

# **Diritto dell'Unione europea**

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**Le competenze dell'UE.  
I principi di sussidiarietà e  
proporzionalità.  
Le procedure decisionali.**

Lezioni 12 e 13

As regards the powers of the EU to adopt legally binding acts, a series of questions arise in logical order:

- i. Is the EU entitled to legislate? → the '**scope**' (or 'limits') of EU competences
- ii. What nature has the EU competence, if any? → the '**categories**' of EU competences
- iii. How the EU must exercise that competence → principles governing the '**use**' of competences: subsidiarity and proportionality

These are 'constitutional' issues → were an act to be adopted by the Union in breach of the relevant rules set forth in the Treaties, that would be a voidable act "*on grounds of lack of competence*" under Art 263 TFEU

What can the Union legally do? → In what policy fields is it entitled to legislate?

## **THE SCOPE OF UNION COMPETENCES**

### Sovereign State

The legislature does not need to justify its acts → it is entitled to do all things → Principle of 'Parliamentary Sovereignty': the Parliament has the right to make or unmake any law whatever ▣ the State, as sovereign and then original entity, finds its legitimacy on itself

### European Union

The legislature needs to justify its acts → it is not entitled to do all things → Principle of 'Conferred Powers': the Union has the right to make only the law MS empowered it to make ▣ the Union, as derived entity, finds its legitimacy on the MS consent

## Union's objectives & competences

Art 3(6) TEU: "*The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties*"

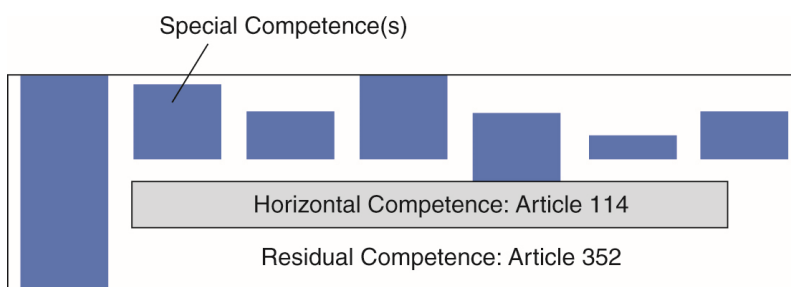
Art 5 TEU: (1) "*The **limits** of Union competences are governed by the **principle of conferral***" = (2) "*...the Union shall act only within the limits of the competences conferred upon it by the MS in the Treaties to attain the objectives set out therein → Competences not conferred upon the Union in the Treaties remain with the MS*"

## Principle of conferral

Art 5(2) TEU: “...the Union shall act only within the limits of the competences conferred upon it by the MS in the Treaties to attain the objectives set out therein”

Art 1(1) TFEU: “This Treaty organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences”

Art 2(6) TFEU: “The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area”



ROBERT SCHÜTZE\_Fig. 7.1

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**Art 114 TFEU:  
the Union's harmonisation power**

The Union is entitled to adopt measures for the approximation (harmonisation) of national laws *"which have as their object the establishment and functioning of the internal market"*

→ does the Union enjoy a general and unlimited power to regulate the European internal market? Could national private laws be generally harmonised on this basis?

→ Or do instead constitutional limits exist on the Union legislative powers?

**The *Tobacco Advertising* case:  
the harmonisation power is not boundless**

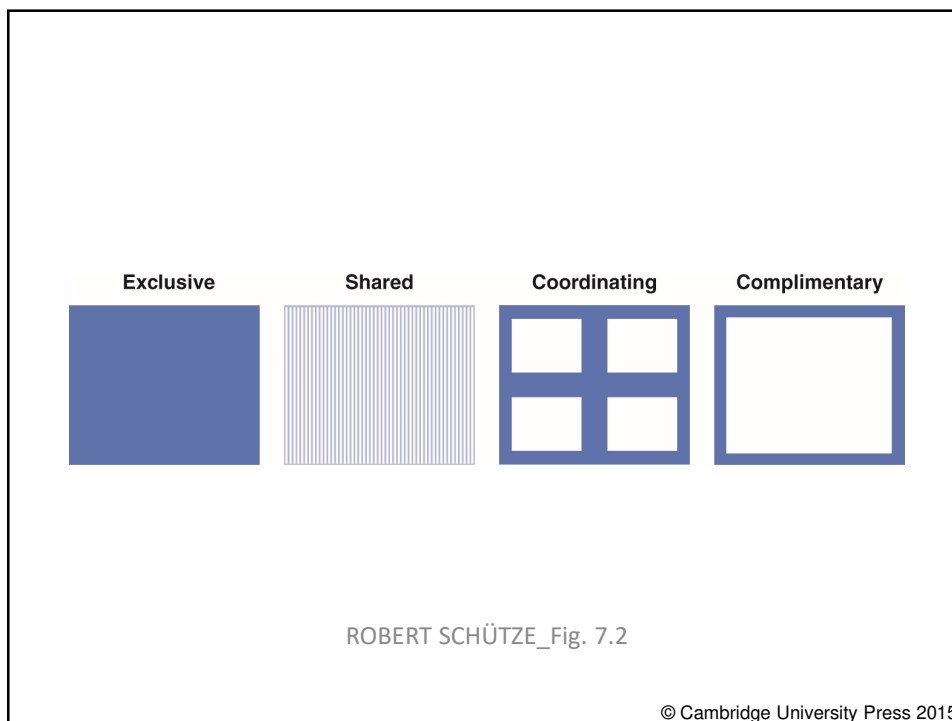
*"the measures referred to in Art [114] are intended to improve the conditions for the establishment and functioning of the internal market.*

*To construe that article as meaning that it vests in the [Union] legislature a general power to regulate the internal market would not only be contrary to the express wording of [Arts 3.3 TEU, 26 and 114 TFEU] but would also be incompatible with the principle embodied in Art [5 TEU] that the powers of the [Union] are limited to those specifically conferred on it" (Case C-376/98, para 83)*

The *Tobacco Advertising* case:  
the harmonisation power is not boundless

*“Moreover, a measure adopted on the basis of Art [114] must genuinely have as its object the improvement of the conditions for the establishment and functioning of the internal market. If a mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom were sufficient to justify the choice of Art [114] as a legal basis, judicial review of compliance with the proper legal basis might be rendered nugatory” (Case C-376/98, para 84)*

**THE CATEGORIES OF UNION COMPETENCES**



## Exclusive competence

Art 2(1) TFEU: *“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”.*

## Shared competence

Art 2(2) TFEU: *“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”.*

## Shared competence

Member States may autonomously legislate

- a) only if and to the extent that the Union has not yet legislated in the policy area at stake or
- b) the national rules are not incompatible with the EU act.

It is excluded that the European Union and Member States could legislate in parallel on the same matter



## Coordinating competence

Art 2(3) TFEU: *“The Member States shall coordinate their economic and employment [as well as ‘social’: see Art 5(3) TFEU] policies within arrangements as determined by this Treaty, which the Union shall have competence to provide”.*

The policy areas above remain with the Member States, who are also responsible for their coordination

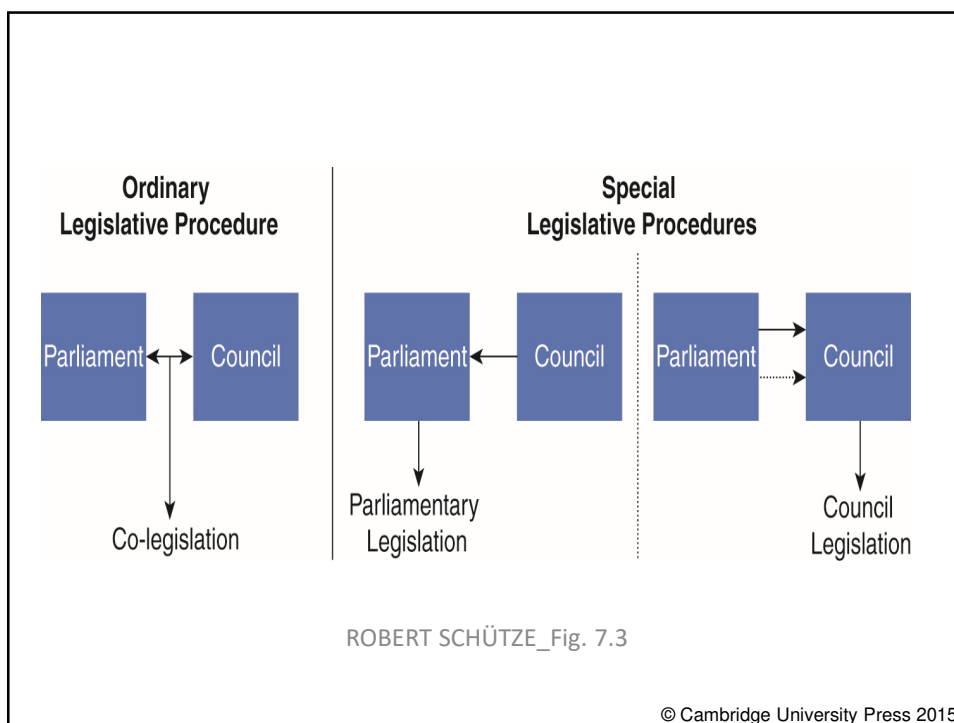
The EU is only empowered to provide the coordination arrangements

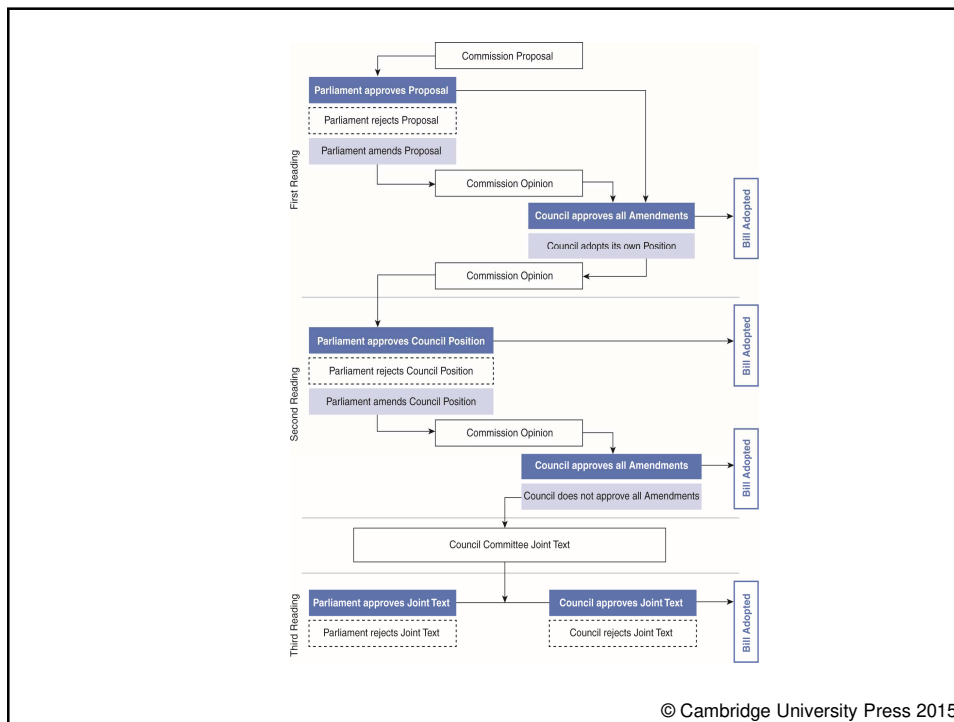
## Complementary competence

Art 2(5) TFEU: *“In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.*

*Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas **shall not entail harmonisation** of Member States’ laws or regulations”.*

# LEGISLATIVE PROCEDURES





## THE PRINCIPLES GOVERNING THE 'EXERCISE' OF UNION'S COMPETENCES

Art 5(1) TEU: “The use of Union competences is governed by the principles of subsidiarity and proportionality”

Limitations on the exercise by the European Union of its competences

→ if a EU legally binding act were adopted without complying with both the principles above, it could be annulled by the CJEU

### Subsidiarity – Art 5(3) TEU

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action

- i) cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but
- ii) can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

...

National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol”.

## Proportionality – Art 5(4) TEU

*“Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.*

*...”.*

## Protocol (No 2) on the application of these principles

*“The institutions of the Union shall apply*

- the principle of subsidiarity and*
- the principle of proportionality*

*as laid down in the Protocol on the application of the principles of subsidiarity and proportionality”.*