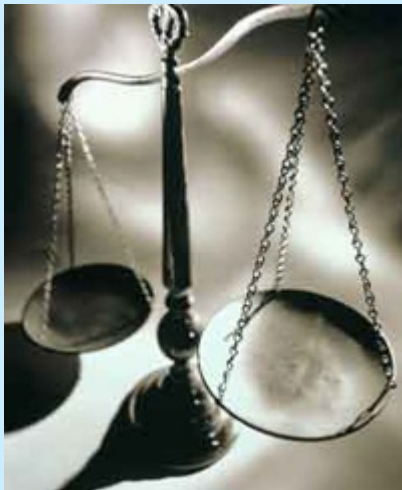


# Locating Competence Norms in the Area of Freedom Security and Justice and the Common Foreign and Security Policy Post-Lisbon



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# Introduction

- Competence goes to the heart of issues of *legitimacy* and *definition* in EU law
- Competence has only recently been expressly addressed in the Treaties: principle of *conferral* (TEU at Maastricht 1992) and distinction of *competence types* by Lisbon
- Under Treaty of Rome and previously, ‘*archipelago*’ characterised the general approach
- The ECJ has had a central role in an expansive approach to competence, e.g. it originated the idea of *exclusive competence* by developing the doctrine of *parrallelism*
- Perception that defining especially *the limits of Union competence* is difficult (‘*competence creep*’) (e.g. Pollack, Weatherill, Van Prechal & Roermund)

# Introduction (contd.)

- Competence has been on the agenda at least since Laeken, Part 11A, called for a clearer delimitation of competences between the EU and the Member States → drive for more clarity, transparency – cf. comment by Dashwood:

“There is a school of thought that no opportunity should be missed of moving the Community caravan forward, if necessary by night marches. ... there was a time when it would have been considered impolite in Community circles to talk about drawing lines at all. That has changed; and I believe the change is healthy, and evidence of the growing maturity of the order”

(Dashwood, 1996, 113, 126)

- An initial general problem is the scope of free movement and competition principles: is anything that restricts trade or distorts competition within Union competence, e.g. Davies comments:

# Introduction (contd.)

“The scope of Community activity is now so broad that few if any areas of national policy are immune from its effects. In order to prevent a complete infantilization of national governments with the inevitable consequent political backlash, there is a pressing need to have a system that defines and contains the legitimate scope of Community power and legislation. ... Alas, as every Community lawyer knows, there could hardly be more open-ended and ambiguous competences than those assigned to the Community. As if the individual policies, notably the legislative competence for the internal market, were not open enough, there is a mop-up clause allowing legislation that may be necessary “in the course of the operation of the common market” to achieve “one of the objectives of the Community”? These objectives include “the raising of the standard of living and quality of life” in the Community. What kind of rules might be necessary in operating an international common market? Shared criminal law, at least concerning fraud? Common tax rules? A common contract code? Harmonized education systems to ease migration of persons? A single language? All are arguable.”

(Davies, 2006, 63-65)

# Structure of Presentation

- The concept of competence
- The general competence problem in EU law + Articles 95 and 308 ECT/114 and 352 TFEU ('the terrible twins')
- The approach of the ECJ to competence issues generally
- Defining types of competence under Lisbon and rules specific to AFSJ (AFSJ, understood to relate especially to old 'JHA' sphere of criminal measures and asylum, visa, and immigration policy) and CFSP
- Assessing the impact of Lisbon on:
  - Free movement and competition principles through Articles 114 and 353 TFEU
  - Criminal rules and asylum and visa
  - The Common Foreign and Security Policy

# The Concept of Competence

- Competence entails a power to change legal relations
- It is the opposite of a disability + as a correlative, it entails liability on others to respect the exercise of power (Hohfeld)
- Lack of competence entails a fundamental failure /invalidity
- A fragment of a norm, norms understood as reasons for action? They cohere fully with common use of term (Hart)
- Competence-conferring norms indicate structural feature of competence: there must be an origin or initial moment of conferral, this cannot be purely a matter of formal legality
- Negative v. regulatory competence (Mayer)

# The General Problem of Competence in EU Law

- The centripetal power of the common market foundational principles of ‘free movement’ and ‘undistorted competition’

“107. In the absence of such a requirement [i.e. for appreciable impact], the powers of the Community legislature would be practically unlimited. National laws often differ regarding the conditions under which the activities they regulate may be carried on, and this impacts directly or indirectly on the conditions of competition for the undertakings concerned. It follows that to interpret Articles 100a, 57(2) and 66 of the Treaty as meaning that the Community legislature may rely on those articles with a view to eliminating the smallest distortions of competition would be incompatible with the principle [of conferral]”

*Case 376/98, Germany v. Parliament* [2000] ECR I-8419 (‘*Tobacco Advertising*’)

- But ECJ does not apply this test consistently (e.g. Cases C-402/05 P and C-415/05 P, *Kadi*, 3<sup>rd</sup> Sep. 2008), in the case of competition and has not identified any equivalent threshold in logically analogous situation of free movement

# ‘The Terrible Twins’: Articles 114 and 352 TFEU

- Up to 2002, about 700 legislative measures were adopted under Article 308 ECT (now Article 352 TFEU)
- Article 308 cannot be used to extend powers beyond ‘the general framework of the Treaty’ (*Opinion 2/94 Re Accession to ECHR* [1996] ECR I-1759, para. 30) → given generality with which Treaty objectives can be described, how much of a constraint is this? (grounds for scepticism on specific facts of the case)
- The harmonization power relative to the common market in Article 95 (now Article 114 TFEU) could be used to prevent even any *future* obstacles to trade or a potential fragmentation of the internal market: *Case C-350/92, Spain v Council* [1995] ECR I-1985, para. 35
- ECJ hardly ever finds Community legislation to be invalid on competence grounds: *Tobacco Advertising* is a notable exception, where ECJ implicitly adopted a *lex specialis* approach to heal competence *vis-à-vis* common market competence, but not clear doctrine has emerged subsequently

# General Approach of ECJ to Competence

- Some conflicting trends in the caselaw:
- e.g. Case C-376/98, *Germany v. Parliament and Council* [2000] ECR I-8419
  - The internal market competence could not be used as a legal basis for a regulation on tobacco advertising as it was essentially a health matter specifically regulated by another Treaty provision
- Compared Case C-438/05, *Viking* [2007] ECR I-10779 and Case C-431/05, *Laval* [2007] ECR I-11767
  - specific Treaty provision circumvented by free movement principle
- Levels of generality an important dynamic: central role of *effet utile* and enhancement of integration, minimising textual constraints
- Subsidiarity not generally invoked to any significant effect by ECJ:

Case C-103/01, *Commission v. Germany* [2003] ECR I-5369, paras. 46-47:

“The harmonisation of such divergent provisions may, by reason of its scope and effects, be undertaken only by the Community legislature.”

# Area of Freedom, Security and Justice (AFSJ)

- Treaty on the Functioning of the European Union (TFEU), Title V (which is in Part 111)
- Three main strands + ordinary legislative procedure applies:
  - Visa, asylum and immigration
  - Cooperation in criminal matters (incl. police cooperation – not dealt with in presentation)
  - Mutual recognition in civil matters
- Law and order and internal security remain with the Member States (Article 69 TFEU) + normal multilateral/bilateral cooperation specifically protected (Article 73 TFEU)

# AFSJ – Visa, Asylum, Immigration

- Article 77(2) TFEU – visas to third country national only within EU competence re short periods, but under:

Article 78, a common asylum policy +

Article 79, common immigration policy + incentive measures to encourage integration of third-country nationals, but excluding harmonisation (sub.-para. 4) and volumes of admission for Member States under (sub.-para. (5))

Article 80 – sharing financial burden

- New legal basis for smart sanctions (codifying *Kadi*):  
Article 75 TFEU

# AFSJ – Criminal Law Cooperation

- Ordinary legislative procedure (could describe as **preliminary matters and final decisions**) (Article 81(1)):
  - (a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
  - (b) prevent and settle conflicts of jurisdiction between Member States;
  - (c) support the training of the judiciary and judicial staff;
  - (d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.
- Minimum rules in matters of mutual recognition having a **cross-border dimension** concerning (Article 81(2)):
  - (a) mutual admissibility of evidence between Member States;
  - (b) the rights of individuals in criminal procedure;
  - (c) the rights of victims of crime;
  - (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision (for (d) unanimity + consent of EP)

# AFSJ – Criminal Law Cooperation

- Emergency break + flexible cooperation (Article 82(3) TFEU)
- Harmonisation of substantive offences **particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis** (Article 83(1) TFEU):

terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime  
+ **can be extended by unanimity**

- If the approximation of criminal laws and regulations of the Member States proves essential to ensure the **effective implementation** of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules (Article 83(2) TFEU)
- Article 85 TFEU – on Eurojust, ambiguous wording, refers to regulations authorising the initiation of criminal investigations by Eurojust, as well as proposing the initiation by Eurojust of prosecutions conducted by competent national authorities

# AFSJ – European Public Prosecutor

- In general, it communitarises (to use pre-Lisbon terminology) the criminal competence of the EU, **but** no exclusive Commission right of initiative (see Article 76 TFEU) and option of Member State emergency break/veto UK and Ireland opt-out
- Union competences can be hard to define, an issue which is also relevant to accountability of an EPP
- EPP provision - Article 86 (TFEU) – very little detail:
  - To have competence over financial crimes against Union
  - Can be extended to serious cross-border crimes
  - To prosecute in national courts, no specialised EU court
  - Legal basis for rules, governing, *inter alia*, admissibility
  - Nine Member States can proceed with on basis of enhanced cooperation procedure

# AFSJ – General Competences

- Treaty text quite tight re immigration, but less on asylum: may depend on how immigration v. asylum is defined (especially re grounds of asylum)
- Just as even relatively minor divergences of national laws on virtually any matter can in the abstract be understood as an obstacle to free movement, so almost any ‘serious’ crimes could be understood in the abstract way as having a cross-border dimension (what crimes are not serious?)
- Crime occurring within a given Member State, when it is at a higher level than another Member State, can be conceptualised as an obstacle to free movement – especially when combined with *effet utile*
- EPP is to have what actually police powers → the EPP as a Trojan horse, in the long term, for a full-fledged, federalised police force within the competence of the EU? (on a slightly Euro-sceptic reading)
- Competence creep and principle of conferral? e.g. *Laval* and *Viking*
- How will emergency break work? (see comment by Dashwood – ‘ways and means’)

# Common Foreign and Security Policy (CFSP)

- Individual sanctions bridge retained, broadened
- Traditionally, an executive-dominated domain
- Article 218 TFEU – negotiating international agreements (not CFSP)
- Article 275 TFEU – no ECJ jurisdiction re CFSP (see Articles 24(1) and 40 TEU – no priority between CFSP and their competences – *lex specialis?*)
- Article 329 TFEU – enhanced cooperation re CFSP (subject to unanimity, though only of participating states: Article 330 TFEU)
- Article 352 ECT – excluded from CFSP

# CFSP (contd.)

- How clear is distinction between CFSP and external relations, cf. concept of spillover? Cf. parallelism, e.g. re trade in arms, sector-specific issues such as marine resources and environment
- European Council to make decisions unanimously

## Article 21 TEU

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

The common foreign and security policy is subject to specific rules and procedures. 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.

# CFSP (contd.)

## Article 31 TEU: - Ambiguity about majority voting?

...

2. By derogation from the provisions of paragraph 1, the Council shall act by qualified majority:

— when adopting a decision defining a Union action or position on the basis of a decision of the European Council relating to the Union's strategic interests and objectives, as referred to in Article 22(1),

— when adopting a decision defining a Union action or position, on a proposal which the High Representative of the Union for Foreign Affairs and Security Policy has presented following a specific request from the European Council, made on its own initiative or that of the High Representative,

— when adopting any decision implementing a decision defining a Union action or position,

— when appointing a special representative in accordance with Article 33.

If a member of the Council declares that, for vital and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The High Representative will, in close consultation with the Member State involved, search for a solution acceptable to it. If he does not succeed, the Council may, acting by a qualified majority, request that the matter be referred to the European Council for a decision by unanimity.

3. The European Council may unanimously adopt a decision stipulating that the Council shall act by a qualified majority in cases other than those referred to in paragraph 2.

# Conclusion

- “The technique of specific and detailed attribution ... remains the most effective method of setting identifiable limits to the competences of the European Union”  
(Dashwood, 2004, 380)
- Do Member States fully understand scope of general principles? Mayer suggested most delegates at European Convention did not (Mayer, 2005, 511)

# References

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