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# To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon

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# To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon

Inge Govaere<sup>1</sup>

## 1. Introduction

The principle of conferral of powers occupies a prominent place in the Lisbon Treaty. Not only is it stated as a fundamental and horizontal principle in the common provisions of the Treaty on the European Union (Art. 5 TEU).<sup>2</sup> For the first time utmost care has been given to lay down, in a Treaty text, also the modalities and the consequences of the application of this principle.<sup>3</sup> As such, a catalogue of competence is introduced in Articles 2-6 TFEU which lists the “categories and areas of union competence” (Title I TFEU) whilst spelling out the nature of the competences conferred to the Union in those fields, for instance exclusive, shared or complementary. Moreover, it is recurrently and firmly stated that powers which are not conferred to the Union by the Treaties are to remain with the Member States (a.o. Arts. 4(1) & 5(2) TEU). Especially those new additions in the Treaties are revealing of the currently prevailing political context whereby the Member States seek to get a renewed grasp on the formulation, interpretation and application of the Treaty principle of conferral. This can hardly be considered in isolation from the development of case law of the CJEU, who deftly asserts exclusive jurisdiction to interpret this key structural principle of EU law.

The importance of the principle of conferral to determine the structure, functioning and exercise of EU law can hardly be overestimated. From a sequential perspective the principle of conferral 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.

For a good understanding of the principle of conferral in all its complexity, it is opportune to clearly distinguish the following two functions.

The principle of conferral is first and foremost the core principle that determines the delimitation of competence between the MS and the EU.<sup>4</sup> At the same time it impacts

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<sup>2</sup> Article 5 TEU (Lisbon) stipulates as follows:

*“1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.*

*2. 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.”*

Note that the text of the Lisbon Treaty is much more substantial than the prior formulation in the Nice Treaty and at that time inserted only in the EC Treaty pillar:

Article 5 TEC (Nice) :

*“The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.”*

<sup>3</sup> On discussions and attempt pre-Lisbon, see for instance De Búrca, G., “Limiting EU powers”, *European Constitutional law review*, 2005, 92-98.

<sup>4</sup> Marise Cremona points to the following 2 dimensions for allocation of competence: the relationship EU-Member States and the relationship between internal and external powers, see Cremona, M., “EU

directly on the relations between the EU and/or its Member States with third countries and other international organisations as it underpins the limitations that may be placed on the legal personality of the Union.<sup>5</sup>

The application of the principle of conferral also determines whether or not a subject matter comes within the ambit of the autonomous EU legal order, which is characterised by the exclusive jurisdiction of the CJEU,<sup>6</sup> primacy and direct effect. As such it is the only one of all the Treaty principles that serves to determine whether and to what extent not only the EU at all has competence but, additionally, whether and to what extent the CJEU may exercise exclusive jurisdiction.

The outcome of the application of the principle of conferral may nonetheless be very different in terms of the EU autonomous legal order as compared to EU competence. The Lisbon Treaty formally abolishes the pillar structure and introduces one legal personality for the whole EU, but this is not always and necessarily fully matched in substance. In many if not most cases there will be a *'plain' or 'full' conferral* with a perfect match in terms of EU competence and CJEU exclusive jurisdiction. However, the area of Common Foreign and Security Policy (hereafter 'CFSP') is still to a large extent kept outside the jurisdiction of the CJEU as well as democratic control by the EP.<sup>7</sup> This may lead to what one could call a *'crippled conferral'*, meaning that competence is conferred on the EU without the corresponding conferral to the autonomous EU legal order. Both judicial and democratic control are then left at the level of the sole Member States. Another complicating factor is that the integration of the former third pillar matters of Justice and Home Affairs into the autonomous EU legal system has entailed the importation of the corresponding opt outs for certain Member States.<sup>8</sup> This implies that both EU competence and CJEU exclusive jurisdiction may be conferred on the Union by some Member States but not by others, thus leading to a situation of *'split conferral'*. It is not inconceivable that the possibility to adopt CFSP measures under the constructive abstention mechanism,<sup>9</sup> whereby a Member State allows the other Member States to go ahead without being bound by the measure itself, could in practice even give rise to claims of a *'crippled split conferral'*.

Especially since the Lisbon Treaty it is therefore no longer sufficient to determine *'whether'* competence is conferred to the Union by the Treaties in any given case. The renewed line of questioning after the Lisbon Treaty is first of all *'who'* may determine whether competence has been transferred to the Union. The first section will therefore address the issue of whether conferral of competence is *'to give or to grab'*. In other words, is this now placed firmly in the hands of the Member States as masters of the Treaties, through the insertion of the catalogue of competence? Or may the CJEU still continue to claim exclusive jurisdiction to settle EU competence issues, including the extent of its own jurisdiction?

The second section will tackle the other and perhaps even more important new development to be discerned in the case law. In a post-Lisbon setting the outspoken or underlying question has increasingly become the determination of the *'modalities'* of the conferral of competence to the Union, be it in a plain, crippled or split form. As such it is not only important to know whether the EU has been attributed competence but also on what legal basis this was, or should have been, done. A crucial question thereby is to know whether it is the legal basis that determines the plain, crippled or

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external relations: unity and conferral of powers", in Azoulai; L. (ed.), *The question of competence in the European Union*, Oxford University Press, 2014, at p. 65.

<sup>5</sup> Article 47 TEU reads: "The Union shall have legal personality."

<sup>6</sup> Article 19 TEU juncto Article 344 TFEU.

<sup>7</sup> Article 24 TEU.

<sup>8</sup> Protocol N° 21, opt out of the UK and Ireland; Protocol N° 22, special opt out for Denmark.

<sup>9</sup> Article 31 TEU.

split form of conferral, both in theory and practice, or whether the prospect of a crippled or split EU action at all influences the finding of the proper legal basis. By way of caveat, it should be underlined that the Lisbon Treaty reforms have sparked a renewed impetus of cases questioning the external competence of the Union in all its complexities. In spite of the sequential importance of the principle of conferral it is in practice not always easy to 'isolate' this principle from other arguments, such as the application of the principle of institutional balance and/or the duty of sincere cooperation as laid down in Article 13(2) TEU and Article 4(3) TEU.<sup>10</sup> Conversely, it is not because the principle of conferral is invoked in any given case that it is also really in dispute. For instance in the OIV case Germany expressly invoked the principle of conferral albeit it did not really dispute the competence of the EU in the matter. Germany rather seemed to oppose to the implications for the Member States as well as to question to modalities of exercise of EU competence in international fora.<sup>11</sup>

## 2. Section I: The Quest for Control of the Principle of Conferral

### 2.1. Full conferral of competence: the proper legal basis

The Member States' endeavour to gain control over the principle of conferral as a reaction to prior case-law of the CJEU can be discerned throughout the Lisbon Treaty. Contrary to what may be expected, this is not always and necessarily to restrict the transfer of competence to the Union. This is perfectly illustrated by the reaction in the Lisbon Treaty to prior case-law of the CJEU concluding to the absence of competence for the Union to adhere to the ECHR.<sup>12</sup> A remedy is now provided by the insertion of a legal basis in Article 6 TEU stipulating that the EU 'shall accede' to the ECHR, thereby expressly conferring the competence to do so to the EU. The crucial question still left to be solved, especially after Opinion 2/13, is how to safeguard the autonomy of the EU legal order in this accession process.<sup>13</sup> Mostly, however, the Lisbon Treaty does not mean to transfer new competence to the Union. Rather the catalogue of competence inserted in Articles 2-6 TFEU appears to a large extent to codify prior case law of the CJEU in a static manner. The Lisbon Treaty expressly lists the subject matters that fall under exclusive, shared or complementary competence of the Union. But it also goes further, as the Lisbon Treaty additionally spells out the different modalities, as well as consequences for the Member States, of the conferral of competence.<sup>14</sup>

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<sup>10</sup> For a recent example, see Case C-73/14, Council v. Commission (IRLOS), of 6 October 2015, ECLI:EU:C:2015:663. For an analysis of prior cases relating to the duty of sincere cooperation, see for instance Klamert, M., "The Principle of Loyalty in EU Law", Oxford University Press, 2014; Neframi, E., "The duty of loyalty: rethinking its scope through its application in the field of EU external relations", *C.M.L.Rev.* (2010) 323-359; Casteleiro, A., Larik, J., "The duty to remain silent: limitless loyalty in EU external relations?", *E.L.Rev.* (2011) 524-541.

<sup>11</sup> Case C-399/12, Germany v Council, ECLI:EU:C:2014:2258. For an analysis of the issues at stake in this case, see Govaere, I., "Novel Issues Pertaining to EU Member States Membership of other International Organisations: The OIV Case", in Govaere, Van Elsuwege, Stanislas, Lannon, (eds.), *the EU in the World*, Martinus Nijhoff Publishers, 2014, pp. 225-243.

<sup>12</sup> Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:1996:140.

<sup>13</sup> Article 6 TEU states the objective of accession to the ECHR yet does not determine the modalities to do so. The key issue is to safeguard the autonomy of the EU legal order in the process, see the negative opinion on the draft accession agreement, Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (II), ECLI:EU:C:2014:2454.

<sup>14</sup> For instance, Article 2 TFEU reads:

The catalogue of competence thus provides some clarity and transparency which before was sometimes lacking. Unfortunately in so-doing it also creates a false sense of legal certainty as it leaves crucial issues regarding the principle of conferral untouched and unresolved. What, for instance, is the precise scope of the newly formulated Common Commercial Policy (CCP),<sup>15</sup> which is now expressly listed among the exclusive competence of the EU in Article 3(1) TFEU ? How should the conferral of competence be formulated if an agreement relates to different policies, such as both CCP and the internal market, which are listed respectively as exclusive and shared competence ? Not surprisingly such questions were already at the core of the early post-Lisbon case law of the CJEU in the *Daiichi Sankyo*<sup>16</sup> as well as the ‘conditional access’<sup>17</sup> judgments.<sup>18</sup> The CJEU thus necessarily had to come up with new delineating criteria not expressly listed in the Lisbon Treaty to determine the precise legal basis of conferral of competence to the EU. As such it clarified that a CCP relates to measures which ‘specifically’ relate to international trade. This was fulfilled in both cases as they concerned either ‘external harmonization’ of intellectual property rights in the framework of TRIPS/WTO,<sup>19</sup> or the ‘externalisation of the internal market acquis’ for application in third countries.<sup>20</sup>

In spite of all the efforts made by the Member States to control the conferral of competence to the Union it thus immediately became apparent with those first post-Lisbon cases that they did not manage to completely forego the role of the CJEU in interpreting the newly inserted catalogue of competence. However, in terms of modalities of conferral these were rather easy cases. The use of either legal basis, CCP or internal market, anyhow implied a ‘full’ conferral of competence, thus simultaneously to both the EU and the autonomous EU legal order. Considered from a constitutional perspective<sup>21</sup> and maintaining inter-institutional balance the stakes were surely important, but with retrospect not all that high as they initially seemed.

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*“1. When the Treaties confer on the Union exclusive competence in a specific area, 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.*

*2. When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.”*

<sup>15</sup> Article 207 TFEU expressly opens up the scope of CCP to include commercial aspects of intellectual property rights, services and foreign direct investments.

<sup>16</sup> Case C-414/11, *Daiichi Sankyo*, Judgment of the Court (Grand Chamber) of 18 July 2013, ECLI:EU:C:2013:520.

<sup>17</sup> Case C-137/12, *Commission v Council* (European Convention on the legal protection of services based on, or consisting of, conditional access), Judgment of the Court (Grand Chamber) of 22 October 2013, ECLI:EU:C:2013:675.

<sup>18</sup> See inter alia Larik, J., “No mixed feelings: The post-Lisbon Common Commercial Policy in *Daiichi Sankyo* and *Commission v. Council* (Conditional Access Convention)”, *Common Market Law Review*(2015) p.779-799; . Ankersmit, L., “The Scope of the Common Commercial Policy after Lisbon: The *Daiichi Sankyo* and Conditional Access Services Grand Chamber Judgments”, *Legal Issues of Economic Integration* (2014) p.193-209.

<sup>19</sup> Case C-414/11, *Daiichi Sankyo* , o.c., para 52-53. The contextual criterion seemed very important in the *Daiichi Sankyo* case, thus begging the question of the legal basis for so-called TRIPS+ provisions in bilateral agreements. On such TRIPS+ obligations, see the respective contributions : Aleman, M., “Impact of TRIPS-Plus obligations in economic partnership – and free trade agreements on international IP law; Nadde-Phlix, S., “IP protection in EU free trade agreements vis-à-vis IP negotiations in the WTO”, both in Drexl et al (eds.), *EU bilateral trade agreements and intellectual property: for better or worse ?*, Springer, 2014 at respectively pp. 61-85 and 133-156.

<sup>20</sup> Case C-137/12, *Commission v Council* (European Convention on the legal protection of services based on, or consisting of, conditional access), o.c., para 64-65.

<sup>21</sup> The CJEU consistently holds that the choice of legal basis has constitutional significance, see Opinion 2/00, *Cartagena Protocol*, ECLI:EU:C:2001:664, at para 5.

The above judgments were rapidly followed by more truly challenging cases in terms of conferral of competences post-Lisbon.

## 2.2. Conferral of competence: to give or to grab ?

A degree of complexity was already added in the cases where the Member States pointed out that they clearly meant to reserve competence to themselves by virtue of the Lisbon Treaty. Such was the firm position of the Council and the Member States in both the “*Broadcasting Organisations*” case<sup>22</sup> and Opinion 1/13.<sup>23</sup> In both cases they argued that the Member States, as masters of the Treaties, had on purpose only expressly inserted the ERTA test of ‘*to affect internal measures or alter their scope*’ in Article 3(2) TFEU. In other words, they claimed that the Lisbon Treaty only partially codified prior implied powers case law of the CJEU. The intended effect was thus to lead to a reversal of prior case law of the CJEU in the ILO<sup>24</sup> and Lugano Convention<sup>25</sup> Opinions which introduced the test of ‘*already covered to a large extent*’.<sup>26</sup> It was spelled out to the CJEU that to reinstate the latter case law post-Lisbon would amount to an “*unlawful extension of the scope of Article 3(3) TFEU contrary to the principle of conferral*”.<sup>27</sup>

This argument fully exposes the underlying quest for control over the principle of conferral through the introduction and formulation of the catalogue of competence in the Lisbon Treaty. Is EU competence for the Member States to give, and if so also to freely take back, by virtue of the Treaties ? Or is conferral of competence a concept of EU law so that the CJEU may firmly grab control in order to safeguard a uniform and binding interpretation for all the Member States alike ?

It does not come as a total surprise that the CJEU was clearly not inclined to follow the Member States in a textual interpretation of the Treaty provisions. Instead it again turned to its habitual purposive method of interpretation of the Treaties, whereby it interprets individual EU law provisions in the light of the objectives of the EU Treaties.<sup>28</sup> As such, it pointed out that the ILO and Lugano Convention developments in implied powers reasoning were not new and separate tests but rather interpretations of the original ERTA-test, which could thus anyhow still be applied post-Lisbon.<sup>29</sup> At least for the sake of clarity as to who controls the principle of

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<sup>22</sup> Case C- 114/12, *Commission v Council*, Convention of the Council of Europe on the protection of the rights of broadcasting organisations, ECLI:EU:C:2014:2151.

<sup>23</sup> Opinion 1/13, Convention on the civil aspects of international child abduction, ECLI:EU:C:2014:2303

<sup>24</sup> Opinion 2/91, Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work, ECLI:EU:C:1993:106.

<sup>25</sup> Opinion 1/03, Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, ECLI:EU:C:2006:81.

<sup>26</sup> Opinion 1/03 enlarges this to include ‘foreseeable developments’ of EU law, see at para 126: “*However, it is not necessary for the areas covered by the international agreement and the Community legislation to coincide fully. Where the test of ‘an area which is already covered to a large extent by Community rules’ (Opinion 2/91, paragraphs 25 and 26) is to be applied, the assessment must be based not only on the scope of the rules in question but also on their nature and content. It is also necessary to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis (see, to that effect, Opinion 2/91, paragraph 25).*”

<sup>27</sup> Case C-114/12, o.c., at para 60.

<sup>28</sup> I have argued elsewhere that only a clear and express prohibition in the Treaties could limit the purposive method of interpretation, as the CJEU adopts a pro-*legem*, but not a contra-*legem* interpretation of the Treaties, see Govaere, I., “Setting the international scene”: EU external competence and procedures post-Lisbon revisited in the light of ECJ Opinion 1/13”, CMLRev,(2015) 1277–1308.

<sup>29</sup> For a detailed analysis in terms of implied powers reasoning, see Govaere, I., “Setting the international scene”: EU external competence and procedures post-Lisbon revisited in the light of ECJ Opinion 1/13”, CMLRev,(2015) 1277–1308.

conferral, it is to be welcomed that the CJEU, contrary to for instance Advocate General Jääskinen in his view on Opinion 1/13,<sup>30</sup> did not additionally search for the intention of the drafters of the Lisbon Treaty in order to guide its conclusions in casu.<sup>31</sup> It also firmly rejected the reference to Protocol 25 by pointing out that this protocol only applies to Article 2(2) TFEU in relation to the exercise of shared competence, and cannot serve to limit the conferral of exclusive competence to the EU by virtue of Article 3(2) TFEU.<sup>32</sup>

Yet what is then the meaning of the principle of conferral of competence for those cases? Rather than making an abstract assessment on the basis of the Treaty provisions, the CJEU indicated that, to answer this crucial question, an assessment of the *ERTA* criteria need to be made in concreto, in the light of each case. In the words of the CJEU:

*“ That said, it is important to note that, since the European Union has only conferred powers, any competence, especially where it is exclusive, must have its basis in conclusions drawn from a specific analysis of the relationship between the envisaged international agreement and the EU law in force, from which it is clear that such an agreement is capable of affecting the common EU rules or of altering their scope (see, to that effect, Opinion 1/03, EU:C:2006:81, paragraph 124). ”*<sup>33</sup>

This forceful statement is most likely meant to act as a counterweight for the generous application and interpretation of the *ERTA* test. It is nonetheless difficult to disagree with Alan Rosas that the reasoning in Opinion 1/13 creates the impression of a low threshold for concluding to an *ERTA* effect,<sup>34</sup> and thus to the conferral of competence to the EU.

The same reasoning was already applied in the *Broadcasting Organisations* judgment. A bit more puzzling, however, considering that it concerns a structural principle of constitutional significance, is that the CJEU in the *Broadcasting Organisations* case then proceeds to point to the burden of proof specifically in relation to the principle of conferral:

*“In accordance with the principle of conferral as laid down in Article 5(1) and (2) TEU, it is, for the purposes of such an analysis, for the party concerned to provide evidence to establish the exclusive nature of the external competence of the EU on which it seeks to rely.”*<sup>35</sup>

Does the CJEU mean to say that there is a burden of proof solely in relation to the exclusive nature of EU competence, or with respect to the application of the principle of conferral itself ? And on who rests such a burden of proof ? Should the Commission *in casu* provide all the necessary evidence, so as to avoid the conclusion that (exclusive) competence is not transferred to the EU ? If so, to what extent is it then really up to the Council and the Member States to prove that the negotiations ‘might also go beyond the EU *acquis*’ to support their claim that

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<sup>30</sup> View of AG Jääskinen, Opinion 1/13, ECLI:EU:C:2014:2292, at para 70.

<sup>31</sup> Yet note that in a very early post Lisbon case, the CJEU did point to the intention of the drafters of the Treaties, see Case C-130/10, *European Parliament v Council (Financial sanctions)*, ECLI:EU:C:2012:472, at para 82: *“Nevertheless, the difference between Article 75 TFEU and Article 215 TFEU, so far as the Parliament’s involvement is concerned, is the result of the choice made by the framers of the Treaty of Lisbon conferring a more limited role on the Parliament with regard to the Union’s action under the CFSP.”*

<sup>32</sup> Case C-114/12, o.c., at para 73.

<sup>33</sup> Case C-114/12, o.c., at para 74. Compare to Opinion 1/13, o.c., para 74, which is very similar in formulation but with the added reference to also ‘foreseeable developments’ of EU law by reference to Opinion 1/03.

<sup>34</sup> Rosas, A., *EU external relations: exclusive competence revisited*, *Fordham International Law Journal* (2015) 1073-1096, at p. 1091.

<sup>35</sup> Case C-114/12, o.c., at para 75.



(exclusive) competence has not been conferred, rather than for the Commission to prove the contrary?<sup>36</sup>

In spite of those questions, the key issue with this reference to the burden of proof lies elsewhere. It could be maintained that the application of such a crucial structural principle as the principle of conferral should not depend mainly or even exclusively on whether the EU institutions have done their homework sufficiently well. Could, or even should, it not be applied *ex officio* by the CJEU? Considering the similarity in reasoning of the CJEU in both cases, it is striking that Opinion 1/13, which was rendered about 1 month after the *Broadcasting Organisations* case, no longer mentions the burden of proof in relation to the principle of conferral. This may in part be due to the fact that here it concerned an advisory opinion rather than an adversary procedure, thereby clearly exposing the limits of the burden of proof approach adopted in the *Broadcasting Organisations* case. What those cases reveal, however, is that the CJEU has maintained the application of the principle of conferral firmly within its grasp also post-Lisbon. Yet in so-doing it appears to be struggling to ascertain the precise grounds for, and limits to, its exclusive jurisdiction.

### 3. Section 2: Special Modalities of Conferral

In post-Lisbon practice not many cases openly address the issue of whether or not external power is at all conferred to the EU, in spite of the theoretical importance of the question,. More often cases expressly or impliedly raise the issue of the precise modalities of the conferral,<sup>37</sup> with the added difficulty in terms of possible crippled and/or split conferral of competence.

#### 3.1. Crippled and semi-crippled conferral of competence

Also before the Lisbon Treaty it was theoretically possible to conclude to a crippled conferral of competence, whereby competence would be conferred to the EU without the corresponding conferral to the autonomous legal system. Pre-Lisbon both the CFSP and JAI pillars were to a large extent kept outside the scope of EU judicial and EU democratic control in favour of bundling such control at the level of the Member States. The practical effect thereof was, however, strongly mitigated by the clear statement in ex Article 47 TEU that the two EU pillars should not affect the EC pillar. This allowed the CJEU to jealousy shield the external *acquis communautaire* against any unwarranted influence from those intergovernmental pillars.<sup>38</sup> Full conferral of competence to the EC was thus systematically favoured over a crippled conferral to the EU. The Lisbon Treaty has fundamentally altered this given.

#### a. Redressing full and crippled competence

The Lisbon Treaty at first sight simplifies the system. It formally abolishes the pillar structure which leads to the incorporation of the former third pillar into the autonomous EU legal order.<sup>39</sup> But at the same time it re-inserts the CFSP as a 'horizontal pillar'<sup>40</sup> by stipulating in Article 24 TEU that "(t)he common foreign and

<sup>36</sup> Case C-114/12, o.c., at para 95.

<sup>37</sup> See above pt. 2. for full or plain conferral cases.

<sup>38</sup> See especially Case C-91/05, *Commission v Council, ECOWAS*, ECLI:EU:C:2008:288. On this case, see for instance Van Vooren, B., "EU-EC External Competences after the Small Arms Judgment" (2009) 14 *European Foreign Affairs Review*, Issue 1, pp. 7-24.

<sup>39</sup> See below pt. 5.

<sup>40</sup> On this concept, see Govaere, I., "Multi-faceted Single Legal Personality and a Hidden Horizontal Pillar: EU External Relations Post-Lisbon", *Cambridge Yearbook of European Legal Studies*, Vol 13, 2010-2011, pp. 87-112.

*security policy is subject to specific rules and procedures*". In essence this implies that the inter-governmental approach still prevails for CFSP measures post-Lisbon, whereby also judicial and democratic control is largely kept at national level, thus outside the autonomous EU legal order.<sup>41</sup> With respect to CFSP the major change in terms of conferral of competence is, however, to be found in Article 40 TEU which redrafts the former Article 47 TEU.<sup>42</sup> It is still stipulated that CFSP shall not affect 'other external EU action' listed in the TFEU. But, importantly, a counterweight is added in the second paragraph stipulating that that 'other external EU action' may not affect the exercise of the Union competences under CFSP.

In so-doing the Lisbon Treaty radically alters the prior approach as it removes the possibility to systematically favour full conferral over crippled conferral of competence.<sup>43</sup> This was clearly illustrated already by the very first post-Lisbon case, the *Financial Sanctions* case, relating to a dispute between the European Parliament and the Council on the proper legal basis to adopt restrictive measures against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban.<sup>44</sup> The European Parliament had expressly drawn the CJEU's attention to the continuing crippled nature of conferral of competence by virtue of CFSP post-Lisbon. In particular the European Parliament evoked the consequences in terms of the level of exercise of democratic control in case the legal basis for a full conferral, Article 75 TFEU, was rejected in favour of Article 215 TFEU.<sup>45</sup> This case is nonetheless special for it only presented features of 'semi-crippled conferral' as it concerned the adoption of financial sanctions which, even under CFSP, exceptionally come under judicial control of the CJEU.<sup>46</sup> As such the only issue at stake was whether democratic control could be kept at the level of the Member States whilst conferring competence to the EU and exclusive jurisdiction to the CJEU.

In line with the newly formulated Article 40 TEU, the CJEU firmly rejected the reasoning that the prospect of a full or (semi-)crippled conferral of competence should determine the legal basis withheld. The Court held that the fact that the European Parliament is only informed and not a co-legislator under CFSP cannot determine the choice of legal basis.<sup>47</sup> Instead it agreed with the Council that "*it is not procedures that define the legal basis of a measure but the legal basis of a measure*

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<sup>41</sup> Article 24 TEU specifies: "*It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.*"

<sup>42</sup> Article 40 TEU (ex Article 47 TEU) reads:

*"The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union.*

*Similarly, the implementation of the policies listed in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter."*

<sup>43</sup> See also Dashwood, A., "The Continuing Bipolarity of EU External Action", in Govaere, Lannon, Van Elsuwege, Adam (eds.), "The European Union in the World", Brill 2014, pp. 3-16.

<sup>44</sup> Case 130/10, EP v. Council, o.c..

<sup>45</sup> Case 130/10, EP v. Council, o.c., at para 32.

<sup>46</sup> Article 275 TFEU.

<sup>47</sup> Case 130/10, EP v. Council, o.c., para 79-80

*that determines the procedures to be followed in adopting that measure*".<sup>48</sup> The full importance of the renewed post-Lisbon setting in terms of conferral of competence was made clear by further underlining : *"..the difference between Article 75 TFEU and Article 215 TFEU, so far as the Parliament's involvement is concerned, is the result of the choice made by the framers of the Treaty of Lisbon conferring a more limited role on the Parliament with regard to the Union's action under the CFSP"*.<sup>49</sup> This clearly shows that all the Treaty legal bases relating to external relations are now on equal footing and should be assessed on their own merit.

## **b. Mixed legal basis CFSP-Other external action ?**

The above finding leads to the next question: if in a post-Lisbon setting full conferral of competence can no longer be systematically favoured over crippled conferral, is it then at all conceivable to conclude to a mixed legal basis CFSP and other EU external action ? In other words, is it possible to combine full and crippled conferral of competence in relation to one and the same legal act ? The common procedural provision for the conclusion of agreements inserted by the Lisbon Treaty, Article 218 TFEU, could perhaps seem to militate in favour of such a conclusion.<sup>50</sup> However, the *financial sanctions* case raises important considerations in this respect. The CJEU pointed to the absence of democratic control by the EU under CFSP as compared to the full democratic control at EU level for other external action,<sup>51</sup> to conclude forcefully *"(d)ifferences of that kind are such as to render those procedures incompatible"*.<sup>52</sup> The CJEU proceeded unequivocally to spell out the consequences: *"It follows from the foregoing that, even if the contested regulation does pursue several objectives at the same time or have several components indissociably linked, without one's being secondary to the other, the differences in the procedures applicable under Articles 75 TFEU and 215(2) TFEU mean that it is not possible for the two provisions to be cumulated, one with the other, in order to serve as a twofold legal basis for a measure such as the contested regulation"*.<sup>53</sup> If it is fundamentally incompatible to combine semi-crippled and full conferral of competence because of the different level of democratic control, then it would surely not be logical to allow for a mixed legal basis including a CFSP provision other than Article 215 TFEU. A strong case can be made that truly crippled conferral under CFSP, whereby not only democratic control by the European Parliament but additionally all judicial control by

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<sup>48</sup> Case 130/10, EP v. Council, o.c., para 80

<sup>49</sup> Case 130/10, EP v. Council, o.c., para 82

<sup>50</sup> The fact that both CFSP and 'other' external relations agreements are to be concluded on the basis of Article 218 TFEU seems to set this question apart from the procedural issue in relation to "mixed agreements" concluded on behalf of both the EU and its Member States. In relation to the latter, see Case C- 28/12 , Commission v. Council, Mixed international agreements, ECLI:EU:C:2015:282 , see especially at para 47-53. At para 49 and 50, the CJEU points in particular to the following: "(49) First, that decision in fact merges two different acts, namely, on the one hand, an act relating to the signing of the agreements at issue on behalf of the European Union and their provisional application by it and, on the other, an act relating to the provisional application of those agreements by the Member States, without it being possible to discern which act reflects the will of the Council and which the will of the Member States.

(50) *It follows that the Member States participated in the adoption of the act relating to the signing of the agreements at issue on behalf of the European Union and their provisional application by it although, under Article 218(5) TFEU, such an act must be adopted by the Council alone. Moreover, the Council was involved, as an EU institution, in the adoption of the act concerning the provisional application of those agreements by the Member States although such an act falls within the scope of, first of all, the internal law of each of those States and, then, international law.*" For a comment, see Flaesch-Mougin, C., RTDEur (2015) 617-621.

<sup>51</sup> Case 130/10, EP v. Council, o.c., para 47

<sup>52</sup> Case 130/10, EP v. Council, o.c., para 48.

<sup>53</sup> Case 130/10, EP v. Council, o.c., para 49.

the CJEU is excluded, can never go hand in hand with a finding of full conferral on the basis of other Treaty provisions. One and the same measure can hardly at the same time be within and outside the autonomous EU legal order. But such a conclusion would then entail that, instead, a clear and often difficult choice will need to be made between CFSP and other EU external action as a legal basis where a measure has multiple objectives.

### c. Centre of gravity test

This begs the question of what objective legal criteria could and should be used by the CJEU to determine the proper legal basis of the conferral. An easy answer is of course to point to the centre of gravity test to conclude to a full or crippled conferral of competence. But this is only half of the answer. The precise criteria to be applied to establish the gravity in each and every case may be less easy to pinpoint in a satisfactory manner. Also this was illustrated by the *Financial Sanctions* case. Here the CJEU first invoked the centre of gravity test to proceed to rule in favour of CFSP as the sole legal basis. It held in essence that Article 215 TFEU provides for action to counter the threat of 'international' terrorism, in relation to persons in third countries.<sup>54</sup> This was held to be the case of the envisaged measure so that Article 75 TFEU, which should then be taken to refer to financial sanctions to counter threats 'internal' to the Area of Freedom, Security and Justice, was not withheld. Not surprisingly, much of the debate in legal doctrine has focused precisely on these criteria laid down by the CJEU,<sup>55</sup> as it seems especially difficult to isolate international from internal terrorism in practice.

The centre of gravity test was also put forward in the subsequent *Mauritius Agreement* case<sup>56</sup> which again opposed the European Parliament to the Council concerning a measure relating to both CFSP and other external action of the EU. Yet this time the dispute did not concern the proper legal basis for the conferral of the competence as such. The European Parliament in fact expressly agreed with the use of the sole legal basis of Article 37 TEU to the extent that the other external relations objectives were merely incidental to the principle aim of the Agreement relating to CFSP.<sup>57</sup> Instead, the European Parliament sought to alter the status of the Agreement from a crippled conferral to more of a full conferral through the backdoor of the unitary procedural provision for the conclusion of agreements, Article 218 TFEU.

### d. Reducing the Handicap

The argument of the European Parliament in the *Mauritius Agreement* case first of all went that considering the underlying multiple objectives of the Mauritius Agreement it did not constitute an 'agreement exclusively related to CFSP', so that it should have been duly consulted pursuant to Article 218(6) TFEU.<sup>58</sup> The CJEU however rejected

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<sup>54</sup> Case 130/10, *EP v. Council*, o.c., para 55-66.

<sup>55</sup> See for instance the respective contributions by Hillion, C., "Fighting Terrorism Through the Common Foreign and Security Policy" and Czuczai, J., "The Powers of the Council concerning the Emergency of International Terrorism after the Judgment in Case C-130/10 *Parliament v. Council*", both in Govaere & Poli (eds.), "EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises", Brill, 2014, at pp. 75-95 and 97-110 respectively.

<sup>56</sup> Case C-658/11, *European Parliament v Council, Mauritius Agreement*, ECLI:EU:C:2014:2025. For a comment, see Van Elsuwege, P., "Securing the institutional balance in the procedure for concluding international agreements: *European Parliament v. Council (Pirate Transfer Agreement with Mauritius)*", *Common Market Law Review* (2015) pp. 1379–1398.

<sup>57</sup> Case C-658/11, o.c., para 44-45.

<sup>58</sup> Article 218(6) TFEU reads as follows: "*The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.*"

this interpretation by reiterating that the substantive legal basis of a measure determines the procedure to be followed, and not vice versa, with the additional clarification that this includes the procedures under Article 218 (6) TFEU.<sup>59</sup> In other words, if the sole legal basis legitimately withheld exclusively confers a crippled competence to the EU, then the handicap in terms of EU level democratic procedures cannot be remedied by pointing to other incidental (full) competence nor to the common procedural provision for the conclusion of agreements.<sup>60</sup>

The second argument of the European Parliament was however more successful. The CJEU agreed that the Council had nonetheless infringed Article 218 (10) TFEU by failing to immediately and fully inform the European Parliament at all stages of the procedure for negotiating and concluding the EU- Mauritius Agreement.<sup>61</sup> The CJEU refused to equate the European Parliament's exclusion from the procedures for negotiating and concluding a CFSP-based agreement with a total absence of a right of scrutiny. Instead, it pointed out that the Lisbon Treaty precisely enhanced the importance of the exercise, at EU level, of democratic scrutiny of EU external action by inserting this information obligation applicable to all the types of procedures listed in Article 218 TFEU, including CFSP. Article 218 (10) TFEU was held to be an essential procedural requirement, breach of which necessarily leads to the annulment of the contested decision.<sup>62</sup>

Very importantly, in so-doing the CJEU also forcefully claimed its own jurisdiction to fully interpret the common procedural provision of Article 218 TFEU. It firmly rejected the argument of the Council that, since the CJEU in principle has no jurisdiction to control CFSP, it also has no jurisdiction to rule on the legality of a measure adopted on the basis of CFSP. The CJEU pointed out that Articles 24 (1) TEU and 275 (1) TFEU introduce a derogation to the rule of general jurisdiction of the CJEU laid down

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*Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:*

*(a) after obtaining the consent of the European Parliament in the following cases:*

*(i) association agreements;*

*(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;*

*(iii) agreements establishing a specific institutional framework by organising cooperation procedures;*

*(iv) agreements with important budgetary implications for the Union;*

*(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.*

*The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.*

*(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act."*

<sup>59</sup> Case C-658/11, o.c., para 57-58. The CJEU first reasoned in terms of symmetry in internal measures and international agreements, in compliance with the institutional balance, see also para 56.

<sup>60</sup> The CJEU further reasoned as follows in para 60: "That interpretation is justified particularly in the light of the requirements relating to legal certainty. By anchoring the procedural legal basis to the substantive legal basis of a measure, this interpretation enables the applicable procedure to be determined on the basis of objective criteria that are amenable to judicial review, as noted in paragraph 43 of the present judgment. That ensures consistency, moreover, in the choice of legal bases for a measure. By contrast, the interpretation advocated by the Parliament would have the effect of introducing a degree of uncertainty and inconsistency into that choice, in so far as it would be liable to result in the application of different procedures to acts of EU law which have the same substantive legal basis."

<sup>61</sup> Case C-658/11, o.c., para 75-76.

<sup>62</sup> Case C-658/11, o.c., para 79-87. However, the CJEU added: "It must be acknowledged that annulment of the contested decision without maintenance of its effects would be liable to hamper the conduct of operations carried out on the basis of the EU-Mauritius Agreement and, in particular, the full effectiveness of the prosecutions and trials of suspected pirates arrested by EUNAVFOR."(para 90).

in Article 19 TEU, so that, as all derogations, they “*must, therefore, be interpreted narrowly*”.<sup>63</sup> The CJEU concluded that:

*“it cannot be argued that the scope of the limitation, by way of derogation, on the Court’s jurisdiction envisaged in the final sentence of the second subparagraph of Article 24(1) TEU and in Article 275 TFEU goes so far as to preclude the Court from having jurisdiction to interpret and apply a provision such as Article 218 TFEU which does not fall within the CFSP, even though it lays down the procedure on the basis of which an act falling within the CFSP has been adopted”*.<sup>64</sup>

As a consequence, the CJEU may thus annul any decision, including exclusively CFSP measures, for breach of an essential procedural requirement listed in Article 218 TFEU. As a counterpart, this most likely entails that the CJEU would also claim jurisdiction to deliver a corresponding Advisory Opinion under Article 218 (11) TFEU, not shying away from envisaged CFSP agreements. The recent statement by the CJEU that “*Article 218 TFEU constitutes, as regards the conclusion of international treaties, an autonomous and general provision of constitutional scope*”,<sup>65</sup> appears to be foreboding in this respect.

As a result of such case-law which deftly explores the potential of the unitary procedural provision of Article 218 TFEU, CFSP thus becomes a bit less of a crippled competence than it was most likely intended to be by the Member States in the Lisbon Treaty. One may discern an echo to pre-Lisbon case law, notably in the *Kadi* cases,<sup>66</sup> where the CJEU already firmly claimed jurisdiction to perform a legality control including of CFSP related measures for respect of fundamental rights.<sup>67</sup> But as important as it may be, case law merely reduces and cannot totally overcome the initial handicap for the application of the autonomous EU legal order in CFSP matters written into the Lisbon Treaty. At best it qualifies the degree of crippled conferral short of turning it into a full conferral.

### 3.2. Split conferral

A different problem is posed where most but not all of the Member States confer competence to the EU. Already prior to the Lisbon Treaty this was made possible by the insertion of the constructive abstention procedure as regards CFSP.<sup>68</sup> A number of Member States may thus decide not to be bound by a CFSP measure but to allow the others to go ahead. For the latter the conferral of powers takes place without the corresponding transfer to the autonomous EU legal order. Using a CFSP legal basis together with the constructive abstention procedure thus in fact amounts to a combined split crippled conferral which remains to a large extent outside the control of the CJEU.

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<sup>63</sup> Case C-658/11, o.c., para 70.

<sup>64</sup> Case C-658/11, o.c., para 73.

<sup>65</sup> Case C- 425/13, *Commission v. Council (Negotiating Directives)*, ECLI:EU:C:2015:483, para 62. The main issue in this case concerned Article 218 (4) TFEU and institutional balance.

<sup>66</sup> Joined cases C-402/05 P and C-415/05 P, *Kadi I*, ECLI:EU:C:2008:461 and Joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, ECLI:EU:C:2013:518. Govaere, I., “The importance of International Developments in the case-law of the European Court of Justice: *Kadi* and the autonomy of the EC legal order”, in Hiscock, M. & van Caenegem, W. (eds.), *The Internationalisation of Law: Legislation, Decision-Making, Practice and Education*, Edward Elgar Publishing, 2010, p. 316-340. Much has been written about these cases, see the doctrine mentioned in Poli, S., Tzanou, M., “The *Kadi* Rulings: A Survey of the Literature”, *Yearbook of European Law* (2009) 533-558; Avbelj, M., Fontanelli, F., Martinico, G. (eds). “*Kadi* on Trial: A Multifaceted Analysis of the *Kadi* Trial”, Routledge, 2014.

<sup>67</sup> Codified in Article 275 (2) TFEU by the Lisbon Treaty.

<sup>68</sup> Article 31 TEU.

### a. Post-Lisbon split conferral

The novelty of the Lisbon Treaty lies in the fact that the former third pillar is abolished and fully incorporated into the autonomous EU legal order, thus in principle leading to a full conferral of competence to the EU. The difficulty lies, however, in the fact that the opt-outs for the UK, Ireland and Denmark have been expressly confirmed to apply in a post-Lisbon setting.<sup>69</sup> Triggering the opt outs with respect to external measures relating to the area of freedom, security and justice therefore amount to a straightforward split conferral under the control of the CJEU. This has induced a novel line of questioning in terms of external relations competence which, however, is still in a rather embryonic state.<sup>70</sup>

The difficulty of coming to terms with those important variations of split conferral in a post-Lisbon era was not really acknowledged in the *Mauritius Agreement* case. Advocate General Bot did, however, expressly point to the necessity to delineate between the external action of respectively the EU as such, the Area of Freedom Security and Justice, and CFSP but without analysing the different modalities of conferral involved.<sup>71</sup>

### b. Split of full conferral

The issue of the split conferral was posed again in the *Philippines Agreement* case.<sup>72</sup> Whereas it was not disputed that a double legal basis CCP and development cooperation was indicated *in casu* nor that the Agreement should be concluded in a mixed form, ie. on behalf of the both the EU and the Member States, the addition of other legal basis was source of conflict and institutional bickering. The CJEU in essence agreed with the Commission that development cooperation should be broadly interpreted so as to ‘absorb’ the provisions in the Agreement relating to transport and environment, but also re-admission of third country nationals.<sup>73</sup> In so doing the CJEU downplayed the importance of the lack of conferral of competence by the UK, Ireland and Denmark by virtue of the opt outs. Instead it concluded to a full conferral to the EU by all the Member States under the development cooperation legal basis.

Contrary to the environment and transport chapters, the CJEU did acknowledge that the Agreement contained ‘specific obligations’ for the contracting parties as concerns re-admission of third country nationals. In particular, the CJEU pointed out that the “*Republic of the Philippines and the Member States undertake therein to readmit*

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<sup>69</sup> See Protocols N° 21 and 22 respectively. This should be read together with Declaration 65: “*Declaration by the United Kingdom of Great Britain and Northern Ireland on Article 75 of the Treaty on the Functioning of the European Union.*”

*The United Kingdom fully supports robust action with regard to adopting financial sanctions designed to prevent and combat terrorism and related activities. Therefore, the United Kingdom declares that it intends to exercise its right under Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice to take part in the adoption of all proposals made under Article 75 of the Treaty on the Functioning of the European Union.*”

<sup>70</sup> See Govaere, I., and Demedts, V., ‘Quelle définition de l’“externe” en matière d’ELSJ? Le cadre et les enjeux’, *La dimension extérieure de l’espace de liberté, de sécurité et de justice de l’Union européenne après le traité de Lisbonne*, Bruylant, 2013, pp. 489-509; Neframi, E., ‘L’aspect externe de l’espace de liberté, de sécurité et de justice: quel respect des principes et objectifs de l’action extérieure de l’Union?’, *La dimension extérieure de l’espace de liberté, de sécurité et de justice de l’Union européenne après le traité de Lisbonne*, Bruylant, 2013, p. 509.

<sup>71</sup> Opinion Advocate General Bot, Case C-658/11, *European Parliament v Council, Mauritius Agreement*, ECLI:EU:C:2014:41, at para 106-108.

<sup>72</sup> Case C-377/12, *Commission v Council, Philippines Agreement*, ECLI:EU:C:2014:1903.

<sup>73</sup> On this case, see Broberg, M., Holdgaard, R., “Demarcating the Union’s Development Cooperation Policy after Lisbon: Commission v. Council (Philippines PCFA)”, *Common Market Law Review*, (2015) pp. 547–567.

*their nationals who do not fulfil, or no longer fulfil, the conditions of entry or residence on the territory of the other party, upon request by the latter and without undue delay once the nationality of those nationals has been established and due process carried out, and to provide their nationals with documents required for such purposes. They also agree to conclude an agreement governing admission and readmission as soon as possible*.<sup>74</sup> In spite of such clear and specific obligations pinpointed in the Agreement, the CJEU nonetheless motivated the disregard of the opt outs by reference to the absence of ‘detailed’ provisions for the implementation of the re-admission process. The fact that reference is made in the Agreement to the future conclusion of a readmissions agreement apparently serves to support such a conclusion.<sup>75</sup> On this basis the CJEU proceeded to state that “*the provisions of the Framework Agreement relating to readmission of nationals of the contracting parties, to transport and to the environment do not contain obligations so extensive that they may be considered to constitute objectives distinct from those of development cooperation that are neither secondary nor indirect in relation to the latter objectives*”.<sup>76</sup> This reasoning immediately triggers the question as of when ‘specific’ provisions on re-admission of third country nationals would be considered to be ‘sufficiently detailed’ and thus ‘sufficiently extensive’ so as to justify recourse to a split conferral legal basis.

### **c. Mixed legal basis full and split conferral ?**

A crucial underlying issue is whether, and if so when, the CJEU would allow at all for a combined use of a full and split conferral as legal bases. It cannot go unnoticed that in the *Philippines Agreement* case the Commission had forcefully spelled out that in particular the addition of Article 79(3) TFEU as a legal basis would produce unwarranted legal effects, both internally and externally. The Commission had warned that such a legal basis would trigger the opt outs under Protocols N° 21 and N° 22 thereby leading not only to incompatible procedures but also to uncertainty about the degree of exercise of the EU’s competence under Articles 3(2) TFEU and 4(2) TFEU.<sup>77</sup> The Council had countered this argument by first of all reiterating the CJEU’s statements in the above mentioned ‘crippled conferral’ cases, namely that “*it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure*”.<sup>78</sup> The Council also pointed out that the obligations of the various Member States may

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<sup>74</sup> Case C-377/12, o.c., para 57.

<sup>75</sup> Case C-377/12, o.c., para 58: *Whilst Article 26(3) of the Framework Agreement does admittedly contain wording stating how requests for readmission are to be dealt with, the fact remains that, as is apparent from Article 26(2)(f), the readmission of persons residing without authorisation is included in Article 26 as one of the matters upon which cooperation on migration and development will have to focus, without it being covered at this stage by detailed provisions enabling its implementation, such as those contained in a readmission agreement. It cannot therefore be considered that Article 26 of the Framework Agreement prescribes in concrete terms the manner in which cooperation concerning readmission of nationals of the contracting parties is to be implemented, a conclusion which is reinforced by the commitment, in Article 26(4), to conclude a readmission agreement very soon.*

<sup>76</sup> Case C-377/12, o.c., para 59.

<sup>77</sup> Case C-377/12, o.c., para 22. Article 3(2) TEU stipulates: “*The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime*”. Article 4(2) TEU reads: “*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State*”.

<sup>78</sup> Case C-377/12, o.c., para 31.



not vary all that much in practice, as the opt out Member States may choose to opt in a particular measure or to conclude similar obligations with the third country bilaterally. It is clear, however, that in the latter case they would only be bound by virtue of international law and not by virtue of EU law,<sup>79</sup> thus not resolving the unwarranted legal effect the Commission is pointing to.

Subsequent case law has clarified that “*Protocol No 21 is not capable of having any effect whatsoever on the question of the correct legal basis for the adoption of the contested decision*”.<sup>80</sup> At least not in the sense that the UK could successfully claim the (additional) use of Article 79 TFEU as the correct legal basis for external measures as soon as it related to the situation of third country nationals. Already in the EEA Agreement and Swiss Agreement<sup>81</sup> cases relating to social security for EEA and Swiss nationals respectively, the CJEU followed the interpretation of Advocate General Kokott,<sup>82</sup> whereby Article 79 TFEU is held to strictly relate to the development of external borders measures, in terms of border checks, asylum and migration.<sup>83</sup> This was held to be different and even ‘manifestly irreconcilable’<sup>84</sup> with the objectives of the EEA Agreement as the latter means to extend<sup>85</sup> internal market measures to the third countries concerned.<sup>86</sup> Full conferral of competence under Article 48 TFEU was therefore withheld rather than a split conferral on the basis of Article 79 TFEU.

Interestingly, however, in the EEA Agreement cases the CJEU also plainly rejected the reasoning of the UK invoking the use of Article 79 TFEU for other similar decisions in relation to other third countries. It was spelled out that each act must be assessed on its own aim and content in order to establish the proper legal basis.<sup>87</sup> In

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<sup>79</sup> This is also follows from Recitals 2 & 3 in the Preamble to the contested decision in the Philippines case:

“(2) *The provisions of the [Framework] Agreement that fall within the scope of Part Three, Title V of the [FEU Treaty] bind the United Kingdom and Ireland as separate Contracting Parties, and not as part of the European Union, unless the European Union together with the United Kingdom and/or Ireland have jointly notified the Republic of the Philippines that the United Kingdom or Ireland is bound as part of the European Union in accordance with the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of Freedom, Security and Justice annexed to the [EU Treaty] and the [FEU Treaty]. If the United Kingdom and/or Ireland cease(s) to be bound as part of the European Union in accordance with Article 4a of the Protocol (No 21), the European Union together with the United Kingdom and/or Ireland are to immediately inform the Republic of the Philippines of any change in their position in which case they are to remain bound by the provisions of the [Framework] Agreement in their own right. The same applies to Denmark in accordance with the Protocol (No 22) on the position of Denmark annexed to those Treaties.*

(3) *Where the United Kingdom and/or Ireland has/have not provided the notification required under Article 3 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of Freedom, Security and Justice, they do not take part in the adoption by the Council of this Decision to the extent that it covers provisions pursuant to Part Three, Title V of the [FEU Treaty]. The same applies to Denmark in accordance with the Protocol (No 22) on the position of Denmark, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union.* “

<sup>80</sup> Case C-81/13, UK v. Council (Turkey Agreement), ECLI:EU:C:2014:2449, para 37.

<sup>81</sup> Case C-656/11, UK v. Council (Swiss Agreement), ECLI:EU:C:2014:97.

<sup>82</sup> AG Kokott; Case C-431/11, UK v. Council, ECLI:EU:C:2013:187, para 39-41.

<sup>83</sup> Case C-431/11, UK v. Council, ECLI:EU:C:2013:589, para 63.

<sup>84</sup> Case C-431/11, UK v. Council, o.c., para 64.

<sup>85</sup> For a recent assessment of the functioning of the EEA agreement, see Fredriksen, H., Franklin, C., “Of pragmatism and principles: The EEA Agreement 20 years on”, *Common Market Law Review* (2015) pp. 629–684.

<sup>86</sup> Case C-431/11, UK v. Council, o.c., para 58. The CJEU further pointed out that to allow the opt outs to be triggered in such a case would lead to two parallel regimes for the coordination of social security systems (para 65). Also in Case C-656/11, o.c., did the CJEU point out that the European Union extended the application of its legislation concerning coordination of social security systems to the Swiss Confederation, see para 55-67.

<sup>87</sup> Case C-431/11, UK v. Council, o.c., para 66-67.

theory this would then imply that similar decisions relating to different Agreements could have a different legal basis and thus also entail different modalities in terms of conferral of competence. Such a reverse reasoning was subsequently invoked by the UK in the *Turkey Agreement* case, in order to justify a different outcome here and to accept Article 79 TFEU as the correct legal basis. The CJEU however rejected this conclusion by pointing out that besides the objectives and content also the ‘context’ of a measure needs to be taken into account, in particular where it concerns an amendment of rules adopted under an existing agreement.<sup>88</sup> In casu the measure was adopted in the context of the EEC-Turkey 1963 Association Agreement, constituting a further step in the objective to progressively secure free movement for workers between the European Union and Turkey under the association agreement.<sup>89</sup>

If the contextual setting was thus similar, the main difference was to be found in the different objective of the Turkey Association Agreement which falls short of the EEA Agreement objective to extend the internal market to the third country concerned. The CJEU therefore agreed with the UK that the contested decision could not legitimately be adopted exclusively on the basis of Article 48 TFEU.<sup>90</sup> But it disagreed that it was the split conferral legal basis of Article 79 TFEU that should be added. The CJEU conceded to the UK that *“it is true that Article 79(2)(b) TFEU empowers the European Union to adopt measures defining the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States”*.<sup>91</sup> Only to immediately limit the scope of application to serve strictly the purposes of Article 79(1) TFEU in terms of the common immigration policy.<sup>92</sup> Instead, the CJEU held that the respect for the principle of conferral, which was at stake *in casu*, could be safeguarded by the addition of Article 217 TFEU which was also the legal basis for initial association agreement. The latter legal basis provides full conferral of external competence to the EU in all the fields covered by the TFEU.

Neither of those cases thus allowed for a combined full and split conferral, instead the legal basis which led to a full conferral was systematically preferred by the CJEU. The context criterion might in practice serve to exclude the addition of a split conferral legal basis to any post-Lisbon measure adopted in the context of a pre-Lisbon agreement. Yet the *Philippines Agreement* case shows that it is also highly unlikely for the use of a double legal basis for conferral to become the standard procedure for post-Lisbon Agreements.

## Conclusion

The Lisbon Treaty has triggered a renewed line of questioning with respect to the principle of conferral which goes to a large extent still unresolved. For sure the CJEU has firmly asserted its exclusive jurisdiction to interpret this crucial structural principle

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<sup>88</sup> Case C- 81/13, UK v. Council (Turkey Agreement), o.c., para 38. The CJEU referred in this respect to Case C-431/11, o.c., para 48, and Case C-656/11, o.c., para 50).

<sup>89</sup> Case C- 81/13, UK v. Council (Turkey Agreement), o.c., para 43-45.

<sup>90</sup> Case C- 81/13, UK v. Council (Turkey Agreement), o.c., para 59: *“As a rule, it is only in the sphere of the internal policies and actions of the European Union or of the external actions relating to third countries which can be placed on the same footing as Member State of the European Union, according to the case-law cited in paragraph 58 of this judgment, that Article 48 TFEU empowers the European Union to adopt measures in this area”*.

<sup>91</sup> Case C- 81/13, UK v. Council (Turkey Agreement), o.c. para 41.

<sup>92</sup> Case C- 81/13, UK v. Council (Turkey Agreement), o.c., para 42: *“that is to say for the purposes of the common immigration policy aimed at ensuring the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings”* .

so as to determine whether or not competence is transferred to the EU in any given case. But it appears to be more difficult to come to terms with the various post-Lisbon modalities of conferral of powers to the EU and the variations in terms of full, crippled and split conferral.

The CJEU recurrently states that it is the legal basis of a measure that determines the procedures to be followed, not vice versa. Such a statement does not always appear to be consonant with the impression created by the outcome of post-Lisbon case law. The above analysis of the cases rendered so far seems to indicate a systematic preference for conferral of competence to the EU and the autonomous EU legal order alike, be it under full conferral or a semi-crippled conferral. This in spite of Article 40 TEU which redresses the balance between CFSP and other external EU action. The handicap in terms of pure crippled conferral under CFSP, whereby control by both the CJEU and the European Parliament is in principle excluded, is as much as possible reduced by deftly exploring the potential of the unitary procedural procedure of Article 218 TFEU. It is most likely highly significant for future case law that the CJEU has recently labelled this procedural provision for the conclusion of agreements as 'an autonomous and general provision of constitutional scope'.

The post-Lisbon importance of possible split conferral scenarios has also been downplayed so far by the CJEU. To do so it pointed to the absence of sufficiently detailed provisions to warrant a split conferral or to the objective or context of the agreement which could justify a full conferral of competence.

The question is what will be the outcome in case such a reasoning is no longer convincingly possible. Could one at all envisage a mixed legal bases combining full, split and/or crippled conferral ? So far the CJEU has managed to steer away from this thorny issue but it is bound to arise in this difficult post-Lisbon setting, it is only a matter of time.



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