The Question of Competence in the European Union

Edited by

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Introductory Remark and Conclusions

The plural of my subject (doctrines) is quite appropriate. If it would be at all possible to speak with regard to EU competences and division of competences of a doctrine of the Court of Justice of the European Union, then we should speak about various doctrines, varying according to the sector involved and sometimes even varying within one and the same sector. However, that being the case, I prefer to speak of approaches, rather than doctrines. The only sector where one could perhaps speak of one single doctrine is that of external relations. Marise Cremona discusses this field in another chapter of this book. Moreover, the field of external relations is the one in which the issue of competences has always been and still is the most extensively discussed. For these reasons, I shall focus my contribution on the internal competences.

Let me for once reverse the normal order of an article and start with the conclusions. This might allow some readers to stop reading any further than that. The conclusions are the following:

1. The Court has not developed a real doctrine, in the sense of a self-standing, systematically-ordered construct, on the issue of competences and the division of competences between the EU and its Member States.
2. The concept of pre-emption plays no role in the case law but it might nevertheless be useful for its understanding.
3. The Lisbon Treaty has not really codified the case law with regard to shared internal competences.
4. The Court will not necessarily have to change that case law but it might nevertheless be expected to do so.
5. The conclusion of an international agreement on a ‘Fiscal Compact’ to solve the euro crisis, whatever its merits, raises questions of a competence divide that should be further explored.
I. Which Approaches?

The most interesting case law on this matter is that concerning the common agricultural policy. This is the case for obvious reasons because this was, and probably still is, the most elaborate and interventionist of EU policies. It may be interesting to note that this case law was particularly abundant in the 1970s and 1980s, but much less so today. The following analysis shall not include the common fisheries policy, more particularly the conservation policy on fish stocks, a subject for which the Court as early as 1976 held the EEC competence to be of an exclusive nature.

In its early case law with regard to the division of competences, the Court took a fairly dogmatic position. To quote from the Bollmann case of 1970: '[t]o the extent to which Member States have transferred legislative powers... with the object of ensuring the satisfactory operation of a common market in agriculture they no longer have the powers to adopt legislative provisions in this field.' So, the mere transfer, and not the exercise of those powers in occupying the field, deprived Member States of their powers.

However, it became quickly apparent on the basis of new cases that it would be unwise to so radically cut off a possible autonomous intervention by Member States. In the decentralized Community system, they had to implement and manage agricultural market organizations, and they were the first to be confronted with daily problems, unexpected events and lacunae in the EC rules. Completely freezing the possibility of autonomous intervention by Member States could in the end be counterproductive and hamper, more than foster, the smooth functioning of the market organizations. Moreover, in various cases, the Court was confronted with autonomous national measures that interfered with the functioning of an agricultural market organization, but that (also) pursued perfectly legitimate objectives, such as national income policy or national competition policy. It would have been difficult to declare such measures incompatible with market organization rules. This is how I explain the change in the case law from the originally dogmatic to a much more flexible and nuanced approach.

Looking again at this case law concerning the common agricultural policy over the last 40 years, the least one can say is that it is complex, fairly casuistic, and, some might say, not always coherent. Nevertheless, essentially, three basic approaches can be distinguished:

5 See for more recent judgments: Case C-137/00 Milk Marque [2003] ECR 1-7975 and Case C-462/01 Ulf Hammarsten [2003] ECR 1-781 para 29 with further references.
1. A strict approach which still echoes somewhat the early dogmatic approach of Bollmann⁶ where there exists an agricultural market organisation providing for the necessary Community competences, Member States must refrain from taking any unilateral measure, even if that measure is likely to support the common Community policy. It is for the Community, and not for a Member State to seek a solution to the problems at stake and exercise Community competences to that effect.⁷ This comes quite close to accepting an exclusive Community competence albeit that the Court normally does not use that qualification, perhaps considering it too provocative.⁸ Examples of this approach can also be found in more recent case law.⁹

A variation of this strict approach—which seems to me less intrusive for Member States' competences but also closely resembles a situation of exclusive Union competence—is the test of completeness or exhaustiveness: if on a specific subject matter an agricultural market organisation can be considered to have established a complete regime or to contain an exhaustive body of rules, Member States have no competence to take unilateral measures.¹⁰

This strict approach in both its emanations comes down to a rule of competence. The criteria used serve to draw the line between Union and national competences. Any unilateral national measure concerning an issue covered by Union competence is ultra vires, irrespective of its contents.

2. The second approach consists of applying not a rule of competence, but a rule of conflict. Member States are admitted some margin to take unilateral measures, also when they enter the field covered by a market organisation, but the Court (β) exercises a close scrutiny. The scope of this rule of conflict is very widely drawn. A national measure is already considered to be in conflict with the regime of a market organisation whenever it jeopardizes the aims or functioning of the market organisation,¹¹ interferes with,¹² or hinders¹³ that functioning. Another oft-used criterion is to establish whether the national measure is such as to undermine or to derogate from, or to create an exception to, the market organisation.¹⁴ There exist

⁶ Bollmann (n 3).
⁸ For an exception see Cucchi (n 7) para 34.
¹² Irish Creamery (n 4) para 15.
¹³ E.g. Apple and Pear Development Council (n 10) para 12; Case C-507/99 Denkert [2002] ECR I-169 para 32.
¹⁴ E.g. Ulf Hammersten (n 5) para 28, with further references; Case C-355/00 Freskot [2003] ECR I-5263 para 19.
ECJ Doctrines on Competences

quite a variety of formulations of this test, but they all express the intention of the Court to exercise a control that goes largely beyond the actual text and contents of the rules of a market organisation.

3. The third and final approach consists of applying the classic test of controlling the compatibility of the national measure with the text of the market organisation rules.\(^{15}\) This also comes down to applying a rule of conflict, but in the more traditional sense.

It should be added that these three different approaches are sometimes applied in one and the same case.\(^{16}\) That is not at all problematic if this concerns different elements of the national measure under consideration. However, it also happens that the first two approaches are combined such as to blur the important distinction between the two.\(^{17}\)

Another sector of Union law in which the issue of the competence divide plays an important role in the case law is that of harmonization of law, more particularly also in the field of environmental law. Here, however, the situation is much more straightforward. Apart from the classic compatibility test, it is only—as far as I am aware—the test of completeness or exhaustiveness which is being applied by the Court.\(^{18}\) For the Court to conclude a loss of power of Member States to act unilaterally, it is certainly not necessary to establish the exhaustive nature of the harmonization instrument as a whole or in its entirety. It often happens that this conclusion remains limited to only one or a combination of rules of the instrument.\(^{19}\) It should be noted that there seems to be no equivalent in the case law on harmonization measures to the second approach followed in the field of agriculture.

What to conclude from this too brief and condensed overview of the case law on the issue of competences, which remained limited—I repeat—to the internal competences?

The obvious conclusion must be that there is no real general doctrine. The test most generally applied to delimit Union competences from national competences is that of completeness or exhaustiveness. However, in the field of agricultural policy, we have seen that this test is applied together, sometimes alternately, with others. Particularly in that field the Court has developed a number of different approaches and criteria within those approaches, from which it is able to choose, in

\(^{14}\) For an example see _Le Campion_ (n 10) para 13 where the third approach is mentioned together with the two other approaches.

\(^{15}\) _Le Campion_ (n 10); for examples of applying approaches 1 and 2 see _Apple and Pear Development Council_ (n 10) paras 23 (approach 1), 12, and 31 (approach 2); _Case 255/86 Commission v Belgium_ [1988] ECR 693; _Case C-27/96 Danisco Sugar_ [1997] ECR 6653; _Spain v Commission and Kpclers_ (both n 9).

\(^{16}\) See _Galii_ (n 11) para 31 (approach 1) and 29-30 (approach 2); _Spain v Commission_ (n 9) paras 73 and 74; _Kupers_ (n 9); the reasoning starts with approach 2 in para 37, but later on the Court uses competence language in paras 41 and 49.


order to judge a case according to its merits, and also—at least that is my impression—according to the margin of intervention it considers appropriate to be left to Member States. So, what we are seeing here is not a real doctrine, but much more a tool box making available various tools from which the Court chooses to solve a case as it deems fit.

II. What about Pre-emption?

Until now I have made no reference to the concept of pre-emption. Deliberately so. The Court has, as far as I know, never explicitly referred to it. However, pre-emption is discussed in legal doctrine, notably to compare Union law in this respect with the constitutional law of those Member States that are federations (German Grundgesetz), and more particularly to compare the case law of the ECJ with that of the US Supreme Court. 20

Allow me to make just one, more conceptual, remark. I shall not enter here into the debate on how to define pre-emption (field-, obstacle-, rule- pre-emption). 21

As far as EU law is concerned, it seems to me that the concept of pre-emption may be useful to distinguish with regard to shared competences between two, entirely different approaches:

1. The exercise of Union competence is considered to block the exercise of national competence. Member States may not at all act unilaterally anymore in the field in which, and to the extent to which, the Union has exercised its competence. Whether or not the national measure can be considered in conflict with Union rules, is completely irrelevant. Each national measure, whatever its contents, will be invalid. 22 This approach establishes a rule of competence; it solves a conflict of competences, not of norms. Here the notion of pre-emption seems useful.

2. In the second approach national competences as such remain unaffected. Member States may continue to exercise their competence in spite of the exercise of Union competences, provided that they respect Union rules. We have to do here with a rule, not of competence, per se, but of conflict. I do not think that applying to this approach the concept of pre-emption has any added value. Where a conflict of norms arises, applying the principle of primacy of Union law will be sufficient to solve it.

The difficulty in the first approach will be how to appreciate, and according to which criteria, the extent to which Union competences must be exercised so as to entail a blockage of national competences and, if so, how far that blockage


21 See on that the articles of Cross and Schütze (n 20).

ECJ Doctrines on Competences

should go. The difficulty in the second approach is entirely different: it is to establish the existence and the scope of a conflict. So far pre-emption.

III. And what about the Lisbon Treaty?

Will the Lisbon Treaty have any consequences for the approaches followed by the ECJ as just discussed? To answer that question we must first have a quick look at the new Treaties.

Let me start with a preliminary remark. When we discuss the scope of Union competences and their relationship to national competences, we should not forget that Union law may of course also affect—and sometimes considerably so—the exercise of national competences in areas in which the Union itself has not been conferred any legislative or regulatory competence. I refer to the consequences of negative integration, the fundamental freedoms, including that of free movement of the Union citizen. In this respect, the Lisbon Treaty brings forth an important innovation by introducing in Article 4(2) EU a fairly detailed definition of what the original, quite general provision of the Maastricht Treaty that the Union shall respect the national identities of its Member States has to imply. That identity has now been defined by a reference to Member States’ ‘fundamental structures, [both] political and constitutional’. Moreover, according to this Article the Union shall respect the essential functions of the state, including ensuring its territorial integrity, maintaining law and order, and safeguarding national security. This enumeration of state functions—which, incidentally, is not exhaustive—, together with the reference to the fundamental constitutional and political structures, indirectly defines the hard core of national sovereignty which the Union may not affect. This new provision—which contrary to its predecessor falls within the jurisdiction of the Court—reads as a sovereignty clause, a ‘réserve de souveraineté nationale’. It applies horizontally, not only to the exercise by the Union of its own competences, but also to the possible impact of the prohibitions of negative integration on the exercise of national competences. The Court has already in its recent case law paid some attention to this new provision, but there is certainly more to come.\(^\text{23}\) Union law is entering a new era here. I cannot go into this any further apart from one obvious question.\(^\text{24}\)

Would the application of this Article be justiciable? I think it should. The definition is not exhaustive, I must admit. Moreover, it would be hard to imagine that the ECJ would determine what belongs to the fundamental constitutional

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24 Another question to be raised in this context is how to interpret the reference in art 53 of the EU Charter of Fundamental Rights to the Member States’ constitutions. The Melloni judgment of 26 February 2013 in Case C-399/11, nyr., now tells us that this Article does not allow Member States to override obligations resulting from secondary EU law instruments by invoking national constitutional specificities of fundamental rights protection.
Christiaan Timmermans

structures of a Member State. Nevertheless, the Article clearly conveys the message that Member States discretion to define their fundamental structures and state functions, which should be considered untouchable for Union action, is not unlimited. Still more importantly, the Article imposes an obligation upon the Union and its institutions, an obligation of Union law, which the Court by its very mission to ensure the respect of that law must abide by and enforce. The Court would at least have to define the outer limits of the scope of this ‘réservé de souveraineté nationale’, similarly to what it has always done when interpreting the public policy exception to the fundamental Treaty freedoms.25 And here also, the proportionality principle might be helpful. In these respects in my view the Court should have the final say, a responsibility to be handled with the greatest care and wisdom, as well as in close cooperation with national supreme and constitutional courts.26

Clarifying the Union’s competences, and delimiting more clearly their scope and relationship to Member States competences was of course one of the main subjects put forward in the Laeken Declaration and thoroughly debated during the Convention.27 What became of all that is, apart from Articles 4 and 5 TEU, to be found in Title I of Part I of the TFEU ‘Categories and Areas of Union Competence’. This Title defines three general categories of competences (exclusive, shared, and supporting, coordinating or supplementing) and allot areas of Union activity to these categories. For exclusive competences and supportive etc. competences these areas are exhaustively listed. For the category of shared competences the main areas are indicated, but this list is not exhaustive; logically so because this category is a rest category: Union competences in areas other than those indicated in the list of exclusive and that of supporting coordinating or supplementing competences are to be considered shared competences (Article 4(1) TFEU).


26 The Runevic-Vardyn judgment (n 23) paras 86 and 91–95, might be a promising precedent. The Court gives an autonomous interpretation as to the relevance in this case of art 4(2) EU and thus ‘controls’ the application of this Article, but it leaves the appreciation with regard to a fair balancing between the protection of the national values involved and the protection of private and family life to the national court. The more recent judgment in the case of Anton Las (n 23) goes an important step further: a national measure, which the Court accepts to be able to benefit from the protection of art 4(2) EU, is submitted to a full proportionality test, which that measure fails to satisfy. For a contrary view about who should have the final say, see A. von Bogdandy and S. Schill, ‘Overcoming Absolute Primacy: Respect For National Identity under The Lisbon Treaty’ (2011) 48 Common Market Law Review 1417. On the necessary cooperation between the highest national courts and the ECJ in order to accommodate the application of the primacy principle see my contribution ‘Multilevel Judicial Co-operation’ in P. Cardonnel, A. Rossis, and N. Wahl (eds.), Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh (Oxford and Portland, Or.: Hart, 2012).

The most interesting category for our subject is that of shared competences. In cases of shared competence, Article 2(2) TFEU states: '[t]he Member States shall exercise their competence to the extent that the Union has not exercised its competence.' This is diplomatic drafting. The *a contrario* is much more interesting: Member States shall not exercise their competence to the extent that the Union has exercised its competence. That this is the real meaning follows also from the next sentence: '[t]he Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.' So they shall not do so before the Union has taken that decision. Normally, such decision will be an implicit one, for instance by withdrawing existing legislation without replacing it with any new rules.

This characteristic of shared competences, that is the blocking of the exercise of national competence to the extent the Union exercises its competence, comes down to what I have earlier called a rule of competence. You could also say this is pre-emption. National competence is neutralized; it is frozen as long as the relevant Union rules remain in force. German lawyers would call this *Sperrwirkung*. Protocol No. 25, annexed to the Treaties, on the exercise of shared competences, clarifies that this blocking effect does not extend to the whole area to which the Union action relates, but only to the part of that area which has been (in my words) effectively occupied by that action. What this exactly means, leaves some margin of appreciation and will finally have to be determined by the Court in each particular case.

This rule of blocking effect, of pre-emption, is to be distinguished from the situation of an exclusive Union competence, where there exists no national competence at all. But it is also to be distinguished from a rule of conflict regulating a conflict between rules. It is much more intrusive. It is something of a paradox that this rule of pre-emption, which could be considered as a fairly radical application of the primacy principle, has survived the operation of stripping the Treaty texts of their constitutional elements after the failure of the Constitution, whereas the primacy principle itself was removed from the Treaty.

The drafters of the Treaty have left part of their work on this Title unfinished. A number of important Union policy areas have not been clearly allotted to one or the other of the three competence categories. This concerns the areas of coordination of national economic and employment policies, partly also social policy, and those of common foreign and security policy and the progressive framing of a common defence policy. These areas are mentioned in Article 2(3) and (4), the first two areas of Union action to be referred to again in Article 5, together with the coordination of Member States' social policies (but see also Article 4(2)(b) TFEU). Apparently, Member States could not agree to include these areas explicitly in the list of shared competences. Nevertheless, these areas could seem to have to be brought into that category because of the rule of Article 4(1) TFEU according to

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28 See also art 4(3) and (4) TFEU where a negative formulation is used: 'Member States being prevented from.'

29 See also on this question Rossi (n 27) 101 and 102.
which any area not included in the list of exclusive or that of supporting etc. competences must be considered a shared competence. Or should one interpret the separate mentioning of these areas in the said articles as meaning that they should not be considered as belonging to any of the three categories of competence?

The real question in this regard is of whether the competence rule applying to shared competences (blocking of national competence) must be considered as applying also to these areas. I would not exclude that. It would be difficult to disregard the clear provision of Article 4(1) TFEU qualifying the category of shared competences as a rest category. Neither does this provision make an exception for these areas nor has the application of the blocking rule been excluded for these areas as has been done for the areas mentioned in Article 4(3) and (4) TFEU (research and development, development cooperation, humanitarian aid). In any event it would not be possible to allot these areas to the third category of supporting etc. competences because they do not figure in the exhaustive list set out in Article 6 TFEU. Consequently, the characteristics of this category (national competences cannot be superseded, no possibility to take harmonization measures) could not be said to apply to these areas. However, it should be added immediately that the practical consequence of these questions is not very important for the areas of employment policy and the coordination of social policies by virtue of Article 153(2)(a) TFEU. Indeed, the latter provision excludes any harmonization of national laws. So does Article 149 TFEU with regard to the harmonization of employment policies.

In passing, I might draw attention to the relationship between Articles 2(2) (blocking effect in case of exercise of shared competences) and 3(2) TFEU. According to the latter provision, external competences become exclusive in three particular situations, well-known from the case law, related to the exercise of internal competences amongst which the ERTA situation. So, no blocking effect but exclusivity. This raises the question of whether Article 2(2) TFEU is at all applicable to the exercise of non-exclusive external competences. There should be no doubt about that. But then it is interesting to note that only the exercise of internal competences may make an external competence exclusive, not the exercise of the external competence itself. The latter may only entail the blocking effect of Article 2(2) TFEU, which, as already mentioned, is not the same as exclusivity.

And now the final question: will the Court have to change its approaches with regard to issues of competences and the competence divide?

Let us first look at the question of whether the existing approaches followed in the case law with regard to shared competences could as such be considered compatible with the new rules. I think that they can. Both criteria used within the framework of what I have called the strict approach (Union competences and procedures have been provided, so they must be used excluding unilateral national

\[30\] Social policy partly figures explicitly on the list of shared competences. This would seem to concern more particularly the areas covered by arts 153(2)(b) and 157(3) TFEU. This differentiation in itself would seem to make it difficult to bring the other part referred to in art 5(3) within the category of shared competences as well.
measures; the criterion of completeness or exhaustiveness) could be regarded as referring to ways of exercising the Union’s shared competence so as to block or to pre-empt the exercise of national competence within the meaning of Article 2(2) TFEU. The other two approaches remain in any event unaffected by the Lisbon rules. They concern rules of conflict that do not fall within the ambit of that provision.

So, the conclusion must be that nothing will change? I do not think so. As far as shared competences are concerned, the new rules bring an important change. In future cases raising issues of competence divide, the starting point will now be the blocking rule of Article 2(2) TFEU. One might expect the parties to focus their debate on that provision, and the Court will have to answer that by interpreting the provision. This might have two consequences. First, the Court might feel inclined when interpreting the blocking rule to develop a single criterion (for instance by giving precedence to the criterion of exhaustiveness) or by merging the two existing criteria into one (for instance by regarding the situation covered by the first criterion as an example of exhaustiveness). Another consequence might be that issues of competence divide will get more attention in the case law, and even that the case law might become stricter in this respect. All that is speculation. But I am not so sure that, as has been often said, the Lisbon rules on these issues are merely codifying existing case law and will not bring changes.

Questions of division of competences are, and will remain, on the agenda, also the political agenda.

I may finish with a comment in that regard on the euro crisis, or if you prefer, the sovereign debt, banking and fiscal crisis, more particularly with regard to the efforts of Member States to solve that crisis by concluding intergovernmental agreements, notably the one on a ‘Fiscal Compact’. When I wrote this paper for the conference, the results of which are presented in this book, the negotiations on this ‘Fiscal Compact’ had not yet been concluded. The final agreement was signed on 2 March 2012 and has entered into force on 1 January 2013.31 But the comment I made in my contribution for the conference is still valid, I think. Indeed, I was struck at the time by the fact that most, if not all of the points listed in the Statement of the Euro-zone summit of 9 December 2011 were either already covered by the so-called Six-pack legislation,32 which entered into force a few days

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31 Strangely enough, the Agreement on the ‘Fiscal Compact’, officially titled ‘Treaty on Stability, Coordination and Governance in the Economic and Monetary Union’, has not been published in the Official Journal of the European Union but on the website of the Council.
later, or could have been dealt with by Union legislation using existing legal bases in the Treaty, or if opposed by one Member State or another, quite probably by enhanced cooperation. I really doubt whether a Treaty amendment as originally insisted upon by Germany and supported by France was legally necessary. In any event, in the hypothesis that Union action to enact the envisaged measures would be legally possible, is it acceptable that 25 Member States take that action outside the Treaty framework and do it the intergovernmental way? I have always thought that, if there exists a Union competence, that competence should be used, even when that competence is not of an exclusive nature. It seems to be an anomaly to opt for an intergovernmental approach and still more so when trying to involve the EU institutions, the Commission, and even the Court, as has been the case with the Treaty on the ‘Fiscal Compact’.

However, an anomaly is not necessarily an illegality, albeit that the line between the two will easily be crossed where Member States, when opting for an intergovernmental approach, at the same time try to involve and benefit from the institutions as they deem fit. It is true that the Court has gone some way in accepting this as far as the Commission is concerned in its Bangladesh case law but there the agreement in question involved all Member States. In any event the EU legal and institutional system is a self-standing, composite whole, not a menu from which the Member States can pick and choose according to their gusto. To put it in more legal terms: the conferral principle together with the impossibility of modifying the Treaties otherwise than by following the amending procedures explicitly provided for in the EU Treaty precludes that. This is not to say that, in the particular case of the ‘Fiscal Compact’, the role attributed to the Commission and the Court of Justice must necessarily be regarded as incompatible with Union law. Indeed, the drafters of the Agreement have been careful to underline in its recitals that the role of the Commission comes within the framework of its already existing powers, whereas that of the Court has been based on the compromissory clause of Article 273 TFEU.

The Court, as far as I know, has never—apart from the case of an exclusive EU competence—condemned an intergovernmental action by Member States because there existed a Union competence to take that action. The closest to that might be the case law on agricultural market organizations requiring Union competences and procedures to be used. But, as we have seen, the Court does not systematically follow that approach.


35 See the case law referred to in nn 7 and 9.
One might also think of the now—because of Article 40 TEU—defunct case law on the relationship between the former pillars requiring the use of a Community competence where it existed instead of enacting the measure within the framework of the second or third pillar.\textsuperscript{36}

Another reference in this context might be the negotiation clauses in secondary Union legislation providing for the conclusion of an international agreement with third countries, which render the external competence exclusive (see now Article 3(2) TFEU). However, the field of external relations poses special problems because the conclusion of international agreements by Member States will normally create obligations with regard to third countries that cannot easily be undone.

In the meantime the Court has rendered its judgment in the \textit{Pringle} case, which sheds some more light on these issues.\textsuperscript{37} The case concerns the Treaty on the European Stability Mechanism, not the Fiscal Compact, but some of the questions the Court had to answer are similar—or at least related—to the ones I have just raised.

First of all, the Court, confirming its \textit{Bangladesh} case law,\textsuperscript{38} has accepted the tasks and powers entrusted by the ESM Treaty to the European Commission, the European Central Bank, and the Court of Justice respectively, as compatible with EU law. As far as the Court is concerned, the compromissory clause of Article 273 TFEU was considered a sufficiently solid legal base. This augurs well for the lawfulness of the role conferred on the EU institutions by the 'Fiscal Compact'.

Mr Pringle had argued that the ESM would encroach upon EU competences on monetary and economic policy referred to in Part I of the TFEU. Therefore, the simplified procedure of Article 48(6) TEU, which procedure is only available to amend the provisions of Part III TFEU, could not be used to amend Article 136 TFEU so as to allow the Euro-zone Member States to establish the ESM. The Court rejected the argument, the ESM not being an instrument of monetary policy—an exclusive Union competence—but of economic policy. Even so, the ESM could not be regarded as affecting economic policy powers of the EU because the Treaties did not confer any specific power on the Union to establish an ESM.\textsuperscript{39} Competences not conferred upon the Union remaining according to Articles 4(1) and 5(2) TFEU with the Member States, the ESM could not be considered affecting existing EU competences on economic policy.\textsuperscript{40} The Court reiterated this reasoning when rejecting the argument that the Member States had lost the power to conclude the ESM Treaty, the EU having acquired an exclusive treaty-making power on the subject under Article 3(2) TFEU, the provision codifying the \textit{ERTA} effect. It is first important to note that the Court interprets this Article as also prohibiting, when the conditions for its application are being fulfilled, the Member States from concluding an agreement amongst themselves.\textsuperscript{41} However, no Union

\textsuperscript{36} Case C-176/03 \textit{Commission v Council} [2005] ECR 1-7879, with further references; Case C-91/05 \textit{Commission v Council (smallarms)} [2008] ECR 1-3651.

\textsuperscript{37} Case C-370/12 \textit{Thomas Pringle v Government of Ireland}, judgment of 27 November 2012, nyr.

\textsuperscript{38} See n 34.

\textsuperscript{39} \textit{Pringle} (n 37) para 64.

\textsuperscript{40} \textit{Pringle} (n 37) para 68.

\textsuperscript{41} \textit{Pringle} (n 37) para 101.
rules could be considered to be affected or having their scope altered by the ESM. Moreover, so the Court added, the EU Treaties not conferring 'a specific power' on the Union to establish a permanent stability mechanism such as the ESM, the Member States were entitled, in the light of Articles 4(1) TEU and 5(2) TEU, to act in this area.\(^{42}\)

This reasoning, more particularly as invoked by the Court to reject the argument with regard to the ERTA effect, is most interesting because it raises at least the question of whether the conclusion would have had to be different if the Treaties had conferred such a 'specific power' on the Union. One could indeed be inclined to read the judgment as implying that if the Union Treaties provide for a specific legal base, a specific power to regulate an issue, that power must be exercised barring the Member States from opting for an intergovernmental approach. If that reading were correct, Pringle would bring an important clarification to the debate on the competence divide. Of course, the precise meaning of the qualification specific power is not so clear and may be subject to further discussion in future cases. We know already that a possible exercise of the subsidiary competence of Article 352 TFEU does not qualify as a specific power.\(^{43}\)

I cannot further explore these questions to which I wanted at least to draw some attention. Let me finish, however, with a proposition for discussion. That proposition is to consider as legally barred a collective action of all Member States outside the framework of the Treaties in a situation in which Union law provides for the necessary legal basis for such action and on a subject matter on which Union legislation already has been or is in the course of being developed.

If that proposition were to be accepted, would then the conclusion have to be different in case not all Member States would be prepared to act but enhanced cooperation could be a valid alternative because the entry conditions to such cooperation were or could be reasonably expected to be met?

\(^{42}\) Pringle (n 37) para 105.  \(^{43}\) Pringle (n 37) para 67.