

CHAPTER 38

SUPPORTING POLICIES

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1. Introduction

This introductory section will explain what is covered by “supporting policies”, how they relate to other areas and indicate their common characteristics.

1.1 *Complementary competences*

Article 6 TFEU provides that the EU “shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be (a) protection and improvement of human health; (b) industry; (c) culture; (d) tourism; (e) education, vocational training, youth and sport; (f) civil protection; (g) administrative cooperation”. This category of competence is often referred to as “complementary”, and for the purposes of this Chapter the policies that ensue from these competences shall be called “supporting policies”.

In accordance with Article 2(5) TFEU, supporting policies are not to “supersede” the competence of the Member States in the area concerned. Moreover, the measures that can be adopted on the Treaty provisions relating to these areas cannot harmonize Member States’ laws or regulations. Underlining the importance attached to it, this limitation is reiterated in each of the specific Treaty provisions relating to these policy areas.¹ These national autonomy clauses and harmonization prohibitions are a fundamental characteristic of complementary competence and betray its complex, two-sided nature: it is often as much directed at *authorizing* EU action as at *containing* it.

1.2 *The place of supporting policies in the Treaties*

As first sight, Article 6 TFEU seems to provide a finite list of complementary competences. This impression is reinforced by Article 4 TFEU, which establishes shared competence as a residual category, comprising all competences conferred by the Treaty that “do not relate to the areas referred to in Articles 3 and 6” TFEU. The truth is more complex. There are several other TFEU provisions, relating to policy areas not listed in Article 6 TFEU and instead classified as a shared competence, that confer only a limited, supporting competence on the EU.

For instance, Article 79 TFEU provides that the EU “may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration

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1. Arts. 168(5), 173(3), 167(5), 195(2), 165(4), 196(2) and 197(2) TFEU.

of third-country nationals residing legally in their territories, excluding any harmonization of the laws and regulations of the Member States". Similar powers are provided in Article 84 TFEU in the field of crime prevention. Furthermore, as an ambiguous addition to the hard competence provided in its first paragraph, Article 19(2) TFEU stipulates that the EU "may adopt the basic principles of Union incentive measures, excluding any harmonization of the laws and regulations of the Member States", supporting Member State action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

While strictly speaking inconsistent with the clear-cut categorization introduced in Articles 2–6 TFEU, the preceding examples are still relatively unproblematic. In essence, it concerns specific, limited parts of broader policy areas, where these limited parts exhibit traits of a complementary competence while the policy area as a whole can be classified as a shared competence.² The situation becomes more complex in other areas.

Firstly, Article 4 TFEU features two policy areas that as a whole do not fit the profile of either complementary or shared competence. Article 4(3) TFEU stipulates that in the areas of research, technological development and space, the Union shall have competence to carry out activities, but adds that the exercise of that competence shall not result in Member States being prevented from exercising theirs. Article 4(4) TFEU provides the same for development cooperation and humanitarian aid. These competences are further elaborated in several provisions under Titles III and XIX TFEU. The focus of EU action in these fields is on coordination and cooperation, but in contrast with complementary competences *stricto sensu*, the EU also possesses a hard legislative competence. At the same time, any EU action on these provisions, legislative or not, is not to pre-empt Member States from exercising their own competence. This contrasts with one of shared competence's defining features, that Member States shall exercise their competence only to the extent that the Union has not (i.e. "pre-emption").³ The fact that continued Member State regulation is allowed regardless of the adoption of EU measures can perhaps be explained by the specific nature of these policy fields, where concurring action by several actors is unlikely to cause any regulatory conflict and instead contributes to the objectives of that policy. It does however show that the Lisbon Treaty's competence classification does not exactly fit the variety of competences featured in the EU legal order.

A different example illustrating that finding can be found in Article 153 TFEU on social policy, stating that "the Union shall support and complement the activities of the Member States" in a number of fields such as, *inter alia*, improving working conditions, social security and social protection, workers' health and safety, information and consultation of workers, and the integration of persons excluded from the labour market. For all the fields listed in Article 153(1) TFEU, the EU "may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonization of the laws and regulations of the Member States". This bears all the features of a complementary competence. Furthermore, the final paragraph of Article 153 TFEU declares that "the provisions of this Article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs". While this does not constitute a prohibition of harmonization in

2. Arts. 79 and 84 TFEU are both part of the area of freedom, security and justice (Title V), which Art. 4(2)(j) TFEU classifies as shared.

3. Art. 2(2) TFEU states: "When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence".

a traditional sense, it does mean that Article 153 TFEU cannot be used as a basis for EU action on these issues. However, in addition to these supporting powers, in all the listed fields except the combating of social exclusion and the modernization of social protection systems, the EU is also granted a hard competence to adopt directives. Still, these are limited to establishing minimum requirements. EU action on this basis can thereby only partially pre-empt Member State action, since they retain the power to set stricter standards. Furthermore, and rather confusingly, while Article 4 TFEU on shared competence features “social policy, for the aspects defined in this Treaty”, Article 5 TFEU provides that “the Union may take initiatives to ensure coordination of Member States’ social policies”. All this makes that social policy is an area with a mixed competence-structure, located somewhere between shared and complementary.⁴

Article 5 TFEU, placed in the middle of, yet separate from, the three categories of Article 3, 4 and 6 TFEU, features two more competences that do not fit the mould. Article 5(2) TFEU provides that the EU shall contribute to a high level of employment by encouraging cooperation between Member States and supporting and complementing their action. This competence is further elaborated in Articles 145–149 TFEU, which provide that the EU may adopt incentive measures and initiatives aimed at developing exchanges of information and best practices, excluding harmonization and stipulating that the competences of the Member States shall be respected. While this therefore exhibits the characteristics of a complementary competence, it is not listed in Article 6 TFEU. Secondly, Article 5(1) TFEU provides that the “Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies. Specific provisions shall apply to those Member States whose currency is the euro”. Strictly speaking, this is therefore not an EU competence at all, but instead allows the Member States and the Council to use the Union framework for the purposes of economic policy coordination. Still, the fact that it is not listed as a “mere” complementary competence was a conscious political decision, considering the importance of the coordination done by the EU institutions in this area.⁵ It seems fair to say that with the adoption of measures like the Sixpack and Twopack,⁶ EU-level action in this area indeed goes beyond a mere supporting policy. However, as we shall come to see in this Chapter, similar things could also be said about several other areas that are nevertheless listed in Article 6 TFEU.

1.3 *Between authorization and restraint*

The foregoing shows that the variety of different competences featured in the EU legal order makes it difficult to establish a watertight categorization. Nevertheless, this was one of the Lisbon Treaty’s most important reforms, resulting from the decade-long “Debate on the Future of Europe”,⁷ supposed to make the competence division between the EU and the Member States more transparent, coherent and more effective at containing EU integration, particularly in sensitive policy fields. This latter objective is very pronounced in the case of complementary competence, constituting its defining characteristic.⁸

4. Art. 169 TFEU on consumer protection constitutes a similar example.

5. J. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (CUP, 2011), 77.

6. See on this issue Ch. 26, “Economic and Monetary Union”, of this book.

7. See: Laeken Declaration on the Future of the European Union, annex I to the Conclusions of the Laeken European Council, 14–15 Dec. 2001, SN 300/1/01 REV 1.

8. In the words of Schütze, the “essence of complementary competences is limited legislative powers”. R. Schütze, “Co-operative federalism constitutionalized: The emergence of complementary competences in the EC legal order”, 31 *EL Rev.* (2006), 167.

This approach is however not new, but instead carries on the tradition established by the introduction of the first complementary competences in the Maastricht Treaty (even if they were not yet named as such). Maastricht created new competences in culture, education, health and industrial policy, but each came with the specific proviso that legal measures adopted on these provisions could not harmonize national laws.⁹ This reflected a more cautious approach than before, showing that Member States were at least as much concerned with setting down boundaries, establishing what the EU cannot do, as with creating scope for future EU initiatives.¹⁰ The Lisbon Treaty has reaffirmed and extended this technique, applying it also to the four new complementary competences that it has created in sport, tourism, civil protection and administrative cooperation.

One might wonder why these complementary competences were created at all, if the Member States were so eager to retain their competence and restrain EU action. Apart from constituting a reluctant recognition that the EU may play a useful role in these areas, it also seems that they had little choice, since *de facto* EU policy had already developed in these areas. A substantial body of higher education law and policy had emerged well before the Maastricht Treaty. Also in the areas of public health and culture there were numerous legal measures adopted in the absence of a specific legal basis. The new competences thus codified existing practice, legitimizing the policy that had come into existence, while at the same time trying to establish that that was as far as it should go. As shall be explored in the rest of this Chapter, this has put the complementary competences in the difficult position of simultaneously serving two masters: of authorization and restraint.

2. European integration in supporting policy areas

This section will reflect on the degree and kind of European integration in the supporting policy areas of Article 6 TFEU, discussing both negative integration, i.e. the disapplication of national rules that conflict with an EU rule, and positive integration, i.e. the creation of common standards or rules through the adoption of EU measures.

2.1 *Limited competence but extensive integration?*

Considering that the essential feature of supporting policy areas is the EU's limited competence, it might be surprising that there exists a substantial body of case law, legislation and other legal measures in most of these areas, both pre-dating and post-dating the introduction of the explicit legal bases. This has several explanations.

Firstly, in the application of *other* Treaty provisions, the limits stipulated in the complementary competences do not apply. This means that other Treaty provisions, such as the prohibitions on obstacles to free movement, can lead to the disapplication of national rules on education, sport, health, culture, civil protection, tourism and industry. Furthermore, it means that legal acts, including harmonization measures, regulating (aspects of) a supporting policy area, can be adopted on other provisions regardless of the harmonization prohibitions.¹¹

Secondly, while the harmonization prohibitions limit direct legislation (as opposed to indirect legislation on other provisions), this does not mean that no legal acts can be adopted on the

9. Arts. 149(4), 150(4), 151(4), 152(4)(c) EC Treaty.

10. See, for culture: N. Nic Shuibhne, *Minority Language Policy: Culture, Citizenship and Fundamental Rights* (Kluwer Law International, 2002), 119.

11. Except for the flexibility clause of Art. 352 TFEU: "Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation."

basis of the complementary competences. Conversely, as we shall come to see, many supporting actions have been adopted by means of legal instruments such as Decisions and Regulations.

Thirdly, also “soft” measures, setting up informal coordination and cooperation, can be far-reaching; limiting and circumscribing national law and policy to a significant degree in practice. Especially European economic governance, in the form of Euro crisis financial assistance measures as well as the yearly policy coordination in the European Semester, is having far-reaching consequences for a number of the supporting policy areas such as health and education.

Finally, European integration in these areas can take place outside the EU institutional framework. The limited nature of EU competence in these fields might constitute a push-factor for such intergovernmental action, which can be broad and fundamental in scope, and can have a significant impact on both national and EU action.

2.2 Negative integration

In 1968, the Court of Justice was faced with the question whether an Italian tax on the export to other Member States of articles having an artistic, historic, archaeological or ethnographic value was caught by the prohibition on export restrictions in the EEC Treaty.¹² Italy argued that such articles could not be assimilated to “consumer goods or articles of general use” and were therefore not subject to the Treaty provisions which applied only to “ordinary merchandise”. The Court firmly rejected the idea that there was a general cultural exemption.¹³ In subsequent years, the Court has continuously confirmed that practices, goods and services are not excluded from the Treaty simply because they fall in areas where the competence of the EU is limited, or even non-existent. The Court has held that teachers qualify as “workers” in the sense of Article 45 TFEU,¹⁴ and that privately funded education constitutes a “service” in the meaning of Article 56 TFEU.¹⁵ Similarly, it qualifies medical care as a “service”¹⁶ and has held that the activities of tourist guides cannot be exempted from the Treaty.¹⁷ This shows that in all the supporting policy areas listed in Article 6 TFEU, the application of other Treaty provisions can lead to the disapplication of national rules, thereby arguably “superseding” national competence in those areas.

Perhaps one of the best-known examples, in EU law and beyond, is the *Bosman* case.¹⁸ At issue were certain transfer rules in professional football that restricted the free movement of workers in the EU. Several governments argued that Article 45 TFEU was not applicable to sporting activities as in most cases sport was not an economic activity, and since sport and culture fell within Member State autonomy and should therefore be shielded from EU interference. The Court replied that, considering the EU’s objectives at that time when there was not yet an EU complementary competence in this field, “sport is subject to [EU] law only in so far as it constitutes an economic activity”. As regards the difficulty of severing the economic from the sporting aspects, the Court held that EU law does not “preclude rules or practices justified

12. Case 7/68, *Commission v. Italy*.

13. R. Craufurd-Smith, “Community intervention in the cultural field” in R. Craufurd-Smith (Ed.), *Culture and European Union Law* (OUP, 2004), 28.

14. Case 66/85, *Deborah Lawrie-Blum v. Land Baden-Württemberg*.

15. Case C-76/05, *Herbert Schwarz and Marga Gootjes-Schwarz v. Finanzamt Bergisch Gladbach*.

16. Case C-158/96, *Raymond Kohll v. Union des caisses de maladie*.

17. Cases C-154/89, *Commission of the European Communities v. French Republic*, Case C-180/89, *Commission of the European Communities v. Italian Republic* and Case C-198/89, *Commission of the European Communities v. Hellenic Republic*.

18. Case C-415/93, *Union royale belge des sociétés de football association ASBL v. Jean-Marc Bosman, Royal club liégeois SA v. Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v. Jean-Marc Bosman*.

on non-economic grounds which relate to the particular nature and context of certain matches". However, this could not "be relied upon to exclude the whole of a sporting activity from the scope of the Treaty". Also the argument based on the limitation of EU competence was firmly rejected, since the question was not about "the conditions under which [EU] powers of limited extent, such as those based on Article [167 TFEU], may be exercised but on the scope of the freedom of movement of workers guaranteed by Article [45 TFEU], which is a fundamental freedom". Because of the judgment, the entire football transfer system had to be changed.¹⁹

As *Bosman* clearly shows, the Court is highly reluctant to carve policy areas out of the scope of the Treaty, even if they fall within Member State competence.²⁰ The Court explicitly separates the question of positive and negative integration, making clear that the fundamental freedoms fully apply even if they cut through areas where the EU possesses no, or only limited, legislative powers. The Court does recognize that certain non-economic objectives might have to be considered, but refers to the possibility of objective justification to accommodate these concerns. In that justification assessment, the Court does not explicitly consider whether an area falls within the scope of EU competence or not. While it could be argued that the Court is slightly more deferential in the application of the proportionality test in these areas,²¹ being less hostile towards justifications of an economic nature²² or towards directly discriminatory measures²³ than it is in other areas, the rigour with which the Court applies the Treaty provisions and the proportionality assessment in these policy areas remains striking.

This approach has had far-reaching consequences in public health.²⁴ By qualifying restrictions on (reimbursement of) care obtained abroad as restrictions of the services provision, the case law has meant that individuals may access other treatments than those allocated in the national package and they can escape waiting lists, having profound consequences for national health systems by challenging domestic practices governing the allocation of these public

19. See S. Van den Bogaert, *Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman* (Kluwer Law International, 2005).

20. See also L. Azoulay, "The 'retained powers' formula in the case law of the European Court of Justice: EU Law as total law?", 2 *European Journal of Legal Studies* (2011), 192.

21. See L. Boucon, "EU Law and Retained Powers of Member States" in L. Azoulay, *The Question of Competence in the European Union* (OUP, 2014).

22. The Court has recognised the risk of "seriously undermining the financial balance of the social security system" in health care cases and the objective of avoiding "an unreasonable burden which could have consequences for the overall level of assistance" in student maintenance. See Case C-157/99, *B.S.M. Geraets-Smits v. Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v. Stichting CZ Groep Zorgverzekeringen*, Case C-209/03, *The Queen, on the application of Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills*.

23. In sport cases, the Court has allowed directly discriminatory measures to be considered under the objective justifications scheme, even if these have not always passed the proportionality test. See e.g. Case C-415/93, *Bosman*, Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération royale belge des sociétés de basket-ball ASBL (FRBSB)*, Case C-438/00, *Deutscher Handballbund eV v. Maros Kolpak*, Case C-325/08, *Olympique Lyonnais SASP v. Olivier Bernard and Newcastle UFC*. K. Pijetlovic "Another classic of EU sports jurisprudence: Legal implications of *Olympique Lyonnais SASP v. Olivier Bernard ad Newcastle UFC* (C-325/08)", 35 *EL Rev.* (2010), 857. In cultural cases, the Court has generally been less lenient, but see on fixed book prices: Case C-531/07, *Fachverband der Buch- und Medienwirtschaft v. LIBRO Handelsgesellschaft mbH*.

24. See: G. Davies, "Welfare as a service", 29 *LIEI* (2002), 27; P. van Nuffel, "Patients free movement rights and cross-border access to health-care", 12 *MJ* (2005), 253; C. Newdick, "Citizenship, free movement and health care: Cementing individual rights by corroding social solidarity", 43 *CML Rev.* (2006), 1645.

services.²⁵ National autonomy to decide on important political questions, weighing the cost and benefit of health care to the public and the individual, is thereby limited by EU law. Furthermore, even though certain restrictions can be justified to protect the stability of the health care system, the Court imposes high standards of rationality through a strict proportionality assessment, which most of the national arrangements have failed.

The same holds true for the area of education. Although the Court has held that unlike medical treatment, publicly funded education does not constitute a “service”,²⁶ the case law has arguably had an even greater impact on national education systems than it has had on health systems. Firstly, privately funded education does constitute a service.²⁷ Secondly, the Court’s judgments on diploma recognition for professional and academic purposes require transparent and reasonable procedures operating from the assumption that equivalent diplomas should be recognized as such.²⁸ Most importantly, the Court has developed a progressive line of case law on mobile students’ right to equal treatment, which has meant in particular that Member States cannot impose restrictions or higher fees on mobile EU students.²⁹ This is controversial because neither the economically inactive students nor their parents will have paid taxes in the host state, and there is no guarantee that they will settle there after their studies.³⁰ As such, EU law requires Member States which choose to devote significant public resources to maintaining a high quality further education system for the benefit of their own populations to subsidize, through the principle of equal access, in addition potentially large numbers of foreign students.³¹ As an important illustration, in the situation of Austria and Belgium, which were flooded by German and French medical students that were escaping their country’s *numerus clausus* system, this led to a situation where it became impossible to maintain their deeply valued tuition fee-free and open-access higher education systems.³²

2.3 Positive integration

Let us recall Article 2(5) TFEU: “In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas. Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonization of Member States’ laws or regulations”. What does this mean for positive integration in the supporting policy areas?

As explained in section 2.1, the fact that in the application of *other* Treaty provisions the limits stipulated in the complementary competences do not apply means that legal acts, including

25. D. Martinsen, “Inter-institutional dynamics in the cross-border provision of healthcare services”, (2009) ARENA Working Paper 5/2009, 6.

26. Case C-263/86, *Belgian State v. René Humbel and Marie-Thérèse Edel*.

27. Case C-76/05, *Herbert Schwarz and Marga Gootjes-Schwarz v. Finanzamt Bergisch Gladbach*.

28. Case C-313/01, *Christine Morgenbesser v. Consiglio dell’Ordine degli avvocati di Genova* and Case C-19/92, *Dieter Kraus v. Land Baden-Württemberg*.

29. Case C-293/83, *Françoise Gravier v. City of Liège*. See: G. Davies, “Higher education, equal access, and residence conditions: Does EU law allow member states to charge higher fees to students not previously resident?”, 12 MJ (2005), 227; M. Dougan, “Fees, grants, loans and dole cheques: Who covers the costs of migrant education within the EU?”, 42 CML Rev. (2005), 943; A.P. van der Mei, “EU law and education: Promotion of student mobility versus protection of the education systems” in M. Dougan and E. Spaventa (Eds.), *Social Welfare and EU Law* (Hart, 2005).

30. A.P. van der Mei, op. cit. *supra* note 37.

31. M. Dougan, op. cit. *supra* note 37.

32. See S. Garben, “Case C-73/08, *Nicolas Bressol and Others, Céline Chaverot and Others v. Gouvernement de la Communauté française*”, 47 CML Rev. (2010), 1493.

harmonization measures regulating a supporting policy area, can be adopted on such other provisions, like the internal market. Indeed, in the following sections, where positive integration in every supporting area will be discussed in turn, we shall see that the most significant integration has taken place through “the back door” on the basis of other Treaty provisions, and that this is still happening regardless of the introduction of specific complementary competences and their harmonization prohibitions. Strictly speaking this is not contradicted by Article 2(5) TFEU, when it says that Union acts “*adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonization*”.³³

To the extent that EU action is undertaken on the provisions relating to the supporting policy areas themselves, Article 2(5) TFEU provides that such action should be directed at “supporting, coordinating or supplementing the actions of the Member States” without “superseding their competence”. The concrete legal significance of these statements is unclear, but these stipulations express the idea that EU action is not to replace or pre-empt national (scope for) action. For instance, while the EU may adopt a measure facilitating academic diploma recognition like a common diploma template, this should not prevent Member States from using other templates (in addition). Or while the EU may set up a scheme for coordination of civil protection interventions in case of natural disasters, this does not prevent Member States from intervening in other ways than through the common mechanism. Or while the EU may run an anti-smoking campaign, this does not prevent Member States from running their own national campaign in parallel. This freedom on the part of the Member States is not unlimited, however, since they are under a general duty of sincere cooperation which means that they cannot undertake action that would undermine the EU action in question, regardless of its complementary nature.³⁴

The fact that Member States remain free to act in parallel of course does not mean that such EU measures are not binding on the Member States. On the contrary, many of these measures constitute traditional “hard law”, adopted by means of Regulations or Decisions. As we shall see below, the above examples of a common diploma template and a civil protection mechanism have been adopted by means of Decisions, as has the funding necessary for EU anti-smoking campaigns. This means that Member States are fully bound to adopt the necessary measures for the implementation of these initiatives in their own legal/institutional order, and that infringement proceedings can be brought against them if they fail to do so. Nevertheless, supporting action often also entails the adoption of non-binding “soft law” measures, such as Recommendations. Such measures can however still be far-reaching, circumscribing national law and policy to a significant degree in practice. For example, the introduction of smoke-free public environments across Europe has been based on a “mere” Council Recommendation.³⁵

One important form of “soft” supporting action is the so-called Open Method of Coordination (OMC), which constitutes an intergovernmental framework for cooperation between the Member States within which national policies are directed towards certain common objectives on a voluntary basis.³⁶ The OMC was developed in the context of employment policy, and is

33. Emphasis added.

34. Art. 4(3) TEU. On the principle of sincere cooperation, see Ch. 11, “Application and enforcement of EU law in the Member States”, of this book.

35. Council Recommendation of 30 Nov. 2009 on Smoke-free Environments. A Commission report found that all EU countries have now adopted anti-exposure measures. As a result, the actual exposure rates have dropped significantly; e.g. for citizens visiting bars from 46% to 28%. See European Commission, Report on the implementation of the Council Recommendation of 30 Nov. 2009 on Smoke-free Environments, SWD (2013) 56 final/2.

36. On the OMC, see Ch. 28, “Social policy”, of this book.

now used for social policy – which includes a limited health care policy element,³⁷ culture, education, vocational training and youth.³⁸ The OMC is not mentioned expressly in the Treaties, but only in an indirect way, where it refers to “the organization of exchange of best practice” in the provisions relating to employment, social policy, health, research and technological development, and industry. Curiously, the Treaty does not contain such a reference in the provisions on culture, education,³⁹ vocational training and youth, while this area features a well-established OMC. A particularly powerful form of policy coordination has emerged since the onset of the financial and economic crisis: economic governance in the so-called European Semester. The Commission, the Council, and the European Council set general priorities in the Annual Growth Survey, review national progress towards the achievement of these goals on the basis of Country Reports prepared by the Commission, and accordingly issue Country Specific Recommendations (CSRs) to MS. As Zeitlin and Vanhercke note, the European Semester brings together within a single annual cycle a wide range of EU governance instruments with different legal bases and sanctioning authority, from the Stability and Growth Pact, the Macroeconomic Imbalances Procedure, and the Fiscal Treaty to the Europe 2020 Strategy and the Integrated Economic and Employment Policy guidelines.⁴⁰ As the CSRs are non-binding, they leave the ultimate decision to the Member States, although the political pressure they exert on national standards should not be underestimated, especially since in some cases non-compliance may lead to financial sanctions. The CSRs concern a wide range of national policies, including where the EU has only complementary, or no, direct competence, such as health, education, wages and social protection.

Finally, it should be noted that the provisions on education, culture and public health make reference to the term “incentive measures”, without this term being explained in more detail. In the case of education and culture it appears that EU action on this provision is limited to such “incentive measures”. The other supporting policy provisions instead allow the adoption of: “specific measures in support of action taken in the Member States”,⁴¹ “specific measures to complement actions within the Member States”,⁴² “the measures necessary to help achieve the objectives”,⁴³ and “the necessary measures to this end”.⁴⁴ Still, it does not appear that the term “incentive measures” has a specific, more restrictive meaning in practice than the other formulations,⁴⁵ but this inconsistent use of terminology in the Treaty provisions is to be deplored.

37. One of the identified targets is providing accessible, high-quality and sustainable health care and long-term care. Commission Communication of 22 Dec. 2005 “A new framework for the open coordination of social protection and inclusion policies”, COM(2005)706.

38. Youth policy does not entail the setting of targets, and it is up to the Member States to decide on objectives without the need for any European-level coordination of national action plans.

39. Art. 165 TFEU does mention “developing exchanges of information and experience on issues common to the education systems of the Member States”.

40. Jonathan Zeitlin and Bart Vanhercke, “Socializing the European Semester? Economic Governance and Social Policy Coordination in Europe 2020” [2014] Swedish Institute for European Policy Studies 7.

41. Art. 173(3) TFEU on industry.

42. Art. 195(2) TFEU on tourism.

43. Art. 196(2) TFEU on civil protection.

44. Art. 197 TFEU on administrative cooperation.

45. In Case C-42/97, *Parliament v. Council*, the Parliament argued that Council Decision 96/664/EC on the adoption of a multiannual programme to promote linguistic diversity in the information society had to be annulled as it was wrongly based on the industry provision and should instead have been based on culture, as the fact that it “promoted” linguistic diversity made it an incentive measure in the sense of (now) Art. 167(5) TFEU. The Court simply held that “the wording of the title of a measure cannot by itself determine

3. The protection and improvement of human health⁴⁶

In light of the degree and extent of EU action in this field, of all the supporting policy areas public health is the one that is the most difficult to distinguish from a shared competence.

3.1 *The place of health in the Treaties*

The Maastricht Treaty added a Title on public health containing a single article (now Art. 168 TFEU). The content of the provision has changed overtime, with the Amsterdam Treaty adding legislative powers partly as a reaction to a number of high-profile events, such as the BSE crisis and AIDS contamination scandals.⁴⁷ In a resolution annexed to the 2000 Nice European Council Conclusions, attention was paid to the precautionary principle, which now plays an important role in EU health policy. The EU Charter of Fundamental Rights that was also adopted in 2000, but only became legally binding upon the entry into force of the Lisbon Treaty in 2009, provides in Article 35 that everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. It also states that a high level of human health protection shall be ensured in the definition and implementation of all the Union's policies and activities. This mainstreaming obligation is echoed in Article 9 TFEU.

Furthermore, the TFEU now classifies a part of public health policy, namely that of "common safety concerns in public health matters", as a shared competence under Article 4(2)(k) TFEU. Indeed, this makes public health an area with an explicit mixed competence-structure. Article 168(4) declares that the EU may adopt (a) minimum harmonization measures setting high standards of quality and safety of organs and substances of human origin, blood and blood derivatives;⁴⁸ (b) full harmonization measures in the veterinary and phytosanitary fields which have as their direct objective the protection of public health;⁴⁹ and (c) full harmonization measures setting high standards of quality and safety for medicinal products and medical devices.⁵⁰ By contrast, such harmonization is not permitted for the "incentive measures designed to protect and improve human health and in particular to combat the major cross-border health scourges, measures concerning monitoring, early warning of and combating serious cross-border threats to health, and measures which have as their direct objective the protection of public health regarding tobacco and the abuse of alcohol" that Article 168(5) TFEU authorizes the EU to adopt.

its legal basis and, in this case, that the words 'to promote [...] linguistic diversity appearing in the title of the contested decision cannot be isolated from the measure as a whole and interpreted independently', upholding the Decision.

46. See on EU health law and policy in more detail also Ch. 34 of this book.

47. See Case C-180/96, *United Kingdom v. Commission*. E. Vos, "EU food safety regulation in the aftermath of the BSE crisis", 23 *Journal of Consumer Policy* (2000), 227.

48. E.g. Directive 2002/98/EC on human blood and of blood components and Directive 2004/23/EC on human tissues and cells intended for human applications. While these measures may only constitute minimum harmonization, such standards will have to comply with the internal market, and the adoption of a common standard, even if minimum, may influence the Court in its proportionality assessment of a more restrictive measure, as illustrated in Case C-421/09, *Humanplasma* (ECR I-12869).

49. E.g. Reg. 726/2004 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency and Reg. 470/2009 laying down Community procedures for the establishment of residue limits of pharmacologically active substances in foodstuffs of animal origin.

50. Rules relating to the safety and performance of medical devices were harmonized in the EU in the 1990s on the internal market legal base, by Directive 90/385/EEC, Directive 93/42/EEC and Directive 98/79/EC. Revisions were adopted by Reg. 2017/745 on medical devices and Reg. 2017/746 on in vitro diagnostic medical devices, on a joint legal basis of Articles 114 and 168 TFEU.

While this already shows that the EU has a relatively extensive mandate for action, perhaps the most important power in this field derives from another provision: Article 114 TFEU on the internal market.⁵¹ Article 114(3) TFEU explicitly provides that within their respective powers, the Commission, the Parliament and the Council, in adopting harmonization measures on this provision concerning health, will take as a base a high level of protection. In addition, the more specific internal market legal bases can also be used to adopt measures that have a bearing on health. As a result, there are numerous directives and regulations concerning health aspects of free movement of goods,⁵² persons⁵³ and free movement in the health sector.⁵⁴ This possibility to harmonize national rules on health in the context of the internal market is a pertinent one, especially since the Member States may derogate from the free movement provisions on grounds of public health. Unless the EU adopts a commonly applicable standard in such instances, obstacles to the fundamental freedoms will remain. Furthermore, the deregulation resulting from the exclusion of a national rule may have to be compensated by re-regulation on the European level, to avoid a regulatory gap.⁵⁵ However, at the same time, this harmonization possibility is difficult to reconcile with the harmonization prohibition of Article 168 TFEU, and has given rise to disputes in several high-profile Court cases, discussed below.

Finally, it deserves mentioning that Article 153 TFEU on social policy features an important health aspect, as one of the objectives for which the EU can adopt minimum harmonization measures on the basis of that provision is the protection of workers' health and safety.⁵⁶ Similarly, Article 169 TFEU on consumer protection authorizes the EU to adopt minimum harmonization for the protection of consumers' health and safety.

3.2 Specific areas of EU health law and policy

As a more systematic and detailed discussion of the various, fragmented areas of EU health law and policy is offered in Chapter 34 of this book, the following section merely aims to provide some key insights demonstrating how an area considered primarily as only a supporting competence nevertheless features a high degree of EU integration.

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51. See G. Davies, "The community's internal market-based competence to regulate healthcare: Scope, strategies and consequences", 4 MJ (2007), 215.
 52. E.g. Directive 2001/95/EC on general product safety, Reg. 1169/2011 concerning consumer information on foodstuffs, Reg. 1830/2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms, Council Directive 90/496/EEC on nutrition labelling rules of foodstuffs, Reg. 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.
 53. E.g., the annex to Directive 64/221 contained a list of diseases, which could form an obstacle to free movement for the person in question. The Directive was repealed by Directive 2004/38/EC on the right of EU citizens and their family to move and reside freely. In accordance with Art. 29, the only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the World Health Organization and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.
 54. On (now) Art. 53 TFEU on the free movement of professionals, two directives (93/61 and 85/584) were issued on medical doctors and on pharmacies respectively. See also the Directive on Patient Mobility.
 55. M. Poires Maduro, "Reforming the market or the state, Art. 30 and the European constitution, economic freedom and political rights", 3 ELJ (1997), 55.
 56. In particular Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

3.2.1 *Free movement of patients*

Essentially a codification of ECJ case law on patient mobility in the context of services,⁵⁷ the 2011 Patient's Rights Directive,⁵⁸ based on Article 114 and 168 TFEU, shows how negative integration may lead to positive integration.⁵⁹ In line with the case law, the Directive provides that the Member State of affiliation shall ensure reimbursement of cross-border care, on the condition that the insured person has the right to the type of care received. While regarding certain treatments, the State of affiliation can implement a system of prior authorization to avoid the risk of undermining the planning and financing of their health system, it may refuse this authorization only in very specific cases and not when this healthcare cannot be provided on its territory within a medically justifiable period.

Commentators have mentioned that the reference to “patient’s rights” in the title of the Directive is misleading, since it only recognizes some values and principles but no patients’ rights in the sense they commonly have, and some therefore see it as a “trick to mask the real intentions of the Directive, namely organizing the harmonization of healthcare services which failed on the occasion of the General Services Directive”.⁶⁰ In any event, patient mobility in the EU shows that building a European health policy is a matter of trade-offs: between the constraints of the economic freedoms and the historical competence of the Member States, between the social values of the EU and the weakness of its powers to express these values, between national and European solidarity, and the Directive had tried to pay due consideration to these conflicting demands.⁶¹ While it constitutes an important EU level regulation of the health care sector, it is true that it “fails to transcend the logic inherent in the legal system of mobility to help create a genuine policy of care in Europe”, for which it would be necessary to “go beyond the legal mechanism of the internal market”.⁶² As such, it serves well to show what is and what is not possible under the current mix of complementary and shared, direct and indirect competence in the area of public health.

3.2.2 *Tobacco regulation*

One of the most important bodies of EU health policy is that in the field of tobacco.⁶³ Article 168(5) TFEU authorizes the EU to adopt incentive measures for the protection of public health regarding tobacco, but the most important regulation has instead been based on the internal market. This has caused controversy, that the Court has had to resolve.

In 1998, Parliament and Council adopted the Tobacco Advertisement Directive 98/43/EC,⁶⁴ prohibiting all advertising of tobacco products. As a minimum harmonization measure, it did not preclude Member States from laying down stricter requirements. Germany challenged the Directive arguing that the internal market provisions did not constitute the appropriate legal

57. See further Ch. 14, “Free movement of services, establishment and capital”, of this book.

58. O.J. 2011, L 88/45.

59. See further Ch. 12, “The functioning of the internal market”, of this book.

60. N. De Grove-Valdeyron, “La directive sur les droits des patients en matière de soins de santé transfrontaliers. Véritable statut juridique européen du patient ou simple clarification d’un régime de mobilité?”, (2011) RTDE, 305 ; H. Nys, “The transposition of the Directive on patients’ rights in cross-care healthcare in national law by the member states: Still a lot of effort to be made and questions to be answered”, 21 EJHL (2015), 1.

61. S. de la Rosa, “The Directive on cross-border healthcare or the art of codifying complex case law”, 49 CML Rev. (2012), 45.

62. Ibid.

63. See further Ch. 34, “EU health law and policy”, of this book.

64. O.J. 1992, L 213/9.

basis. The Court agreed, at least to a certain extent, and annulled the Directive.⁶⁵ In coming to that conclusion, the Court considered that particularly the prohibition of advertising on posters, parasols, ashtrays and the prohibition of advertising spots in cinemas in no way helped to facilitate trade in these products. Hence, the prohibitions were not justified by the need to eliminate obstacles to the free movement of advertising media or advertising services. Nevertheless, as an important *obiter dictum*, the Court held that “provided that the conditions for recourse to [Article 114 TFEU] as a legal basis are fulfilled, the Community legislature cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made”.

Following this much-discussed ruling,⁶⁶ Directive 2003/33/EC⁶⁷ was enacted, concerning specific advertising measures instead of a general ban. Germany again brought an application for annulment, arguing that this new, more limited directive still concerned EU health policy, and could therefore not be based on Article 114 TFEU. This time, Germany was unsuccessful.⁶⁸ The Court confirmed its approach as indicated in the *obiter dictum* in the first Tobacco Advertisement judgment, meaning that as long as the measure in question contributes to the functioning of the internal market, it can be based on the internal market provisions, regardless of its (fundamental) impact on health policy. Also subsequent cases brought against another important piece of EU tobacco legislation, the Tobacco Products Directive 2001/37 on manufacture, presentation and sale of tobacco products, were unsuccessful.⁶⁹ This has re-solidified the EU’s basis for legislative action in this area, and for (indirect) positive integration of supporting policy areas in general.

In March 2014, a revision of the Tobacco Products Directive was adopted, “in order to reflect scientific, market and international developments”.⁷⁰ Because of the fact that the old Directive constituted full harmonization on certain points, Member States had been prevented from adapting their labelling rules and strengthening protection. Central features of this new measure are the prohibition of characterizing flavours (e.g. menthol) and the mandatory large picture and text warnings. Together with the prohibition of “lipstick-style” packs and statements such as “free of additives”, the Directive aims to put an end to products which entice children and teenagers into starting to smoke.

3.2.3 Protection of workers’ health and safety: The Working Time Directive

Germany’s main argument against the Tobacco Advertisement Directive was that it pretended to be an internal market regulation, while actually it constituted health policy. The UK made the opposite argument in another case, against the Working Time Directive.⁷¹ The UK argued that this legislative measure, laying down minimum requirements regarding maximum working

65. Case C-376/98, *Germany v. European Parliament and Council of the European Union*, para 88.

66. See also Ch. 34, “EU health law and policy”, of this book.

67. O.J. 2003, L 152/16.

68. Case C-380/03, *Germany v. European Parliament and Council of the European Union*.

69. Case C-491/01, *The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*, Case C-210/03, *The Queen, on the application of: Swedish Match AB and Swedish Match UK Ltd v. Secretary of State for Health*, Case C-434/02, *Arnold André GmbH & Co. KG v. Landrat des Kreises Herford*.

70. Directive 2014/40/EU, O.J. 2014, L 127/1–38, para 1 of the preamble.

71. Council Directive 93/104/EC replaced by Directive 2003/88/EC concerning certain aspects of the organization of working time, O.J. 2003, L 299/9–19.

hours, minimum rest periods and paid annual leave, pretended to be health policy but instead constituted social policy.⁷²

The Directive was adopted on Article 118a EEC (now Art. 153 TFEU) concerning the protection of workers' health and safety, following qualified majority voting. The UK resisted the adoption of the Directive from the outset and argued that Article 235 EEC (now Article 352 TFEU) should have been used, requiring unanimity.⁷³ The UK argued that the Council had misused its power by using Article 118a EEC in order to avoid the unanimity requirements, claiming that working time, paid annual leave and rest periods were only remotely related to health and safety. The Court disagreed on all points except one, holding that the provision which stated that weekly rest periods should in principle include Sunday was unconnected to health and safety issues, and therefore this provision was annulled.

Although applicable to the entire economy, the Directive has arguably had the largest impact in the health care sector. After some transitional arrangements, the Directive now fully applies to all hospital doctors, including those in training. Long working hours have been a characteristic feature of this profession in many Member States. Moreover, a number of judgments on the issue of on-call time, which is a working arrangement often used in the health care sector where the worker is at the workplace ready to respond to a call but not necessarily working actively the whole time, have had a profound impact.⁷⁴ The fact that following the judgments, all time spent at the workplace, whether active or inactive, has to be fully considered as working time for applying the limits to working hours and the minimum rest periods of the Directive, has necessitated some structural reorganization of 24-hour care provision.

3.2.4 Fiscal sustainability of national health care systems

Article 168(7) TFEU provides that "Union action shall respect the responsibilities of the Member States for the definition of their health policy and for the organization and delivery of health services and medical care" and, further, that these national responsibilities "shall include the management of health services and medical care and the allocation of the resources assigned to them". While the measures and policies discussed in the preceding section could already be argued to challenge these statements of national autonomy, this could be said to apply with even more force to the EU's economic governance in recent years.⁷⁵ Firstly, the support provided to Member States in financial difficulties has taken the form of economic adjustment programmes, requiring reforms to address economic imbalances, specified in Memoranda of Understanding.⁷⁶ The detailed conditionalities specified therein have significantly affected national competences in the area of health, with rather controversial results. The European Centre for Disease Control has warned that serious health hazards have emerged because of the fiscal consolidation measures introduced since 2008, "more specifically, in Greece, Spain and Portugal citizens' access to public health care services has been seriously constrained, to the extent that there are

72. Case C-84/94, *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union*.

73. T. Nowak, "The working time Directive and the European Court of Justice", 15 MJ (2008), 447.

74. Case C-303/98, *Sindicato de Médicos de Asistencia Pública (Simap) v. Conselleria de Sanidad y Consumo de la Generalidad Valenciana* and Case C-151/02, *Landeshauptstadt Kiel v. Norbert Jaeger*.

75. See for this argument also S. Greer, "The three faces of European Union health policy: Policy, markets and austerity" 33 *Policy and Society* (2014), 13.

76. The European Stability Mechanism (ESM) and the European Financial Stability Facility (EFSF) are inter-governmental support mechanisms created by the euro Member States in response to the financial crisis. EFSF is a temporary rescue mechanism. In October 2010, it was decided to create a permanent rescue mechanism, the ESM, on the basis of an international Treaty. See Ch. 26, "Economic and Monetary Union", of this book.

reported increases in mortality and morbidity”.⁷⁷ In January 2013, doctors from Portugal, Spain, Ireland and Greece sent an open letter in which they deplored the effects that financial and economic decisions were having on the health of the populations of their countries, calling for immediate action to reverse the situation.⁷⁸ Secondly, health systems are increasingly featured in the Country Specific Recommendations (CSRs) issued in the context of the European Semester, usually “framed in the discourse of sustainability of public finances”.⁷⁹

4. Education, vocational training, youth and sport

These four fields lumped together in Article 6 TFEU constitute different but related areas, featuring various degrees and kinds of integration. They were introduced at different stages in the integration process: vocational training being the only supporting policy present from the beginning, education and youth being introduced by the Maastricht Treaty, and sport constituting the most recent addition by the Lisbon Treaty. The competences are further elaborated in the two articles of Title XII: Article 165 TFEU on education, sport and youth, and Article 166 TFEU on vocational training. Policy wise, they are now merged in the new ERASMUS+ Programme.⁸⁰

4.1 Education and vocational training

The 1957 Rome Treaty did not confer any specific powers for the development of a common educational policy, but this did not deter the Court to expand its influence and to help establish a “Community law of education”,⁸¹ stating that “although educational and training policy is not as such included in the spheres which the Treaty has entrusted to the Community Institutions, it does not follow that the exercise of powers transferred to the Community is in some way limited if it is of such a nature as to affect the measures taken in the execution of a policy such as that of education and training”.⁸² Moreover, there was not a complete lack of explicit competence in educational matters. Article 57 EEC (now Art. 53 TFEU) granted legislative powers for the mutual recognition of diplomas. Furthermore, the EEC Treaty also provided for competence in vocational training. It is in fact on this provision that the EU’s initial education law was developed.

4.1.1 ERASMUS

In its consequential *Gravier* judgment, where the Court held that Member states cannot charge higher enrolment fees to non-national EU students, the Court interpreted vocational training to include an element of “general education”.⁸³ Shortly afterwards, the Commission presented the ERASMUS programme for student exchange solely under Art. 128 EC.⁸⁴ The Council however modified the legal basis, adding Art. 235 EC (now Art. 352 TFEU), considering that the planned

77. As reported by the International Labour Organization, World Social Protection Report, 2015, p. 135.

78. See <www.epha.org/spip.php?article5563>.

79. N. Azzopardi-Muscat and H. Brand, “EU Country Specific Recommendations for health systems in the European Semester process: Trends, discourse and predictors” 119 *Health Policy* (2015), 375.

80. Reg. 1288/2013 establishing “Erasmus+”: The Union programme for education, training, youth and sport”, O.J. 2013, L 347/50-73.

81. B. de Witte (Ed.), *European Community Law of Education* (Nomos, 1989).

82. Case 9/74, *Donato Casagrande v. Landeshauptstadt München*.

83. Case 293/83, *Gravier*. Further developed in Case 24/86, *Blaizot v. University of Liege*, clarifying that this could also include university education whenever it prepares students for an occupation.

84. L. Pépin, “The history of EU cooperation in the field of education and training: How lifelong learning became a strategic objective”, 42 *European Journal of Education* (2007), 124.

measures exceeded the scope of vocational training.⁸⁵ The Commission disagreed and brought an action for annulment regarding the inclusion of Article 235.⁸⁶ The Court found for the Council and upheld the Decision as based on both provisions,⁸⁷ but only because elements of the ERASMUS programme dealt with scientific research, which could not be considered part of vocational training. The Court sided with the Commission on the other crucial points, holding that the fact that the ERASMUS programme applied to all university studies did not mean that the measure exceeded the scope of vocational training. Even if this specific legal basis discussion has been long superseded since the introduction of a specific legal basis for education (the most recent incarnation of the programme, ERASMUS, is based on both Arts. 165 and 166 TFEU), it remains interesting as it shows the dynamics behind the evolution of these areas.

ERASMUS establishes a European University Network, encouraging universities by means of financial incentives to set up student and teacher exchange agreements. It gives out grants to the participating students; covering the cost of linguistic preparation for the studies abroad, travel expenditure and compensation for the higher cost of living in the host state. ERASMUS is very much a success story, both in terms of numbers, outcomes and public perception.⁸⁸ It has served not only to create a favourable public image of the role of the EU in educational matters, but arguably also of the EU generally.

4.1.2 Professional diploma recognition

The Rome Treaty featured another competence related to education: Article 53 TFEU on professional recognition of diplomas. Professional recognition deals with the rules of Member States that make access to or pursuit of a regulated profession in their territory contingent on possession of professional qualifications.⁸⁹ Article 53 TFEU provides an explicit legal basis for legislative action, approaching the issue from an internal market logic. Considering that currently around 800 professions are regulated by one or more Member States, the establishment of a common employment market would be fundamentally impaired if Member States could “carve out” these professions by applying their different statutory regimes. This has allowed for far-reaching measures. The numerous directives on co-ordination of training and recognition of qualifications obviously have a direct impact on content of courses.⁹⁰ For instance, Directive 78/687 caused the entire dentistry curriculum of Italian universities to be recreated.⁹¹

Over the years, the EU has pursued various regulatory strategies. The approach that was adopted in the '70s aimed at tackling recognition problems profession-by-profession and which entailed minimum harmonization of the education required for the respective profession was eventually abandoned as it proved too arduous. The strategy changed to a mutual recognition approach, resulting in the adoption of “umbrella” Directive 2005/36/EC.⁹² This complex

85. Council Decision 87/327/EEC adopting the European Community Action Scheme for the Mobility of University Students, O.J. 1987, L 166/20.

86. K. Lenaerts, “Erasmus: Legal basis and implementation” in B. de Witte (Ed.), *European Community Law of Education* (Nomos, 1989), 116; J. Shaw, “Education and the law in the European Community”, 21 *Journal of Law & Education* (1992), 420.

87. Case 242/87, *Commission v. Council (Erasmus)*.

88. See European Commission, *Erasmus: Success stories. Europe Creates Opportunities* (Office for Official Publications of the European Communities, 2007).

89. H. Schneider, *Die Anerkennung von Diplomen in der Europäischen Gemeinschaft* (Intersentia, 1995).

90. J. Lonbay, “Education and the law: The Community context”, 14 *EL Rev.* (1989), 368.

91. C. Zilioli, “The recognition of diplomas and its impact on educational policies” in B. De Witte (Ed.), *European Community Law of Education* (Nomos, 1989), 51.

92. O.J. 2005, L 255/22-142. See also the discussion on the Internal Market Information System further below.

measure consolidated almost all the previous legislation, except for the specific directives on the provision of services and establishment of lawyers.⁹³ This directive does not substantially impact the higher education systems of the Member States in a direct way. As it does not propose the harmonization of new professions, but simply applies a mutual recognition approach to the non-coordinated professions, it is less intrusive and less contested. Still, the mechanism of mutual recognition might have an important effect on the national higher education systems, as it could put pressure on the national higher education systems that are less competitive, attractive or “efficient”.

4.1.3 Academic diploma recognition

In contrast to professional recognition, academic recognition is concerned with the academic status of obtained degrees. Academic recognition is often regarded to lie outside the scope of formal EU powers. Although it could be argued that this distinction is unfounded,⁹⁴ no EU legislation concerning the academic recognition of diplomas has been adopted. That is not to say that no European integration has taken place in this area. Firstly, to refuse recognition of academic diplomas or titles can constitute a restriction of the fundamental freedoms.⁹⁵ Secondly, the EU has adopted a number of supporting measures to facilitate academic recognition, such as the European Credit Transfer System for higher education (ECT)⁹⁶ and for vocational training (ECVET),⁹⁷ Europass,⁹⁸ the European Qualifications Framework⁹⁹ and the Diploma Supplement.¹⁰⁰ Thirdly, significant European integration has taken place in this area in an inter-governmental way, most notably in the context of the Council of Europe, which has adopted the Lisbon Recognition Convention,¹⁰¹ and the independent Bologna Process.¹⁰²

The Bologna Process, a non-binding intergovernmental project including all EU Member States, aims to create a European Higher Education Area, with at its core common Bachelor-Master-Doctorate system. The Sorbonne and Bologna Declarations, which constitute the basis of the process, are “political artefacts”¹⁰³ that may be regarded as “public international soft law”.¹⁰⁴ It could be said that the Bologna Process constitutes both a result and an illustration of the strong

93. Directives 77/249/EEC and 98/5/EC.

94. S. Garben, “On recognition of qualifications for academic and professional purposes”, 16 *Tilburg Law Review* (2011), 127.

95. Case C-19/92, *Dieter Kraus v. Land Baden-Württemberg*, Case C-153/02, *Valentina Neri v. European School of Economics*. The non-recognition on equal terms of secondary school qualifications was considered a restriction of Arts. 18 and 21 TFEU on equal treatment of EU citizens, in Cases C-65/03, *Commission v. Belgium* and C-147/03, *Commission of the European Communities v. Republic of Austria*, and Case C-73/08, *Nicolas Bressol and Others, Céline Chaverot and Others v. Gouvernement de la Communauté française*.

96. ECTS was developed by the Commission in the context of ERASMUS to enable students to take the credits obtained during their period of study abroad and use them within their home curriculum.

97. Recommendation on the establishment of a European Credit system for Vocational Education and Training (ECVET), O.J. 2009, L 155.

98. Decision 2241/2004/EC.

99. *Recommendation of the European Parliament and of the Council of 23 Apr. 2008 on the establishment of the European Qualifications Framework for lifelong learning*, O.J. 2008, C 111/1-7. The EQF constitutes a European reference framework, consisting of 8 levels, based on “learning outcomes”.

100. The Diploma Supplement is a European administrative annex to diplomas, which has been elaborated jointly by a working group of the European Commission, Council of Europe and UNESCO.

101. Convention on the Recognition of Qualifications concerning Higher Education in the European Region.

102. S. Garben, op. cit. *supra* note 105.

103. A. Amaral and A. Magalhaes, “Epidemiology and the Bologna saga”, 48 *Higher Education* (2004), 84.

104. E. Hackl, “Towards a European area of higher education: Change and convergence in European higher education”, EUI Working Paper, 9 RSC (2001), 28.

counter-forces in this area. On the one hand, it *de*-nationalizes higher education policy, as it lifts the organization of higher education systems to a European level. At the same time, from an EU perspective, Bologna constitutes a *re*-nationalization. The Process withdraws the important areas of teacher and student mobility and diploma recognition from the supranational spheres of EU influence, moving them to the intergovernmental realm where state autonomy still reigns. But although the Process takes place outside the EU framework, there is considerable material and institutional interaction. The Commission is heavily involved in by means of funding and steering, and characterizes its contribution to the Process as part of the Europe 2020 Strategy.¹⁰⁵ The follow-up relies heavily on the EU presidency and the European Credit Transfer System has been transposed into the Bologna Process' Bachelor-Master system. Furthermore, since 2015, the EU offers a Student Loan Guarantee Facility, which provides partial guarantees to financial intermediaries in respect of loans granted to students undertaking a second-cycle degree, such as a Master's degree, which is neither their country of residence nor the country in which they obtained their qualification granting access to the Master's programme.¹⁰⁶ This EU measure is of course an important support for the system and the goals of the Bologna Process. All of this makes the exact status of the Bologna Process obscure.¹⁰⁷

Where the Court's aforementioned case law in *Gravier* and *ERASMUS* blurred the legal distinction between (university) education and vocational training, the Bologna Process has been responsible for merging them in practice. While there is a specific Copenhagen Process for vocational training, the Bologna Process has altered the meaning of vocational training in many Member States by requalifying higher vocational institutions as "universities" which can offer either special Bachelor degrees or regular Bachelor and, even Master degrees.

4.1.4 Student residence

Further EU measures concerning mobile students include the Student Residence Directives. Directive 93/96 granted students the right of residence in the Member State of study, but under the conditions of sufficient health insurance and sufficient resources to avoid becoming a burden on the host State's social assistance schemes. This Directive was repealed by Directive 2004/38/EC on the right of citizens to move and reside freely within EU territory. The Directive constitutes a consolidation and clarification of all the legislation on the right of entry and residence for Union citizens. It indicates specifically that host Member States are not required, prior to the acquisition of the permanent right of residence, to grant maintenance aid for studies, including for vocational training, in the form of grants or loans. Remarkably, this provision led the Court to hold in *Bidar*¹⁰⁸ that maintenance grants were included in the scope of EU law for the purposes of the non-discrimination principle. The Court has however allowed a relatively wide derogation, meaning that Member States may require at least 5 years of prior residence.¹⁰⁹

Directive 2004/114/EC concerns students from third countries. The rationale behind the Directive is, according to its preamble, to "promote Europe as a whole as a world centre of excellence for studies and vocational training" by promoting the mobility of third-country nationals

105. European Commission, *Realising the European Higher Education Area*, Contribution of the European Commission to the Berlin Conference of European Higher Education Ministers on 18/19 Sept. 2003.

106. Reg. 1288/2013 establishing "Erasmus+": The Union programme for education, training, youth and sport", O.J. 2013, L 347/50–73.

107. S. Garben, "The Bologna process: From a European law perspective", 16 *ELJ* (2010), 186.

108. Case C-209/03, *The Queen, on the application of Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills*.

109. Case C-158/07, *Jaqueline Förster v. IB-Groep*.

to the EU for the purpose of studies,¹¹⁰ or, in the words of a commentator “to facilitate the admission and residence of groups of third-country nationals whose presence is welcome for economic reasons”.¹¹¹ The Directive distinguishes four categories of third-country nationals, to wit students, pupils, unpaid trainees and volunteers. The conditions for entry of students and pupils are that they have a valid travel document and, if minors, come with parental authorization, that they have sickness insurance and sufficient resources to cover their stay and that they have been accepted by a higher educational establishment or school.

4.1.5 Education of migrant children

Finally, one of the most obvious categories of individuals that have been granted educational rights by means of EU legislation is that of migrant workers and their children. The worker itself is the least disputed beneficiary of equal treatment in relation to education, for he is the embodiment of the free movement of persons in the internal market. Realizing that the achievement of this objective would be undermined if the worker were to be separated from his family, Community law also provided for accommodation of the family members of the worker in the host state, which was a breakthrough development at the time. One of the most important pieces of legislation in this context was Regulation 1612/68, replaced by Regulation 492/2011.¹¹² In accordance with Article 10, the children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State’s general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory. In addition, the children of migrant workers have been the subject of a legal measure constituting a piece of veritable education policy, namely the Directive on language teaching for the children of migrant workers.¹¹³ This Directive of 25 July 1977 contains an obligation to take positive action, namely to promote teaching of the mother tongue and culture of their country of origin.

4.1.6 Cost-effectiveness of education systems

In recent years, education has become included in the European Semester, where it is being considered as a factor of economic stability and growth. Apart from enhancing inclusion policies, overall, the Country Specific Recommendations (CSRs) are predominantly concerned with the “cost-effectiveness” and “employability” of Member States’ education systems. For instance, Denmark has been told that “[c]ontinued efforts are [...] needed to improve the quality and cost-effectiveness of its education and training systems”,¹¹⁴ Estonia to “[I]ink training and education more effectively to the needs of the labour market”¹¹⁵ and Malta that it should “focus education outcomes more on labour market needs”.¹¹⁶ The CSRs can be remarkably de-

110. Preamble of *Council Directive 2004/114/EC of 13 Dec. 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service*, O.J. 2004, L 375/12-18.

111. G. Fitchew, “European policy and legislation on immigration”, (2009) Migration Watch UK Briefing Paper 4.12.

112. O.J. 2011, L 141/1–12.

113. Directive 77/486 (O.J. 1977, L 199/32).

114. Council Recommendation of 9 July 2013 on the National Reform Programme 2013 of Denmark and delivering a Council opinion on the Convergence Programme of Denmark, 2013-2016, O.J. 2013, C 217/18, point 12.

115. Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Estonia and delivering a Council Opinion on the Stability Programme of Estonia, 2012-15, O.J. 2012, C 219/25–27, point 14.

116. Council Recommendation of 12 July 2011 on the National Reform Programme 2011 of Malta and delivering a Council opinion on the updated Stability Programme of Malta 2011-2014, O.J. 2011, C 215/10–12, point 3.

tailed and specific on the required reforms concerning various aspects of national education systems, which could be said to sit uncomfortably with the national autonomy clause in Article 165(1) TFEU that EU action should fully respect the responsibility of the Member States for the content of teaching and the organization of education systems. For example, the Commission's proposed CSR in 2017 for Croatia states: "Since 2015, as part of the implementation of the education, science and technology strategy, a reform of the school curricula was launched to improve on content and teaching of transferable skills. After ambivalent stakeholder reactions, the curricular reform was revised, and implementation has been significantly delayed. The process now needs to continue in line with the original objectives".¹¹⁷ Furthermore, the CSRs reflect a clear policy to increase the involvement of the private sector in higher education and to make the funding of higher education "competitive". In this vein, Bulgaria has received the recommendation that "frameworks fostering collaboration between universities and the private sector have to be further developed, and funding should be allocated in a competitive, merit-based and transparent way", and to "pursue the reform of higher education, in particular through better aligning outcomes to labour market needs and strengthening cooperation between education, research and business",¹¹⁸ Estonia to "enhance cooperation between businesses and academia",¹¹⁹ and Italy to address the "underperformance of the tertiary education system" *inter alia* by creating "a stronger link between universities' performance and the allocation of public funding".¹²⁰

4.2 Youth

According to Article 165(2) TFEU, Union action on youth shall be directed at encouraging the development of youth exchanges and of exchanges of socio-educational instructors, and encouraging the participation of young people in democratic life in Europe. In addition, Article 47 TFEU provides that Member States shall, within the framework of a joint programme, encourage the exchange of young workers. In the context of humanitarian aid, Article 214(5) TFEU states that to establish a framework for joint contributions from young Europeans to the humanitarian aid operations of the Union, a European Voluntary Humanitarian Aid Corps shall be set up.¹²¹ Finally, the Charter of Fundamental rights features the rights of the child (Art. 24) and the prohibition of child labour and protection of young people at work (Art. 32). This latter right is given more concrete expression in Directive 94/33/EC on the protection of young people at work, adopted on Article 153 TFEU on social policy.¹²² The Directive obliges Member States to prohibit work by children, and to ensure that work by adolescents is strictly regulated. Working with several harmful substances is prohibited.

117. Recommendation for a Council Recommendation on the 2017 National Reform Programme of Croatia and delivering a Council opinion on the 2017 Convergence Programme of Croatia, COM(2017)510 final.

118. Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Bulgaria and delivering a Council opinion on the Convergence Programme of Bulgaria, 2012-15, O.J. 2012, C 219/9-12, point 16 and Council Recommendation of 9 July 2013 on the National Reform Programme 2013 of Bulgaria and delivering a Council opinion on the Convergence Programme of Bulgaria, 2012-2016, O.J. 2013, C 217/10-13, point 4.

119. Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Estonia and delivering a Council Opinion on the Stability Programme of Estonia, 2012-15, O.J. 2012, C 219/25-27, point 14.

120. Council Recommendation of 10 July 2012 on the National Reform Programme 2012 of Italy and delivering a Council opinion on the Stability Programme of Italy, 2012-2015, O.J. 2012 C 219/46-49, point 16.

121. Reg. (EU) No. 375/2014 establishing the European Voluntary Humanitarian Aid Corps ("EU Aid Volunteers initiative"), O.J. 2014, L 122/1-17.

122. O.J. 1994, L 216/12-20.

In response to the high levels of youth unemployment as a consequence of the economic and financial crisis, this area has become a more defined political priority in recent years. As part of the “Youth Employment Package”, in April 2013 the Council adopted the Recommendation on establishing a Youth Guarantee,¹²³ calling on Member States to ensure that all young people under 25 receive a good quality offer of employment, continued education, an apprenticeship or a traineeship within four months of leaving formal education or becoming unemployed. While not legally binding, the EU is seeking to enforce the implementation of the Youth Guarantee via other means. Firstly, the Youth Guarantee is supported by EU Structural Funds and the €6.4 billion Youth Employment Initiative agreed by the Council in 2013. Furthermore, the Country Specific Recommendations for 2014,¹²⁴ proposed by the Commission and endorsed by the European Council as part of the European Semester, urged 18 Member States to take urgent steps to combat youth unemployment by improving transitions from school to work, proposing specific recommendations on implementation of the Youth Guarantee to 8 countries.¹²⁵ In March 2013, as a supporting measure in the context of the Youth Guarantee, the Council adopted a Recommendation on a Quality Framework for Traineeships,¹²⁶ providing a common set of guidelines, inviting Member States to ensure that traineeships are based on a written agreement, better learning content and respect for the rights and working conditions of trainees, reasonable duration of traineeships and their proper recognition, and increased cross-border mobility of trainees.

Other notable measures include the Daphne Programme to prevent and combat violence against children, young people and women, Council Decision of 29 May 2000 to combat child pornography on the Internet,¹²⁷ and Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography,¹²⁸ based on Article 82(2) and Article 83(1) TFEU, which establishes minimum rules concerning the definition of criminal offences and sanctions in the area of sexual abuse and sexual exploitation of children, child pornography and solicitation of children for sexual purposes.

4.3 Sport

Despite the initial absence of any reference to sport in the Treaties, a significant body of European sport's law and policy has steadily been built over the years. First and foremost, the Commission and the Court apply the free movement and competition law rules to sporting rules.¹²⁹ The impact of such indirect, negative integration can hardly be overstated.¹³⁰ While the Court has generally excluded discriminatory nationality rules in the context of national teams from the scope of the Treaty,¹³¹ it has firmly applied the free movement provisions to such measures

123. O.J. 2013, C 120/1–6.

124. See Commission Communication, 2014 *European Semester: Country-specific recommendations*, COM(2014)400 final.

125. Spain, Italy, Slovakia, Croatia, Portugal, Poland, Bulgaria and Ireland.

126. O.J. 2014, C 88/1–4.

127. O.J. 2000, L 138/1–4.

128. O.J. 2011, L 335, replacing Council Framework Decision 2004/68/JHA.

129. See e.g. Case C-176/96, *Jyri Lehtonen and Castors Canada Dry Namur-Braine ASBL v. Fédération royale belge des sociétés de basket-ball ASBL*, Case C-438/00, *Deutscher Handballbund eV v. Maros Kolpak*, Case C-265/03, *Igor Simutenkov v. Ministerio de Educación y Cultura and Real Federación Española de Fútbol* In Case C-519/04 P, *David Meca-Medina*, Case C-325/08, *Olympique Lyonnais SASP v. Olivier Bernard*.

130. S. Van den Bogaert and A. Vermeersch, “Sport and the EC Treaty: A tale of uneasy bedfellows”, 32 *EL Rev.* (2006), 821.

131. Case 36/74, *Walrave and Koch*.

at club level. And while it has been willing to accept the specificity of sport to a certain extent in some cases, the Court has not granted an outright exemption to sport, regardless of the consistent efforts of especially sporting bodies and their representatives to prevent the application of EU rules to sporting activities. In addition, as regards the passive enjoyment of sport there is a clear impact of the rules on media and supporter mobility.

Regarding positive integration, the importance of sport for the development of European integration has been acknowledged and the EU has developed a “moderate direct sports policy”, emphasizing sport’s cultural, educational and social functions, primarily through the “creative use”¹³² of the EU’s competences in other supporting policy areas such as culture, education and health, and the internal market.¹³³ As regards sport’s societal role, there are a number of actions focusing on sport’s capacity to improve social inclusion, particularly in relation to people with a disability, and those from minority groups.¹³⁴ Furthermore, in the context of the increasing societal problem of obesity, a large part of EU activities in the field of sport now focus on implementing the Council’s Recommendation on promoting health-enhancing physical activity across sectors,¹³⁵ including a monitoring framework that takes into account the 2008 EU Physical Activity Guidelines.¹³⁶ The EU also plays a role in combatting match fixing,¹³⁷ through the coordination of EU legislation in related areas as well as cooperation with international bodies such as the International Olympic Committee and the Council of Europe. In 2012, the Commission published a study mapping national criminal law provisions applicable to match fixing,¹³⁸ and it is planning a Recommendation on best practices in the prevention and combating of betting-related match fixing.¹³⁹

Article 165 TFEU now provides that the Union “shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function”. As such, EU action shall be directed at “developing the European dimension in sport, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen”. The insertion of this sports article by the Lisbon Treaty was considered desirable from the viewpoint of legal certainty and the legitimacy of already existing and future EU action in this area, and to a certain extent to provide a firmer legal and financial basis for certain actions. However, as is the case for the other supporting policies, it seems that the introduction

132. S. Van den Bogaert and A. Vermeersch, *op. cit. supra* note 129, at 822.

133. E.g., specific rules applicable to equestrian sports have been adopted on the agriculture/market provisions. Directive 90/428/EEC governs trade in equidae intended for competitions and establishes the conditions for their participation in competitions. Decision 93/195/EEC lays down the animal health conditions for the re-entry of registered horses for racing, competition and cultural events after temporary export to non-EU countries, and Decision 92/260/EEC, mainly used in the arrival from and return to their home countries outside the EU of sport horses.

134. Council conclusions on the role of sport as a source of and a driver for active social inclusion, O.J. 2010, C 326/5–8.

135. 2013/C 354/01.

136. EU Physical Activity Guidelines, 2008, available at <ec.europa.eu/sport/library/policy_documents/eu-physical-activity-guidelines-2008_en.pdf>.

137. See e.g. Council conclusions on combating match-fixing, O.J. 2011, C 378/1–2 and European Parliament resolution on the European dimension in sport, O.J. 2013, C 239E/46–60.

138. Available at <ec.europa.eu/sport/library/studies/study-sports-fraud-final-version_en.pdf>.

139. Available at <ec.europa.eu/sport/policy/organisation_of_sport/match_fixing_en.htm>.

of an explicit legal basis has not made a big difference in the scope and direction of EU sports law and policy, is not expected to do so in the near future.¹⁴⁰

5. Culture

The initial Treaty only contained two scant references to culture, in Article 36 EEC which permitted Member States to restrict imports and exports in order to protect national treasures, and in Article 131 EEC which enabled the Member States to extend the benefits to associated countries in order to further the “economic, social and cultural development [...] which they desire”.¹⁴¹ For many years, national cultural bodies or those pleading of their behalf claimed that their cultural policy was not, and should not be, affected by European law. However, as has proven to be the case for so many other supporting policy areas, the case law of the Court and indirect legislation having a bearing on culture¹⁴² had already removed any doubt on this point before the Maastricht Treaty’s insertion of an explicit competence in the form of (now) Article 167 TFEU. The new provision thus did little more than legitimizing existing practice and attempting to draw sharper boundaries for future initiatives.

Article 167(1) TFEU provides that the EU “shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore”. As such, EU action shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action, for the improvement of the knowledge and dissemination of the culture and history of the European peoples, the conservation and safeguarding of cultural heritage of European significance, non-commercial cultural exchanges, and artistic and literary creation.

EU law does not attempt to define “culture”, and as such it depends on one’s own definition to what extent EU rules and policies affect it. In its widest understanding, there is hardly anything that escapes culture, as any act of regulation could somehow be argued to be a part, reflection of consequence of a region’s/country’s culture and identity.¹⁴³ Under a more focused but still broad interpretation of the term, EU rules and case law on e.g. the mutual recognition of foodstuffs and beverages and their denomination of origin,¹⁴⁴ media,¹⁴⁵ tourism¹⁴⁶ and

140. See to this effect also S. Weatherill, “EU sports law: The effect of the Lisbon Treaty” in A. Biondi, P. Eeckhout and S. Ripley (Eds.), *EU Law After Lisbon* (OUP, 2012).

141. R. Craufurd-Smith, “The evolution of cultural policy in the European Union” in P. Craig and G. de Búrca, *The Evolution of EU Law* (OUP, 2011), 869.

142. Such as the Television Without Frontiers Directive 89/552/EEC, Directive 2001/84 on the resale right for the benefit of the author of an original work of art, Directive 2006/116 on the term of protection of copyright and certain related rights, and the Audiovisual Media Services Directive 2010/13/EU.

143. As such, only in exceptional cases will this constitute a reason to derogate from the Treaty provisions. See on Sunday trading rules, predating *Keck*: Case C-145/88, *Torfaen Borough Council v. B & Q plc*. On a prohibition of games involving simulated killings: Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*. On abortion, see: Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others*.

144. Case 170/78, *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland*, Case 178/84 *Commission of the European Communities v. Federal Republic of Germany*, Case 237/82, *Jongeneel Kaas BV and others v. State of the Netherlands and Stichting Centraal Orgaan Zuivelcontrole*. Council Reg. (EC) No. 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs and Council Reg. (EC) No. 509/2006 on agricultural products and foodstuffs as traditional specialities guaranteed.

145. See e.g. Case C-288/89, *Stichting Collectieve Antennevoorziening Gouda and others v. Commissariaat voor de Media*, and the directives cited *supra* note 151.

146. See section 2.2.5.

on languages¹⁴⁷ should be included. Under the narrowest definition, one would only look at the EU's impact on the arts (fine arts, music, dance, theatre, literature)¹⁴⁸ and cultural¹⁴⁹/archaeological¹⁵⁰ heritage.

No matter what definition one adopts, however, the underlying tension becomes clear: while perhaps there is nothing more distinctively and characteristically European than its deeply rich and diverse cultures, from the viewpoint of European integration, national cultures are perhaps the biggest and least surmountable obstacle. Culture is what both binds and divides Europeans. To a certain extent, the EU's strategy in dealing with this tension has been to focus on culture's economic manifestations, where it could make a stronger case for its involvement. This however has fed into a second underlying tension in this area: between culture's economic and explicitly *non*-economic aims and character. While the EU has been criticized for adopting a liberal approach, prioritizing trade over less easily quantifiable cultural interest, it has been pointed out that the EU "has not been completely blind to the fact that competitive pressures and the operation of consumer choice can diminish as well as enhance cultural diversity".¹⁵¹

147. It has been said that there is undoubtedly EU language law, but that one may doubt whether there is a coherent positive language policy. See B. de Witte, "Language law of the European Union" in R. Craufurd-Smith, *Culture and European Union Law* (OUP, 2004), 205. Relevant cases include: Case C-379/87, *Anita Groener v. Minister for Education and the City of Dublin Vocational Educational Committee*, Case C-366/98, *Criminal proceedings against Yannick Geffroy and Casino France SNC*, Case C-424/97, *Salomone Haim v. Kasenzahnärztliche Vereinigung Nordrhein*, Case C-281/98, *Roman Angonese v. Cassa di Risparmio di Bolzano SpA*, Case C-222/07, *Unión de Televisiónes Comerciales Asociadas (UTECA) v. Administración General del Estado*. Relevant EU measures include: EEC Council: Reg. No. 1 determining the languages to be used by the European Economic Community (O.J. 1958, L 17/385–386), Commission Communication, A New Framework Strategy for Multilingualism, COM/2005/596 final. Art. 22 of the EU Charter states that the Union shall respect cultural, religious and linguistic diversity. See also Case C-361/01 P, *Christina Kik v. OHIM*, concerning the rules in force governing languages at the Office for Harmonisation in the Internal Market.

148. See e.g. Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State and amending Reg. (EU) No. 1024/2012 (O.J. 2014, L 159/1–10), Council Reg. (EC) No. 116/2009 on the export of cultural goods (O.J. 2009, L 39/1–7), Council Resolution implementing the work plan on European cooperation in the field of culture: European added value and mobility of persons and circulation of works in the cultural sector (O.J. 2003, C 13/5–7), Council Resolution on the promotion of the free movement of persons working in the cultural sector, European Parliament resolution on the importance and dynamics of the theatre and the performing arts in an enlarged Europe (O.J. 2003, C 300E/156–162), Council Resolution on exchange of information and experience concerning conditions for professional artists in the context of EU enlargement (O.J. 2001, C 213/9–10). See also Case C-17/92, *Federación de Distribuidores Cinematográficos v. Estado Español and Unión de Productores de Cine y Televisión*, Joined Cases 60 and 61/84, *Cinéthèque SA and others v. Fédération nationale des cinémas français*.

149. See e.g. the Capitals of Culture initiative. Decision No. 1622/2006/EC establishing a Community action for the European Capital of Culture event for the years 2007 to 2019.

150. Although primarily the responsibility of the Council of Europe (see European Convention on the Protection of the Archaeological Heritage), heritage is also a priority for the EU. Action takes place through the OMC, funding and mainstreaming. Cultural heritage benefits from EU investments in 2014–2020 through the European Structural and Investment Funds (€ 351 billion for regional policy), Horizon 2020 (€ 80 billion for research) and Creative Europe (€ 1.5 billion for cultural and creative industries). Regarding mainstreaming, the EU's Environmental Impact Assessment Directive 2014/52 requires consideration of a project's impact on cultural heritage, and General Block Exemption Reg. 651/2014 allows state aid. See Council conclusions on cultural heritage as a strategic resource for a sustainable Europe adopted 21 May 2014 and Commission Communication "Towards an integrated approach to cultural heritage for Europe" COM(2014)477 final.

151. R. Craufurd-Smith, op. cit. *supra* note 146.

The EU's main incentive measure in this policy area today is “Creative Europe”, with a budget of € 1.46 billion, providing support to the audio-visual and culture sector aiming to protect and promote European culture heritage, while additionally supporting the cultural and creative industries, seeing them as a driver for growth and job creation.¹⁵² These funds are also used to support the Open Method of Coordination in culture, launched in 2008 on the basis of a proposal made by the Commission in the European Agenda for Culture.¹⁵³ The Member States agree on the themes on which the OMC should focus every four years, in the framework of the Work Plan for Culture.¹⁵⁴ Under the OMC, national authorities appoint representatives and individuals to be part of specialized working groups. There have been more than ten culture OMC groups, working on *inter alia* the mobility of culture professionals,¹⁵⁵ artists' residencies and the promotion of Creative Partnerships. Complementing the OMC dialogue between decision-makers, the Commission organizes a bi-annual Culture Forum, bringing together stakeholders and decision-makers.

In addition, the Commission represents the interests of the EU in international initiatives, such as those headed by the United Nations Educational, Scientific and Cultural Organization (UNESCO). Indeed, more than perhaps in other supporting policy areas, EU action in culture takes place in the context of action by other international players, in particular the Council of Europe and UNESCO, which could be said to have a more direct mandate for developing cultural policies and instruments. Of the various external binding instruments in the field, the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions should be mentioned, to which the EU became a signatory in 2006,¹⁵⁶ as well as the Council of Europe Cultural Convention, to which all EU Member States are signatories.

6. Industry

Article 173 TFEU provides that “the Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union's industry exist”, for which purpose their action shall be aimed at speeding up the adjustment of industry to structural changes, encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings, encouraging an environment favourable to cooperation between undertakings, and fostering better exploitation of the industrial potential of policies of innovation, research and technological development. The second paragraph indicates that the Member States shall consult each other in liaison with the Commission and, where necessary, shall coordinate their action. The Commission may take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of

152. Reg. (EU) No. 1295/2013 establishing the Creative Europe Programme (2014 to 2020) and repealing Decisions No. 1718/2006/EC, No. 1855/2006/EC and No. 1041/2009/EC.

153. Commission Communication on a European agenda for culture in a globalizing world, SEC(2007)570.

154. The 2015–18 Work Plan for Culture, adopted by EU Culture Ministers in December 2014, sets out four main priorities for European cooperation in cultural policy-making: 1) Accessible and inclusive culture, 2) Cultural heritage, 3) Cultural and creative sectors: creative economy and innovation, 4) Promotion of cultural diversity, culture in EU external relations, and mobility.

155. Report and recommendations to the Cultural Affairs Committee on improving the conditions to support the mobility of artists and culture professionals, available at <ec.europa.eu/culture/policy/cultural-creative-industries/documents/artist-mobility_en.pdf>, and Report on building a strong framework for artists' mobility: 5 key principles, 2012, available at <ec.europa.eu/culture/library/reports/artist-mobility-report_en.pdf>.

156. Council Decision 2006/515/EC on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, OJ. 2006, L 201/15–30.

guidelines and indicators, the organization of exchange of best practice, and the preparation of the necessary elements for periodic monitoring and evaluation.

Considering its economic nature, one may wonder why industry is only a complementary competence. The text of Article 173 TFEU clearly bears the traces of a compromise between the age-old difference of views about the need for an industrial policy and the form it should take. The conflict was principally between the more *dirigiste* approach based on southern European thinking, and the liberal non-interventionist approach. The original draft was much more *dirigiste* in nature, but resistance from the northern, more market-oriented Member States led to the present text. All the actions that can be undertaken on Article 173 TFEU take place in accordance with a system of open and competitive markets. This point is emphasized by the last paragraph of the provision, which provides that this title “shall not provide a basis for the introduction by the Union of any measure which could lead to a distortion of competition”. This confirms the free-market philosophy of the more liberally-minded Member States.

In July 2005, a Commission communication for the first time set out an integrated approach to industrial policy based on a concrete work programme of cross-sectoral and sectoral initiatives.¹⁵⁷ The 2007 “mid-term review of industrial policy” concluded that the actions described in the 2005 communication had benefited Europe’s industries, with regard to both large companies and SMEs, and emphasized that the integrated approach had proved successful and had the support of Parliament and the Member States.¹⁵⁸ In the context of Europe 2020, the flagship initiative “An industrial policy for the globalization era” focuses on 10 actions to promote European industrial competitiveness, thus placing more emphasis on factors such as SME growth and the supply and management of raw materials.¹⁵⁹ In January 2014 the Commission launched the communication “For a European Industrial Renaissance”¹⁶⁰ focusing on reversing industrial decline and reaching the target of 20% of GDP for manufacturing activities by 2020. The Commission states that to attract new investments and create a better business environment, the EU needs more coherent politics in the field of the internal market, including European infrastructure such as energy, transport and information networks, as well as for goods and services. The importance of improved cooperation in the areas of good quality public administration, trade, research and raw materials is also mentioned.

7. Tourism

Introduced by the Lisbon Treaty, Article 195 TFEU provides that the Union shall complement the action of the Member States in tourism, particularly by promoting the competitiveness of Union undertakings. To that end, Union action shall be aimed at: “(a) encouraging the creation of a favourable environment for the development of undertakings in this sector; (b) promoting cooperation between the Member States, particularly by the exchange of good practice”. The Parliament and the Council, under the ordinary legislative procedure, shall establish specific measures to complement actions within the Member States, excluding harmonization.

As in the case of the other supporting policy areas, there was already some EU integration in this field before the introduction of this specific legal basis. Many tourists have been able to

157. “Implementing the Community Lisbon Programme: A policy framework to strengthen EU manufacturing — towards a more integrated approach for industrial policy” (COM(2005)474).

158. COM(2007)374.

159. COM(2010)614. See also Commission Communication “Industrial Policy: Reinforcing competitiveness” (COM(2011)642), Commission Communication “A Stronger European Industry for Growth and Economic Recovery”, COM(2012)582) and European Parliament resolution on an Industrial Policy for the Globalized Era (O.J. 2012, C 199E/131).

160. COM(2014)14.

make use of the freedom to receive services as well as the free movement of persons,¹⁶¹ which for example means that Member States may not charge higher museum fees to EU citizens than to nationals.¹⁶² Furthermore, in the tourist guide cases the Court held the activities of tourist guides fall within the freedom to provide services under Article 56 TFEU, meaning that licensing and other restrictions will be closely scrutinized and are likely to be prohibited by EU law.¹⁶³ Other relevant measures are the consumer protection directives on package tours¹⁶⁴ and on timesharing,¹⁶⁵ and a 2011 Regulation on statistical information on tourism.¹⁶⁶

In 2010 the Commission adopted a Communication laying down a comprehensive strategy to boost the competitiveness of the sector, to promote sustainability, and to maximize the potential of EU financial policies.¹⁶⁷ The area is receiving increasing policy attention in recent years, which is not surprising considering its high economic significance, not least in the EU Member States that have been particularly hit in the economic crisis. In 2014, the Commission adopted a Green Paper on the safety of tourism accommodation,¹⁶⁸ a proposal for a Council Recommendation on European Tourism Quality Principles,¹⁶⁹ and a Communication on a European Strategy for more Growth and Jobs in Coastal and Maritime Tourism.¹⁷⁰

8. Civil protection

Civil protection assistance consists of governmental aid delivered in the immediate aftermath of a disaster. It can take the form of in-kind assistance, deployment of specially-equipped teams, or assessment and coordination by experts sent to the field. Ever since the terrorist attacks of 11 September 2001, the subject of civil protection is receiving more attention in the EU, with numerous legal instruments and initiatives being adopted, providing a more structured European framework. This is an area where EU action is firmly supported by citizens, who see a clear added value in coordinated responses to disasters.¹⁷¹ Also the Member States have shown a sustained willingness to enhance the EU's crisis management capacities. After a large-scale crisis or disaster, they routinely call for additional EU capacities to coordinate, link, or integrate their response capacities, and few European Council meetings conclude without some call for more crisis cooperation.¹⁷²

161. Case 186/87, *Cowan v. Trésor Publique*.

162. Case C-45/93, *Commission v. Kingdom of Spain*, C-388/01, *Commission v. Italian Republic*.

163. Case C-154/89, *Commission v. French Republic*, Case C-180/89, *Commission v. Italian Republic*, Case C-198/89, *Commission v. Hellenic Republic*, Case C-375/92, *Commission v. Kingdom of Spain*.

164. Council Directive 90/314/EEC on package travel, package holidays and package tours, O.J. 1990, L 158/59–64, adopted on the basis of (now) Art. 114 TFEU.

165. Directive 2008/122/EC on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts.

166. Reg. (EU) No. 692/2011 concerning European statistics on tourism, O.J. 2011, L 192/17–32.

167. Commission Communication, "Europe, the world's No. 1 tourist destination – a new political framework for tourism in Europe", COM(2010)352 final.

168. European Commission, Green Paper on Safety of Tourism Accommodation Services, COM/2014/464 final.

169. COM(2014)85 final – 2014/43 (NLE).

170. COM(2014)86 final.

171. 82% of EU citizens agree that a coordinated EU action in dealing with disasters is more effective than actions by individual countries, 2012 Eurobarometer.

172. A. Boin, M. Ekengren and M. Rhinard, *The European Union as Crisis Manager: Patterns and Prospects* (CUP, 2013).

Council Decision 2001/792 established an EU Mechanism to facilitate cooperation in civil protection interventions.¹⁷³ The Mechanism was set up to enable coordinated assistance from the participating states to victims of natural and man-made disasters in Europe and elsewhere, and it currently includes all 28 EU Member States as well as Iceland, Norway, and Macedonia. The EU Civil Protection legislation was revised in 2013 by Decision 1313/2013/EU of the European Parliament and of the Council on a Union Civil Protection Mechanism,¹⁷⁴ placing greater emphasis on disaster prevention, risk management, and disaster preparedness, including the organization of trainings, simulation exercises and the exchange of experts, but also developing new elements, such as a voluntary pool of pre-committed response capacities by the Member States. The “operational hub” of the EU Civil Protection Mechanism is the Emergency Response Coordination Centre (ERCC)¹⁷⁵ which monitors emergencies around the world on a 24/7 basis, and coordinates the response of the participating countries in case of a crisis. The ERCC teams are ready to intervene at short notice both within and outside the EU. They undertake specialized tasks such as search and rescue, aerial forest fire fighting, advanced medical posts and more. Since its launch in 2001, the EU Civil Protection Mechanism has monitored over 300 disasters and has received more than 180 requests for assistance.¹⁷⁶ The Mechanism also intends to help in marine pollution emergencies, where it works closely with the European Maritime Safety Agency.

In November 2017, the Commission put forward a proposal for a targeted revision of Decision 1313/2013. [add footnote: “European Commission, Proposal for a Decision amending Decision No. 1313/2013/EU on a Union Civil Protection Mechanism, COM(2017)0772 final.” The explanatory memorandum indicates that the revision would be mainly aimed at reinforcing the Union and Member States’ collective ability to respond to disasters, and addressing recurrent and emerging capacity gaps, especially with the creation of a dedicated reserve of response capacities at Union level, with decisions on deployment taken by the Commission, which retains command and control (to be known as rescEU). rescEU will be equipped with selected emergency capacities to respond to wildfires, floods, earthquakes and health emergencies as appropriate. Following discussion with Member States, a field hospital that can rapidly be deployed inside or outside the Union as part of the European Medical Corps should also be foreseen for cases of epidemics.

The increasing EU-level activities in this area were given a more solid basis by the Lisbon Treaty in Article 196 TFEU, which provides that the Union shall encourage cooperation between Member States to improve the effectiveness of systems for preventing and protecting against natural or man-made disasters. Union action shall aim to: “(a) support and complement Member States’ action at national, regional and local level in risk prevention, in preparing their civil-protection personnel and in responding to natural or man-made disasters within the Union; (b) promote swift, effective operational cooperation within the Union between national civil-protection services; (c) promote consistency in international civil-protection work”. The Parliament and the Council, under the ordinary legislative procedure, shall establish the measures necessary to help achieve these objectives, excluding harmonization.

173. O.J. 2001, L 297/7–11, adopted on (now) 352 TFEU.

174. O.J. 2013, L 347:924–947, adopted on Art. 196 TFEU.

175. Replacing and upgrading the functions of the previous Monitoring and Information Centre. See <ercportal.jrc.ec.europa.eu/>.

176. It has intervened e.g. in Hurricane Katrina in the USA (2005), the earthquake in Haiti (2010), the triple-disaster in Japan (2011), and typhoon Haiyan that hit the Philippines (2013).

9. Administrative cooperation

The effectiveness of the many rights and obligations under EU law rests on a legal framework consisting of direct application of Treaty rules, harmonized European rules, national rules, and mutual recognition, and the task of implementing and ensuring compliance with these rules lies, in practice, with a large number of public authorities in the Member States.¹⁷⁷ In order to carry out this task, Member States' authorities need to cooperate closely, meaning that administrative cooperation is not only desirable but is required by the very nature of the EU. In the context of the free movement of goods, many circulation regimes are accompanied by their own specific mechanism of administrative cooperation.¹⁷⁸ In the context of services, three important recent directives emphasized implementation through cooperation between Member States, to wit the revised Professional Qualifications Directive,¹⁷⁹ the Services Directive and the Patient's Rights Directive.¹⁸⁰ All three rely on the Internal Market Information system, developed to improve communication between Member State administrations.¹⁸¹

Introduced by the Lisbon Treaty, Article 197 TFEU provides that the “effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest”. On this basis, the Union “may support the efforts of Member States to improve their administrative capacity to implement Union law. Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes.¹⁸² No Member State shall be obliged to avail itself of such support. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish the necessary measures to this end, excluding any harmonization of the laws and regulations of the Member States”. The third paragraph provides that this Article shall be without prejudice to the obligations of the Member States to implement Union law or to the prerogatives and duties of the Commission. It shall also be without prejudice to other provisions of the Treaties providing for administrative cooperation among the Member States and between them and the Union.¹⁸³

While it cannot be considered irrelevant that the Lisbon Treaty created a specific provision in this area, Article 197 TFEU does not seem to have added or changed much, instead reiterating

177. F. Lafarge, “Administrative cooperation between member states and implementation of EU law”, 16 EPL (2010), 598.

178. E.g. veterinary checks, waste, explosives, and dangerous/hazardous goods. Council Reg. (EC) 515/97 creates one of the currently most elaborated cooperation mechanisms, which are used by other regulations related to circulation of special goods, such as the export of cultural goods (Council Reg. 3911/92), dual use items (Council Reg. 1334/2000) and drug precursors (Council Reg. 111/2005).

179. Directive 2013/55/EU on the recognition of professional qualifications and Reg. (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System, O.J. 2013, L 354/132–170.

180. See section 3.2.1 *supra*.

181. F. Lafarge, *op. cit. supra* note 183. See Reg. 1024/2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC (O.J. 2012, L 316/1–11).

182. E.g., the Seconded National Experts and Experts in Training, who work for a national, regional or local public administration and are temporarily assigned to the Commission. See: Commission Decision of 12.11.2008 laying down rules on the secondment to the Commission of national experts and national experts in professional training C(2008) 6866 final. For a study on the impact of such exchanges: J. Trondal, “Is the European Commission a ‘hothouse’ for supranationalism? Exploring actor-level supranationalism”, 45 JCMS (2007), 1111.

183. Art. 74 TFEU in the area of freedom, security and justice provides: “The Council shall adopt measures to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to Art. 76, and after consulting the European Parliament.”

the status quo. It has been regretted that the Lisbon Treaty has not properly extended the EU legal basis for action in the area of European administrative law, particularly in order to allow the Union to codify the basic principles of European administration, pointing out that this would be desirable and much less intrusive than the extremely detailed provisions for the implementation of rules regarding specific matters which can currently be found as an annex to the various substantial rules of secondary EU law.¹⁸⁴

10. Concluding Remarks

Of course, the various supporting policy areas all have a different scope and character. The degree and forms of integration differ, with public health on one side of the spectrum being very close to a shared competence, and on the other side of the spectrum areas like industry, where EU-level action is more limited. Some of the supporting policies were explicitly present from the beginning (vocational training), while others have only recently been added by the Lisbon Treaty (sport, tourism, civil protection and administrative cooperation). In some areas, EU-level action remains highly contested (education, sport), while in other areas it is generally welcomed (civil protection). While some areas seem inherently destined to be at odds with European integration (culture), for others it appears that the path towards becoming a shared EU competence is not necessarily blocked (health).

Keeping in mind these differences, in discussing these various supporting policy areas, one is nevertheless struck by several important commonalities. In practically all these fields, the most important European influence has taken place on other Treaty provisions, either via negative or positive integration. In that context, especially the internal market provisions have been the main “backdoor”. The insertion of specific legal bases for action in these areas has therefore generally been regarded as a necessary legitimization of pre-existing practice rather than a gateway for further integration. Most, if not all, of these complementary competences have been as much directed at containing the development of supporting policies as at authorizing it. But it seems that the complementary competences have not fully succeeded in legitimizing, authorizing or containing European integration in these areas. Indirect legislation through other Treaty provisions continues, meaning that such action has neither been legitimized by the complementary competences, nor effectively contained. While the competences sometimes do provide for a firmer basis for the development of European-level initiatives and incentive measures, the introduction of harmonization prohibitions excludes the development of comprehensive and holistic European-level policies that take due account of the non-economic objectives and characteristics of the policy areas concerned.

The foregoing discussion shows that regardless of assurances to the contrary, areas that fall primarily in Member States’ competence can still be deeply affected by European integration. Negative integration through case law limits the capacity of national communities to organize these sensitive areas in the way they see fit, which is difficult to reconcile with the stipulation that EU action shall not “supersede” national competence in these areas. Harmonization prohibitions prevent these communities from re-arranging or addressing the ensuing problems holistically on the European level, leading to a regulatory gap. This also has the effect of pushing harmonization through the back door, not prevented by the harmonization prohibitions, which does not sit easily with national autonomy clauses, harmonization prohibitions and the conferral principle. Although legally permissible, this kind of EU action clearly poses problems of transparency and accountability. Furthermore, because it often entails the use of the internal

184. J. Schwarze, “European administrative law in the light of the treaty of Lisbon”, 18 EPL (2012), 285.

market or economic policy provisions, there is a danger of economic bias in the adoption of these measures, risking overlooking or undervaluing the socio-cultural values at stake. In addition, harmonization prohibitions push harmonization out of the EU legal framework into an intergovernmental one, either inside or outside the EU institutional framework. Both alternatives pose legitimacy problems of their own. The lack of a true harmonization possibility on the basis of the complementary competences has therefore been deplored,¹⁸⁵ and it has been suggested that the right way forward in these areas is to abolish the harmonization prohibitions, allowing for the adoption of legislative measures where necessary.¹⁸⁶ Instead of expecting (complementary) competences to contain EU integration and to protect Member State autonomy, which they have consistently failed to do, it would arguably make more sense to invest efforts in the democratization of the EU legislative process instead.¹⁸⁷ Such an approach would shift the focus from limiting the *existence* of competence to limiting its *exercise*, which would arguably better reflect and suit the dynamics of the EU legal order.¹⁸⁸

Further reading

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185. R. Craufurd-Smith, op. cit. *supra* note 146; S. Van den Bogaert and A. Vermeersch, “Sport and the EC Treaty: A tale of uneasy bedfellows”, 32 *EL Rev.* (2006), 838; J. Schwarze, “European administrative law in the light of the Treaty of Lisbon” 18 *EPL* (2012), 285.

186. S. Garben, “Confronting the competence conundrum: Democratizing the European Union through an expansion of its legislative powers”, (2015) 35(1) *OJLS* 55.

187. *Ibid.*

188. K. Nicolaidis and R. Howse (Eds.), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (OUP, 2001), 451.

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