

European Union Law

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**Legislative powers of the EU.
Legislative procedures.
Principles of subsidiarity and
proportionality**

Lessons No 18 and 19

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”*.

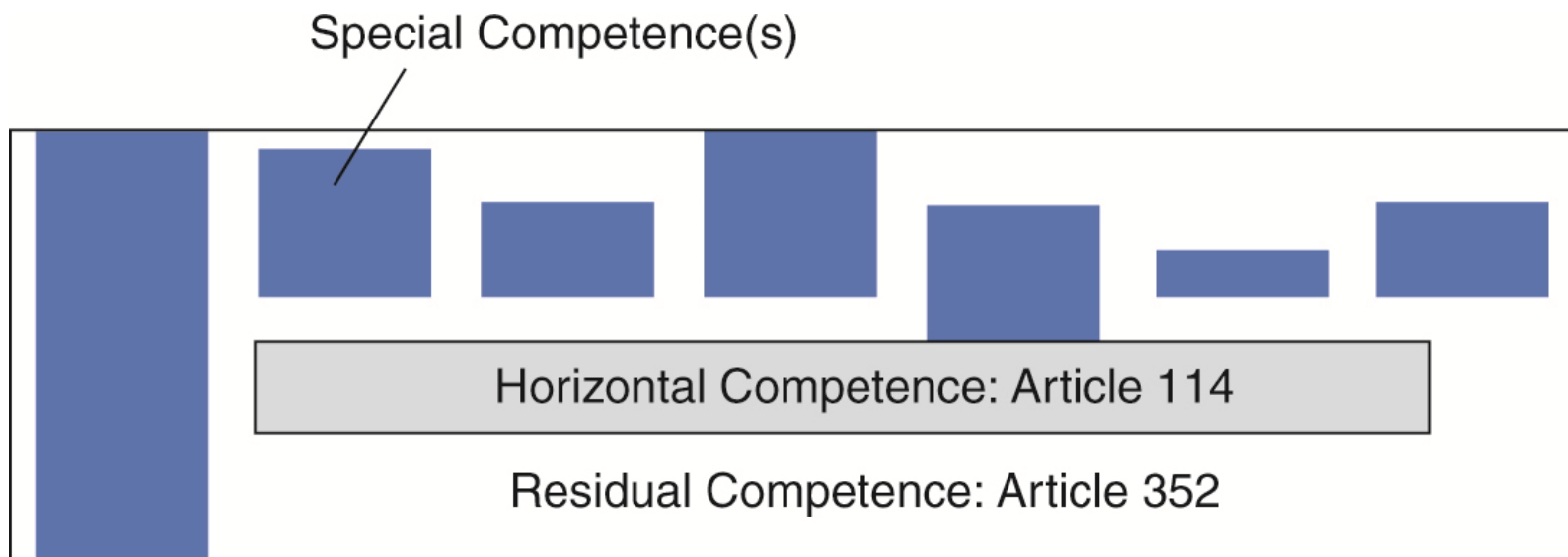
Art 5 TEU: (1) *“The limits of Union competences are governed by the principle of conferral”* = (2) *“...the Union shall act only within the limits of the competences conferred upon it by the MS in the Treaties to attain the objectives set out therein → Competences not conferred upon the Union in the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

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 *Tobacco Advertising* case:

What is not enough? What is further needed?

THE CONSTITUTIONAL LIMITS ON THE UNION'S HARMONISATION POWER

What is not enough

A mere finding that, since national rules differ from each other (what surprise!), there is the abstract risk of

a) obstacles to the exercise of fundamental freedoms of movement (of goods, services, persons or capital) or

b) distortions of competition

is not sufficient to trigger the Union's harmonisation competence under Art 114 TFEU

What is needed to justify harmonisation under Art 114 TFEU?

- Should the risk of obstacles to free movement or distortions of competition to be actual (not simply abstract or potential)?
- Should the harmonisation measures actually aimed at preventing those obstacles or distortions?

If so, the rationale underlying the legislative powers under Art 114 does not lie in a 'unification aim' (i.e. the idea that, within a single European market, a single set of uniform rules is better than different national rules)

A case study: the harmonisation of consumer law

THE CONSTITUTIONAL LIMITS ON THE UNION'S HARMONISATION POWER

Directive 93/13/EEC on unfair terms in B2C contracts

How the Union's competence to harmonise the matter at stake is justified in the Directive's preamble?

What arguments are put forward?

“Whereas the laws of MS relating to the terms of contract between the seller of goods or supplier of services, on the one hand, and the consumer of them, on the other hand, show many disparities, with the result that the national markets for the sale of goods and services to consumers differ from each other and that distortions of competition may arise amongst the sellers and suppliers, notably when they sell and supply in other MS”

Whereas... the laws of MS relating to unfair terms in consumer contracts show marked divergences;

Whereas, generally speaking, consumers do not know the rules of law which, in MS other than their own, govern contracts for the sale of goods or services; whereas **(A)** this lack of awareness may deter them from direct transactions for the purchase of goods or services in another MS;

Whereas, in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of MS other than his own, it is essential to remove unfair terms from those contracts;

Whereas sellers of goods and suppliers of services will thereby be helped in their task of selling goods and supplying services, both at home and throughout the internal market; whereas **(B)** competition will thus be stimulated, so contributing to increased choice for Community citizens as consumers

Directive 2011/83/EU on consumer rights

How the Union's competence to harmonise the matter at stake is justified in the Directive's preamble?

What arguments are put forward?

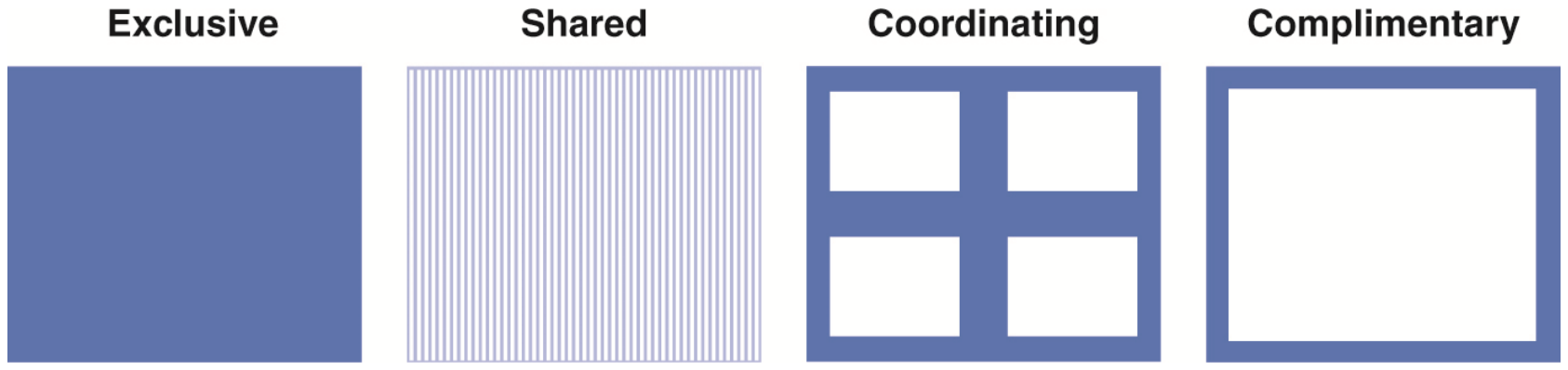
(4) ...The harmonisation of certain aspects of consumer distance and off-premises contracts is necessary for the promotion of a real consumer internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity

(5) The cross-border potential of **distance selling**, which should be one of the main tangible results of the internal market, is not fully exploited. Compared with the significant growth of domestic distance sales over the last few years, the growth in cross-border distance sales has been limited. This discrepancy is particularly significant for Internet sales for which the potential for further growth is high. The cross-border potential of **contracts negotiated away from business premises (direct selling)** is constrained by a number of factors including the different national consumer protection rules imposed upon the industry. Compared with the growth of domestic direct selling over the last few years, in particular in the services sector, for instance utilities, the number of consumers using this channel for cross-border purchases has remained flat. Responding to increased business opportunities in many MS, small and medium-sized enterprises (including individual traders) or agents of direct selling companies should be more inclined to seek business opportunities in other MS, in particular in border regions. *Therefore the full harmonisation of consumer information and the right of withdrawal in distance and off-premises contracts will contribute to a high level of consumer protection and a better functioning of the business-to-consumer internal market.*

(6) Certain disparities create significant internal market barriers affecting traders and consumers. Those disparities (A) **increase compliance costs to traders** wishing to engage in the cross-border sale of goods or provision of services. Disproportionate fragmentation also (B) **undermines consumer confidence** in the internal market.

(7) Full harmonisation of some key regulatory aspects should (C) **considerably increase legal certainty** for both consumers and traders. Both consumers and traders should be able to rely on a single regulatory framework based on clearly defined legal concepts regulating certain aspects of business-to-consumer contracts across the Union. The effect of such harmonisation should be to eliminate the barriers stemming from the fragmentation of the rules and to complete the internal market in this area. Those barriers can only be eliminated by establishing uniform rules at Union level. Furthermore consumers should enjoy a high common level of protection across the Union.

THE CATEGORIES OF UNION COMPETENCES



ROBERT SCHÜTZE_Fig. 7.2

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

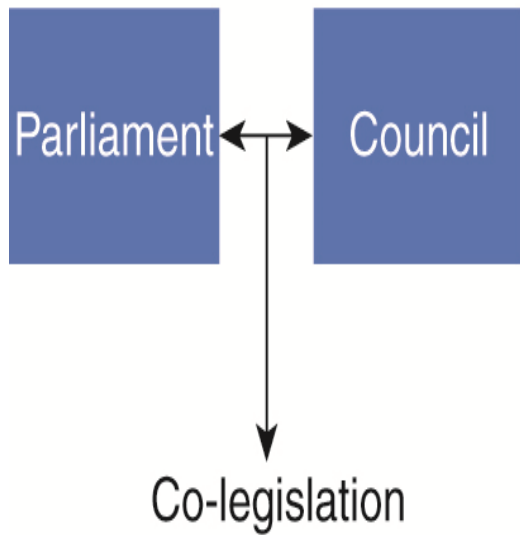
Complementary competence

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.”*

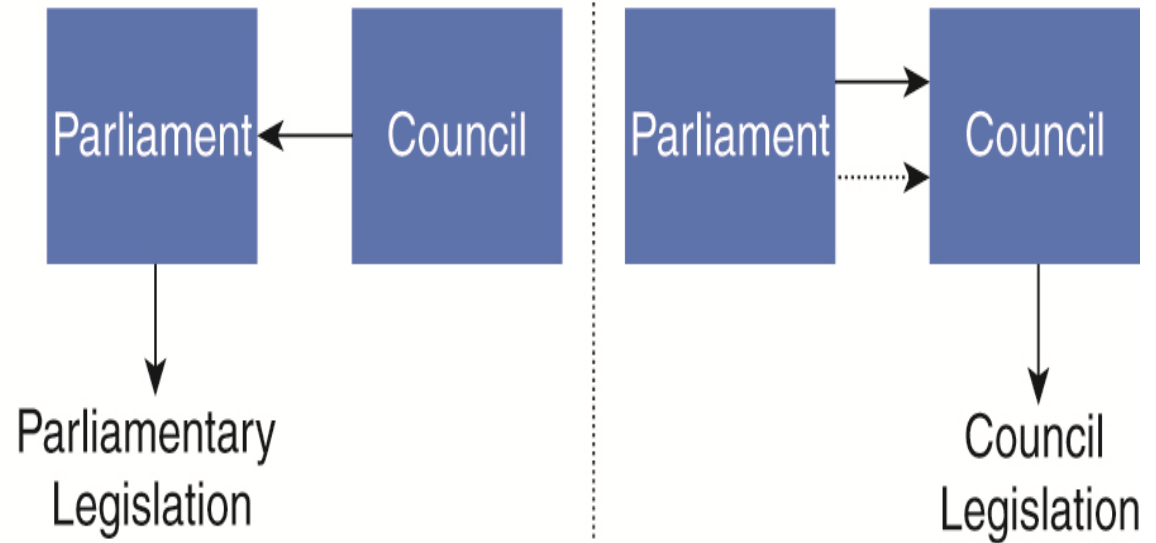
Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States’ laws or regulations”.

LEGISLATIVE PROCEDURES

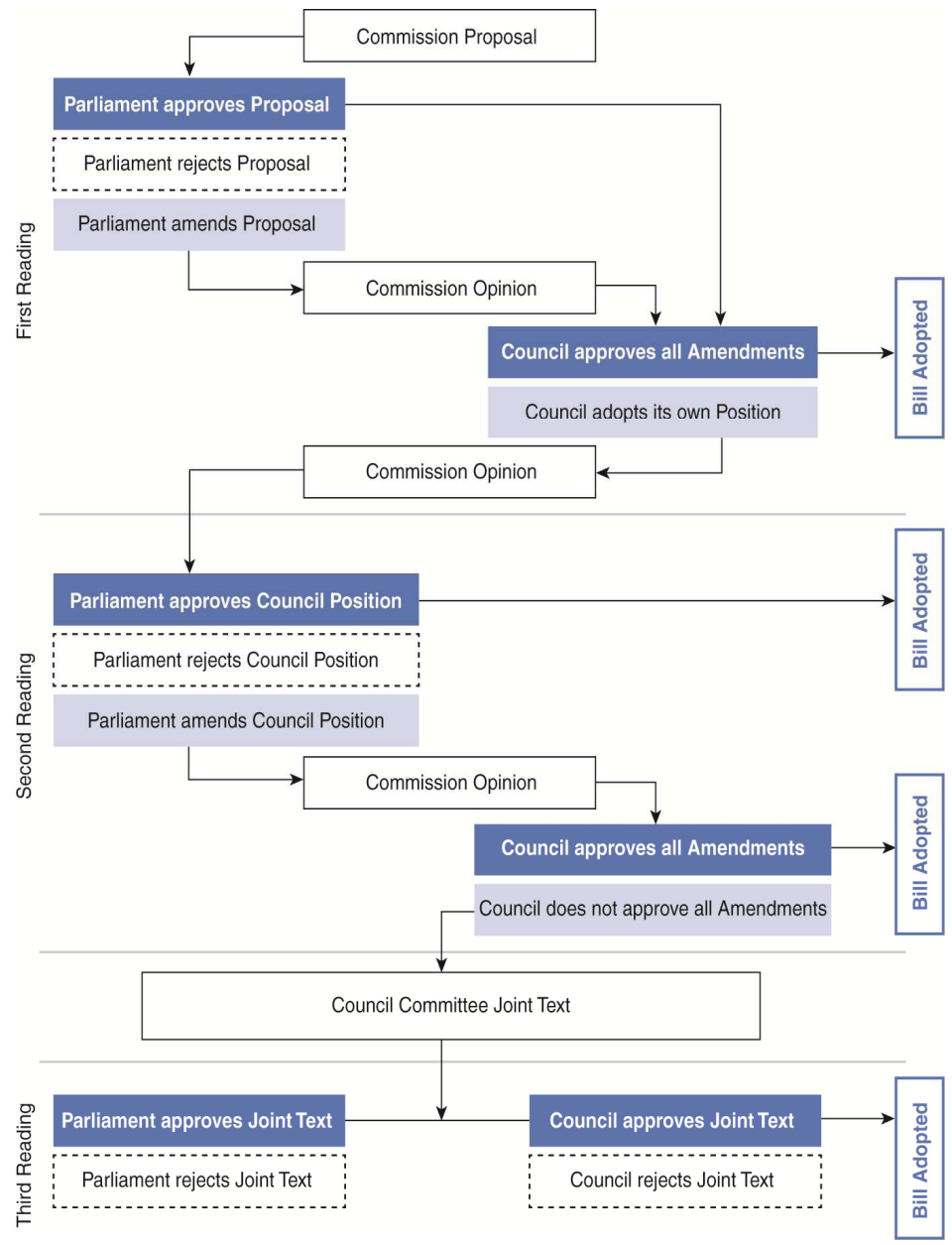
Ordinary Legislative Procedure



Special Legislative Procedures



ROBERT SCHÜTZE_Fig. 7.3



**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 Union of its competences (other than the exclusive ones)

→ 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”.