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Theme

Division of competences and regulatory powers between the EU and the Member States

Report: United Kingdom
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1. The division of competences between the European Union and its Member States

1.1. Principle of conferral and scope of European Union law

1.1.1. The perception of the principle of conferral (Q I-2)

There is a considerable volume of literature dealing with the division of competences between the European Union and the Member States.[1] It can be divided into different groups. Firstly, almost every textbook on EU law has a section on the competences.[2] Secondly, there is a small number of books dedicated to competences.[3] Thirdly, there is a plethora of commentary on competences pre

[1] See, *inter alia*, B. Guastaferro, *The European Union as a Staatenverbund? The endorsement of the principle of conferral in the Treaty of Lisbon*, in M. Trybus, L. Rubini, *The Treaty of Lisbon and the Future of the European Law and Policy*, Edward Elgar Publishing, Cheltenham-Northampton 2012, pp. 117-132.

[2] See, *exempli gratia*, P. Craig, G. de Búrca, *EU Law. Text, Cases and Materials*, 6th ed., Oxford University Press, Oxford 2015, pp. 73-104; T.C. Hartley, *The Foundations of European Union Law*, 8th ed., Oxford University Press, Oxford 2014, pp. 112-119; K. St C Bradley, *Legislating in the European Union*, in C. Barnard, S. Peers (eds.), *European Union Law*, pp. 104-110; L. Woods, P. Watson, *Steiner and Woods EU Law*, 12th ed., Oxford University Press, Oxford 2014, pp. 50-59; A. Dashwood, M. Dougan, B. Rodger, E. Spaventa, D. Wyatt, *Wyatt and Dashwood's European Union Law*, 6th ed., Hart Publishing, Oxford and Portland, Oregon 2011, pp. 97-113; K. Lenaerts, P. Van Nuffel, *European Union Law*, 3rd ed., Sweet & Maxwell, London 2011, pp.112-130; P. Weatherill, *Cases & Materials on EU Law*, 11th ed., Oxford University Press, Oxford 2014, pp. 29-45; R. Schütze, *European Constitutional Law*, Cambridge University Press, Cambridge 2012, 151-169; R. Schütze, *EU Competences. Existence and Exercise*, in A. Arnull, D. Chalmers (eds.), *The Oxford Handbook on European Union Law*, Oxford University Press, Oxford 2015, pp. 75-102.

[3] R. Schütze, *From Dual to Cooperative Federalism. The Changing Structure of European Law*, Oxford University Press, Oxford 2009; T. Konstatinides, *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States*, Kluwer Law International, The Hague 2009; L Azoulai (ed), *The Question of Competence in the European Union*, Oxford University Press, Oxford 2014.

and post-Lisbon, comprising edited volumes and journal articles.[4] Post-Lisbon literature discusses the competence issue either as part of more general analysis of the Treaty of Lisbon[5] or the research outputs specifically target the EU competences and their new typology.[6]

The formulation of the principle of conferral is not, in general terms, the centre of gravity of the academic analysis. Furthermore, insertion of Article 5 TEU is not considered to be a novelty. Some academics argue that although the EU is based on attributed powers, though there is an on-going drive to have them extended.[7]

The academic analysis focuses largely on the new catalogues of competences introduced by the Treaty of Lisbon as well as principles of subsidiarity and proportionality. As far as the early assessment of drafts that emerged from the European Convention is concerned, articles by G. Davies[8] and M. Dougan[9] merit particular attention. Both authors argued that the formulation of the principle of conferral adds nothing new. According to G. Davies, Article 9 of the Draft Constitution was "unsurprising" and "conform to existing law".[10] M. Dougan emphasised that the proposed wording was in fact based on Article 5(1) EC, however it was "reworded to stress the idea that the Union competences derive from the Member States via the Constitutional Treaty".[11] That Author also claimed that more important than the wording of the provision in question was the actual division of competences between the European Union and its Member States. In similar vein proceeded P. Craig in his contribution to the debate. An article published by that Author in European Law Review in 2004 focuses largely on the proposed catalogues of competences than on the formulation of the principle of conferral, as such.[12]

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[4] Pre-Lisbon literature includes, *inter alia*, A. Dashwood, *The limits of European Community powers*, 21 ELRev. (1996) pp. 113-128; S. Weatherill, *Competence Creep and Competence Control*, (2004) 23 *YEL* p. 1; G. Davies, *The post-Laeken division of competences*, 28 ELRev (2003) pp. 686-698; M. Dougan, *The Convention's draft Constitutional Treaty: bringing Europe closer to its lawyers?*, 28 ELRev (2003) pp. 763-793; P. Craig, *Competence: clarity, conferral, containment and consideration*, 29 ELRev (2004) pp. 323-344; R. Schütze, *The European Community's Federal Order of Competences – A Retrospective Analysis*, in M. Dougan, S. Currie (eds.), *50 Years of the European Treaties. Looking Back and Thinking Forward*, Hart Publishing, Oxford and Portland, Oregon 2009, pp. 63-92.

[5] T. Tridimas, *Competence after Lisbon. The elusive search for bright lines*, in D. Ashiagbor, N. Countouris, I. Lianos (eds), *The European Union after the Treaty of Lisbon*, Cambridge 2012, pp. 47-77, M. Dougan, *The Treaty of Lisbon 2007: Winning Minds not Hearts*, 45 CMLRev. (2008) pp. 617-70; P. Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform*, Oxford 2010, pp. 155-192; M. Claes, B. de Witte, *Competences: Codification and Contestation*, in A. Lazowski, S. Blockmans (eds.), *Research Handbook on EU Institutional Law*, Edward Elgar Publishing, Cheltenham 2016, in print.

[6] See, *inter alia*, R. Schütze, *Lisbon and the federal order of competences: a prospective analysis*, 33 ELRev. (2008) pp. 709-722; R Schütze, *From Rome to Lisbon: "Executive Federalism" in the (New) European Union*, 47 CMLRev. (2010) p. 1385.

[7] See D. Wyatt, *Is the European Union an Organisation of Limited Powers?* In A. Arnull, C. Barnard, M. Dougan, E. Spaventa (eds.), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood*, Hart Publishing, Oxford and Portland, Oregon 2011, pp. 3-23.

[8] G. Davies, *The post-Laeken division of competences*, 28 ELRev (2003) pp. 686-698.

[9] M. Dougan, *The Convention's draft Constitutional Treaty: bringing Europe closer to its lawyers?*, 28 ELRev (2003) pp. 763-793.

[10] G. Davies, *loc. cit*. n. 1, at p. 693.

[11] M. Dougan, *loc. cit.* n. 1, at p. 765.

[12] P. Craig, *Competence: clarity, conferral, containment and consideration*, 29 ELRev (2004) pp. 323-344. See particularly at p. 326.

The same approach is visible in the literature focusing on the Treaty of Lisbon. Many authors agree that new Article 5 TEU largely corresponds to former Article 5 EC and thus the new provision is merely a confirmation of the existing principle and does not add much new.[13] As P. Craig put it, "The EU has always had attributed competence".[14] At the same time, however, B. Guastaferro argues that former Art. 5 EC did not refer to conferral as a principle (unlike in relation to subsidiarity and proportionality). Thus, the change provided by means of Treaty of Lisbon, in the words of that Author, "puts the three principles governing both the existence and the exercise of EU powers on a par".[15] Furthermore, the addition of the word "only" to Article 5(2) TEU translates into a more restrictive version of the principle of conferral.[16] This is also evidenced by the restriction that competences not conferred on the EU remain with the Member States and by the possibility of repatriation of competences to the Member States, which is now envisaged in the TEU.[17] In her contribution to the debate L. S. Rossi does not discuss the wording of Article 5 TEU in detail, however, she argues that the new provisions reflect "the obsession for conferral", which reveals "a distrustful attitude of the Member States towards European competences". [18]

In the political discourse the principle of conferral *per se* has very little presence. A prevalent view, arguably inspired by the media coverage, is that the European Union has excessive competences, which should be brought back to the Member States. A good example is an open letter to Daily Telegraph sent by a large group of MPs from the Conservative Party. Very limited understanding of EU competences in Area of Freedom, Security and Justice is painfully visible.[19] Alas, there is little understanding of the existing legal framework, let alone a political will on the side of the UK government to disseminate the outcomes of its £ 5 million worth Balance of Competence Review.[20]

1.1.2. *Ultra vires* review (Q I-3)

As far as the *ultra vires* review is concerned, it is worth starting by referring to the European Communities Act 1972 (hereinafter ECA). This piece of legislation was enacted at the time of the UK's accession to then the European Communities. It imposes an obligation upon the UK courts to respect the primacy of EU law. Section 2(1) of the ECA 1972 provides that all national authorities, including UK courts and tribunals shall recognise, make available in law, enforce, allow or follow all rights, powers, liabilities and restrictions provided by EU law. Moreover, Section 3(1) of the ECA 1972 requires the UK courts to determine any questions concerning the meaning or effect of

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[13] For instance, T. Tridimas, *Competence after Lisbon. The elusive search for bright lines*, in D. Ashiagbor, N. Countouris, I. Lianos (eds), *The European Union after the Treaty of Lisbon*, Cambridge 2012, at p. 50-51, M. Dougan, *The Treaty of Lisbon 2007: Winning Minds not Hearts*, 45 CMLRev. (2008) pp. 617-703, at p. 654.

[14] P. Craig, *The Lisbon Treaty. Law, Politics, and Treaty Reform*, Oxford 2010, at p. 156.

[15] B. Guastaferro, *The European Union as a Staatenverbund? The endorsement of the principle of conferral in the Treaty of Lisbon*, *op. cit.* at p. 123.

[16] *Ibidem*.

[17] *Ibidem*.

[18] L. S. Rossi, *Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and Member States?* in A. Biondi, P. Eeckhout, S. Ripley (eds.), *EU Law After Lisbon*, Oxford University Press, Oxford 2012, pp. 93-94,

[19] The letter is reproduced in A. Hinarejos, J.R. Spencer and S. Peers, *Opting out of EU Criminal law: What is actually involved?,* CELS Working Paper, New Series, No.1.

[20] See a critical report of the House of Lords: The Review of the Balance of Competences between the UK and the EU. It is available at: http://www.publications.parliament.uk/pa/ld201415/ldselect/ldeucom/140/140.pdf

EU law in accordance with relevant decisions of the Court of Justice of the European Union (CJEU).

In the context of the UK constitution, the primacy of EU law is difficult to reconcile with the principle that Parliament is supreme and cannot bind its successors, which is a central issue in the on-going debate[21]. Nonetheless, the UK courts have embraced their responsibilities under the ECA 1972, and respected the primacy of EU law over domestic legislation. For example, in *Factortame (No. 2)* the Court has temporarily disapplied the Merchant Shipping Act 1988, which violated provisions of what is now Art. 49 TFEU[22] and in *EOC* case the UK court confirmed that it is prepared to permanently disapply Acts of Parliament which are incompatible with EU law[23].

Although the UK courts have respected supremacy of EU law in the UK legal system, as enshrined in the ECA 1972, it is arguable whether they have gone as far in their jurisprudence, as to accept that the final decision on the division of competences belongs to the CJEU[24]. In the report entitled 'The Future Role of the European Court of Justice' the House of Lords, European Union Committee has opined that the application of EU law in the domestic legal system of the Member States depends on acceptance of EU law by national courts[25]. It further highlighted, the fundamental function of the UK courts is to protect the UK constitution, and it is unlikely that this role has been relinquished by the obligations imposed in the ECA 1972[26]. Consequently, the House of Lords did not exclude the possibility of UK courts exercising their jurisdiction to rule on the division of competence between the Union and its Member States, although it recognised that this decision belongs in the first instance to the CJEU[27].

The UK courts have not in expressed terms reserved the right to decide whether an act of an institution of the EU respects the principle of conferral. However, certain statements in the domestic jurisprudence have been construed in a manner that allows for conclusion that the UK courts would be prepared to use the doctrine of *ultra vires* to ensure that the balance of competences established in EU Treaties is observed. The dictum of Lord Bridge of Harwich in *Factortame (No.2)* has been cited in the abovementioned House of Lords report in support of an opinion that the national courts have power to adjudicate on the limits of supremacy of EU law[28]. Notwithstanding this interpretation, in his dictum Lord Bridge has merely highlighted that the supremacy of EU law will be respected in those areas in which the EU law applies, without clarifying which court should

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[21] P. Craig, Parliamentary Sovereignty of the United Kingdom Parliament After Factortame, 11 YBEL (1991) p. 221; E. Szyszczak, Sovereignty: Crisis, Compliance, Confusion, Complacency?, 16 ELRev. (1990) p. 480, Wade, *The Basis of Legal Sovereignty,* [1955] CLJ 172, 188-9; Wade, Sovereignty: Revolution or Evolution?, 112 LRQ (1996) p. 568.

[22] *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603.

[23] *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] ECR I-2433.

[24] European Union Committee, 'The Future Role of the European Court of Justice. Report with Evidence' HL (2003-2004) [86].

[25] *Ibidem* at [88].

[26] *Ibidem.*

[27] *Ibidem* at [89].

[28] *Ibidem at* [86].

determine the scope of the EU competence[29]. Another example, is the case of *Thoburn* where Lord Justice Laws opined that the foundation for all EU competence is in English law, but without stating which court is competent to determine the question on the division of competences[30].

It has been suggested in the legal scholarship on this issue that UK courts will be cautious when engaging in any constitutional challenges of the authority of the CJEU and that it is likely that they will first refer the question on the division of competences to the CJEU before determining whether EU institutions transgressed the limits of their competences[31]. This is consistent with the more recent opinion expressed in the House of Lords report[32]. Nonetheless, the House of Lords has urged the Government to express their view on the *Kompetenz – Kompetenz* question clearly to the Parliament and to its citizens in the UK in order to assure the public that "the Union is not some Frankenstein creation over which there may be little or no control"[33].

A visible change has come with most recent jurisprudence of the Supreme Court of the United Kingdom. On two occasions their lordships have expressed dissatisfaction with the alleged competence creep attributable to the Court of Justice. In early 2014 in HS2 case the Supreme Court challenged the interpretation of EU legislation on the environmental impact assessment conducted by the judges in Luxembourg.[34] This was followed by an open challenge to the legality of judgment in case C-135/08 *Rottman v. Freistaat Bayern* in Pham case.[35] The following citation from the latter judgment (comprising a citation from a judgement of a lower court) exemplifies issues, which are at stake:

> "The conditions on which national citizenship is conferred, withheld or revoked are integral to the identity of the nation State. They touch the constitution; for they identify the constitution's participants. If it appeared that the Court of Justice had sought to be the judge of any procedural conditions governing such matters, so that its ruling was to apply in a case with no cross-border element, then in my judgment a question would arise whether the European Communities Act 1972 or any successor statute had conferred any authority on the Court of Justice to exercise such a jurisdiction. We have not heard argument as to the construction of the Acts of Parliament which have given the Court of Justice powers to modify the laws of the United Kingdom. Plainly we should not begin to enter upon such a question without doing so. That in my judgment is the course we should have to adopt if we considered that the Court of Justice, in Rottmann or elsewhere, had held that the law of the European Union obtrudes in any way upon our national law relating to the deprivation of citizenship in circumstances such as those of the present case." (para 43)
> I have quoted from the judgment at some length because it raises issues of general importance and some difficulty, which in agreement with Laws LJ I do not think are satisfactorily resolved

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[29] *R v Secretary of State for Transport, ex p Factortame Ltd (No 2)* [1991] 1 AC 603

[30] *Thoburn v Sunderland City Council* [2002] 1 CMLR 1461, para 59.

[31] P. Craig, *Report on the United Kingdom*, in A-M. Slaughter, A. Stone-Sweet and J.H.H. Weiler (eds.), *The European Court and National Court – Doctrine and Jurisprudence. Legal Change in its Social Context,* Hart Publishing, Oxford and Portland, Oregon 1998, p. 209.

[32] European Union Committee, 'The Future Role of the European Court of Justice. Report with Evidence' HL (2003-2004) [89].

[33] *Ibidem*.

[34] R (on the application of HS2 Action Alliance Limited) (Appellant) v Secretary of State for Transport and another (Respondents), [2014] UKSC 3.

[35] Pham (Appellant) v Secretary of State for the Home Department (Respondent), [2015] UKSC 19.

> by the judgment in Rottmann itself. Mr Southey relies also on more recent decisions of the European court (Zambrano v Office National de l'emploi (Case C-34/09) [2011] ECR I-1177, Dereci v Bundesministerium für Inneres (Case C-256/11) [2011] ECR I-11315) for the general proposition (citing Rottmann) that TFEU article 20 precludes national measures which have the effect of depriving citizens of the genuine enjoyment of "the substance of the rights conferred by virtue of their status as citizens of the European Union". This formulation, as he says, is not expressly limited to cross-border rights. However, as Mr Eicke notes, the scope of Zambrano remains a matter of controversy in domestic case-law (see, for example, Harrison v Home Secretary [2012] EWCA Civ 1736). It is sufficient for present purposes to say that none of the more recent European authorities provides clear answers to the questions raised by Laws LJ in G1."

Both judgments have been noted for their reservations to the most recent jurisprudence of the Court of Justice. Some academics and practitioners have concurred with the Supreme Court and argued that the Luxembourg judges should exercise more self-restraint. For example this was the tone of discussions during a seminar held at the British Institute of International and Comparative Law in London on 2 November 2015. It is worth drawing attention to presentations by Marie Demetriou QC[36] and Professor Derrick Wyatt QC.[37] Both speakers were very critical of the Court and the way it proceeds with a competence creep.

1.1.3. Alleged violation of the division of competences and panacea for ever closer Union (Q I-4)

Alleged breaches of division of competences is prevalent in the public discourse, not so much in a purely academic debate. It is worth noting that the United Kingdom for decades now has considered the expansion of EU competences as an unwelcome precedent. Thus, it was hardly surprising that the Government conducted its Balance of Competence Review with the view of verifying which competences of the European Union should be repatriated to the Member States. As explained later in this Report, the material produced as part of that exercise did not meet the expectations of political circles as it demonstrated that the balance of competence in all chapters is, as a matter of principle, correct. Nevertheless, the division of competence between the European Union and its Member States is currently at the heart of the referendum debate. As things stood at the time when this report was finalised, the political circles seemed to have had a licence to criticise the European Union at their leisure. In the public debate, particularly in the majority of newspaper outlets, the EU was portrayed as an entity meddling with domestic legislation, almost as if it were a plot against the masters of the Treaties. While some of the criticism is justified, in a great majority of cases the members of the public were exposed to a great deal of demagogy that had little merits.

The UK's stance on expansion of EU competences and potential abuses thereof has been reflected in plethora of out-outs it has negotiated with subsequent revisions of the Founding Treaties. The main areas of contention were participation in the EMU and the AFSJ. Incorporation of Schengen *acquis* by the Treaty of Amsterdam also proved to be a stumbling block. For the purposes of this report it is worth taking an inventory of the opt-outs the United Kingdom has negotiated in the areas if considered to be undesirable for EU legislator.

To begin with, Paragraph 1 of Protocol no 15 to the Treaties makes it unequivocally clear that the UK is under no obligation to adopt the Euro as its currency. Furthermore, Paragraph 3, in a similar

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[36] http://www.biicl.org/documents/776_marie_demetriou_paper.pdf?showdocument=1

[37] http://www.biicl.org/documents/760_derrick_wyatts_paper.pdf?showdocument=1

fashion, clarifies that the UK retains its powers as far as monetary policy is concerned. At the same time the UK may at any time decide to seek adoption of the Euro, however, this will be subject to compliance with the standard convergence criteria and dependent on positive (unanimous) decision of the Council. If that were to happen this opt-out regime would cease to apply. This solution meets the desires of the UK, which so far has expressed no intention to participate in the common currency. At the same time, however, it exacerbates tensions at the time when deeper integration within the Eurozone is inevitable. Being an opt-out country arguably reduces the UK's influence on measures that are developed and which in some ways may affect it. At the same time, however, changes in the Eurozone and attempts at deeper integration are carefully watched at the Whitehall. Should it be necessary the government may resort to a veto along the lines of the Fiscal Compact Treaty, which as a result of UK's defiance was concluded outside the EU framework.[38]

The UK is also covered by opt-outs in respect of AFSJ, including the Schengen *acquis*. As per Article 4 of Protocol No 19 to the Founding Treaties, the UK may at any time express a desire to take part in some Schengen legislation. Article 5 of this Protocol lays down a *modus operandi* should the UK request participation (and also should it change its mind during the negotiations). Furthermore, Protocol no 20 to the Treaties guarantees the UK's right to maintain border controls, including a separate visa regime for nationals of third countries. It also preserves the Common Travel Area between the UK and Ireland. Protocol No 21 regulates the position of the UK as far as the AFSJ is concerned. This extends to both, measures dealing with border checks, asylum, immigration as well as Judicial Co-operation in Civil and Criminal Matters. Unless the UK decides to opt-in, it remains largely immune to EU developments in these areas. Article 2 of Protocol 21 makes it clear that no secondary legislation, international treaty concluded by the EU or ruling of the Court is binding on the UK or affects it rights or obligations. A desire to opt in has to be presented, as per Article 3 of Protocol 21, within three months of publication of particular measures. Interestingly enough, Article 3 para. 2 of Protocol 21 contains a provision clearly aimed at potential defiance that could be exercised by the United Kingdom (and equally Ireland) during negotiations of measures it expressed interest in during the early stages of the decision-making procedures. Mainly, it allows the Member States to go ahead without the UK and Ireland if they cannot be adopted after "a reasonable period of time". This solution is of advantage for both sides. It allows the EU to go ahead with secondary legislation the Member States wish to adopt and, at the same time, it won't force the UK to be bound by the adopted *acquis*. The latter would have been the case if a vote was triggered in those cases when TFEU requires qualified majority in the Council. It would also not allow the UK to veto secondary legislation that requires unanimous approval of all Member States (should it have a change of heart following a notification of intention to opt-in). Furthermore, Protocol 21 provides for *modus operandi* applicable to negotiations of revisions of measures the UK had opted-in before. As per Article 4(a) of the Protocol, when the UK decides to exercise the right to opt-out in relation to a proposal for secondary legislation which amends an existing measure to which it had already opted in, the Council may "urge" opt-out should application of amended rules made the original measures "inoperable". This, no doubt, is a highly contentious matter. It is of particular interest to note that a large majority of Brexeteers argues that only by withdrawing from the European Union the United Kingdom would be able to restrict influx of foreigners, including the nationals of third countries. What escapes the attention of withdrawal

[38] Treaty on Stability, Cooperation and Governance, nyp. See further, *inter alia*, P. Craig, The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism', 37 ELRev (2012) p. 231; S. Peers, *The Stability Treaty: Permanent Austerity or Gesture Politics?*, 8 EuConst (2012) p. 404.

protagonists is a simple fact that the United Kingdom already benefits from the opt-out in the area in question, thus it controls its borders to the best of abilities of relevant state authorities.

The debate about EU competences in criminal matters returned like a boomerang in 2014 when the transitional period for a grand-JHA opt-out envisaged in the Treaty of Lisbon was coming to an end. Once again, in the public debate the European Union was accused of encroaching on the Member States' competences and their sovereignty. It is notable that under the terms of Article 10(4) of Protocol 36 the United Kingdom was given 5 years from the date of entry into force of the Treaty of Lisbon to decide on the fate of JHA measures it had opted in before 1 December 2009. Arguably, in order to reduce the appetite for such an exercise, only an *en block* opt-out was made available with a possibility of opting in back to some of those measures. To put it differently, the complexity associated with such a move was supposed to force the UK authorities to think twice before employing this mechanism. Arguably, the possibility of opting in back again gave the UK an option of making domestic political gains by trumpeting the Grand opt-out and then quietly opting in back again to those legal acts that were necessary or useful for all actors involved in the UK criminal justice system. The deterrent effect proved not to be strong enough for the Government, which, after months of heated debates, decided to pull the trigger. As expected, the en block opt-out was followed by opt-in to measures the UK had still a desire to adhere to.[39] One of the main bones of contention was the European Arrest Warrant, which by some is perceived as a very useful tool to combat crime but for others it is a limitation of sovereignty and - at best - a unnecessary nuisance.[40] As argued in the literature, much of the debate was a Shakespearean "much ado about nothing" as a lot of legislation the UK eventually opted out from is already firmly present in the UK legal orders.[41] This conclusion only strengthens the argument that the entire ordeal was merely a political exercise, which, alas, will have serious legal implications.

The debate about transfer of competences to the European Union is unlikely to go away, in particular if, as a result of the referendum, the United Kingdom stays in the European Union. It is notable that any future transfer of powers to the European Union may/will be subjected to a referendum (referenda) as per the European Union Act 2011. It was pushed through both chambers of the Parliament against cheers of the Conservative backbenchers and, at the same time, fierce criticism of some parts of the academic community.[42] First and foremost, the EUA imposes a referendum requirement largely on any future revision of TEU or TFEU, be it a fully-fledged revision based on Article 48(1-6) TEU or a decision of the European Council adopted pursuant to

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[39] Council Decision 2014/857/EU of 1 December 2014 concerning the notification of the United Kingdom of Great Britain and Northern Ireland of its wish to take part in some of the provisions of the Schengen acquis which are contained in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters and amending Decisions 2000/365/EC and 2004/926/EC, OJ L 345/2014, p. 1; 2014/858/EU: Commission Decision of 1 December 2014 on the notification by the United Kingdom of Great Britain and Northern Ireland of its wish to participate in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon and which are not part of the Schengen acquis, OJ L 345/2014, p. 6.

[40] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190/1.

[41] A. Hinarejos, J.R. Spencer and S. Peers, *Opting out of EU Criminal law: What is actually involved?,* CELS Working Paper, New Series, No.1.

[42] See S. Peers, *European integration and the European Union Act 2011: an irresistible force meets an immovable object?*, Public Law (2013) pp. 119-134; P. Craig, *The European Union Act: locks, limits and legality*, 48 CMLRev. (2011) pp. 1915-1944; M. Gordon, M. Dougan, *The United Kingdom's European Union Act 2011: "who won the bloody war anyway?"*, 37 ELRev. (2012) pp. 3-30.

the simplified treaty revision procedures laid down in Articles 48(7-8).[43] Interestingly enough, it does not require a referendum for approval of a withdrawal agreement (which is not part of primary law). It is argued in the academic literature that the increase of democratic control over EU related decisions of the UK government, either *qua* increased parliamentary control or plebiscite, is - at the level of principle - a very desired step.[44] However, the extent to which the Act requires the use of referenda may translate into costly exercises devoted to technical matters, which are of very little relevance for the UK, let alone its citizens.[45] Arguably, with its locks and widespread introduction of direct democracy, the Act is likely to backfire in the future. It is argued that the European Union Act is not likely to serve as a tool for defiance but rather it has a great potential to become a weapon of mass obstruction.[46]

1.1.4. The distinction between the domains of competences of the European Union and the field of application of European Union law (Q I-5)

Scholarship on EU law in the UK explains in detail conceptual aspects of the division of competences between the EU and its Member States. The distinction between the fields of competences and the scope of application of EU law is generally understood and explained. In some cases it is discussed with references to US constitutional doctrine. For instance, T. Tridimas employs the term “dormant EU competence” when referring to the application of EU law to areas which fall within parameters of domestic competence but, as per jurisprudence of the Court of Justice, should be applied with due regard to EU law.[47]

The terminology used in majority of texts divides EU competences into exclusive and shared, as well as, competence to support, co-ordinate and supplement the actions of the Member States[48]. Scholarship generally describes the division of competences between the EU and its Member States in a broader context of principles of conferral, subsidiarity and proportionality, which further facilitates understanding of the nature of the EU legal order.[49]

Commentators acknowledge broad nature of EU competences, as well as, their expansive dynamism promoted by the CJEU.[50] Consequently, some literature recognises that this wide reach, coupled with lack of precise definition with regards to the scope of application of EU competences

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[43] See, *inter alia*, sections 2-6 of the Act.

[44] For similar view see M. Gordon, M. Dougan*, The United Kingdom's European Union Act 2011: “who won the bloody war anyway?”, op. cit*, p. 16.

[45] See, for instance, P. Craig, *The European Union Act: locks, limits and legality*, *op. cit* at pp. 1932-1933. M. Gordon, M. Dougan*, The United Kingdom's European Union Act 2011: “who won the bloody war anyway?” op. cit.*, p. 19.

[46] For similar criticism see P. Craig, *The European Union Act: locks, limits and legality*, *ibidem* and M. Gordon, M. Dougan*, The United Kingdom's European Union Act 2011: “who won the bloody war anyway?”, ibidem.*

[47] T. Tridimas, *Competence after Lisbon. The elusive search for bright lines*, *op. cit.* at pp. 74-76.

[48] A. Dashwood, M. Dougan, B. Rodger, E. Spaventa, D. Wyatt, *Wyatt and Dashwood's European Union Law*, *op. cit*. pp. 114-119; P. Craig and G. de Búrca, *EU Law. Text, Cases, and Materials, op. cit.* p. 99; P. Mathijsen and P. Dyrberg, *Mathijsen's Guide to European Union Law*, 11th ed., Sweet & Maxwell, London 2013, p. 3; A. O'Neil QC, *EU Law for UK Lawyers,* Hart Publishing, Oxford and Portland, Oregon 2011, p. 20.

[49] *Ibidem.*

[50] A.O'Neil QC, *EU Law for UK Lawyers, op. cit.* at p. 20; A. Dashwood, M. Dougan, B. Rodger and E. Spaventa, D. Wyatt, *Wyatt and Dashwood's European Union Law*, *op. cit* at pp. 105-111.

in specific areas, can pose practical difficulties in application of EU law.[51] As explained further in next sections of this Report, the commentators highlight issues, in relation to 'competence creep', particularly in the context of Articles 114 and 352 TFEU. As explained further in the next sections of this Report, problems associated with a choice of an appropriate legal basis are also evaluated in the literature in the context of the division of competences between the EU and its Member States[52].

The case of *Åkerberg Fransson* has generated considerable scholarship on the scope of the Charter[53]. Scholars post-*Åkerberg Fransson* conclude that the CJEU does not interpret the Charter in a manner that restricts the application of EU fundamental rights. Questions regarding the scope of the Charter and the meaning of Article 51(1) have been raised before the judgement in *Åkerberg Fransson*[54]. This ruling although considered, as a step forward does not appear to provide sufficient clarification as to national activity which may fall within the scope of the Charter[55]. Although scholars criticised the judgement for lack of clarity with respect to application of EU law, most analysed the issue from the perspective of protection of fundamental rights in the EU and welcomed wide interpretation of Article 51(1)[56].

1.2. Principles that apply to the division and to the exercise of competences

1.2.1. Perception and application of the principle of subsidiarity (Q I-6 to I-7)

Legal scholarship in the UK recognises subsidiarity as one of the key principles to be applied to the divisions of competences between the EU and its Member States. This includes texts for

[51] *Ibidem.*

[52] Examples of cases evaluated in this context include: Case C-300/89 *Commission v Council* [1991] ECR 2867; C-155-91 *Commission v Council* [1993] ECR I-939l; Case C-187-93 *European Parliament v Council* [1994] ECR I-2857.

[53] E. Hancox, *The meaning of "implementing" EU law under Article 51(1) of the Charer: Åkerberg Fransson*, 50 CMLRev. (2013) p. 1411; R. Camcho Palma, *Case Comment: Aklagaren v Hans Åkerberg Fransson: chater(ing) new territory,* BTR (2013) p.137; B. van Bockel and P. Wattel, *New Wine into old wineskins: the scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson,* 38 ELRev (2013) p. 866.

[54] Editorial Comment, *The Scope of Application of the General Principles of Union Law: an Ever Expanding Union?* 47 CMLRev. (2010) p. 1589; K. Lenaerts, J. A. Guetiérrez-Fons, *The Constitutional Allocation of Powers and General Principles in EU Law*, 47 CMLRev. (2010) p.1629.

[55] E. Hancox, *The meaning of "implementing" EU law under Article 51(1) of the Charer: Åkerberg Fransson*, op. cit.

[56] E. Hancox, *The meaning of "implementing" EU law under Article 51(1) of the Charer: Åkerberg Fransson*, op. cit.; R. Camcho Palma, *Case Comment: Aklagaren v Hans Åkerberg Fransson: chater(ing) new territory,* op. cit.; B. van Bockel and P. Wattel, *New Wine into old wineskins: the scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson,* op. cit.

practitioners[57], handbooks[58] and more specialist scholarship.[59] All literature recognises that the EU's decision to exercise its shared competence should be made in accordance with the principle of subsidiarity enshrined in Art. 5(3) TEU. Wyatt and Dashwood describe subsidiarity as a principle that "provides a constitutional limit to the EU's ability to act in spheres which do not fall within the Union' exclusive competence" The principle of subsidiarity is also often described together with principles of conferral and proportionality. The role of the principle of conferral is generally understood as determining the powers the EU possess, whereas the subsidiarity and proportionally are recognised as principles governing how these powers are exercised.[60] Scholarship often explains the principle of subsidiarity alongside describing the scope of EU's competence, which highlights general consensus as to the importance of subsidiarity for the division of powers between EU and its Member States.

Some general texts on EU law distinguish between the operation of subsidiary before and after the entry into force of the Treaty of Lisbon.[61] Commentaries to the Treaty of Lisbon and other scholarly works post-2009 evaluate the latest reform.[62] More specialised literature, *inter alia*, often provides details of the procedure under Protocol 2.[63] Literature concerned with other branches of law, such as public law, mentions subsidiarity as one of the accountability mechanism of the EU and its institutions.[64]

The impact of the principle of subsidiarity on the UK and its national interests has been recently evaluated in the balance of competences review. In the final report, entitled: "Review of the Balance of Competences between the United Kingdom and the European Union: Subsidiarity and Proportionality", the Government has described subsidiarity as "a principle that must be followed

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[57] A. O'Neil QC, *EU Law for UK Lawyers, op. cit.* at p. 20; P. Mathijsen and P. Dyrberg, *Mathijsen's Guide to European Union Law*, op. cit., 3-02.

[58] A. Dashwood, M. Dougan, B. Rodger, E. Spaventa, D. Wyatt, Wyatt and Dashwood's European Union Law, *op. cit.* pp. 114-119; P. Craig and G. de Búrca, *EU Law. Text, Cases, and Materials, op. cit.* pp 95-96; J. Fairhurst, *The Law of the European Union*, 9th ed, Pearsons, Essex 2012, pp. 146-140; T.C. Hartley, *The Foundations of European Union Law, op. cit.* pp. 121-127; R. Schütze, *The European Union Law,* Cambridge University Press 2015, pp. 252-259; L. Woods and P. Watson, *Steiner & Woods EU Law, op. cit.* pp. 59-61.

[59] M. Cartabia, N. Lupo and A. Simoncini (eds), *Democracy and Subsidiarity in the EU. National Parliaments, Regions and Civil society in the Decision- Making Process,* Societá Editrice Il Mulino, Bologna, 2013; A. Cygan, *Accountability, Parliamentarism and Transparency in the EU. The Role of National Parliaments* ,Edward Elgar Publishing, Cheltenham 2013, pp. 121-184.

[60] T.C. Hartley, *The Foundations of European Union Law, op. cit.* pp. 121-127; L. Woods and P. Watson, *Steiner & Woods EU Law, op.cit.* p. 59.

[61] P. Craig and G. de Búrca, *EU Law. Text, Cases, and Materials, op.cit*. pp. 95-96.

[62] P. Craig, *The Lisbon Treaty. Law politics, and Treaty Reform, op.cit.* pp. 184-187; P. Craig, *Institutions, Power, and Institutional Balance,* in P. Craig and G. de Búrca (eds) *The Evolution of EU Law*, 2nd ed., Oxford University Press, Oxford 2011, pp. 41-84; J-C. Piris, *The Lisbon Treaty. A Legal and Political Analysis*, Cambridge University Press, Cambridge 2010, pp. 122-145; A. Cygan, *Collective' Subsidiarity Monitoring by National Parliaments after Lisbon: the Operation of the Early Warning Mechanism,* in M. Trybus and L. Rubini *The Treaty of Lisbon and The Future of European Law and Policy,* op. cit pp. 55-74.

[63] M. Cartabia, N. Lupo and A. Simoncini (eds), *Democracy and Subsidiarity in the EU. National Parliaments, Regions and Civil society in the Decision- Making Process, op. cit.* pp. 122-145.

[64] M. Elliot and R. Thomas, *Pubic Law, Oxford University Press*, Oxford 2011, p. 312.

by the EU when considering whether or not to exercise competence."[65] The House of Commons and the House of Lords, also recognise subsidiarity, as an important principle to be applied to the division of competences between the EU and its Member States[66] and both actively engage in monitoring whether the principles is observed by the EU's institutions.[67]

The UK courts have referred questions to the CJEU in four cases concerning alleged breach of subsidiarity principle.[68] The earliest case, in 1996, considered the Working Time Directive. The CJEU dismissed the question at the outset on the grounds that the aims of the directive would be better served at the EU level.[69] The CJEU provided the same answer to subsidiarity questions referred by the UK court in cases of: the *British American Tobacco*[70]*,* in December 2002, and *Alliance for Natural Health*[71]*,* in 2005. The only case referred to the CJEU after the entry into force of the treaty of Lisbon was *Vodafone*[72]*,* which concerned Regulation (EC) No 717/2007 on roaming on public mobile telephone networks. Similarly to the previous cases, the CJEU has found that the principle of subsidiarity was not breached.

The division of competences generated reasoned opinions in the United Kingdom in the context of the subsidiarity control procedure. In the period between 2010 and 2014 the House of Commons and the House of Lords have issued 15 and 7 reasoned opinions respectively.[73] In all opinions issued by both the House of Commons and the House of Lords the analysis of proposed EU's acts have been undertaken only in the context of subsidiarity and did not evaluate appropriateness of the legal basis. Although declarations in all reasoned opinions only referred to the principle of subsidiarity, the House of Lords in its report on "The Role of National Parliaments in the European Union" has proposed that the proportionality principle should be included within the scope of the review together with the assessment whether the proposal is brought forward under an appropriate legal basis.[74]

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[65] Foreign and Commonwealth Office, 'Review of the Balance of Competences between the United Kingdom: Subsidiarity and Proportionality' (December 2014), [1.1].

[66] See the principle of subsidiarity explained on the House of Common and House of Lords websites, respectively: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/scrutiny-reserve-overrides/> (accessed 31/10/2015); <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/committee-work/parliament-2010/subsidiarity/> (accessed 31/10/2015).

[67] House of Lords and House of Common collectively issued 22 reasoned opinions under the Protocol 2 procedure, see: Ibid; European Union Committee, 'The Role of National Parliaments in the European Union' HL (Session 2013-24).

[68] Case C-84/94 *UK v Council (Working Time Directive)*, ECLI:EU:C:1996:431; Case C-491/01 *British American Tobacco,* ECLI:EU:C:2002:741; Case C-154/04 *Alliance for Natural Health*, ECLI:EU:C:2005:449; Case C-58/08 *Vodafone*, ECLI:EU:C:2010:321.

[69]Case C-84/94 *UK v Council (Working Time Directive)* 55.

[70] Case C-491/01 *British American Tobacco*.

[71] Case C-154/04 *Alliance for Natural Health*.

[72] Case C-58/08 *Vodafone*.

[73] Reasoned Opinions of the House of Commons: <http://www.parliament.uk/business/committees/committees-a-z/commons-select/european-scrutiny-committee/scrutiny-reserve-overrides/> (Accessed 31/10/2015); Reasoned opinions of the House of Lords: <http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-select-committee-/committee-work/parliament-2010/subsidiarity/> (Accessed 31/10/2015)

[74] European Union Committee, 'The Role of National Parliaments in the European Union' HL (2013-14), [79, 194]

The House of Lords noted in its report that principles of subsidiarity and proportionality are clearly related, thus extending scope of the review as to include proportionality would improve both democratic accountability of the EU, as well as, effectiveness of the procedure, through preventing sterile debate whether a particular issue falls under principle of proportionality or subsidiarity.[75] In relation to the issue of legal basis, the House of Lords noted that since the existence of an appropriate legal basis is a condition precedent for the EU exercising its power in a particular area, this aspect should also be made available for review under the reason opinion procedure.[76]

Although the UK Parliament has made number of recommendations for improvements, a cursory review of its reasoned opinions issued to date clearly indicated that both Houses of Parliament to large extent complied with the existing procedure and did not exceed scope of the review.

1.2.2. Exclusive competences and pre-emption (Q I-8 to I-10)

Both, exclusive competences and pre-emption have received a fair share of academic commentary. The scholarship has modified the analysis by extending it to the post-Lisbon legal environment, thus the centre of gravity of the academic discourse is on Articles 3-6 TFEU.[77] It goes without saying that prior to the adoption and entry into force of the Treaty of Lisbon the development of exclusive competences attracted the attention of academic circles. A leading example is an article by R. Schütze published in European Law Review.[78] Furthermore, the evolution from Laeken to the Constitutional Treaty was also closely scrutinised by the academic commentators.[79] T. Konstantinides analyses the development of competence provisions all the way from Laeken Conclusions to the Treaty of Lisbon.[80]

The list of domains falling under the exclusive competence is frequently reproduced in the post-Lisbon academic literature, however its formulation is in many cases neither praised nor criticised. There are, of course, exceptions. For instance R. Schütze has provided a fair degree of criticism in another article published in European Law Review.[81] According to that Author, inclusion of customs union competence was devoid of purpose as the competence to establish a customs union had been abolished by the Treaty of Amsterdam and by the fact that the adoption of Common Customs Tariff falls within the parameters of Common Commercial Policy, which is listed separately in Article 3(1) TFEU. Furthermore, the wording of Article 3(1) second *tiret* TFEU raises doubts, in particular the phrase “necessary for the functioning of the internal market”. This, as argued by R. Schütze, amounts to “ontological fallacy”. That Author also questions inclusion of

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[75] *Ibidem* at [77].

[76] *Ibidem* at [78].

[77] For a comparison see P. Craig, *EU Administrative Law*, Oxford University Press, Oxford 2006, pp. 401-418 and P. Craig, *EU Administrative Law*, 2nd ed, Oxford University Press, Oxford 2012, pp. 367.

[78] R. Schutze, *Dual federalism constitutionalised: the emergence of exclusive competences in the EC legal order*, 32 ELRev. (2007) pp. 3-28.

[79] G. Davies, *The post-Laeken division of competences*, *op. cit.* pp. 686-698; M. Dougan, *The Convention's draft Constitutional Treaty: bringing Europe closer to its lawyers?*, *op. cit.* pp. 763-793; P. Craig, *Competence: clarity, conferral, containment and consideration*, *op. cit.* pp. 323-344.

[80] T. Konstatinides, *Division of Powers in European Union Law: The Delimitation of Internal Competence between the EU and the Member States*, *op. cit.* at pp. 221-249.

[81] R. Schutze, *Lisbon and the federal order of competences: a prospective analysis*, 33 ELRev. (2008) pp. 709-722.

monetary policy for the Member States with Euro as the currency as it translates into extension of "concept of constitutional exclusivity to situations of differentiated integration".[82] Last but not least, the same Author claims that "the conservation of marine biological resources could well have been re-integrated into the European Union's shared agricultural competence."[83] In more general terms P. Craig emphasises that the catalogue of exclusive competences is modest, which is not surprising bearing in mind that the political process that followed the Laeken Conclusions was aimed at containment of EU powers.[84] That Author is also critical of the catalogue in its current shape and focuses, in particular, on delimitation between the competition rules and internal market. To put it differently, he considers the scope of exclusive competence, in particular whether it covers Articles 101-102 TFEU (no major doubts here) as well as Article 106 TFEU. This question is answered in affirmative.[85] Further problems, according to that Author, arise from the inclusion of customs union in the catalogue of exclusive competences. The question emerges where a line should be drawn between the exclusive competence in the area in question and the internal market, which is a shared competence. L. S. Rossi argues in her contribution to the debate that some items on the list of exclusive competences are not surprising, as they had been classified as exclusive competence by earlier jurisprudence of the Court of Justice. This does not include the monetary policy.[86]

Pre-emption is widely discussed in the academic literature.[87] Not surprisingly, Article 2(2) TFEU and the Protocol on the exercise of shared competence are the centre of gravity. According to T. Tridimas, who followed R. Schütze in this respect, a distinction can be drawn between rule pre-emption and field pre-emption. As per first, adoption of an EU measure prohibits adoption of conflicting domestic legislation. The second interpretation leaves "no margin for intervention by the national legislature".[88] The Protocol annexed to the Treaties, arguably, establishes a presumption against field pre-emption.[89] Ch. Timmermans in his contribution to the debate argues that the concept of pre-emption originates from the legal doctrine not per se from the jurisprudence of the Court of Justice. That Author looks at two different concepts of pre-emption. The first is when the exercise of EU "competence is considered to block the exercise of national competence". In the second approach the Member States are allowed to legislate as long as they comply with EU legislation. This, according to Ch. Timmermans, is not a rule of competence but a rule of conflict.[90]

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[82] *Ibidem*, at p. 713.

[83] *Ibidem*, at p. 713.

[84] P. Craig, *EU Administrative Law*, Oxford University Press, 2nd ed., Oxford 2012, at p. 372.

[85] P. Craig, *The Lisbon Treaty*, *op. cit*. at pp 159-161.

[86] L. S. Rossi, *Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and Member States?*, *op. cit.* at pp. 98-99.

[87] In pre-Lisbon literature see, *inter alia*, S. Weatherill, *Beyond Preemption? Shared Competence and Constitutional Change in the European Community*, in D. O'Keefe and P. Twomey (eds.), *Legal Issues of Maastricht Treaty*, Chancery Law Publishing, London 1994; E. D. Cross, *Pre-emption of Member State law in the European Economic Community: A framework for analysis*, 29 CMLRev. (1992) p. 447; R. Schütze, *Supremacy without pre-emption? The very slowly emergent doctrine of Community pre-emption*, 43 CMLRev. (2006) p. 1023.

[88] T. Tridimas, *Competence after Lisbon. The elusive search for bright lines*, *op. cit.* at p. 65.

[89] *Ibidem* at p. 65.

[90] Ch. Timmermans, *ECJ Doctrines on Competences*, in L. Azoulai (ed.), *The Question of Competence in the European Union*, *op. cit.* at p. 159.

The Treaty of Lisbon clarifies that when the EU exercises the shared competence then the "national competence is neutralized: it is frozen as long as the relevant Union rules remain in force."[91]

P. Craig in his seminal textbook on EU Administrative Law argues that as per Article 2(2) the "Member States action is pre-empted where the Union has exercised its competence". This, however, is subject to the following clarifications:

- the Member States will loose the competence to the extent the EU has legislated, which has to be determined on provision by provision basis,

- the Member States will loose the competence but only to the extent the EU has legislated in a given area of law,

- competences may be repatriated back to the Member States,

- the Member States may continue to exercise their competences as per Articles 4(3) and 4(4) TFEU.[92]

United Kingdom was authorised to legislate in the area of EU's exclusive competence, for instance, in Commission Implementing Decision 2014/13/EU.[93] The UK proposed measures to protect marine ecosystems in a number of areas of conservation. As far as shared competences are concerned, certain derogations were allowed, *inter alia*, in VAT and transport.[94]

Transposition of EU directives is done at the UK level by acts of parliaments or statutory instruments.[95] The legal basis in European Communities Act 1972.[96] It is notable that in the areas where the devolved authorities in Scotland, Wales and Northern Ireland hold powers they will be in charge of transposition of directives using the suite of legal acts available to them. Furthermore, EU directives may be transposed separately for Gibraltar. When it comes to transposition technique, there is no one size fits all approach. EU directives may find their way into more complex pieces of domestic legislation (sometimes with other directives) or they will be transposed qua tailor-made measures. Statistical data prepared by the House of Commons proves that a great majority of EU legal acts is given effect by statutory instruments. In the period 1993-2014 a total of 4283 EU

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[91] *Ibidem*.

[92] P. Craig, *EU Administrative Law*, 2nd ed., *op. cit.* p. 379.

[93] Commission Implementing Decision 2014/13/EU of 11 December 2013 confirming measures proposed by the United Kingdom for the protection of marine ecosystems in the areas of conservation Haisborough Hammond & Winterton; Start Point to Plymouth Sound & Eddystone, and Land's End & Cape Bank (notified under document C(2013) 9003), OJ L 30, 31.1.2014, p. 1–87.

[94] Council Implementing Decision (EU) 2015/2109 of 17 November 2015 authorising the United Kingdom to apply a special measure derogating from Articles 26(1)(a), 168 and 168a of Directive 2006/112/EC on the common system of value added tax, OJ L 305, 21.11.2015, p. 49–50; Commission Decision 2014/426/EU of 1 July 2014 authorising the United Kingdom to derogate from certain common aviation safety rules pursuant to Article 14(6) of Regulation (EC) No 216/2008 of the European Parliament and of the Council (notified under document C(2014) 4355) Text with EEA relevance, OJ L 196, 3.7.2014, p. 35–37.

[95] See V. Miller, *Making EU law into UK law*, House of Commons Library, SN/IA/7002, 22 October 2014.

[96] This was a highly contentious matter in the period leading up to UK's accession to the European Communities. See, *inter alia*, D. Nicol, *EC Membership and the Judicialization of British Politics*, Oxford University Press, Oxford 2001, particularly see pp. 76-116.

related statutory instruments was adopted. In the same period of time 231 EU related acts of Parliament were approved, out of which 18 exclusively implemented EU law. [97]

Detailed rules on transposition of directives are provided in a transposition guide prepared by the Government. The guidelines highlight relevant procedures to be followed, including the regulatory impact assessment conducted from the early days of the EU decision-making process, avoidance of gold plating and double banking, drafting (copy-out or elaboration). No equivalent guidelines are available for EU regulations and EU decisions. The assumption is that since regulations are directly applicable they won't require domestic intervention, unless it is necessary to make them effective. A good example is the European Public Limited-Liability Company Regulations 2004, which give effect to EU Regulation and EU Directive on *Societas Europea*.[98] Another example is the Civil Aviation (Denied Boarding, Compensation and Assistance) Regulations 2005 facilitating direct applicability and effectiveness of EU Regulation 261/2004/EC on compensation for denied boarding, flight delays and cancellations.[99]

Case C-370/12 *Pringle*[100] has been extensively analysed in the United Kingdom, details were provided in FIDE 2014 Report prepared by P. Eeckhout and M. Waibel.[101]

1.3. Implicit competences (Q I-11 to I-13)

Implicit competences in the internal matters are not receiving much attention in the contemporary academic literature.[102] Much more attention has been paid to the codification of ERTA doctrine in Article 3(2) TFEU, more generally implied competence in external relations as well as to Article 352 TFEU.

Not surprisingly, Article 3(2) TFEU is widely discussed in the academic literature. The debate started early when the first drafts of the Constitution emerged. For instance, M. Dougan found the formulation of, what was then Article I-12(2) very problematic and claimed that this attempt to codify the jurisprudence of the Court of Justice was done in "a simplistic and potentially misleading

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[97] V. Miller, *EU obligations: UK implementing legislation since 1993*, House of Commons Briefing Paper No 07092, 10 June 2015.

[98] Council Regulation 2157/2001/EC of 8 October 2001 on the Statute for a European Company, OJ L 294, 10.11.2001, p. 1; Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22.

[99] Council Regulation (EC) No. 261/2004 of 11th February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, OJ L 46, 17.2.2004, p.1.

[100] Case C-370/12 *Thomas Pringle v Governement of Ireland, Ireland and The Attorney General*, ECLI:EU:C:2012:756.

[101] See also P. Craig, *Pringle and use of EU institutions outside the EU legal framework: foundations, procedure and substance*, 9 EuConst (2013), p. 263; G. Beck, *The Court of Justice, legal reasoning, and the Pringle case: law as the continuation of politics by other means*, 39 ELRev. (2014) p. 234; A. Knade-Plaskacz, *Comment on judgment of the Court of Justice (Full Court) in case C-370/12 Thomas Pringle v. Government of Ireland*, 16 CLR (2013) p. 287; S. Adam and F. J. Mena Parras, *The European Stability Mechanism through the legal meanderings of the Union's constitutionalism: comment on Pringle*, 38 ELRev.(2013) p. 848; B. de Witte, *The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle : case C-370/12, Thomas Pringle v. Government of Ireland, Ireland, the attorney general*, 50 CMLRev. (2013) p. 805.

[102] See, for instance, K. Lenaerts, P. Van Nuffel, *European Union Law*, *op. cit.* pp. 120-121.

manner".[103] P. Craig concluded that it run against the main stream, which was the containment of powers attributable to the European Union. This provision aimed to do just the opposite.[104] The post-Lisbon literature is very prolific and looks at Article 3(2) TFEU mainly from a broader perspective of EU competences in external relations and also in combination with Article 216 TFEU.[105] The assessment of its value added varies. For instance, P. Koutrakos claims that if Article 3(2) TFEU were to be read literally, it would "appear to broaden up the scope of the Union's exclusive competence to an extent which is clearly at odds with the genesis and interpretation of the principle of necessity".[106] That Author is particularly critical of the wording of both, Article 3(2) TFEU and Article 216 TFEU. Interpretation of those rules, is arguably, not straightforward.[107] T. Tridimas argued that Article 3(2) TFEU grants the exclusivity also to competences, which internally fall under the umbrella of shared competences.[108] Along the same lines R. Schütze claims that the "potential for exclusivity is significantly expanded" *qua* Article 3(2) TFEU and the amendment in question may have "potentially suicidal consequences" for the Member States.[109]

Article 352 TFEU, just like its predecessor (Art. 308 EC) has received a lot of attention in the academic literature.[110] It should be noted that it is frequently analysed en pair with Article 114 TFEU. Both are generally considered to have served as vehicles for expansion of EU competence. The terminology employed by the Authors varies; however, it is notable that the term "implied competences" is not often used. For instance, B. Guastaferro refers to it as "competence extension provision"[111], while P. Craig, as many others, calls it a "flexibility clause".[112] Many Authors argue that Article 308 EC was used too frequently in the period leading up to extension of EU competences *qua* the Single European Act and the treaty revisions that followed since.[113] Some authors claim that recourse to the post-Lisbon flexibility clause is likely to diminish now that the European Union is equipped with extensive competences in many areas where previously Article

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[103] M. Dougan, *The Convention's draft Constitutional Treaty: bringing Europe closer to its lawyers?*, *op. cit.* at pp. 770-771.

[104] P. Craig, *Competence: clarity, conferral, containment and consideration*, *op. cit.* at p. 330.

[105] See further, *inter alia*, P. Koutrakos, *EU International Relations Law*, 2nd ed., Hart Publishing, Oxford and Portland, Oregon 2015, pp. 75-130; B. Van Vooren, R.A. Wessel, *EU External Relations Law. Text, Cases and Materials*, Cambridge University Press, Cambridge 2014, pp. 74-137; P. Eeckhout, *EU External Relations Law*, 2nd ed., Oxford University Press, Oxford 2011, pp. 120-164; M. Cremona, *Allocation of Competences in the field of External Relations*, in L. Azoulai, *op. cit.*

[106] *Ibidem*, at p. 128.

[107] *Ibidem*, at p. 129.

[108] T. Tridimas, *Competence after Lisbon. The elusive search for bright lines*, *op. cit.* at p. 60.

[109] R. Schütze, *Lisbon and the federal order of competences: a prospective analysis*, *op. cit.* at p.714.

[110] For an extensive analysis see R. Schütze, *From Dual to Cooperative Federalism*, *op. cit.* pp. 130-143. See also, *inter alia*, A. Dashwood, *Article 308 EC as the Outer Limit of Expressly Conferred Community Competence*, in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law*, Hart Publishing, Oxford and Portland, Oregon, 2009, pp. 35-44.

[111] B. Guastaferro, *The European Union as a Staatenverbund? The endorsement of the principle of conferral in the Treaty of Lisbon*, *op. cit.* p. 122.

[112] P. Craig, EU Administrative Law, *op. cit.* pp. 384-385.

[113] Environmental policy and regional policy are traditionally used as examples. See, R. Schütze, *From Dual to Cooperative Federalism*, *op. cit.* pp. 137-139.

308 EC had been used as a legal basis.[114] Most recent literature focuses mainly on two aspects of Article 352 TFEU. Firstly, the authors analyse the scope of the provision in question and emphasise the fact that it is no longer limited to common market. Secondly, a lot of attention is paid to procedural requirements as well as the involvement of national parliaments.

[114] *Ibidem* at p. 388.

2. The current division of competences between the European Union and the Member States

2.1. The concept of legal basis (Q II-1 to II-2)

The concept of legal basis is present in some textbooks in the chapters devoted to the EU's competences and decision-making.[115] It is subject of academic commentary[116], in particular in case-notes and case commentaries devoted to judgments of the Court of Justice touching on this issue.[117]

The concept of legal basis is on the radars of both, the UK Government and the Parliament. In the last years the UK has proven to be very active in this respect by challenging EU secondary legislation it was against of in the Council.[118] This, for instance, includes a series of opt-out cases where the UK questioned the legal bases for decisions of the Council in the area of external relations. The first in line was case C-431/11 *United Kingdom v. Council*[119] in which the UK challenged the legality of Council Decision 2011/407/EU dealing with an update to EEA Agreement.[120] The UK argued that the legal basis chosen by the Council, that is Article 48 TFEU on free movement of workers, was incorrect and should have been replaced with Article 79(2)(b) TFEU. The latter provision falls under the Area of Freedom, Security and Justice, therefore the UK could have benefited from an opt-out as per Protocol 21 to the Founding Treaties.[121] Neither AG Kokott[122], nor the Court agreed with the applicant hence the action was dismissed.[123] The same happened in cases C-656/11 *United Kingdom v. Council*[124] and C-81/13 *United Kingdom v.*

[115] See, for instance, K. Lenaerts, P. Van Nuffel, *European Union Law*, *op. cit.* pp. 116-120, A. Dashwood, M. Dougan, B. Rodger, E. Spaventa, D. Wyatt, *Wyatt and Dashwood's European Union Law*, *op. cit.* pp. 111-114.

[116] See, for instance, N. Emilio, *Opening Pandora's Box: the Legal Basis of Community Measures before the Court of Justice*, 19 ELRev. (1994) p. 488; M. Klamert, *Conflicts of Legal Basis: No Legality but a Bright Future under the Lisbon Treaty?*, 35 ELRev. (2010) p. 497.

[117] See, for instance, N. Rennuy and P. van Elsuwege, *Integration without membership and the dynamic development of EU law: United Kingdom v. Council (EEA)*, 51 (2014) CMLRev. pp. 935.

[118] A classic example from the early days see Case C-84/94 *UK v Council (Working Time Directive),* ECLI:EU:C:1996:431.

[119] Case C-431/11 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, ECLI:EU:C:2013:589.

[120] Council Decision 2011/407/EU of 6 June 2011 on the position to be taken by the European Union within the EEA Joint Committee concerning an amendment to Annex VI (Social Security) and Protocol 37 to the EEA Agreement, OJ 2011 L 182, p. 12.

[121] The same would have applied to Ireland, which supported this action for annulment submitted by the United Kingdom.

[122] Opinion of Advocate General Kokott in case C-431/11 United Kingdom v. Council, ECLI:EU:C:2013:187.

[123] For an academic appraisal see, *inter alia*, N. Rennuy and P. van Elsuwege, *Integration without membership and the dynamic development of EU law: United Kingdom v. Council (EEA)*, 51 (2014) CMLRev. pp. 935–954.

[124] Case C-656/11 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, ECLI:EU:C:2014:97.

Council.[125] In the first the legality of Council Decision 2011/863/EU was challenged.[126] In the second case the United Kingdom sought annulment of Council Decision 2012/776/EU.[127] In terms of substance, the legal issue at stake was just the same as in the EEA case therefore it should not come as a surprise that neither of the actions was successful. These judgments triggered an unavoidable discussion about the actual scope of the JHA opt-outs and have lead to a formal enquiry conducted by the EU Select Committee of the House of Lords.[128]

The challenges to several other pieces of secondary legislation, allegedly affecting the financial centre based in London, provide further good examples.[129] Case C-507/13 *United Kingdom v. Council* is interesting for a number of reasons, not necessarily related to the substance of the dispute but the shockwaves it created in the United Kingdom. [130] The request for annulment covered Directive 2013/36/EU[131] and Regulation 575/2013/EU.[132] The government argued that in both cases the EU legislator acted in breach of TFEU. AG Jääskinen presented his Opinion on 20 November 2014 and advised the Court to reject the action *in toto*.[133] For the ruling Conservative Party the timing was not very fortunate as the opinion was presented on the day of by-elections where it was expected to loose a seat to the heavily populist UK Independence Party (UKIP). To surprise of many, having received opinion of AG Jääskinen, the Government withdrew the action for annulment on the same day, arguing that it wished to save taxpayers money in a case it was certain to loose. If that is so, the question remains why the Government submitted the action in the first place. In legal terms the withdrawal of this case makes little sense, however, if one looks at the timing of Court proceedings, and puts it against the electoral cycle in the United Kingdom, the answer is rather obvious. It was easier to swallow a bitter pill on the day of by-elections than it would have been in the heat of electoral campaign before the parliamentary elections of May 2015.

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[125] Case C-81/13 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, ECLI:EU:C:2014:2449. See also Opinion of Advocate General Kokott, ECLI:EU:C:2014:2114.

[126] Council Decision 2011/863/EU of 16 December 2011 on the position to be taken by the European Union in the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons as regards the replacement of Annex II to that Agreement on the coordination of social security schemes, OJ 2011 L 341, p. 1.

[127] Council Decision 2012/776/EU of 6 December 2012 on the position to be taken on behalf of the European Union within the Association Council set up by the Agreement establishing an association between the European Economic Community and Turkey, with regard to the adoption of provisions on the coordination of social security systems, OJ 2012 L 340, p. 19.

[128] Written evidence as well as transcripts of oral evidence are available at: http://www.parliament.uk/business/committees/committees-a-z/lords-select/eu-law-and-institutions-sub-committee-e/inquiries/parliament-2010/the-uks-opt-in-and-international-agreements/ (last accessed on 28 January 2015).

[129] See Case C-270/12 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, ECLI:EU:C:2014:18.

[130] Case C-507/13 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union.*

[131] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing directives 2006/48/EC and 2006/49/EC, OJ 2013 L 176, p. 338.

[132] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ 2013 L 176, p.1.

[133] Opinion of Advocate General Jääskinen delivered on 20 November 2014 Case C-507/13 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, ECLI:EU:C:2014:2394.

Another example worth paying attention to is Case C-209/13 *United Kingdom v. Council*.[134] This time the UK government challenged the legality of Council Decision 2013/52/EU.[135] It has been opposing the introduction of such a tax from the start, arguing a possible economic damage to the City. It was joined by a group of other countries that, too, refused their support for the proposal tabled by the European Commission in 2011.[136] The opposition was so fierce that the Member States had to accommodate a veto threat from the UK and some Member States and, at the same time, the pressure coming from other capitals to go ahead. The only way forward was to authorize enhanced co-operation. The UK government took a decision to move from political to legal tools of defiance and challenged the legality of that decision. However, the Court unequivocally dismissed the action as premature, hence unfounded.[137]

Equally tricky in practice is determination of a correct legal basis when a proposed measure deals with a non-opt out policy, yet it carries flavours of matters where the UK benefits from one of the opt-outs. A very good example to prove this point is Case C-43/12 *Commission v. European Parliament and Council*.[138] The European Commission challenged the legality of Directive 2011/82/EU on transfer of data regarding road traffic accidents.[139] The Directive in question was based on Article 87(2) TFEU, allowing the UK (alongside Ireland and Denmark) to benefit from an opt-out. However, as the European Commission argued, a correct legal basis should have been Article 91(1)(c) TFEU dealing with transport. The latter belongs to non-opt out areas, therefore, it should not come as a surprise that the UK expressed a great interest in this litigation. The end result proved to be not satisfactory for the Whitehall as the Court annulled this Directive and held that the correct legal basis was transport, not AFSJ.

In most recent jurisprudence Case C-121/14 *United Kingdom v European Parliament and Council* stands out.[140] It was an action for annulment of Regulation (EU) No 1316/2013 establishing the Connecting Europe Facility.[141] All arguments of submitted by the plaintiff as to the wrong legal bases of the legislation in question were dismissed by the Court of Justice.

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[134] Case C-209/13 *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, ECLI:EU:C:2014:283.

[135] Council Decision 2013/52/EU of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax, OJ 2013 L 22, p. 11.

[136] Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC, COM (2011) 594 final.

[137] See paras. 35-40.

[138] Case C-43/12 *European Commission v European Parliament, Council of the European Union*, ECLI:EU:C:2014:298.

[139] Directive 2011/82/EU of the European Parliament and of the Council of 25 October 2011 facilitating the cross-border exchange of information on road safety related traffic offences, OJ 2011 L 288, p. 1.

[140] Case C-121/14 *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union*, ECLI:EU:C:2015:749.

[141] Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010, OJ L 348, 20.12.2013, p. 129.

Courts in the United Kingdom have submitted a number of references to the Court of Justice where the legality of EU secondary legislation was challenged. Cases C-344/04 *IATA et al*[142] and C-58/08 *Vodafone et al*[143] are very good examples.

2.2. Assessment of the balance of competences (Q. II-3 to II-4)

As noted earlier, the question of repatriation of some competences back to the Member States is frequently on the political agenda in the United Kingdom. Alas, rarely examples of candidates for repatriation are put forward. In order to build a case for renegotiation of UK's terms of membership in the EU, in July 2012 the Foreign Secretary launched a review of the EU's competences in the UK. The review has been undertaken by the 2010-2015 Conservative and Liberal Democrat coalition government over a period of two years and encompassed 32 areas of EU competence.

The review was one of the most extensive analyses of what the EU means for the UK that was ever conducted in the UK. The aim of this exercise was to provide a comprehensive assessment of the effects that EU's actions and EU law has on the UK and its national interests.

The review was conducted over four semesters, each focusing on 6-10 individual areas of the EU's competence. During each semester, the relevant Government departments issued 12-week Calls for Evidence setting out scope of their work and requesting input from a range of interested parties and members of the public with relevant expertise. The Government consulted with Parliament and its committees, business, the devolved administration, civil societies, EU institutions and European partners on the issue of how the EU's competences work in practice. The Government summarised findings in separate reports, each focusing on a specific area of EU's competence. Each report addressed an aspect of competences listed under Title I of the TFEU. In total the Government published 32 reports.

In semester 1, which run between Autumn 2012 and Summer 2013, the Government undertook reviews and published reports in the following areas: (1) Single Market, (2) Taxation, (3) Animal Health and Welfare and Food Safety, (4) Health, (5) Development Cooperation and Humanitarian Aid, (6) Foreign Policy.

In semester 2 - Spring 2013 to Winter 2013, the Government undertook reviews and published reports in the following areas: (7) Single Market: Free Movement of Goods, (8) Asylum and Non-EU Migration, (9) Trade and Investment, (10) Environment and Climate Change, (11) Transport, (12) Research and Development, (13) Culture, Tourism and Sport, (14) Civil Judicial Cooperation.

In semester 2 the Government has also undertaken review of the Single Market: Free Movement of Persons; however the report no. 15, summarising findings in this area was published in Semester 3.

In semester 3, Autumn 2013 to Summer 2014, also the following reports were published: (16) Single Market: Free Movement of Services, (17) Single Market; Financial Services and the Free Movement of Capital, (18) EU Budget, (19) Cohesion, (20) Social and Employment, (21)

[142] Case C-344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport*, ECLI:EU:C:2006:10.

[143] Case C-58/08 *The Queen, on the application of Vodafone Ltd and Others v Secretary of State for Business, Enterprise and Regulatory Reform*, ECLI:EU:C:2010:321.

Agriculture, (22) Fisheries, (23) Competition and Consumer Policy, (24) Energy, (25) Fundamental Rights.

In Semester 4, Spring 2014 to Autumn 2014 the Government reviewed and published reports in last 7 areas of EU Competence it was reviewing, including: (26) Economic and Monetary Policy, (27) Police and Criminal Justice, (28) Information Rights, (29) Education, Vocational Training and Youth, (30) Enlargement, (31) Voting, Consular and Statistics, (32) Subsidiarity and Proportionality

All evidence was published at the same time as reports, unless there was a compelling reason not to do so. All reports are available to the public and can be accessed via the governmental website: https://www.gov.uk/guidance/review-of-the-balance-of-competences.

The Government has decided not to publish a report summarising finding of all 32 reports and drawing general conclusion for the entire review. As noted earlier, this decision has been heavily criticised by the House of Lords.[144] However, on its website the Government has summarised common themes, which run through the report and drew some general conclusions. According to this summary, majority of contributors observed that principles of subsidiarity and proportionality were not sufficiently implemented. They have found that harmonisation of rules in some areas was unnecessary and resulting in disproportionate costs to business. According to the Government's conclusions, many contributors have found that unnecessary actions of the Union is some areas contributed to undermining the EU's legitimacy in some Member States.

The reports have also highlighted the need for greater democratic accountability of EU institutions. Some contributors suggested that CJEU had too wide a margin over interpretation of EU's competences and suggested that accountability could be improved by increasing powers of national governments.

Majority of contributors agreed that progress is required in many spheres over which the EU exercises its competences, and highlighted in particular the need for better EU regulation, and better implementation and enforcement of existing legislation.

The general conclusions drawn by the Government were that the EU needs an ambitious reform to make it more open, competitive flexible and democratically accountable. Foreign Secretary, Philipp Hammond also added that the reports underline the need for the EU to focus on those areas where it genuinely adds value. Although the review itself benefited from engagement of several academics who either contributed to the reports or submitted written and oral evidence, it has received little attention in the academic literature. A thorough assessment was in fact provided overseas by CEPS, a Brussels based think-thank.[145]

[144] European Union Committee, 'The Review of the Balance of Competences between the UK and the EU' L (2014-15) [55].

[145] M. Emerson (ed.), *Britain's Future in Europe. Reform, renegotiation or secession?*, CEPS, Brussels 2015.

3. Sharing of competences and executive federalism

3.1. The conceptualization of European Union executive federalism (Q III-1)

The body of literature on the subject of EU administrative law has been growing in the UK in recent years[146]. Specialist scholarship distinguishes between direct and indirect administration, but also recognises different terminology used in this area of EU law, such as: shared administration, executive federalism, co-administration, and mixed proceedings. Some scholars express a preference for using terminology of the Committee of Independent Experts embodied in the 2002 Financial Regulations[147], and use term shared and centralised administration to describe form of administrative organisation within the EU.[148] The literature often uses terminology of shared and indirect administration interchangeably[149].

The concept of multi-level governance is often acknowledged in the literature; however not always it is used to describe arrangements in EU administrative law in any detailed or critical manner. Existing literature on the subject of EU administrative law[150] and texts more general in nature[151] describe the concept of multi-level governance in theoretical terms and acknowledge the developments in this area made by political scientists[152]. More specialist scholarship, which specifically examines a multi-level system of governance, and evaluates legal issues encountered in such form of governance in the EU, can also be found in the UK[153].

Specialist scholarship on the subject of EU administrative law[154] and EU law generally[155] takes account of the hierarchy of norms in EU law and distinguishes between legislative acts, quasi legislative-acts of general application, and implementing acts, consistently with Articles 289-291 TFEU. The literature also acknowledges different types of 'executive' measures after entry into

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[146] P. Craig, *EU Administrative Law, op. cit.*; D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution*, Oxford University Press, Oxford 2009; D. Curtin, *Tradition and Innovation: Europe's Accumulated Executive Order*, 31(3) West European Politics (2008) p. 639; H. C.H. Hofmann and A. Türk, *The Development of Integrated Administration in the EU and its Consequences*, 13 (2007) ELJ p. 253; E. Chiti, *Administrative Proceedings Involving European Agencies,* 68 Law & Contemp. Probs. (2004-2005) p. 219; G. Della Cananea, *The European Union's Mixed Administrative Proceedings,* 68 Law & Contemp. Probs. (2004-2005) p. 197; M. P. Chiti, *Forms of European Administrative Action,* 68 Law & Contemp. Probs. (2004-2005) p. 37; S. Cassese, *European Administrative Proceedings*, 68 Law & Contemp. Probs. (2004-2005) p. 21; P. Craig, *A New Framework for EU Administration: The Financial Regulation 2002*, 68 Law & Contemp. Probs. (2004-2005) p. 107.

[147] P. Craig, *EU Administrative Law, op. cit.* p. 27.

[148] Paul Craig, *EU Administrative Law, op. cit.* p. 28.

[149] D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution*, *op. cit.* p.167.

[150] P. Craig, *EU Administrative Law,* op. cit. at p. 99.

[151] P. Craig and G. de Búrca, *EU Law. Text, Cases, and Materials, op. cit.* pp. 25-26; P. Craig, *Integration, Democracy and Legitimacy*, in P.Craig and G. de Búrca (eds) *The Evolution of EU Law op. cit.* pp. 21-26.

[152] P. Craig, *EU Administrative Law, op. cit*. p. 99. Curtis, 253

[153] R.Kaiser and H. Prange, *Managing Diversity in a System of Multi-level Governance: the Open Method of Co-ordination in Innovation Policy,* 11 JEPP, p. 249.

[154] D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution*, *op. cit.* p. 123.

[155] P. Craig, *The Lisbon Treaty. Law Politics and Treaty Reform, op. cit.*

force of the Treaty of Lisbon and accounts for the roles of the Commission in application and execution of normative acts of the European Union.[156]

Legal texts concerned with EU law evaluate functions of all EU institutions, including powers conferred upon the Commission. Competence of oversight, which is often described as a duty to ensure compliance with EU law is identified as one of the competences of the Commission.[157] The Commission's competence of oversight is also characterised, as judicial power of the Commission and is often mentioned in the context of EU competition policy.[158] Executive and oversight competences of the Commission are differentiated in the scholarship in the UK.[159] The former is understood as Commission's responsibilities relating to finance and those concerning external relations. Scholarship recognises that executive functions of the Commission are not confined to external representation and budgetary responsibilities, but also acknowledges that the Commission may be required to exercise its executive powers to 'ensure the application' of the Treaties within the internal market.[160]

3.2. The legal problems of the practice related to executive federalism (Q III-4)

In the UK, the European Communities Act 1972 s. 2(1) provides for the EU law to be directly effective in the UK legal system and s.3(1) requires that any questions as to the meaning or effect of the Treaties to be determined in accordance with the rulings of the Court of Justice of the European Union. The UK courts have embraced principles of direct applicability and primacy of EU law already in their early case law, decided soon after the UK's accession to the EU. In *Grand v British Rail Engineering,* Lord Diplock observed that in accordance with s. 2 of the European Communities Act 1972, the UK statutes should be construed in such a manner, as to bear the meaning and carry out obligations consistent with the EU Treaties.[161]

The UK courts apply purposive reading to UK legislation which specifically implements EU provisions. Thus they have a power to add, delete from, or hold ineffective provisions of implementing national legislation in order to ensure that it gives full effect to the provisions of EU law.[162] Although conflict between primacy of EU law and UK constitutional principles became apparent in *Factortame,* the House of Lords, as required by EU law, set aside a clear rule of English law that injunction cannot be granted against the Crown.[163] In the light of this ruling, O'Neil

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[156] D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution, op. cit.* p. 123.

[157] A. O'Neil, *EU Law for UK Lawyers, op. cit.* p. 176.

[158] P. Craig and G. de Búrca, *EU Law. Text, Cases, and Materials, op. cit.* p. 38.

[159] P. Craig and G. de Búrca, *EU Law. Text, Cases, and Materials, op. cit.* pp. 37-38; A. Dashwood, M. Dougan, B. Rodger, E. Spaventa, D. Wyatt, *Wyatt and Dashwood's European Union Law, op. cit.* Chapter 4; R. Schütze, *European Union Law, op. cit.* p. 54.

[160] R. Schütze, *European Union Law, op. cit.* p. 54; D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution*, *op. cit*. p.123.

[161] *Grand v British Rail Engineering* [1983] 2 AC 751,[771A-B].

[162] *Lister v Forth Fry Dock Co Ltd* 1989 SC (HL).

[163] *R v Secretary of State for Transport, ex p Factortame (No 2* [1990] 2 AC 85.

concluded that: "No clearer illustration can be given of the obligation of courts in the UK to protect EU law rights as against conflicting common law and statutory provisions."[164]

The UK courts have recently allowed for judicial review of the decision of the UK Government in relation to the distribution of structural funds across the UK.[165] The UK Supreme Court reviewed whether the decision of the Secretary of State for Business, Innovation and Skills complied with both the domestic legislation in the UK and EU law. Although the court concluded that the actions of the Government were non-compliant with the Equality Act 2010, it decided not to invalidate the decision of the Secretary of State. The court adopted a cautious approach when undertaking a judicial review of an administrative action implementing EU act, as the decision in relation to the distribution of structural funds was approved by the European Commission prior to the commencement of the proceedings the before UK courts.[166]

3.3. The joint management of EU funds and in particular the Structural Funds (Q III-6)

Organisational structure for the management of Structural Funds in the UK

In relation to the EU's funding round for 2014 to 2020, the UK government has set up a general framework for management of the Structural Funds. In this organisational structure the Department for Business, Innovation and Skills (BIS) leads the UK government on policy for the European Structural Funds (European Regional Development Fund (ERDF) and European Social Fund (ESF)) and on the UK Partnership Agreement. The Department for the Environment, Food and Rural Affairs (Defra) leads the policy on European Agricultural Fund for Rural Development (EAFRD) and European Maritime and Fisheries Fund (EMFF).

The Scottish and Welsh government and the Northern Ireland Executive are responsible for delivery of the European Structural and Investment Funds (ESIF) in their own respective territories. In England there are three Managing Authorities responsible for the delivery of funding, these are: Department for Communities and Local Government (DCLG) for ERDF, Department for Work and Pension (DWP) for ESF and Department for Environment, Food and Rural Affairs for EAFRD.

Assessment of the Procedure for Planning and Execution of Structural Funds in the UK

On 22 July 2014 the report on the "Balance of competences review on cohesion policy" was published by the UK government.[167] The report, *inter alia*, included assessment of the extent to which the UK has benefited from the EU Structural Funds expenditure. The evaluation focused specifically on ERDF and ESF in the two most recent programme periods of 2000-06 and 2007-13. The programmes were appraised against five criteria: (a) the performance of UK Regions in receipt of Structural Funds expenditure; (b) programme impacts; (c) the additionality of spending; (d) the leverage of the Funds (in terms of match-funding); and (e) added value[168]. The review has found

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[164] A. O'Neil QC, *EU Law for UK Lawyers, op. cit.* p. 77.

[165] *R (on the application of Rotherham Metropolitan Borough Council and others) (Appellants) v Secretary of State for Business, Innovation and Skills (Respondent*) [2015] UKSC 6.

[166] *Ibidem* [24].

[167] Department of Business Innovation & Skills, 'Balance of Competences Cohesion Review Literature Review on EU Cohesions Policy' (BIS Research Paper No. 179) February 2014.

[168] *Ibidem*.

that the EU Structural Funds have had valuable influence on the delivery of economic development policy in the UK[169].

The UK courts have not made a reference to CJEU for preliminary rulings relating to the allocation of structural funds. However, in the recent case *R. (on the application of Rotherham MBC) v Secretary of State for Business, Innovation and Skills* [2015], the Supreme Court reviewed the decision of the UK government on the allocation of 2014-2020 funds[170]. The application for judicial review was brought by two local authorities in England (South Yorkshire, Merseyside), which argued that the decision of the Secretary of State concerning allocation of the latest round of EU funding was irrational. The local authorities contended that they were treated in a less favourable manner than similarly-categorised regions in Scotland and Northern Ireland and suggested that the decision on allocation of funds was non-compliant with the Equality Act 2010.

Although the Supreme Court allowed for judicial review, it has not found the decision of the Secretary of State to be unlawful. Lord Sumption has noted that the UK courts were cautious to intervene in cases concerning allocation of structural funds because of the wide discretion enjoyed by the Government, the fact that such cases concern distribution of finite domestic and EU resources and the decisions on distribution of funds are approved by the Commission[171].

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[169] *Ibidem*.

[170] *R (on the application of Rotherham Metropolitan Borough Council and others) (Appellants) v Secretary of State for Business, Innovation and Skills (Respondent*) [2015] UKSC 6.

[171] *Ibidem* at [23-24].