitation of one form without equally limiting another may provoke a regulatory gap, when the former serves to compensate for the loss

<sup>1</sup> Also the use of QMV where there is legislative competence but where unanimity is required may be considered competence creep (Konstadinides, 2009).

of regulatory capacity caused by another form of integration. Moreover, all the different forms of competence creep merit a joint discussion because, as will be seen, they can be explained by largely the same factors and generally pose similar problems.

A broad approach has been used in the political science literature to denote similar dynamics, using the terms ‘integration by stealth’ and ‘covert integration’. Majone has linked ‘integration by stealth’ to the functionalist approach to integration, where spillover of economic integration is used to further political integration of other areas (Majone, 2009). Héritier defines ‘covert integration’ in areas of core state powers as ‘a process that takes place outside the formal European political decision-making arena’ and maps various patterns thereof (Héritier, 2014). Meunier has used the term to denote formal competence accrual through covert policy-entrepreneurship by the European Commission (Meunier, 2017). All oppose this type of integration to ‘frankly political integration’ explicitly and openly mandated by ‘formal political actors’. While certainly useful, these approaches lack a certain precision. Most importantly, they do not explain how it is that the various Treaty reforms and explicit limits on EU competence have not been able to stop this process. To establish that fundamental understanding of the phenomenon, a legal focus is necessary, which this article intends to offer.

Six main forms of competence creep can be distinguished in line with the above discussion: indirect legislation, negative integration through case law, international (trade) agreements, economic governance, soft law and parallel integration. All induce the approximation of national laws, regulations and/or administrative practices by reference to a common norm. This norm, and the resulting integration, can be ‘negative’, such as in the form of a prohibition excluding certain national rules or practices, or ‘positive’, such as in the form of a commonly applicable substantive standard. It can be of general application, or specific in the sense that it applies only to a single Member State. The norm can be ‘hard’, in the sense of a legally binding requirement, or ‘soft’, in that it lacks formal binding-ness but nevertheless produces indirect effects on national law and policy. But it always results from a European-level decision of some kind, whether by the European legislator, European judiciary or European and/or national executives, and induces convergence of national policies, rules or practices. Furthermore, all these modes of integration take place in areas of Member State autonomy, in that the areas have not been defined as being exclusive or shared EU competence (in Articles 2–6 TFEU), that harmonization has been specifically excluded in the specific legal basis applicable to these areas, or that it takes place without a legal basis in the Treaties altogether.

### *Indirect Legislation*

The first form is the one that is most commonly understood as the core of the competence problem, namely the adoption of EU legislation in areas where the EU’s direct legislative competence is limited. The Treaty’s functional powers – mostly, but not exclusively related to the internal market – can cut horizontally through all policy areas, including those where the EU has no, or only complementary, competence. This means that the EU can, through such indirect powers, legislate in areas that are considered to fall within national autonomy. As de Witte has pointed out, there are many examples of this phenomenon, such as the Directive on return of works of art illegally removed from the territory of Member States, the Television Without Borders Directive, the large body of legislation

on the recognition of diplomas, the Citizenship Directive, and the Patients' Rights Directive (de Witte, 2002).

The CJEU has been instrumental in the validation of this cross-cutting approach, by categorically refusing to shield any type of policy field from indirect EU action. A striking example is the judgment in Case C-176/03, *Commission v Council* which allowed the EU legislator to specify that EU obligations in a legislative measure for environmental protection had to be implemented through criminal law, even if the EU did not at the time possess any specific competence to do so. The obvious question of how such indirect legislation can be reconciled with the harmonization prohibitions in the complementary competences, has been answered in C-376/98, *Tobacco Advertisement*. Germany challenged a directive that imposed a general ban on the advertising of tobacco products. The measure had been based on the internal market. Article 168 TFEU on public health contains a harmonization prohibition, which Germany argued led to the directive's invalidity. The Court disagreed, holding that the harmonization prohibition did not mean that harmonizing measures adopted on other Treaty provisions were prohibited from having any impact on the protection of human health. The Court did ultimately annul the directive, as the internal market rationale could not justify a general ban on advertisements, but this was not because Article 168(4) prohibited all harmonization *per se*. In the area of health, the Patients' Rights Directive clearly proves this point, and the same applies to the other complementary competences, such as culture and education (Garben, 2011; Gori, 2001; Psychogiopoulou, 2006; Von Bogdandy and Bast, 2002).

The only exception is the flexibility clause of Article 352 TFEU, which since the Lisbon Treaty specifically provides that it cannot be relied on to harmonize national law where such harmonization has been excluded by the Treaties. That provision has often been identified as one of the main causes of 'competence creep', and although the unanimity requirement has always provided an important brake on this integration accelerator, it remains a powerful provision also in its post-Lisbon manifestation, at least in theory. It mandates the adoption of EU measures 'if action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers' and is no longer confined to the attainment of internal market objectives. According to the German Constitutional Court, Article 352 TFEU: 'meets with constitutional objections with regard to the ban on transferring blanket empowerments or on transferring Kompetenz-Kompetenz,<sup>2</sup> because the newly worded provision makes it possible substantially to amend treaty foundations of the European Union without the constitutive participation of legislative bodies in addition to the Member States' executive powers'. It has therefore vowed to strictly police the use of Article 352 TFEU, requiring prior bicameral ratification in Germany for its application. This means that in practice, the use of Article 352 TFEU is now significantly constrained.<sup>3</sup>

### *Case Law*

The second way in which areas of Member States competence can be integrated is when the Court considers a national provision contrary to EU law and it will therefore have to

<sup>2</sup> The competence to define competences.

<sup>3</sup> Since the Lisbon Treaty, around 14 (relatively inconspicuous) acts have been adopted on this legal basis.

be dis-applied regardless of whether it falls within an area of Member State autonomy (Azoulai, 2011). In 1968, the Court was faced with the question of whether an Italian tax on the export of articles having an artistic, historic, archaeological or ethnographic value was caught by the prohibition on export restrictions (Case 7/68, *Commission v. Italy*). Italy argued that such articles could not be assimilated to ‘consumer goods or articles of general use’ and were therefore not subject to the Treaty provisions. The Court firmly rejected the idea that there was a general cultural exemption (Craufurd-Smith, 2004). In subsequent years, the Court has continuously confirmed this approach, emphasizing that practices, goods and services are not excluded from the Treaty simply because they fall in areas where the legislative competence of the EU is non-existent or limited. In that vein, the Court has held that teachers qualify as ‘workers’, and that medical care and privately funded education constitute a ‘service’.

Perhaps one of the best-known examples is the *Bosman* case (Case C-415/93). At issue were certain transfer rules in professional football that restricted the free movement of workers in the EU. Several governments argued that the Treaty was not applicable to sporting activities since sport and culture fell within Member State autonomy. The Court replied that ‘sport is subject to [EU] law only in so far as it constitutes an economic activity’. Regarding the difficulty of severing the economic from the sporting aspects, the Court held that EU law does not ‘preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches’. However, this could not ‘be relied upon to exclude the whole of a sporting activity from the scope of the Treaty’. Also the argument based on the limitation of EU competence was firmly rejected, since the question was not about ‘the conditions under which [EU] powers of limited extent, such as those based on Article [167 TFEU], may be exercised but on the scope of the freedom of movement of workers guaranteed by Article [45 TFEU], which is a fundamental freedom’. Because of the judgment, the entire football transfer system had to be changed (van den Bogaert, 2005).

As *Bosman* shows, the Court is eager to enforce the *effet utile* of EU law and as such is highly reluctant to carve policy areas out of the scope of the Treaty, confirming that the free movement provisions fully apply even if they cut through areas where the EU possesses no, or only limited, legislative powers. The Court does recognize that certain non-economic objectives might have to be considered, but refers to the possibility of objective justification to accommodate these concerns. While it could be argued that the Court is slightly more deferential in the application of the proportionality test in these areas (Boucon, 2014), being less hostile towards justifications of an economic nature or towards directly discriminatory measures, the rigour with which the Court applies the Treaty provisions and the proportionality assessment in these policy areas remains striking.

### *International Agreements*

Competence creep can furthermore occur through (the exercise of the EU’s competence to conclude) international agreements, particularly the EU’s trade policy. International trade agreements can deeply affect Member State powers in areas in which the EU’s legislative competence is limited. First, although Article 207(6) TFEU states that ‘the exercise of the competences [in the common commercial policy] shall not affect the delimitation of

competences between the Union and the Member States, and shall not lead to harmonization of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonization', this does not mean that trade agreements cannot relate to areas where harmonization is excluded. The CJEU confirmed this recently in Opinion 2/15, where it held that the EU-Singapore Agreement's provisions on direct investment protection did 'not encroach upon the competences of the Member States regarding public order, public security and other public interests, but obliges the Member States to exercise those competences in a manner which does not render the trade commitments [...] redundant'. Regarding Article 345 TFEU, according to which the Treaties are in no way to prejudice the rules in Member States governing the system of property ownership, the Court similarly concluded that it 'does not mean that those rules are not subject to the fundamental rules of the European Union'.

Second, international trade agreements can lead to competence creep through the limitation of national (and possibly even EU) regulatory power in areas of Member State competence on the basis of their free movement and investment obligations. While many agreements contain clauses recognizing the Parties' mutual right to establish their own levels of, for instance, social protection, and to adopt or modify accordingly their relevant laws and policies, the fact remains that such regulation needs to be consistent with their international commitments in those fields and can give rise to significant financial liability. The extent of such negative integration depends on the interpretation given to the trade obligations, and who will give it. Dispute settlement independent from national courts is often expected to lead to expansive interpretations, suppressing national regulatory competence. In Opinion 2/15, the CJEU however held that the EU is not competent to set up such dispute settlement without the involvement of the Member States, providing some limit to this aspect of competence creep.

### *Soft Law*

When soft measures or policies are based on a Treaty provision that specifically provides for them in relation to that policy area, like the complementary competences which allow the EU to adopt 'incentive measures', it would seem inappropriate to qualify such integration as 'competence creep' – since a direct legal basis is used. Nevertheless, one could counter-argue that the 'creeping' element results from the fact that the action exerts a normative power that in certain ways is not very different from harmonizing legislation, but is adopted without the checks-and-balances and safeguards imbued in the legislative process. From that point of view, the 'harder' the effects of the soft action, the more appropriate it is to include it.

Because of its power to structurally converge national laws and policies in sensitive areas of Member State competence, the Open Method of Coordination (OMC) is probably the most important source of competence creep through soft law (de la Porte, 2002). In the OMC, Member State executives (guided by the European executive) agree on certain objectives, such as common quantitative benchmarks, but remain free to implement them in the way they see fit, taking into account their system differences, and they are not sanctioned for failures. As such, the OMC has been described as respectful of national identity and subsidiarity (Hodson and Maher, 2001). But while the OMC is certainly less coercive than legislation, case law and economic governance, to characterize it as entirely

compatible with national autonomy and subsidiarity nevertheless underestimates the OMC's tangible effects on sensitive national sectors. As Szyszczak has stated, 'there are arguments to be made that, despite being viewed as an aspect of subsidiarity, the OMC penetrates into national systems changing internal policy, re-configuring political institutional frameworks' (Szyszczak, 2006). International standard-setting and comparing are effective means for putting pressure on 'underperforming' states to make them conform to a common standard. The influence of 'soft law' may not be easily understood in traditional legal conceptions of norms and power, but it structures and influences national actors and standards all the same (Dawson, 2017).

### *Economic Governance*

A deep tension between the need for containment and for conferral of the EU level underlies the area of economic policy. On the one hand, in light of its pervasive nature, Member States are concerned about granting the EU a hard competence in this area, as they fear it may allow the EU to decide highly sensitive decisions of a re-distributive nature at the core of their sovereign powers, and arguably beyond the EU's limited legitimacy (Føllesdal and Hix, 2006). Yet, the closely intertwined European economies and the common currency seem to necessitate a strong European-level capacity to decide on the crucial elements of the economic and monetary union to which the Member States have committed themselves. In the wake of the economic crisis, this latter consideration has become particularly poignant, and alongside monetary policy, economic policy co-ordination has gained in importance and intensity. In this, it is affecting a wide range of other policy areas in unprecedented ways. As such, it is perhaps the most powerful manifestation of competence creep.

First and foremost, the economic and sovereign debt crisis has necessitated the grant of financial assistance to Member States in economic peril, and the conditions on which such assistance has been granted have amounted to a powerful form of European integration of national law and policies in areas of Member State competence. The Commission co-ordinates the financial support provided by Euro-countries and the IMF in the form of economic adjustment programmes, requiring reforms to address economic imbalances, specified in Memorandums of Understanding. Such MoU's have been signed under the ESM, the EFSF and earlier financial assistance agreements, with Cyprus, Greece, Hungary, Ireland, Latvia, Portugal, Romania and Spain. The detailed conditionalities specified relate to many areas and issues that are otherwise considered to lie outside EU competence, such as the organization of health, education, pension and social protection systems, and wage-setting (Garben, 2017a).

Furthermore, the crisis has given momentum to the so-called European Semester, in which the EU issues country-specific recommendations (CSRs) as part of the co-ordination of Member States' economic and employment policy. The Semester brings together within a single annual policy co-ordination cycle a wide range of EU governance instruments with different legal bases and sanctioning authority, from the Stability and Growth Pact, the Macroeconomic Imbalances Procedure, and the Fiscal Treaty to the Europe 2020 Strategy and the Integrated Economic and Employment Policy Guidelines (Zeitlin and Vanhercke, 2014). Under the Excessive Deficit Procedure and the Excessive Imbalance Procedure, the recommendations are backed up by the possibility of financial

sanctions if Member States repeatedly fail to act. There have been many highly detailed CSRs concerning areas of Member State autonomy, such as minimum pay levels and social protection measures.

The CSRs, adopted by the European Council on proposal of the Commission, are non-binding and thereby formally leave the ultimate decision to the national level. Nevertheless, the political pressure they exert on national standards should not be underestimated, especially as they take place in a structured framework with an eventual possibility for sanctions. Admittedly, CSRs are followed only in a minority of cases perhaps because national parliaments can indeed refuse to legally implement them. Nevertheless, governments can play into a lack of transparency and sense of urgency to (selectively) push through the implementation of the reforms, arguing that ‘international obligations’ have to be met, perhaps pointing at the threat of sanctions or reduced EU-level funding.

### *Parallel Integration*

The final form of competence creep is constituted by action outside the EU framework, through intergovernmental processes governed by international law, undertaken by all Member States or a group of Member States with constitutional significance (for example, all Euro-Member States), when such international Treaty-making interacts with the EU legal/institutional/political framework. The action may complement, facilitate or support other EU policies, instruments and/or institutions and as such become intertwined with, and sometimes *de facto* entrenched in, EU action. For instance, a number of important pieces of Euro-crisis legislation have been enacted by intergovernmental agreements between Member States: the ESM Treaty, the Fiscal Compact and the Agreement on the Single Resolution Fund for banks (Timmermans, 2017). Also in the context of the migration crisis such intergovernmental tools have been used, such as the EU–Turkey Statement (Timmermans, 2017). Under the current interpretation of the Treaties, such parallel action is in conformity with EU law when the EU does not possess a ‘specific competence’ to undertake the same action within the EU’s legal framework. As such, the Court validated the conclusion outside the EU framework of the ESM Treaty in Case C-370/12, *Pringle*. Although the Member States had considered it necessary to amend Article 136 TFEU to allow the establishment of such a mechanism outside the Treaty, the Court held that the parallel action was legal with or without such formal authorization. Even if *Pringle* could be read as a confirmation that when the EU does possess such specific competence for a certain action, Member States may not resort to the parallel international framework (Timmermans, 2017), this still leaves a great number of areas open to such parallel integration, *particularly* the areas of Member State competence.

This can be seen in education, where EU direct legislative competence is limited and harmonization is excluded (Article 165 TFEU). This is often explained by the fact that education is a core national power, closely related to national identity. However, over the past 15 years, higher education systems across Europe have been effectively harmonized into a common 3-tier Bachelor-Master-Doctorate structure. This ‘harmonization by stealth’ has taken place through the so-called Bologna Process (Garben, 2011). The Process is based on the Sorbonne and Bologna Declarations, two intergovernmental statements devoid of any formal legal effect. Nevertheless, the Declarations and the process of policy exchange and co-operation that has resulted from them, has effectively



structurally harmonized the higher education systems of the participating countries, including all Member States. The Bologna Process is being applied through a range of national implementation measures such as accreditation and quality assurance, often anchored in national laws and regulations and thus binding on higher education institutions, and interacts to an important extent with EU law and policy (Garben, 2011). The Bologna Process is a curious phenomenon, raising questions about the real reasons for Member States to oppose EU action if they so readily give up their national autonomy in the context of another Europeanization process.

## II. Competence Creep's Democratic Deficit

The various forms of competence creep can be expected to be driven by complex multi-level dynamics, in which furthermore both neofunctionalism and intergovernmentalism are part of the explanation. Integration of areas of Member State autonomy may occur because of a need to complement action undertaken in other areas especially considering the open, goal-oriented formulation of many of the EU's tasks (spillover; Davies, 2015; Haas, 1964), to find solutions to common problems and crises in cases where the more direct, formal mechanisms are not available for legal or political reasons (Timmermans, 2017), and because of two-level games played by national executives (Büchs, 2008; Moravcsik, 1994; Putnam, 1988). Indeed, while the political discourse tends to associate competence creep with a predatory EU, it is also driven by the Member State executives themselves, in their various European capacities (Craig, 2004, Weatherill, 2004).

In fact, the various modes of integration giving rise to competence creep are *particularly* well-suited for governments' strategic use of the European level for domestic purposes. In all cases of competence creep, integration takes place in more opaque ways than through direct harmonization, making it more difficult to allocate responsibility for decisions, and to determine the content and nature of the resulting 'obligations'. In this obscurity, Member States can selectively push national reforms under the EU's guise, avoiding the normal national contestation (Büchs, 2008; Moravcsik, 1994; Racké, 2007). This even applies to negative integration, where Member States also carry a certain responsibility: firstly, in the original creation of the Treaty provisions (and apparent acceptance of the CJEU's interpretation thereof), and secondly, because Member States can play into court proceedings to pursue their own political agenda without having to take the responsibility on the national level, for example, by choosing not to defend the contested practices.

This insight inevitably leads to questions of legitimacy. We have seen that all six forms of competence creep are, under EU law's current interpretation, perfectly *legal*. The various limits to EU competence only apply in relation to the legal basis in which they feature, and not to action undertaken on other bases. Arguably, this is for good reason: as policy areas are not watertight compartments but closely inter-related, and as a single regulation will usually address various aspects of human life and thus touch on various policy areas, such 'spill-over' or 'cross-cutting' may be inevitable for effective government. For that same reason, a system of 'categorical' (Resnik, 2001) or 'dual' (Schütze, 2009) federalism, characterized by strict competence demarcation between different levels of government, is bound to fail. From a legal perspective, the fundamental principles of effectiveness and primacy of EU law mandate such indirect effects of action undertaken on

one legal provision, on other policy areas. But although there may be good reason for ‘co-operative federalism’ (Schütze, 2009), the various forms of competence creep raise profound *legitimacy* problems, particularly to the extent that they displace at the same time the national and European legislator. As a result, decisions of utmost political consequence are not taken by the legislator but instead taken by the judiciary or the executive, and parliaments are left in a passive, rubberstamping role, if any at all.

*Indirect Legislation: Displacing the National Legislator by the European Legislator*

It is ironic that the one form of competence creep that arguably suffers the least from these legitimacy concerns, is the one that is most commonly understood to be the core of the problem: that of indirect legislation. Of course, this is not to deny that such indirect legislation poses certain problems. As Dougan has argued: ‘the power to harmonise involves an effective transfer of regulatory initiative to the Union legislature in a manner which can ultimately not merely displace but replace individual national political choices’, and

‘such transfers of competence is of especial constitutional significance not only because such transfers imply in every case fundamental reconfigurations in the exercise and accountability of public power, but also because such an approach poses specific legitimacy problems for the Union – problems arguably aggravated since the entry into force of the Lisbon Treaty, since the Union’s primary law now places renewed emphasis on the principle of the Union as an organisation of only limited powers, and contains a more formalised system of differentiated competences explicitly attached to different policy spheres’ (Dougan, 2010).

However, while it is true that legislation on for instance Article 114 TFEU has touched on a wide array of issues that seem only remotely connected to the internal market, the extent to which this indirect legislation is responsible for displacing the national legislator can be questioned. A similarly wide range of policy issues has been brought within the internal market’s scope by the Court in its case law. If the national legislator is already disempowered through negative integration, then the concerns about re-regulation by the European legislator are less pressing. The initial, relevant transfer of competence in such cases takes place through the case law, rather than the re-regulation based on ‘indirect’ provisions. Re-regulation may in such cases actually be necessary, to prevent, or prevent aggravating, a de-regulatory bias in the integration process. Halberstam calls this the ‘federal conservation of powers principle: unless a loss of competent state authority is made up for by a gain in authority at the centre, federalism institutionalizes a bias in favour of deregulation’ (Halberstam, 2011). Scharpf has powerfully warned us about the risk of an imbalance between negative and positive integration in the EU context (Scharpf, 2010). In order to combat the potentially corrosive effects of negative integration on the vital areas in question, it may be necessary to re-regulate on the European level.

Furthermore, the choice to legislate, ‘indirectly’ as much as ‘directly’, is made explicitly by the European legislator, which entails the involvement of the Commission, the Council, the European Parliament as well as national parliaments, under high consensus requirements and following a balanced procedure accommodating all the different institutional, national and federal interests. Efforts have furthermore been made to increase the transparency of decision-making and public consultation in the EU legislative process in

recent years (Hillebrandt *et al.*, 2014). While indeed still not as democratically legitimate as national legislation, European legislation is adopted through the most democratic form of international decision-making that is available. It benefits from high levels of input and ‘throughput legitimacy’ (Schmidt, 2015), especially when compared to all the other forms of competence creep. Indeed, this is in no way intended to argue that the problems connected to indirect legislation in areas of Member State competence should be neglected, nor to deny the existence of the overall democratic deficit in the EU integration process including through legislation (Føllesdal and Hix, 2006), but instead to point out that from a democratic perspective indirect legislation is the least worrisome form of competence creep and that as such, it is not particularly effective that it has been singled out as the target for all the containment action undertaken in the various Treaty revisions.

### *Negative Integration: Displacement of the National and European Legislator by the Judiciary*

A certain measure of competence creep through the Court’s case law can be considered constitutionally legitimate, since the Treaties endow the CJEU explicitly with the task and power to interpret EU law. That mandate can legitimize the Court’s expansion of the scope of EU law to situations not strictly foreseen by the text of the law. It does not, however, give the Court a *carte blanche*. Negative integration is particularly problematic when it displaces sensitive national policy choices in areas of Member State competence. In that context, it is in fact much more problematic than the displacement of the national legislator through indirect legislation, because in that latter scenario national governments and national parliaments have collectively, following the various majority rules, decided to replace national decisions by European ones. In the case of case law, there is no such involvement of the national democratically legitimate actors, nor of the elected European Institutions. Competence creep through judicial intervention is furthermore highly non-transparent, only accessible to those initiated into the complexities of CJEU judgments and featuring a high measure of case-by-case assessment, implying both democratic and rule-of-law problems. These concerns apply with even more force to negative integration by arbitration tribunals set up by international trade agreements, as their constitutional mandate and legitimacy is much narrower than that of the CJEU, and they are further removed from democratic control (Choudhury, 2008).

Despite these fundamental concerns, the Court regularly engages actively in the displacement of the national legislator in areas of Member State competence, particularly in the context of the free movement provisions (Davies, 2015). Its cross-cutting approach, driven by the *effet utile* objective, has had far-reaching consequences. For instance, in public health, EU case law means that individuals may access other treatments than those allocated in the national package and can escape waiting lists, having profound consequences for national health systems by challenging domestic practices governing the allocation of these public services. National autonomy to decide on important political questions, weighing the cost and benefit of health care to the public and the individual, is limited by EU law. The same holds true for the area of education. The Court has developed a progressive line of case law on mobile students’ right to equal treatment, meaning that Member States cannot impose restrictions or higher fees on mobile EU students. This is controversial because neither the economically inactive students nor their parents will

have paid taxes in the host state, and there is no guarantee that they will settle there after their studies (van der Mei, 2005). As such, EU law requires Member States which choose to devote significant public resources to maintaining a high quality further education system for the benefit of their own populations to subsidize, through the principle of equal access, in addition potentially large numbers of foreign students (Dougan, 2005).

Another example is that of national labour standards. Article 153 TFEU authorizes the EU to adopt measures laying down minimum requirements for the protection of workers, without precluding Member States' more protective measures and excluding the issues of pay and the right to strike. However, the CJEU has held that such provisions can be a restriction on companies' free movement. While initially the Court conducted a deferential review, upholding most measures as justified, the situation changed with the *Laval*, *Viking* and *Rüffert* judgments. Widening simultaneously the definition of 'restrictions' and narrowing the scope for justification, these judgments fundamentally displace national rules such as on minimum pay, regardless of any seemingly hard limits included in the social policy legal basis. Moreover, the European legislator has been unable to re-regulate the issue, due to the opposition of national parliaments, partially in light of the EU's limited legislative competence. Indeed, the CJEU's negative integration does not only displace the national legislator, it also displaces the European legislative process.

The role of any judiciary in sensitive policy decisions is a thorny issue, let alone in the EU's constitutional order, where 'correction' by the political process is exceedingly difficult. The EU may lack the competence altogether to re-regulate the issue, or it must rely on the internal market which leads to an economic bias (Davies, 2015). The EU legislator is subject to high consensus requirements, to fulfil in a very diverse EU-28, with national parliaments posing an additional hurdle. The case law affects bargaining conditions in the Council, making it difficult for the legislator to deviate from case law in practical terms (Scharpf, 2010). Moreover, a fundamental deviation is difficult in legal terms, as the Court's interpretations of the internal market provisions are constitutional. In the case of international trade agreements, the obligations as interpreted by the arbitration body may also take precedence over secondary law. This renders the legislative process powerless. Only a revision of the Treaty (or, the case may be, international agreement) would suffice. The picture thus emerges that it is the judiciary that, to a large extent, decides on the political question of the place of the market in our societies, and on the power of our societies to regulate the market.

### *Soft Law, Economic Governance and Parallel Integration: Displacement of the National and European Legislator by National and European Executives*

What soft law, economic governance and parallel integration have in common, is that they mainly involve non-binding measures, or measures that are not binding by virtue of EU law, and as such that they formally leave the ultimate decision to the national level. One could therefore question whether they entail any displacement of the legislator at all. The answer is that only on the most narrow, formalistic and legalistic understanding of power and authority could one argue that this would not be the case. They all carry important normative power and constrain national action in various ways, doing so largely without the free involvement of the legislator and particularly the European and national parliaments. As such, these forms of harmonization by stealth contribute to the

de-parliamentarization of European integration, the legitimacy deficit of which has been examined at length (Auel and Benz, 2005; Cygan, 2013; Duina and Oliver, 2005; Richardson, 2006).

The OMC has been left deliberately outside of the (re)organization of competences in the Lisbon Treaty, probably to maintain its flexibility (Szyszczak, 2006). In a way, its rationale is precisely to overcome the limits on EU legislative competence: a complementary form of governance for when ‘harmonization is unworkable but mutual recognition and the resulting regulatory competition may be too risky’ (Trubeck and Mosher, 2003) for instance ‘to encourage the Member States to coordinate sensitive policy areas that are being eroded by the rulings of the Court’ (Szyszczak, 2006). But the OMC does have the capacity to exercise a certain degree of coercive power, and at the same time its lack of transparency and failure to engage with the (more) democratic institutions of the EU such as the European Parliament, the ESC, and the Committee of the Regions as well as a broad participation of civil society have been noted to run counter to principles of good governance such as transparency, accountability and democratic input (Szyszczak, 2006). Precisely for those reasons, it can be deployed by national executives for their two-level games (Büchs, 2008).

‘It is not clear to electorates exactly who is participating in these processes or which actors are successful in influencing the OMC agenda. Member state electorates cannot, therefore, hold the actors responsible for the content of the OMC objectives accountable. Neither the European nor national Parliaments are involved in formulating the OMC objectives. The objectives therefore lack any input-legitimacy. All this is problematic if national governments subsequently use the OMC in political discourses to justify existing policies by credit claiming or defend planned changes by blaming the EU’ (Büchs, 2008).

The OMC might seem respectful of national autonomy, however, its executive-dominated nature and exclusion of transparent procedures and parliamentary involvement means it lacks democratic legitimacy (Dawson, 2011).

The European Semester poses similar problems. The CSRs are, technically speaking, not legally binding. Nevertheless, they are issued in the context of a structured framework, which features an ultimate possibility of financial sanctions in case of non-compliance. While sanctions are only possible under the macroeconomic imbalance procedure and excessive deficit procedure, the yearly package of CSRs is presented integrally and it is difficult to specify the legal basis of each CSR, meaning that all CSRs operate under the shadow of financial sanctions. Furthermore, soft norms construct a narrative and influence institutional actor’s behaviour in subtler ways (Dawson, 2017). Very similar legitimacy problems plague the Euro-crisis measures. The MoUs allow ‘circumvention’ of the EU’s limited competences on social policy, education and health (Dawson and de Witte, 2013). Their coercive power is unlike anything previously seen, as a country faces bankruptcy if it does not accept and comply with the European-level decisions. As Scharpf notes, ‘these conditionalities were not defined by European legislation under the Community Method or through consensus-oriented voting in the Council but through extremely asymmetric bargaining between creditor and debtor governments that resembled conditions of an unconditional surrender’ (Scharpf, 2015).

Admittedly, economic policy co-ordination is firmly rooted in EU primary and secondary law. However, the actual, substantive decision-making by contrast takes place in a non-transparent, exclusionary and undemocratic way, mainly between the Commission and the Council. The problem is that the role of law here is to legalize the ‘outsourcing’ of highly sensitive, political questions that from a democratic perspective should be taken through the legislative process, to an executive, non-transparent forum. The parliamentary complicity in setting up the framework is understandable because of the crisis at the time, but cannot validate the indefinite displacement of substantive decision-making on highly crucial issues, locating it outside the democratic legislative process.

Economic governance has also made extensive use of parallel integration. Such inter-governmental law-making on the borders of the EU legal and institutional framework also raises concerns about democratic legitimacy. Once again, it is national executives in particular that are empowered in these intergovernmental settings. These concerns apply equally to international soft law such as the Bologna Process, in which there are no pre-determined procedures, decision-making is limited to governmental officials, and which does not require ratification. Such international soft law avoids not only the checks and balances of the legislative process but those imbued in the EU’s institutional framework altogether. Although national parliaments could in theory have refused to legally implement the Bologna Declaration, governments have been able to play into a lack of transparency and sense of urgency, arguing that ‘international obligations’ had to be met (Papatsiba, 2006; Ravinet, 2008; Racké, 2007), thereby subjecting national higher education systems to an unprecedented level of reform and Europeanization without an effective debate.

Although all European action empowers national governments by permitting them to loosen domestic constraints imposed by legislatures, interest groups and other societal actors (Moravcsik, 1994), EU legislative procedures at least offer checks and balances that are largely absent in intergovernmental processes. In the words of Chalmers:

‘... it is positively perverse for those who criticise the European Union because it is executive-oriented or does not sufficiently involve national parliaments to hark back nostalgically to [the] intergovernmental model. It leads to an even higher executive dominance and even greater parliamentary exclusion’ (Chalmers, 2010).

## Conclusion

Regardless of all the Treaty revisions, the European integration of areas of Member State autonomy remains possible. This is mainly because the various limits to EU competence only apply in relation to the specific legal basis to which they directly relate, and not to action undertaken on *other* legal bases or outside the Treaties. Arguably, this is required for effective government: policy areas are closely inter-related and a single regulation will usually address various aspects of life. This does not, however, legitimize competence creep. While these practices may be legal under EU law’s current interpretation, democratic deficiencies damage their legitimacy. The main concerns are that they are highly non-transparent and that they displace at the same time the national *and* the European legislator in taking decisions of high political consequence, relocating this power to the judiciary or the executive, and leaving parliaments largely disempowered. It is ironic that

the one form of competence creep that suffers the least from this concern, is the one that is most commonly understood to be the core of the problem: that of indirect legislation. This means that most of the political action undertaken to solve the competence problem has been misguided.

The case could therefore be made that the legitimacy problems arising from especially the *other* forms of integration by stealth should be addressed. While the EU system ‘must retain its necessary capacity for dynamism and adaptability’ (Weatherill, 2004) and for effective governance, such governance must surely also be democratically legitimate. The goal of any reforms should be to reinstate and reinforce the powers of both the national and European legislator in taking the important decisions that impact, directly or indirectly, European citizens’ lives. This should be done by, on the one hand, limiting the various possibilities of competence creep and, on the other hand, expanding the possibilities for the adoption of EU legislation particularly through the Community Method (Garben, 2015, 2017b; Scharpf, 2017). Admittedly, this is an ambitious course of action, but warranted considering the seriousness of the legitimacy crisis facing the European integration process today.

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