

Chapter 3 Union Competences

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Introduction*

When a sovereign parliament legislates, it need not 'justify' its acts. It is considered to enjoy a competence to do all things. This 'omnipotence' is seen as inherent in the idea of a 'sovereign' State. The European Union is however neither 'sovereign' nor a 'State'. Its powers are *not inherent* powers. They must be *conferred* on it by the Member States in the European Treaties. This constitutional principle is called the 'principle of conferral'. The Treaty on European Union defines it as follows:

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.²

The Treaties employ the notion of competence in various provisions. But sadly, there is no positive definition of the concept. So what is a legislative competence? The best definition is this: a legislative competence is the *material field* within which an authority is entitled to legislate.

What are these material fields in which the Union is entitled to legislate? The Treaties do *not* enumerate the Union's competences in a single list. Instead, the EU Treaties pursue a different technique: they attribute legislative competence for each and every Union activity in the respective Treaty title dealing with that activity. Each policy area contains a provision—sometimes more than one—on which Union legislation can be based. The various 'Union policies and internal actions' are set out in Part III of the TFEU (Table 3.1).

The Treaties here present a picture of thematically limited competences in distinct policy areas. This picture is however—partly—misleading. Three legal developments have significantly undermined the principle of conferral in the past; and these three developments have led to widespread accusations that the European Union's competences are 'unlimited'. What are they? First,

*All footnotes have been omitted for this excerpt.

Part I European Law: Creation

there has been a rise of teleological interpretation, which will be discussed in Section 1. The Union's competences are here interpreted in such a way that they potentially 'spill over' into other policy areas. This 'spillover' effect can be particularly observed with regard to a second development: the rise of the Union's general competences. For in addition to its specific competences in specific areas, the Union enjoys two very general legislative competences that horizontally cut across the various policy titles within the Treaties. These two competences are Articles 114 and 352 TFEU and will be

Table 3.1 Union policies and internal actions

Part III TFEU – Union Policies and Internal Actions			
Title I	The Internal Market	Title XIII	Culture
Title II	Free Movement of Goods	Title XIV	Public Health
Title III	Agriculture and Fisheries	Title XV	Consumer Protection
Title IV	Free Movement of Persons, Services and Capital	Title XVI	Trans-European Networks
Title V	Area of Freedom, Security and Justice	Title XVII	Industry
Title VI	Transport	Title XVIII	Economic, Social and Territorial Cohesion
Title VII	Common Rules on Competition, Taxation and Approximation of Laws	Title XIX	Research and Technological Development and Space
		Title XX	Environment
Title VIII	Economic and Monetary Policy	Title XXI	Energy
Title IX	Employment	Title XXII	Tourism
Title X	Social Policy	Title XXIII	Civil Protection
Title XI	The European Social Fund	Title XXIV	Administrative Cooperation
Title XII	Education, Vocational Training, Youth and Sport		

Article 192	Title XX – Environment
The European Parliament and the Council, acting in accordance with the ordinary legislative procedure ... shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191.	Article 191 Aims and Objectives
	Article 192 Legislative Competence
	Article 193 Powers of the Member States

discussed in Section 2. Lastly, there is a third development that would qualify the principle of conferral significantly: the doctrine of implied external powers, which will be analysed in Section 3.

Importantly, not all Union competences thereby allow the Union to act to the same degree. Indeed, depending on the type of competence involved, the Union may or may not be permitted to interfere with national choices. What types of competences are thus recognized by the Treaties? Different competence categories were originally 'discovered' by the European Court of Justice, and the EU Treaties have today codified them. These competences categories will be discussed in Section 4.