Luigi Corrias

The Passivity of Law

Competence and Constitution in the European Court of Justice

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Luigi Corrias

Introduction

Europe's constitutional journey has not been a smooth one. On the contrary, it is not an exaggeration to say that Europe's search for a constitution has turned out to be an opening of Pandora's box: In the controversy surrounding the European Constitution, all kinds of quarrels and debates are cast on issues ranging from the enlargement of the European Union to its legal-political nature, from the legitimacy of the Union to its very identity, from the role the Union should play in the world to the way its actions influence daily life in its smallest regions.[1] Anyway, the Constitution has proved tougher than expected. Its proclaimed 'death by (double) referendum' did not make it disappear. Indeed, the Treaty of Lisbon, so lawyers seem to agree, is to an important degree, similar to the 'dead' constitutional treaty stripped from its most 'constitution-like' characteristics. Is this problematic? There is surely no easy answer to this question. What seems less difficult to ascertain, however, is that the project of a constitution for Europe embodied a desire to improve the legitimacy of the Union and the way in which the citizens value the reality of an ever further integrated Europe.[2] The Treaty of Nice had not tackled some important problems, and the constitution was being enacted, amongst other motives, precisely to come up with solutions to these issues. A 'better division and definition of competence in the European Union' was one of the four core problems to which the new Constitution had to find a solution, as the Laeken Declaration stated:

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[1] As this book will use both the terms 'European Union' and 'European Community', their distinction should be explained from the beginning. Between 1993 and 2009, the European Union encompassed three pillars. The first pillar consisted of the three (now two) European Communities: The European Atomic Energy Community (EAEC or EURATOM), the European Community (EC) and the now-expired European Coal and Steel Community (ECSC). The second pillar was formed by the Common Foreign and Security Policy (CFSP) and the third pillar was made up of the Police and Judicial Cooperation in Criminal Matters (PJCC). With the coming into force of the Treaty of Lisbon (1 December 2009) the pillar structure has been abolished.

[2] The Laeken Declaration speaks of three challenges for the European Union: the democratic challenge, bringing Europe closer to its citizens and giving Europe a new role in a globalised world. See: Presidency Conclusions of the Laeken European Council (14 and 15 December 2001): Annex I: Laeken Declaration on the future of the European Union, in Bulletin of the European Union. 2001, No 12, pp. 19–23, available at: http://ec.europa.eu/justice_home/unit/charte/en/declarations-laeken.html [visited on 29 October 2009].

> Thus, the important thing is to clarify, simplify and adjust the division of competence between the Union and the Member States in the light of the new challenges facing the Union. (...)
> A first series of questions that needs to be put concerns how the division of competence can be made more transparent. (...)
> The next series of questions should aim, within this new framework and while respecting the 'acquis communautaire', to determine whether there needs to be any reorganisation of competence. (...)
> Lastly, there is the question of how to ensure that a redefined division of competence does not lead to a creeping expansion of the competence of the Union, or to encroachment upon the exclusive areas of competence of the Member States and, where there is provision for this, regions. How are we to ensure at the same time that the European dynamic does not come to a halt? In the future as well, the Union must continue to be able to react to fresh challenges and developments, and must be able to explore new policy areas. Should Articles 95 and 308 of the Treaty be reviewed for this purpose in the light of the 'acquis jurisprudentiel'?[3]

It is this problem of 'creeping competences' that forms the starting point of this book.[4] After the rejection of the European Constitution, the answer to this question was laid down in the Treaty of Lisbon. Given the importance of this Treaty and its resemblance to the old constitution, it may not come as a complete surprise that it received no warm welcome in all Member States.[5] In Germany, several people brought constitutional complaints against the act ratifying the Treaty of Lisbon to the Federal Constitutional Court (FCC). Surely, it was not the first time that the FCC was asked to give its opinion on a decisive step in the integration process, and because of its critical attitude, the judgment was awaited with anxiety. This judgment came by the end of June 2009, and in the considerations of the FCC, we find some hints about the depth of the legal-political problems lying at the heart, not simply of the Treaty of Lisbon, but of the very endeavour that is Europe's constitutional quest.

So what does the FCC think? Has the 'creeping expansion of the competence of the Union' indeed come to a halt? What limits to European competences does the German court put forward? Time and again, the FCC has stressed that the EU legal order is a derived order (i.e., derived from that of the Member States). Accordingly, its competences are also of a derived nature, and this is reflected by the main principle regulating the legal powers of the Union, the principle of conferral. This principle, also known as the principle of conferred powers, holds that the Union only possesses those competences that are given to it. Now, according to the FCC, this entails that there is at least one hard limit to the competences of the Union, that of constituent power: 'The constituent power of the Germans, which gave itself the Basic Law, wanted to set an insurmountable boundary to any future political development.

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[3] Ibid. Note that the numbering of the articles has changed. Article 95 EC is now Article 114 of the Treaty on the Functioning of the European Union (TFEU). Article 308 EC is now Article 352 TFEU.

[4] Cf. M.A. Pollack, 'Creeping Competence: The Expanding Agenda of the European Community', *Journal of Public Policy*, vol. 14 (1994), pp. 95–145.

[5] The Irish people only accepted the Treaty of Lisbon in a second referendum held on 2 October 2009.

(...) The so-called eternity guarantee takes the disposal of the identity of the free constitutional order even out of the hands of the constitution-amending legislature. The Basic Law thus not only assumes sovereign statehood but guarantees it.'[6] Any transfer of powers, as has taken place by joining the project of European integration, is, therefore, necessarily limited in nature: 'The Basic Law does not grant the German state bodies powers to transfer sovereign powers in such a way that their exercise can independently establish other competences for the European Union. It prohibits the transfer of competence to decide on its own competence (Kompetenz-Kompetenz).'[7] Nevertheless, an interpretation of EU powers, in order to safeguard their 'effet utile', is admitted by the German court. In other words, the FCC says that it has no problems with the doctrine of implied powers[8], as long as the principle of conferral is respected.[9] It is under these conditions that Germany can go on with the project of European integration, because the Member States remain the masters of the Treaties.[10] The doctrine of implied powers appears to be a borderline case, thus it is the last admissible form of broad interpretation of the European competences that the ECJ may use. In any case, the constituent power of the Member States is to be protected. Hence, granting the EU 'Kompetenz-Kompetenz' would go too far.[11]

At this point, my questions begin to surface. What are these 'creeping competences'? What makes them creep? What to make of these implied powers? In what way are they the last admissible instrument for the ECJ, the bridge it may cross just before reaching 'a bridge too far'? What, if anything, may serve as an argument by which to assign this doctrine such an important role? In this respect, the nature of this doctrine 'on the threshold' may be exemplified by the fact that the FCC seems to have changed its opinion on implied powers. In its judgment on the Treaty of Maastricht, the FCC had rejected the doctrine as an interpretation tool that went too far.[12] But this makes the questions only more pertinent. What to make of these implied powers as a borderline concept? What makes them distinguishable from 'Kompetenz-Kompetenz', a power which the FCC explicitly says that the EU does not possess, and should not possess? What exactly is the German court trying to protect when it points to the untouchable constituent power of the German people? The most interesting feature of the FCC's judgment on the Treaty of Lisbon is, perhaps, that it does not only address strictly legal questions, but that it also connects these questions with fundamental issues in legal and political philosophy. In this way, the FCC shows that there is more to 'creeping competences' than meets the (legal) eye. Indeed, (not even so deep) under the surface, 'creeping competences' pose

[6] BVerfG, 2 BvE 2/08 vom 30.6.2009, Absatz-Nr. (1–421), par. 216. The preliminary English translation is available at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html [visited on 29 October 2009].

[7] Ibid., par. 233.

[8] Ibid., par. 237.

[9] Ibid., par. 238, 240 and 265 amongst others.

[10] Ibid., par. 298 amongst others.

[11] In par. 322 the FCC holds that the Treaty of Lisbon does not give the EU 'Kompetenz-Kompetenz'.

[12] See Chap. 1, Sect. 1.5.

questions that invite us to dwell at the very centre of legal and political philosophy. In my opinion, it is no exaggeration to say that 'creeping competences' give food for thought. What, then, lies at the beginning of this study? Starting from the hypothesis that the FCC is right in connecting the problem of 'creeping competences' with issues like implied powers, constituent power and 'Kompetenz-Kompetenz', this book is an attempt to elucidate these problems in their mutual relationships in order to shed new light on them.

A Note on Methodology

This is a work in Philosophy of Law. Therefore, I will start by identifying the problems as they appear *in* law, and first articulate them in the language *of* law. Only at a second stage will I connect these problems to more general issues in legal and political philosophy. Finally, at a last stage, I will come back to the legal level in order to show what the philosophical detour has given us. The general methodology of the book is conceptual analysis. In order to understand the phenomenon of 'creeping competences', I will start by describing how competences, or legal powers, are regulated in the European legal order. In this context, special attention will be devoted to the pivotal role played by the European Court of Justice (ECJ). As the example of implied powers shows, the ECJ's case law has become essential to any understanding of competences in the European Union.[13] Here, it should immediately be noted that there exist different meanings of the concept of an implied power. One can distinguish at least two formulations, both of which are important for our purposes: 'According to the narrow formulation, the existence of a given power implies also the existence of any other power which is reasonably necessary for the existence of the former; according to the wide formulation, the existence of a given *objective* or *function* implies the existence of any power reasonably necessary to attain it.'[14] Some other chapters of the case law of the ECJ will also be analysed in order to show that, when it comes to competences, there is more room for manoeuvre than a strict reading of the Treaties suggests.

Discussing these cases, and some other problems with the current regulation of competences, will automatically bring us to the concepts of 'Kompetenz-Kompetenz' and constituent power. Since these notions address the same legal-political problem, I will continue with the concept of constituent power since it is more common in constitutional theory. Indeed, constitutional theory usually starts from the distinction between constituent or constituting power (the power to give the constitution) on the one hand, and constitutional or constituted power (the power given by the constitution) on the other. Competence or legal power can then be equated with constituted

[13] Cf. G. Conway, 'Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ', *German Law Journal*, vol. 11 (2010), pp. 966–1005.

[14] T.C. Hartley, quoted in: P. Craig & G. de Bùrca, *EU Law. Text, Cases, and Materials* (4th edition), Oxford (etc.): Oxford University Press 2008, p. 90 [Italics in the original].

power. Given the recent processes of 'constitutionalisation' in Europe (on the level of the EU, but also in several East-European countries) and in international organisations, the concept of constituent power has received quite some attention recently.[15] In that sense, this thesis takes up a problem that is central to contemporary legal theory. At the same time, it is also necessary to show how the conceptual problems encountered in the sphere of EU competences have developed in the history of constitutional thinking. Hence, a part of this study will be devoted to analysing important moments of this history in order to understand how constituent power and the relation with constituted power have been conceptualised. Furthermore, I will argue that the concept of constituent power represents the specific legal-political version of a more general philosophical problem: How are we to understand the creation or constitution of something meaningful?

Casting the problem of constituent power in these terms allows me to address it at a deeper level. What is at stake are the very foundations of constitutional theory. In order to reconceptualise these foundations, I take my cue from a movement in philosophy called phenomenology, and especially from the work of Maurice Merleau-Ponty (1908–1961). Phenomenology is the movement in Western philosophy that starts from, and aims to, articulate the viewpoint of the first person. This entails, in the words of Charles Taylor, taking the stance of radical reflexivity: 'What matters to us is the adoption of the first person standpoint. (...) The world as I know it, is there for me, is experienced by me, or thought about by me, or has meaning for me. Knowledge, awareness is always that of an agent. (...) In our normal dealings with things, we disregard this dimension of experience and focus on the things experienced. But we can turn and make this our object of attention, become aware of our awareness, try to experience our experiencing, focus on the way the world is *for* us. This is what I call taking a stance of radical reflexivity, or adopting the first-person standpoint.'[16] This stance of the first person, singular or plural, is of central importance for law and legal theory because it acknowledges the necessity of knowledge of identity, of oneself for legal discourse.[17] In other words, the importance of phenomenology for law and legal theory is that it articulates this primordial intersection between me and the world that is only found in experience,

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[15] Cf. M. Loughlin and N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, Oxford (etc.): Oxford University Press 2007, and N. Tsagourias (ed.), *Transnational Constitutionalism. International and European Perspectives*, Cambridge (etc.): Cambridge University Press 2007.

[16] C. Taylor, *Sources of the Self. The Making of the Modern Identity*, Cambridge (etc.): Cambridge University Press 1989, p. 130 [Italics in the original].

[17] Cf. B. van Roermund, 'Introduction: Law - the Order and the Alien,' *Ethical Perspectives: Journal of the European ethics network*, vol. 13 (2006), pp. 331–357, at pp. 332–333: 'Legal discourse provides ample evidence of this "self-based" conceptual geography. Without silently recalling the experience of one's own existence, it is incomprehensible why certain rights should be regarded as "fundamental." Without the internal view on a legal order as "one's own", there is no reason why some assertions should count as "normative", and some form of authority as "supreme". Without appreciating the reflexive overtones of the "proper", one would be unable to understand the concepts of "property" or of "trespassing". Phenomenology basically explicates this starting point, as it pervades all our thinking, speaking and acting.'

and that is central to law. For the concept of legal power this means that a phenomenological approach is able to understand legal power from the first person stance; to grasp a fundamental sense of self or identity that is presupposed in any account of legal power.

The oeuvre of Merleau-Ponty comprises texts on subjects such as perception, language, history, painting, expression, politics, ontology, nature, pedagogy and behaviour. Merleau-Ponty did not explicitly address legal problems. Yet, his work has formed the inspiration for Claude Lefort, one of the most important contemporary French political philosophers.[18] Not unlike Lefort, I will use the work of Merleau-Ponty to analyse the concepts central to this study: constituent power and constituted power. For this purpose, I will put emphasis on certain aspects of Merleau-Ponty's work, leaving others aside. Furthermore, I will confront his works with that of others in order to unveil their full potential for the themes of this inquiry. It is important to stress that this is not an inquiry into the value of Merleau-Ponty's thoughts for legal philosophy in general, nor a book on the political philosophy of Merleau-Ponty himself.[19] Rather, I would like to see my engaging with Merleau-Ponty's work as in accordance with his own way of philosophising, taking up an 'unthought' of his thought.[20] In this way, the theme of constituent power can be traced back to its philosophical foundations. From there, a new light may be cast on the problem of how to make sense of the 'competence creep'. As a philosophical study, this book makes no pretentions of coming up with solutions to the problem of creeping competences. Its aim is more modest. Philosophy of Law may help elucidate problems in law and can point a way, or offer an alternative framework, wherein these legal problems can be articulated and solutions might be found. This study hopes to develop such a framework for the problem of creeping competences in the EU.

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[18] For the intellectual relationship between Merleau-Ponty and Lefort, see: G. Labelle, 'Maurice Merleau-Ponty et la genèse de la philosophie politique de Claude Lefort', *Politique et Sociétés*, vol. 22 (2003), pp. 9–44, available at: http://id.erudit.org/iderudit/008849ar [visited 29 October 2009] and D. Loose, *Democratie zonder blauwdruk. De politieke filosofie van Claude Lefort*, Best: Damon 1997, Chap. I.

[19] There are also some other publications that use Merleau-Ponty's work to analyse problems in the field of legal philosophy: W. S. Hamrick, *An Existential Phenomenology of Law: Maurice Merleau-Ponty*, Dordrecht (etc.): Nijhoff 1987, B. van Roermund, 'We, Europeans. On the Very Idea of a Common Market in European Community', in B. van Roermund, F. Fleerackers, & E. van Leeuwen (eds.), *Law, Life and the Images of Man*, Berlijn: Duncker & Humblot 1996, pp. 455–467, and H. Lindahl, 'Acquiring a Community: The Acquis and the Institution of European Legal Order', *European Law Journal*, vol. 9 (2003), pp. 433–450.

[20] M. Merleau-Ponty, *The Visible and the Invisible*, trans. A. Lingis, Evanston, Ill.: Northwestern University Press 1968, p. 199/M. Merleau-Ponty, *Le visible et l'invisible*, Paris: Gallimard 2003 [1964], pp. 249–250: '[C]an one put to a philosophy questions that it has not put to itself? (...) My point of view: a philosophy, like a work of art, is an object that can arouse more thoughts than those that are "contained" in it (can one enumerate them? Can one count up a language?), retains a meaning outside of its historical context, even *has* meaning only outside of that context' [Italics in the original]. For the notion of 'unthought', see: M. Merleau-Ponty, *Signs*, trans. R.C. McCleary, Evanston, Ill.: Northwestern University Press 1964, p. 160/M. Merleau-Ponty, *Signes*, Paris: Gallimard 2001 [1960], p. 260.

Outline of the Book

Concluding this introduction, let us take a look at what awaits us in the pages to come. The first chapter will describe the central problem of this book: What are we to make of the competence creep of the European Union? This chapter will thus be a legal account of the competence creep, and the role the ECJ plays in it. For that purpose, the present division of competences, and the main principles regulating it, will be sketched. Central to an understanding of creeping competences is the ECJ's doctrine of implied powers as an emblematic case of this phenomenon. What lies at the core of this doctrine is the relationship between constituent and constituted power. This becomes clear when we reread parts of the Maastricht-judgment of the German Federal Constitutional Court. Chapter 2 will address the relationship between constituent power and constituted or constitutional power from the viewpoint of the history of constitutional theory. Making the distinction between a tradition of constituent power, on the one hand, and a tradition of constitutionalism, on the other, I will argue that this relationship is traditionally conceptualised in a dualistic way. The work of several authors will be discussed in this context. Yet, since this dualism cannot make sense of the phenomenon of creeping competences, the present theories need to be rejected as far as this aspect is concerned.

Proceeding to the next stage of this inquiry, I will rethink the concepts of constituent and constituted power, and sketch an alternative theory of their relationship in Chaps. 3 and 4. Borrowing a term from Merleau-Ponty, I will call my alternative 'chiastic'. Accordingly, I will show what a chiastic understanding of legal power amounts to. Chapter 3 will first explore an alternative way of understanding constitution by taking it as a form of expression. In the fourth chapter, I will argue that this goes with a specific understanding of rule-following. In this respect, Merleau-Ponty's work offers important insights to help make sense of what Wittgenstein called the 'animal' character of rule-following. In the fifth and last chapter, I will return to the legal problem of 'creeping competences' and show that this alternative theory (a theory of chiastic power) can make sense of the Court's role in the competence creep, in general, and the doctrine of implied powers, in particular. Indeed, implied powers as a borderline case reveals that in constitutional settings, legal power moves between power *in* and power *over* law. Hence, there can be no strict distinction between constituent power (or politics) on the one hand, and constitutional power (or law) on the other. Several other case studies concerning competences will also be discussed to sustain this claim. Finally, the conclusion will summarise the main argument of this book.

Contents

Chapter 1
Competences and Authority in the European Legal Order

European integration is no longer an idea that is taken for granted, much less taken as gospel. Especially in the last couple of years, with the European Union trying to adopt its own constitution, one can witness growing reservations about the process of European integration. Often, this reticence goes hand in hand with a criticism of the growing power of Brussels, and the lack of democratic legitimacy. Central to these debates is the concept of legal competence, the power to impose binding norms. The criticism against European integration is often expressed in terms of a 'competence creep', as if Brussels is the head of a giant octopus that, in the name of integration, usurps more and more national powers. This study is to be an inquiry into these 'creeping competences'. How can we legally make sense of them? In what way are they creeping at the cost of national powers? At what cost will national powers come if integration is the issue? What are the philosophical problems hiding in the background of this phenomenon? In this chapter, I will give an overview of how the issue of competence lies at the heart of politico-legal developments in the European Union. In this respect, I will pay attention to the monitoring role that the European Court of Justice (ECJ) plays as the highest judge of the Union. I will also discuss the so-called doctrine of implied powers, as an emblematic case of 'creeping competencies'. Furthermore, I will analyse the problem of competences, and will show how a strictly legal solution does not suffice. However, I will start by sketching the present division of competences between the European Union and its Member States.

1.1 The Division of Competences Between Union and Member States

Any inquiry into the problem of competence in the European Union should start with an analysis of what the Treaty says on the issue of competence. What remains of the story of a power-usurping Union when we take into account the legal

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documents? Where do we, legally speaking, stand today?[1] In this respect, two important principles need to be distinguished. The first appears in Article 13, paragraph 2 Treaty on European Union, or TEU (ex Article 7 EC) that governs the horizontal division of competences, i.e., the division between the different institutions of the EU. It holds that '[e]ach institution shall act within the limits of the powers conferred upon it by this Treaty.'[2] Accordingly, each institution has only those powers attributed to it and in the Union one may speak of an 'institutional balance'.[3] Its importance notwithstanding, Article 13 TEU does not say which powers the institutions of the Union hold. A first answer to this question may be found when we take a look at the so-called principle of conferred powers, also known as the principle of attribution or conferral. This is the main principle governing the competences of the European Union. We find it in Article 5 TEU, paragraph 2 (ex Article 5 EC, paragraph 1) that states: '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.'[4]

The principle says that the Union only has the power to act within the fields and by the means explicitly mentioned. Therefore, the Union has no general competence to act within the framework of the Treaty. The direct consequence of the principle of conferred powers for the European Union is that all its actions must depend on a prior legal basis in the Treaty. The rationale underlying this requirement is the idea that the Union itself has no power to create competences, but that its powers derive from the Member States. In other words, all competences of the European institutions are retraceable to the Member States. This view is also supported by the case law of the ECJ: With the signing of the Treaties, the Member States have 'limited their sovereign rights, albeit within limited fields.'[5] Because of this, a transfer of competences for an indefinite period has taken place.

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[1] For the sake of clarity, I will also refer to the Treaty establishing a Constitution for Europe, C 310/1. This constitution had structured and laid down the existing case law of the ECJ on the division of competences in a better way. For an excellent analysis of the way in which the European Constitution had dealt with the issue of competence, see: Z.C. Mayer, 'Competences – Reloaded? The Vertical Division of Powers in the EU and the new European Constitution', *International Journal of Constitutional Law*, vol. 3 (2005), pp. 493–515.

[2] It should immediately be noted that an important kind of competence creep takes place here. The 'competences of EU institutions' are often confused with matters that fall 'within the scope of EU law'. It is important to note that we are dealing here with two different things. A matter 'within the scope of EU law' does not necessarily entail a competence of an EU institution. However, by claiming that a certain matter falls 'within the scope of EU law', the ECJ contributes to a loss of power for the Member States. On this issue see: S. Prechal, S. de Vries and H. van Eijken, 'The Principle of Attributed Powers and the "Scope of EU Law"', in L. Besselink, F. Pennings and S. Prechal (eds.), *The Eclipse of Legality in Europe*, Kluwer Law International, forthcoming 2011.

[3] Cf. J-P. Jacqué, 'The Principle of Institutional Balance', *Common Market Law Review*, vol. 41 (2004), pp. 383–391.

[4] Cf. Article 5 EC, paragraph 1 stated: 'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.' See also Article I-11, paragraph 2, of the Treaty establishing a Constitution for Europe.

[5] Case 26/62, *Van Gend & Loos* [1963] ECR 1.

The importance of the requirement of a prior legal basis comes into sight when we consider its two different, but interrelated, functions.[6] First of all, it works as a guarantee. The legal basis of a decision contains the scope of the competence, the authorized institution, the required decisionmaking procedure and the instruments that must be used. With these specific requirements, the competences of an institution can be distinguished from those of other institutions, or the powers of Member States. In this way, citizens, Member States and other institutions can be protected against unauthorized actions of an institution. This protection is reflected in Article 296 TFEU (ex Article 253 EC) that demands to state the reasons on which the acts of an institution are based. As this is an essential procedural requirement in the sense of Article 263 TFEU (ex Article 230 EC), the Court can declare void actions that do not comply with it. The second function of the requirement of a prior legal basis is instrumental. Since the institutions of the European Union do not have a general competence, they can only act using the specific competences that were explicitly given to them. In other words, the competences of an institution are the 'legal limbs' with which it can act.[7] Yet, sometimes there seems to be more than one legal basis for a certain action. In this respect, it is important to stress that the institutions do not possess a wide-ranging discretionary power to choose the applicable legal basis. In its case law, the ECJ has determined that the choice of the legal basis must depend on objective factors which are the purpose and the content of the decision.[8]

The following division of legislative competences between the institutions of the European Union and the Member States can be sketched. In the current system, one may draw a distinction between exclusive competences of the Member States, exclusive competences of the Union, competences that are shared or concurrent and complementary competences of the Union.[9] Beginning with the **exclusive competences of the Member States**, we can make a further distinction between two groups. First, there are domains that the Treaties do not cover. In these areas, Member States remain exclusively competent.[10] The second group of exclusive com-

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[6] R. Barents & L.J. Brinkhorst, *Grondlijnen van Europees Recht*, Deventer: Kluwer 2006, pp. 146–149.

[7] One could also say that the specific competences granted to the Community are 'the legal expedient created to enable them to proceed with the task stipulated in their constitutive acts.' Cf. A. Goucho Soares, 'The Principle of Conferred Powers and the Division of Powers between the European Community and the Member States', *Liverpool Law Review*, vol. 23 (2001), pp. 57–78, at p. 57.

[8] As Van Ooik comments: 'The European Court of Justice (ECJ) has always played an important role in monitoring the division of competence, both between the Member States and the EU institutions (vertical competence disputes), and between the EU institutions themselves (horizontal battles over might and power). Most of these types of disputes reach the ECJ in the form of a legal basis case (...)'. See: R. van Ooik, 'The European Court of Justice and the Division of Competence in the European Union', in: D. Obradovic and N. Lavranos (eds.), *Interface between EU Law and National Law*, Groningen: Europa Law Publishing 2007, pp. 11–40, at p. 13.

[9] Van Ooik, o.c., also distinguishes the residual competence of the Union, i.e. Article 308 EC (now Article 352 TFEU). I will come back to this provision in the next Section of this Chapter.

[10] The implied powers of the European Community are not yet taken into account. I will turn my attention to them in the next Section of this Chapter.

petence of the Member States consists of those domains where their competence is explicitly mentioned, or where the Union is prohibited from acting. Examples can be found in Articles 114, 154 and 169 TFEU (ex Articles 95, 138 and 153 EC). There are very few areas in which the Member States are exclusively authorized to enact legislation. It is also important to notice that we are not dealing with large, clearly demarcated domains, but only with specific aspects of certain fields. Legislation concerning acquiring and forfeiting nationality makes a good example. The competence in this area is exclusively reserved for the Member States.[11]

Just like the Member States, the European Union is exclusively competent in only a small number of fields. This follows from the principle of conferred powers: an **exclusive power of the Union** can never be the rule. An exclusive competence of the EU is defined in Article 2 TFEU, paragraph 1: '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.' In this context, 'the concept of an "area" is essentially built up by a collection of Treaty provisions enabling the EC [/EU, LC] institutions to adopt secondary legislation on the various aspects of a certain substantive matter.'[12] This exclusivity applies even if the Union has not yet taken any legislative action in the field. Therefore, were a Member State to enact legislation in an area belonging to the exclusive competences of the Union, a citizen of a Member State could lodge a complaint with the national judge referring directly to the exclusivity of the Union competence. The judge will have to declare the national rule not applicable. However, it remains possible that Member States are allowed to act in these domains. The Union may explicitly authorize the Member States, or the competence may be delegated to them. In total, there are five areas where the Union is exclusively competent. The Treaty on the Functioning of the European Union enumerates the areas in which the Union has exclusive competence in Article 3, paragraph 1: '(a) customs union; (b) the establishing of the competition rules necessary for the functioning of the internal market; (c) monetary policy for the Member States whose currency is the euro; (d) the conservation of marine biological resources under the common fisheries policy; (e) common commercial policy.'[13] Lawyers agree that these areas are not new, but that the Union was already exclusively competent in these domains.[14] To some extent the Treaty on the Functioning of the European Union only confirmed what was already known from the case law of the European Court of Justice. In its case law the ECJ had recognized two of these areas of exclusive competence. The first of these

[11] The Declaration on nationality of a Member State, attached to the Maastricht Treaty, states that: '(...) wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned.'

[12] R. van Ooik, o.c., p. 15.

[13] See also: Article I-13 of the Treaty establishing a Constitution for Europe.

[14] Cf. Van Ooik, o.c., p. 14. The external exclusive competences of the Community will be treated separately.