

The Division of Competences between the EU and the Member States

Reflections on the Past, the Present
and the Future

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The Division of Competences between the EU and the Member States: Reflections on the Past, the Present and the Future

SACHA GARBEN AND INGE GOVAERE*

THE EVER-INCREASING IMPORTANCE OF THE COMPETENCE QUESTION

AS THE EUROPEAN Union presently moves from crisis to crisis, one may wonder whether it is the right time to revisit the discussion on EU competences. The European integration process is facing a host of pressing issues, among which a great influx of refugees, the aftermath of the euro- and economic/financial crisis and its social consequences, a range of terrorist attacks with cross-border implications, the prospect of UK secession—and more generally a faltering confidence in the European project among citizens and a rise of Eurosceptic parties across the EU. Perhaps all available intellectual resources should for now be directed at finding a solution to those problems, before EU scholars and practitioners can once again afford to turn their attention to constitutional niceties such as competences? And, furthermore, didn't the Lisbon Treaty finally resolve 'the competence problem'¹ that was one of the core issues in the decade-long 'Debate on the Future of Europe'?²

While the Lisbon Treaty certainly introduced a number of changes to the Treaties' competence arrangement aiming to make the division of competences between the EU and its Member States clearer and more effective at containing European integration, the various contributions to this book will show that not all the competence questions have been conclusively resolved—quite the contrary.

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¹ Term borrowed from P Craig, 'Competence: Clarity, Conferral, Containment and Consideration' (2004) 29 *European Law Review* 323.

² The Intergovernmental Conference held in Nice in December 2000 launched the 'Debate on the future of the European Union', aimed at answering the question 'how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the

It could furthermore be argued that underlying these various crises confronting the Union at present is in fact a problem very much intertwined with the matter of competences, namely that of finding the right balance between the containment and the empowerment of the EU. While agreement may lack on whether these crises stem from either too much European integration, or instead from insufficient empowerment of the EU institutions (or perhaps both), many would agree that the mechanisms for deciding what and how much the EU can do are crucial for effective government in Europe and that these crises are symptoms showing that these mechanisms still do not function properly.

In theoretical terms, this goes to the federal question of how to organise a system of multi-level governance in such a way as to reap the benefits of both central and local rule; how to ensure that the right levels of government are always implicated in the right situations.³ In political terms, it raises the sovereignty issue. Nation states are concerned with preserving regulatory autonomy where possible but also heed the need to pool authority in certain situations, perhaps in reaction to the de facto limitation of their individual sovereignty due to pressures of globalisation and the externalities of policy making by other ‘sovereign’ jurisdictions. The competence question is the legal manifestation of this *problématique*, of how to organise the tasks, powers and modalities thereof among the various levels or sites of authority on a given territory. It goes to the core of a polity’s constitutional settlement—in many ways, it is the concrete expression of that settlement.

The competence question is therefore of perennial, fundamental, and perhaps ever-increasing importance for any polity, let alone the European Union. The EU is a particularly dynamic system of multi-level government, in which nation states have voluntarily engaged in a unique and unprecedented sovereignty-sharing exercise, the limits of which have not been, and most likely cannot be, clearly defined and are continuously contested. As such, its constitutional arrangement is constantly evolving, and so is the competence question. Debates on the limits of Community powers are as old as the Treaties themselves, but they continue with growing intensity in the current, volatile, post-Brexit-referendum EU legal and political order. It is thus exactly the right time to revisit the competence discussion, looking at the way the concerns of the past have shaped the system of the present, and to reflect whether this is the appropriate arrangement to carry the European Union into the future.

THE LEGAL PRINCIPLES LIMITING EU COMPETENCE

The current Treaties feature a double-pronged approach of limiting both the *existence* and the *exercise* of EU competence. The exercise of competences is

principle of subsidiarity’. One year later, the Laeken Declaration of 13 December 2001 redrafted and concretised these issues. See Laeken Declaration on the Future of the European Union, Annex I to the Conclusions of the Laeken European Council, 14–15 December 2001, SN 300/1/01 REV 1.

³ See D Halberstam, ‘Federalism: A Critical Guide’ (2011) *University of Michigan Public Law Working Paper* No 251.

limited mainly through three principles. The first and foremost is the principle of subsidiarity, which demands that all EU-level action be necessary in the sense that the policy goals in question cannot be achieved as effectively and efficiently on the national level.⁴ The second is the proportionality principle, which requires EU action to be rational, in that it should be appropriate and necessary to achieve its aims, and that it should not limit individual (or Member State) autonomy too gravely (proportionality *stricto sensu*).⁵ The third limitation is found in Article 4(2) TEU. Although the precise legal value of this provision has yet to be determined, the idea is that EU action should respect national diversity and ‘core areas of constitutional identity’.⁶ All three principles can form the basis of judicial review of EU legislation by the Court of Justice of the EU (CJEU). Furthermore, the principle of subsidiarity is policed by national parliaments through the so-called Early Warning System introduced by the Lisbon Treaty, described in further detail by María José Martínez Iglesias in Chapter 12.⁷

The limit on the *existence* of EU competences follows quite logically from the conferral principle, entailing that as any other international organisation, as distinguished from states, the EU only possesses those powers attributed to it. The importance of this principle to determine the structure, functioning and exercise of EU law can hardly be overestimated.⁸ From a sequential perspective it is necessarily the very first of all the structural principles to be applied. It may be difficult if not impossible to establish a full sequential order of the various structural principles underlying EU law, but all the other EU law principles are triggered only once this initial hurdle has successfully been taken by the EU.⁹ While the EEC Treaty referred to the principle of conferred powers only implicitly in Article 7(1) EEC,¹⁰ over time, the Member States have felt the need to make the principle more explicit.¹¹ The Lisbon Treaty has both reinforced the wording and inserted multiple references to the principle of conferral.¹² Article 5(2) TEU now provides:

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 See, for a discussion and overview of the wealth of academic literature on the subsidiarity principle, A Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford, Oxford University Press, 2002).

⁵ See T Harbo, ‘The Function of the Proportionality Principle in EU Law’ (2010) 16 *European Law Journal* 158.

⁶ For an interesting recent account: F Millet, ‘Respect for National Constitutional Identity’ in L Azoulay, *The Question of Competence in the European Union* (Oxford, Oxford University Press, 2014).

⁷ Art 69 TFEU, Protocol on the application of the principles of subsidiarity and proportionality.

⁸ I Govaere, ‘To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon’ (2016) 4 *College of Europe Research Paper in Law* 2.

⁹ *ibid.*

¹⁰ ‘Each Institution shall act within the limits of the powers conferred upon it by this Treaty’.

¹¹ Article 3b EC (Article 5 EC) provided: ‘The Community shall act within the limits of the powers conferred on it by the Treaty and of the objectives assigned to it therein’.

¹² I Govaere, ‘Multi-faceted Single Legal Personality and a Hidden Horizontal Pillar: EU External Relations Post-Lisbon’ (2011) 13 *Cambridge Yearbook of European Legal Studies* 87–111.

This central principle has been translated more concretely in a drafting technique that entails the specific and detailed attribution of competences in separate provisions scattered throughout the Treaty.¹³ These legal bases, which generally refer to either a specific policy area or to a policy objective to be achieved, are defined with a precision that outmatches the precision of the constitutions of most federal states.¹⁴ This reflects the contentious nature of the issue of competence demarcation, the most explosive of federal battlegrounds.¹⁵ The idea is that each policy area has negotiated its own specific scope of competence and appropriate procedures, allowing for better Member State control—or at least the illusion of it.¹⁶

Since the Maastricht Treaty, some of these legal bases explicitly and specifically exclude the harmonisation of Member States' laws and regulations. The Lisbon Treaty reaffirmed and extended this technique of limiting legislative competence by applying it to the newly labelled category of 'supporting, coordinating or supplementary competences' in Article 2(5) TFEU.¹⁷ It also amended the flexibility clause of Article 352 TFEU to prevent its use to adopt harmonising measures in those areas. Lisbon introduced two additional categories. The competences exclusive to the EU, such as the customs union and monetary policy for the euro countries, are set out in Article 2(1) and 3 TFEU. Competences shared between the Member States and the EU, such as in the internal market and agriculture, are governed by Articles 2(2) and 4 TFEU. The EU's coordinating powers in the area of economic, social and employment policy are mentioned separately in Article 5 TFEU, but are to be considered part of shared competences.¹⁸ Finally, the Treaties feature an implicit category of exclusive Member State competences, namely those powers that are not conferred to the Union and hence fully remain with the Member States (Article 4(1) TEU). This category would seem to comprise national security, which Article 4(2) TEU identifies as 'the sole responsibility of each Member State'.

THE PROBLEM OF COMPETENCE CREEP

The categorisation of competences, the various reiterations of the principle of conferral,¹⁹ the Early Warning System as well as a number of other changes, such as a reference to reducing competence in Article 48(2) TFEU, were introduced

¹³ A Dashwood, 'The Relationship Between the Member States and the European Union/European Community' (2004) 41 *Common Market Law Review* 357.

¹⁴ G de Búrca and B De Witte, 'The Delimitation of Powers between the EU and its Member States' in A Arnulf and D Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford, Oxford University Press, 2002) 202.

¹⁵ J Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

¹⁶ S Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers' (2014) *Oxford Journal of Legal Studies* 5.

¹⁷ See R Schütze, 'Co-operative Federalism Constitutionalized: The Emergence of Complementary Competences in the EC Legal Order' (2006) 31 *European Law Review* 167.

¹⁸ Art 4 TFEU states that 'the Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6'.

¹⁹ Art 7 TFEU, Arts 4, 5, 13(2) TEU, Declaration 18.

out of a concern for clarity and containment.²⁰ Indeed, one of the main purposes of the Constitutional Treaty, later modified into the Lisbon Treaty, was to make the competence arrangement more transparent, more coherent, and more effective at containing EU integration particularly in certain sensitive policy areas.²¹ In essence, this was to heed the often-heard concerns about ‘competence creep’,²² referring to a process whereby the powers of the EU were perceived as expanding in covert or somehow unclear ways, including into areas where Member States were supposed to remain fully in charge.

The main cause of competence creep is often considered to lie with the existence, and/or wrongful use and interpretation of, the functional powers of Articles 114 and 352 TFEU.²³ Of Article 114 TFEU it is argued that its harmonisation powers are being put to use for purposes only remotely connected with the functioning of the internal market.²⁴ While the Court of Justice has drawn some outer limits to the use of this provision in *Tobacco Advertisement*,²⁵ subsequent case law has taken something of the force out of these limits.²⁶ Gareth Davies argues in Chapter 5: ‘it allows in principle for the removal of almost all legislative differences between Member States’. As for the flexibility clause of Article 352 TFEU, which was amended by the Lisbon Treaty partially to reduce its scope,²⁷ the persistent problems with containment were set out by 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, 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.²⁸

But it is not because of the continuing existence of Articles 114 and 352 TFEU that the Lisbon Treaty has not been able to resolve the problem of competence creep.

²⁰ P Craig, ‘Competence: Clarity, Conferral, Containment and Consideration’ (2004) 29 *European Law Review* 323.

²¹ S Garben, ‘Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers’, *Oxford Journal of Legal Studies* (2014) 2.

²² S Weatherill, ‘Competence Creep and Competence Control’ (2004) 23 *Yearbook of European Law* 1.

²³ De Búrca and De Witte, above n 14, 204.

²⁴ M Dougan, ‘Legal Developments’ (2010) 48 *Journal of Common Market Studies* 172.

²⁵ Case C-376/98, *Germany v European Parliament and Council* [2000] 8419.

²⁶ Case C-380/03, *Germany v European Parliament and Council of the European Union*, C-491/01, *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, C-210/03, *The Queen, on the application of Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health*, C-434/02, *Arnold André GmbH & Co KG v Landrat des Kreises Herford*.

²⁷ The unanimity requirement has always provided an important brake on this potential integration accelerator, and it is now made explicit that it cannot be used to harmonise areas where the direct legal basis for that area has excluded such harmonisation. Still, Art 352 TFEU remains a powerful provision, especially since it is no longer confined to the attainment of objectives in the context of the common market.

²⁸ *BVerfG*, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr (1–421) para 328, available in English at: www.bverfge.de/entscheidungen/es20090630_2bve000208en.html, accessed 29 August 2014.

The legitimate criticism of overuse of these two provisions notwithstanding, it does not tell the full story about how exactly it happens that in spite of either a complete absence or a clear limit of EU competence in a certain policy area, that very area can nevertheless be subject to a significant degree of European integration. For a meaningful answer to that question, it would seem that the scope of the discussion on competences would have to be extended beyond its traditional confines. First, we should not only examine the principles limiting the EU, but also, and particularly, those limiting the competences of the Member States. Second, in considering the problems of competence containment, we should not only focus on EU legislation, but also take into account European integration from other sources.

THE LEGAL PRINCIPLES LIMITING MEMBER STATE COMPETENCE

EU law limits the competences of the Member States in several ways. The first and arguably only limit on the *existence* of Member State competence is by virtue of an exclusive EU competence. Before the Lisbon Treaty, the exclusive nature of an EU competence was identified by the CJEU in its case law. The Lisbon Treaty now declares such exclusivity in Article 3 TFEU, in the area of the customs union, the establishing of the competition rules necessary for the functioning of the internal market, monetary policy for the Member States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy and common commercial policy.

The consequence of this constitutional exclusivity is, according to Article 2(1) TFEU, that in these areas 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. So, while there may be continuing Member State action in these areas, this is by way of delegation and not by virtue of a remaining Member State competence. As specified in Article 5(3) TEU, the subsidiarity principle does not apply to these areas. Furthermore, as Marise Cremona explains in Chapter 8, the Lisbon Treaty also codified existing case law on exclusive external competences. As a result, we have a group of policies which are explicitly exclusive, listed in Article 3(1) TFEU, such as the common commercial policy. In addition, the Treaties now provide that exclusive competence to conclude international agreements, under Article 3(2) TFEU,

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 CJEU has firmly rejected an interpretation of the latter which would ‘pick and choose’ what prior case law would, or would not, survive the Lisbon Treaty reforms.²⁹

²⁹ I Govaere, “Setting the international scene”: EU external competence and procedures post-Lisbon revisited in the light of ECJ Opinion 1/13’ (2015) 52(5) *Common Market Law Review* 1277–1307.

As regards shared competence, Article 2(2) TFEU provides that both the Union and the Member States may legislate and adopt legally binding acts in that area. It specifies that the Member States shall exercise their competence to the extent that the Union has not exercised its competence, and that they shall again exercise their competence to the extent that the Union has decided to cease exercising its competence. This is an expression of the principle of pre-emption, which limits the *exercise* of Member State competences.³⁰ According to the Treaty, such pre-emption does not fully apply to all areas of shared competence; however, since in the areas of research, technological development and space, and development co-operation and humanitarian aid, Article 4(3) and (4) TFEU provide that the exercise of Union competence ‘shall not result in Member States being prevented from exercising theirs’. Similarly, in areas where only minimum harmonisation is allowed, such as social policy, the pre-emption principle is mitigated.

The self-standing value of the principle of pre-emption and the exclusivity of EU competences is contestable. Arguably, they are both mere consequences of the fundamental principles of primacy, sincere co-operation and the effectiveness of EU law (*effet utile*). In fact, these principles better explain the actual functioning of the competence constellation in terms of the scope of Union versus Member State action, than the categorisation of competences as set out since Lisbon.

The most powerful illustration thereof is the limitation of Member States’ exercise of their retained powers, namely those where the EU has no or only complementary competence.³¹ As Christiaan Timmermans notes in Chapter 2 and Bruno De Witte sets out in further detail in Chapter 4, while the Treaties provide that such areas either ‘remain with the Member States’ or, respectively, that the exercise of EU competence shall not ‘supersede’ the competence of the Member States, the Court has often repeated, in slight variations of wording, that ‘powers retained by the Member States must be exercised consistently with EU law’. This means that provisions of EU law in other policy areas may constrain (pre-empt?) the action of Member States in areas of retained powers. This logic is derived from the fundamental principles of primacy and *effet utile* of EU law, which do not allow policy areas to be carved out of the scope of application of the Treaty altogether. Particularly the internal market provisions powerfully cut through areas where the EU possesses no, or only limited, legislative powers, such as health, wages, education, culture and sport.³² But this is just one of many examples. Pablo Ibáñez Colomo demonstrates in Chapter 7 that the state aid provisions can also have such pervasive effects. The same mechanism has furthermore led the Court to recognise a power for 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

³⁰ R Schütze, ‘Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption’ (2006) *Common Market Law Review* 1023–48.

³¹ S Garben, ‘Supporting Policies’ in F Amtenbrink et al, *The Handbook of European Union Law* (Alphen aan den Rijn, Kluwer, 2017), forthcoming.

³² *ibid.*

to do so.³³ Furthermore, the Union may very well restrict Member States' competences in these areas through the adoption of Union legislation on the basis of other Treaty provisions.³⁴

The principles of primacy, effectiveness and sincere co-operation do not only limit the exercise of Member State competence in areas which primarily fall within their responsibility. As said, arguably these principles also explain the specific dynamics of 'pre-emption' in relation to shared competences and even constitute the very reason for the exclusive nature of certain areas of EU competence. The underlying logic of the exclusion of incompatible national law and policy based on the primacy and effectiveness of EU law is the same.

This explains why in certain areas of shared competence, the law-making powers of the Member States can be fully abrogated through progressive EU legislative action, while in other areas of shared competence, such as social policy, development co-operation and humanitarian aid such full pre-emption is not a priori possible: in pursuing those latter goals it is unlikely that continuing parallel action by the Member States will obstruct the EU in the achievement of its tasks or result in outright incompatibilities. However, in the hypothetical case that a Member State would unilaterally and knowingly act in clear conflict with EU action in such a field, there seems no reason why such action would not be precluded under the principles of primacy, loyalty and *effet utile*. It would furthermore seem that the very same mechanism lies behind the fact that Member States cannot act independently in areas of exclusive EU competence: the very nature of these policies demands that any unilateral national action would not be compatible with the supreme EU policy in place. Arguably, it is not because these fields are exclusive that Member States cannot act but because Member States can no longer act without contravening the established EU policy (or the very fact that it is supposed to be a common policy) that these competences are, or have become, exclusive. As Marise Cremona discusses in Chapter 8, the main rationales for exclusivity in external relations remain, also after Lisbon, the principles of *effet utile* and of sincere co-operation.

From this perspective, the categorisation of competences introduced by the Lisbon Treaty is problematic. It comes across, at best, as a theoretical exercise attempting to systematise the status quo at a certain point in time. It thereby fails to capture the inherently dynamic nature of the competence arrangement, which is shaped as the *acquis* progresses, with the principles of effectiveness, primacy and loyalty as driving forces. In light of changing political, legal and societal realities, some areas may see such an increase in European integration that they move from complementary to shared, or from shared to exclusive. For similar reasons, common policies can be decentralised and devolved. It remains to be seen to what

³³ Case C-176/03, *Commission of the European Communities v Council of the European Union*, EU:C:2005:542.

³⁴ S Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers' (2014) *Oxford Journal of Legal Studies* 8.

extent the rigid constitutional categorisation of the Lisbon Treaty will disrupt this fluid development of the competence arrangement. Probably the CJEU will simply continue its pragmatic, flexible and case-by-case approach to competence division, as Christiaan Timmermans and Marise Cremona suggest in Chapters 2 and 8 referring to the post-Lisbon case law. That would render the Lisbon categorisation progressively outdated and invalid.

As regards the retained powers of the Member States, the Lisbon categorisation is moreover highly misleading.³⁵ It pretends that certain policy areas are free from integration, or will only be subject to very limited EU action, while this is only true for the EU's direct legislative competences in those areas. More generally, this is because the competence categorisation fails to take account not only of the dynamic evolution of policy areas as mentioned above, but also their dynamic interaction. Contrary to the implicit assumption underlying the categorisation, no single policy area stands alone—all are to a certain extent inter-linked. For instance, as Michael Waibel explores in Chapter 6, while monetary and economic policy fall into different competence categories, they are highly interconnected especially in the context of the EMU. As Robert Schütze has noted in his work on EU federalism, the legislative reality within Europe 'is increasingly characterized by mutual interpenetration and interlocking laws', which is a natural consequence to the fact that 'an ever more interconnected social reality' cannot be divided into 'neat competence categories that mutually exclude each other'.³⁶ The Lisbon competence categorisation is an expression of dual federalism, while the EU legal order is characterised by co-operative federalism instead. Robert Schütze further explores these themes in a comparative setting in Chapter 3.

BEYOND LEGISLATIVE COMPETENCE: THE REAL SOURCES OF 'CREEP'

Apart from the above finding that the Lisbon competence categorisation fails to take the dynamic evolution and interaction of policy areas into account, it furthermore ignores another important piece of the puzzle: European integration from other sources than EU legislation. Such non-legislative integration is just as important for the underlying *problématique* of competence creep, as it too can significantly limit national autonomy and displace decision making to the European level. The most important of these non-legislative sources of European integration are: (i) CJEU case law, particularly concerning the EU's 'negative competences' as Gareth Davies calls them in the context of the internal market in Chapter 5; (ii) soft law, such as in the context of EU economic governance, as explained by Mark Dawson in Chapter 14; and (iii) parallel integration on the margins of the EU institutional framework, as discussed by Christiaan Timmermans in Chapter 2 and Sacha Garben in Chapter 18.

³⁵ *ibid.*

³⁶ R Schütze, *From Dual to Cooperative Federalism—The Changing Structure of European Law* (Oxford, Oxford University Press, 2009) 346.

As Gareth Davies points out in Chapter 5,

when courts apply the Treaty prohibitions to national measures they restrain national policies, and so limit the remaining competences of the Member States. The competence division between the EU and its Member States, the subject of this book, is not just determined by which directives and regulations the EU can adopt, but also by the extent to which its primary texts constrain national freedom of action. Both what EU law allows itself, and what it prevents in Member States, are part of the division of powers.

Neither the discussions on competence containment, nor the various Treaty amendments aimed at improving that containment, have taken this form of negative integration sufficiently into account. While many scholars agree that the Court has taken a very wide approach to the free movement provisions, these considerations are not often enough integrated into the competence discussion.

This is misguided not only because it misses an important part of the picture, but also because when only (the existence and exercise of) positive, legislative EU competences are limited while ‘negative competence creep’ through the CJEU’s case law is left entirely unaddressed, the result may be a regulatory gap, where neither the national nor the European legislator is able to protect the public interest. This would aggravate the asymmetry in European integration that Fritz Scharpf has identified,³⁷ the implications of which he explains in detail in Chapter 17. This risk of inadvertent deregulatory consequences due to an over-emphasis on EU legislation in the competence debate while ignoring the effects of negative integration is further heightened because the discourse on the need for ‘Better Regulation’ increasingly tends to feed into the competence debate. As the same concerns for national autonomy, subsidiarity and proportionality that inform the competence debate are deployed in the narrative of the Better Regulation Agenda, the latter may appear to be a natural ally in the search for competence containment. However, a very different agenda ultimately informs Better Regulation policy: one that is concerned with cutting ‘red tape’ and reducing ‘regulatory burdens’ as perceived obstacles to the competitiveness of businesses.

Mark Dawson points out in Chapter 14 that in fact, the Better Regulation Agenda itself seems to largely escape competence control because of its soft law character. Nevertheless, he points out, its potential effects, while non-judicial, are very real and its impact has been felt ‘well beyond the political institutions’. Testimony is the creation of a ‘Better Regulation watchdog’ consisting of over 50 civil society groups joined to form of to oversee the impact of REFIT on citizen, worker and consumer rights out of concern for its possible deregulatory consequences. More generally, Mark Dawson warns us about turning a blind eye to the expansion of European integration through soft law:

[A]ttempting to control EU power via judicial and political oversight of competence allocation may be important but it does not get to the heart of how power is exercised via soft law. Competence control is aimed at hard, juridical power: EU action under soft

³⁷ F Scharpf, ‘The Asymmetry of European Integration, or Why the EU Cannot be a “Social Market Economy”’ (2010) 8 *Socio-Economic Review* 211.

law is simply not of this nature. This does not, however, obviate the normative need for control. The type of power and coercion being exercised via soft law may be just as real; it simply doesn't carry hard law's traditional repressive form.

From this perspective, it is curious that in the context of Impact Assessment of new legislation, the subsidiarity principle is operationalised through a default preference for soft law options. While often perceived as less intrusive than hard law, such soft norms can equally challenge the division of competences in the EU and the objectives of national regulatory autonomy and democratic legitimacy that ultimately underlie it.

For a powerful example, one only needs to consider the Country Specific Recommendations (CSRs) issued in the context of the European Semester—the EU's yearly cycle of economic policy coordination. The CSRs deal with a range of issues that lie outside the EU's direct competences, such as minimum wages and redistributive policies on health care, social protection and education.³⁸ While strictly speaking the recommendations are non-binding, they are issued in a highly structured and coercive framework with the possibility of financial sanctions for non-compliance in some cases, making them a particularly hard form of soft law. Similarly, the Memorandums of Understanding signed with countries receiving financial assistance in the context of the euro crisis undermine the division of national and European competences.³⁹ The exact legal status of these Memoranda is unclear,⁴⁰ which is troublesome in light of their scope and breadth,

including very detailed instructions regarding the state budgets both on the revenue and on the spending side ... affect[ing] policy choices in areas which are not within the EU legislative competence.⁴¹

The old concerns about competence creep, subsidiarity and the protection of national regulatory autonomy in the context of 'over-expansive and intrusive' EU legislation that gave rise to the constitutional reforms over the course of various subsequent Treaty revisions seem positively trivial when compared to the competence coup taking place through European economic governance.⁴² This is further facilitated by the fact that part of this economic governance takes place outside the EU's legal and institutional framework, in an intergovernmental arena ostensibly governed by international law. As Christiaan Timmermans notes in Chapter 2,

important pieces of the legislation adopted in the aftermath of the euro crisis have been enacted by intergovernmental agreements between Member States: the Treaty establishing the European Stability Mechanism, the Treaty on Stability, Coordination and

³⁸ S Garben, 'The constitutional (im)balance between "the market" and "the social" in the European Union (2017) 13 *European Constitutional Law Review*, 23.

³⁹ M Dawson and F De Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 *Modern Law Review* 817–44.

⁴⁰ C Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They Are Not EU Law?' (2014) 10 *European Constitutional Law Review* 393, M Schwarz, 'A Memorandum of Misunderstanding' (2014) 51 *Common Market Law Review* 398–99.

⁴¹ B De Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?' (2015) 11 *European Constitutional Law Review* 452.

⁴² Garben, above n 38.

Governance in the Economic and Monetary Union (the Fiscal Compact) and the Agreement on the Single Resolution Fund for banks. There is little doubt that the latter two texts could also have been decided as Union instruments. The Two Pack has already incorporated part of the Fiscal Compact into Union legislation. Moreover, both texts provide for their incorporation into Union law.

Another important instance of such parallel integration straddling the borders of the EU institutional framework is the Bologna Process, which has harmonised higher education systems through the introduction of a common Bachelor-Master-Doctorate system across Europe, as discussed by Sacha Garben in Chapter 18.

While the legality of such parallel integration is not contested, at least under the current interpretation of EU law in *Bangladesh* and *Pringle*,⁴³ its legitimacy is another question altogether. Avoiding the in-built checks and balances and democratic safeguards of the EU legislative process, with the involvement of the European Parliament as a co-legislator and national parliaments through the Early-Warning System, the judicial review of the Court of Justice to guarantee the rule of law and respect for fundamental human rights, and the weighted and balanced voting rules in the Council which help to mitigate traditional power politics, such intergovernmental integration suffers from various fundamental defects from the viewpoint of constitutional democracy. In stark contrast to the efforts to make the EU a democratic, balanced, fair and transparent platform for transnational governance, it brings us back to all the flawed characteristics of traditional international co-operation: ‘redistribut[ing] domestic power in favour of national executives by permitting them to loosen domestic constraints imposed by legislatures, interest groups, and other societal actors’⁴⁴ and suffering from grave ‘executive dominance and ... parliamentary exclusion’⁴⁵ Similar legitimacy concerns could be levelled against soft law,⁴⁶ and against negative integration by the CJEU where highly political decisions are displaced from the legislator (at national and European level) to the judiciary, as Fritz Scharpf explains in Chapter 17.

IMPLICATIONS FOR LEGAL PRACTICE

The competence picture that emerges is rich and complex. While there has always been agreement that there should be some limits to what the EU can do,⁴⁷

⁴³ Case C-181/91, *Parliament v Council and Commission* and Case C-370/12, *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*.

⁴⁴ A Moravcsik, ‘Why the European Union Strengthens the State: Domestic Politics and International Cooperation’ (1994) 52 *Harvard University Centre for European Studies* WPS 1.

⁴⁵ D Chalmers, G Davies, and G Monti, *European Union Law* (Cambridge, Cambridge University Press, 2010) 132.

⁴⁶ For instance, on the OMC, see M Dawson, *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy* (Cambridge, Cambridge University Press, 2011), in particular 203, 207 and 280 on the role of national parliaments.

⁴⁷ Even the Court of Justice in its most revolutionary and federalist judgment to date recognised that Member States have limited their sovereign powers only in ‘limited fields’: Case 26/62, *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1962] 1 para 3. In 1991 the CJEU, however, spoke of ‘ever wider fields’: Opinion 1/91 on the draft EEA Agreement [1991] 6084.

there remains much confusion and disagreement about where those limits actually lie, where they should lie, and what form they should take. As Christiaan Timmermans notes:

it may pose a challenge to law professors but create confusion for legal practice. Indeed, in individual cases it might not be so easy to establish the precise impact of Union law, where it starts, where it stops and what the exact margin is for Member States to apply their own rules.

This statement appears to be well-founded, as Päivi Leino reports in Chapter 13:

when working as a legal advisor for a Member State government and solving competence problems before national parliamentary committees, I was often faced with the difficulty of giving a clear-cut answer to a legal basis question. Outcomes of EU discussions on the choice of legal basis were hard to anticipate, no matter how objective they were claimed to be. Equally difficult was it to identify absolute national competence reserves.

One thing is clear: the Lisbon Treaty's competence categorisation fails to grasp the complexity of the competence constellation.

For practitioners, the competence question usually translates more concretely in that of the choice of legal basis, and this fact remains unchanged after the Lisbon reforms. To know exactly the scope of EU powers and the various conditions and modalities of its exercise in relation to a specific action, issue or area, it will still be necessary to refer to the applicable specific legal basis or legal bases as scattered throughout the Treaties. But as Karen Banks describes in Chapter 11, the Lisbon categorisation is also used:

Issues of exclusive or shared competence, and indeed the question whether the EU has any competence at all over a given matter, figure largely in the daily work of the Commission. From fisheries to public health matters, from disputes with Member States over whether a proposed international agreement is covered by the exclusive EU competence for trade matters to the question whether and how the EU can step back from full harmonization of a sector in order to restore a competence to the Member States, questions touching on competence arise constantly, and are the subject matter of vigorous debates both internally and with the other Institutions.

In a way, competence categories are just another instrument in the toolbox of legal argumentation that can be used in competence disputes. As Päivi Leino describes, legal concepts such as competences essentially serve as the 'rules of the game', framing political choices and power politics, rather than providing clear and conclusive answers in themselves.

This practical context clearly brings to the fore the importance of the horizontal, that is inter-institutional, dimension of competence division. In competence litigation, each institution or actor will inevitably seek to enhance its own powers and position, to 'defend its prerogatives', as also María José Martínez Iglesias invokes with respect to the European Parliament in Chapter 12. Still, there tends to be an indirect federal dimension also to such horizontal inter-institutional wrangling, as some institutions naturally tend to represent the national level's interest (the Council, the national parliaments) and others naturally side with the

interest of the EU level (the Commission, the Parliament). This can be seen clearly from Karen Banks' discussion of the areas of trade and the conservation of marine biological resources where the Commission closely guards the EU's exclusive competence against the Council and the Member States. That discussion also shows that while exclusivity of EU competence could be argued, as explained above, to be a simple expression of the principles of primacy, loyalty and effectiveness, in practice it matters a great deal whether an issue falls into that category or not.

Indeed, it is arguably in this practical context that competences are, ultimately, most relevant. For upon reading the preceding sections, one could be forgiven for thinking that competence division is redundant, as the EU's scope for action is virtually unlimited, especially if one takes into account non-legislative forms of European integration. However, the CJEU has established that the doctrine of the choice of legal basis has 'constitutional significance'.⁴⁸ Hence, for legal practice, especially that in the European institutions, competences, particularly in their concrete expression of legal bases, are of crucial significance, as also a large and dense body of case law testifies. Alan Dashwood wrote in a seminal article on competences two decades ago: 'much of my time at the Council was spent in worrying whether this or that proposal by the Commission was based on the correct Treaty provision or whether it was not, perhaps, entirely beyond Community powers'.⁴⁹ It transpires from the contributions by our practitioners in Part III of the book that for them this is still the case.

THE WAY FORWARD

Nevertheless, the fact that competences have real and important consequences does not necessarily mean that they, in the larger scheme of things, are useful. If they are eventually found to do little to contain European integration, because their delimitation can be so easily undermined by resorting to soft law, inter-governmental co-operation and negative integration, then they do not seem to serve their ultimate purpose: namely to protect the rule of law and democratic decision making.⁵⁰ Of course, the choice of legal basis can have an impact on the democratic and constitutional legitimacy of EU action: the more direct the competence, and the more democratic the procedure (that is, co-decision in the ordinary legislative procedure), the more legitimate the action. But then, would European integration overall not be much more legitimate if all of it took place on the basis of legislation adopted through the Community Method? Is perhaps the (de)limitation of EU competences in itself an important part of the competence

⁴⁸ CJEU, Opinion 2/00, Cartagena Protocol [2001] 664 para 5.

⁴⁹ A Dashwood, 'The limits of European Community powers' (1996) *European Law Review* 21(2) 113.

⁵⁰ S Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of its Legislative Powers' (2014) *Oxford Journal of Legal Studies*.

problem, at least as long as it can be undermined by less legitimate, covert forms of integration?

That train of thought has led Sacha Garben to propose the introduction of a general legislative competence for the EU, coupled with limits on integration ‘by stealth’ through soft law, parallel integration and CJEU case law, as further explained in Chapter 18. This is a far-reaching and provocative proposal, meant as much to highlight the shortcomings of the current system as to stimulate debate. What is perhaps most important to take away from it, is the call for the reinstatement of the Community Method and for EU legislation as the main mode of governance of European integration. Instead of caving in to the self-flagellating narrative of EU ‘over-regulation’⁵¹ and thus implicitly giving credence to the destructive discourse of a power-hungry EU that spreads itself too thinly and too widely by intruding in a range of issues that is none of its business, the merits and benefits of the European legislative process should be trumpeted and taken pride in. In theoretical terms, it remains the most stunning accomplishment of transnational democratic government and constitutionalism. In political terms, it is a well-balanced and carefully weighted procedure that provides both for federalist safeguards and majoritarianism. In practical terms it delivers, more often than not, high standards of protection of the public interest to the benefit of Europe’s citizens.⁵²

This is not to say that there is no scope for improvement of the European legislative process. Päivi Leino mentions the important practice of trilogues: informal negotiations that ‘are increasingly taking over as the main legislative deal-making forum between the three institutions’. While arguably increasing the effectiveness of EU governance, they are ill at ease with a transparent democratic process. In Chapter 16, Gregorio Garzón Clariana describes the expanded powers of the EU’s most democratic institution, but also identifies remaining problems, such as the special legislative procedures where the Council appears as sole legislator and ‘the continuing effect of acts adopted in the past in accordance with obsolete procedures that are no longer applicable to their subject matter, or even that no longer exist in the law of the European Union’ which ‘perpetuates inappropriate limitations to parliamentary scrutiny’. In Chapter 15, Ton van den Brink puts forward the argument that national discretion should be addressed in a more systematic and careful fashion in EU legislative processes. In Chapter 17, Fritz Scharpf criticises the multiple-veto character of the ordinary legislative procedure constraining the capacity for effective political action.

What finally emerges in the normative, theoretical discussion on the issues that underlie the competence conundrum, is a fallacious opposition of the effectiveness of governing in Europe on the one hand, and its democratic and constitutional legitimacy on the other. Some argue that the EU should be seen as, first and

⁵¹ D Kelemen, paper presented at the workshop ‘*The EU Better Regulation Agenda: Critical Reflections*’ organised at the College of Europe on 10 October 2016.

⁵² *ibid.*

foremost, a problem-solving platform for national leaders, and that its legitimacy would ultimately be dependent on the results it delivers. As the ends would justify the means, democratic and constitutional legitimacy would be of secondary importance; a ‘nice-to-have’ rather than a ‘have-to-have’. However, as Fritz Scharpf points out in Chapter 17:

democratic legitimacy presupposes effective governing and problem-solving capacity. Hence the failure of output legitimacy may undermine or even destroy the possibility of input legitimacy—a risk for which the fate of the Weimar Republic remains a most disturbing memento (Brecht 1955). At the same time, however, the lack of input legitimacy in the present European context will constrain and may ultimately destroy the effectiveness of measures based on non-accountable supranational authority.

In his chapter, Fritz Scharpf postulates the root causes of the ‘self-inflicted crises’ and proposes to redress the various ways in which the legislator (at national and European level) is displaced in crucial areas of European integration, by loosening the institutional constraints on democratic political action on both levels.⁵³ As regards re-empowering the national legislator, Scharpf points at the need to limit the CJEU’s negative integration in the internal market. As regards the re-empowerment of the European legislator, ‘the theory of deliberative democracy offers a legitimation of majority rule that is generated by the process of political communication and policy-oriented deliberation itself’. Together, these proposals constitute an ambitious democratic vision for Europe.

FINAL THOUGHTS

This introductory chapter has attempted to provide the overall narrative of this edited volume. While convinced that the various contributions can indeed be joined into a coherent overall account of the competence conundrum as seen from the past, the present and the future, we have not meant to gloss over the differences in approach of our collected authors. There are as many interpretations of the issues connected to competences in the EU legal and political order, as there are minds to reflect upon them. The richness of the topic of our inquiry merits such diversity, thus the editors have welcomed it and hope the readers will too. Ultimately though, what binds all chapters together, no matter how critical their account of the current status quo or different their approaches to the topic, is a genuine concern for the welfare of the European project and thus a firm commitment to it.

⁵³ For this argument concerning the social dimension of European integration, see Garben, above n 38.