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To Give or To Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon

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I. Introduction

The principle of conferral of powers occupies a prominent place in the Lisbon Treaty. Not only is it stated as a fundamental and horizontal principle in the common provisions of the Treaty on the European Union (Article 5 TEU).¹ For the first time utmost care has been given to lay down, in a Treaty text, also the modalities and the consequences of the application of this principle.² As such, a catalogue of competence is introduced in Articles 2 to 6 of the Treaty on the Functioning of the European Union (TFEU) which lists the ‘categories and areas of union competence’ (Title I TFEU) whilst spelling out the nature of the competences conferred to the Union in those fields, for instance, exclusive, shared or complementary. Moreover, it is recurrently and firmly stated that powers which are not conferred to the Union by the Treaties are to remain with the Member States (including Articles 4(1) and 5(2) TEU). Especially those new additions in the Treaties are revealing of the currently prevailing political context whereby the Member States seek to get a renewed grasp on the formulation, interpretation and application of the Treaty principle of conferral. This can hardly be considered

¹ Article 5 TEU (Lisbon) stipulates as follows: ‘1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States’. Note that the text of the Lisbon Treaty is much more substantial than the prior formulation in the Nice Treaty and at that time inserted only in the EC Treaty pillar: Art 5 TEC (Nice): ‘The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein’.

² On discussions and attempt pre-Lisbon, see, eg, G De Búrca, ‘Limiting EU Powers’ (2005) 1 *European Constitutional Law Review* 92.

in isolation from the development of case law of the Court of Justice of the European Union (CJEU), which deftly asserts exclusive jurisdiction to interpret this key structural principle of EU law.

The importance of the principle of conferral to determine the structure, functioning and exercise of European Union (EU) law can hardly be over-estimated. From a sequential perspective, the principle of conferral is necessarily the very first of all the structural principles to be applied. It may be difficult if not impossible to establish a full sequential order of the various structural principles underlying EU law, but all the other EU law principles are triggered only once this initial hurdle has successfully been cleared by the EU.

For a good understanding of the principle of conferral in all its complexity, it is opportune to clearly distinguish the following two functions.

The principle of conferral is first and foremost the core principle that determines the delimitation of competence between the Member States and the EU.³ At the same time it impacts directly on the relations between the EU and/or its Member States with third countries and other international organisations as it underpins the limitations that may be placed on the legal personality of the Union.⁴

The application of the principle of conferral also determines whether or not a subject matter comes within the ambit of the autonomous EU legal order, which is characterised by the exclusive jurisdiction of the CJEU,⁵ primacy and direct effect. As such, it is the only one of all the Treaty principles that serves to determine not only whether and to what extent the EU has any competence but, additionally, whether and to what extent the CJEU may exercise exclusive jurisdiction.

The outcome of the application of the principle of conferral may nonetheless be very different in terms of the EU autonomous legal order as compared to EU competence. The Lisbon Treaty formally abolishes the pillar structure and introduces one legal personality for the whole EU, but this is not always and necessarily fully matched in substance. In many if not most cases there will be a 'plain' or 'full' conferral with a perfect match in terms of EU competence and CJEU exclusive jurisdiction. However, the area of Common Foreign and Security Policy (CFSP) is still to a large extent kept outside the jurisdiction of the CJEU, as well as democratic control by the European Parliament.⁶ This may lead to what one could call a *crippled* conferral, meaning that competence is conferred on the EU without the corresponding conferral to the autonomous EU legal order. Both judicial and democratic control are then left at the level solely of the Member States. Another complicating factor is that the integration of the former third pillar matters of

³ Marise Cremona points to the following two dimensions for allocation of competence: the relationship between the EU–Member States and the relationship between internal and external powers, see M Cremona, 'EU External Relations: Unity and Conferral of Powers' in L Azoulai (ed), *The Question of Competence in the European Union* (Oxford, Oxford University Press, 2014) 65.

⁴ Article 47 TEU reads: 'The Union shall have legal personality'.

⁵ Article 19 TEU in conjunction with Art 344 TFEU.

⁶ Article 24 TEU.

Justice and Home Affairs (JHA) into the autonomous EU legal system has entailed the importation of the corresponding opt-outs for certain Member States.⁷ This implies that both EU competence and CJEU exclusive jurisdiction may be conferred on the Union by some Member States but not by others, thus leading to a situation of *split* conferral. It is not inconceivable that the possibility to adopt CFSP measures under the constructive abstention mechanism,⁸ whereby a Member State allows the other Member States to go ahead without being bound by the measure itself, could in practice even give rise to claims of a *crippled split* conferral.

Especially since the Lisbon Treaty, it is therefore no longer sufficient to determine *whether* competence is conferred to the Union by the Treaties in any given case. The renewed line of questioning after the Lisbon Treaty is first of all *who* may determine whether competence has been transferred to the Union. The first section will therefore address the issue of whether conferral of competence is 'to give or to grab'. In other words, is this now placed firmly in the hands of the Member States as masters of the Treaties, through the insertion of the catalogue of competence? Or may the CJEU still continue to claim exclusive jurisdiction to settle EU competence issues, including the extent of its own jurisdiction?

The second section will tackle the other and perhaps even more important new development to be discerned in the case law. In a post-Lisbon setting, the outspoken or underlying question has increasingly become the determination of the *modalities* of the conferral of competence to the Union, be it in a plain, crippled or split form. As such, it is not only important to know whether the EU has been attributed competence but also on what legal basis this was, or should have been, done. A crucial question thus is to know whether it is the legal basis that determines the plain, crippled or split form of conferral, both in theory and practice, or whether the prospect of a crippled or split EU action in any way influences the finding of the proper legal basis.

By way of caveat, it should be underlined that the Lisbon Treaty reforms have sparked a renewed impetus of cases questioning the external competence of the Union in all its complexities. In spite of the sequential importance of the principle of conferral, it is in practice not always easy to 'isolate' this principle from other arguments, such as the application of the principle of institutional balance and/or the duty of sincere cooperation as laid down in Article 13(2) TEU and Article 4(3) TEU.⁹ Conversely, it is not because the principle of conferral is invoked

⁷ Protocol No 21, opt-out of the United Kingdom and Ireland; Protocol No 22, special opt-out for Denmark.

⁸ Article 31 TEU.

⁹ For a recent example, see Case C-73/14 *Council v Commission (IRLOS)*, Judgment EU:C:2015:663. For an analysis of prior cases relating to the duty of sincere cooperation, see, eg, M Klamert, *The Principle of Loyalty in EU Law* (Oxford, Oxford University Press, 2014); E Neframi, 'The Duty of Loyalty: Rethinking Its Scope Through Its Application in the Field of EU External Relations' (2010) 47 *CML Rev* 323; A Casteleiro and J Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 *EL Rev* 524.

in any given case that it is also really in dispute. For instance, in the *OIV* case, Germany expressly invoked the principle of conferral albeit it did not really dispute the competence of the EU in the matter. Germany rather seemed to oppose the implications for the Member States, as well as to question to modalities of exercise of EU competence in international fora.¹⁰

II. Quest for Control of the Principle of Conferral

A. Full Conferral of Competence: Proper Legal Basis

The Member States' endeavour to gain control over the principle of conferral as a reaction to prior case law of the CJEU can be discerned throughout the Lisbon Treaty. Contrary to what may be expected, this is not always and necessarily to restrict the transfer of competence to the Union. This is perfectly illustrated by the reaction in the Lisbon Treaty to prior case law of the CJEU concluding as to the absence of competence for the Union to adhere to the European Convention on Human Rights (ECHR).¹¹ A remedy is now provided by the insertion of a legal basis in Article 6 TEU stipulating that the EU 'shall accede' to the ECHR, thereby expressly conferring the competence to do so to the EU. The crucial question still left to be solved, especially after Opinion 2/13, is how to safeguard the autonomy of the EU legal order in this accession process.¹²

Mostly, however, the Lisbon Treaty does not mean to transfer new competence to the Union. Rather the catalogue of competence inserted in Articles 2 to 6 TFEU appears to a large extent to codify prior case law of the CJEU in a static manner. The Lisbon Treaty expressly lists the subject matters that fall under exclusive, shared or complementary competence of the Union. But it also goes further, as the Lisbon Treaty additionally spells out the different modalities, as well as consequences for the Member States, of the conferral of competence.¹³

¹⁰ Case C-399/12 *Germany v Council*, Judgment, EU:C:2014:2258. For an analysis of the issues at stake in this case, see I Govaere, 'Novel Issues Pertaining to EU Member States' Membership of Other International Organisations: The *OIV* Case' in I Govaere, E Van Elsuwege, P Stanislas and S Lannon (eds), *The EU in the World, Essays in Honour of Marc Maresceau* (Leiden, Brill, 2014).

¹¹ Opinion 2/94, EU:C:1996:140.

¹² Article 6 TEU states the objective of accession to the ECHR yet does not determine the modalities to do so. The key issue is to safeguard the autonomy of the EU legal order in the process, see the negative opinion on the Draft Accession Agreement, Opinion 2/13, EU:C:2014:2454.

¹³ For instance, Art 2 TFEU reads: '1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts. 2. 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.'

The catalogue of competence thus provides some clarity and transparency which before was sometimes lacking. Unfortunately, in so doing it also creates a false sense of legal certainty as it leaves crucial issues regarding the principle of conferral untouched and unresolved. What, for instance, is the precise scope of the newly formulated Common Commercial Policy (CCP),¹⁴ which is now expressly listed among the exclusive competences of the EU in Article 3(1) TFEU? How should the conferral of competence be formulated if an agreement relates to different policies, such as both the CCP and the internal market, which are listed respectively as exclusive and shared competence? Not surprisingly, such questions were already at the core of the early post-Lisbon case law of the CJEU in the *Daiichi Sankyo*¹⁵ case, as well as the ‘conditional access’¹⁶ judgments.¹⁷ The CJEU thus necessarily had to come up with new delineating criteria not expressly listed in the Lisbon Treaty to determine the precise legal basis of conferral of competence to the EU. As such, it clarified that the CCP relates to measures which ‘specifically’ relate to international trade. This was fulfilled in both cases as they concerned either ‘external harmonisation’ of intellectual property rights in the framework of TRIPS/WTO,¹⁸ or the ‘externalisation of the internal market *acquis*’ for application in third countries.¹⁹

In spite of all the efforts made by the Member States to control the conferral of competence to the Union, it thus immediately became apparent with those first post-Lisbon cases that they did not manage to completely forego the role of the CJEU in interpreting the newly inserted catalogue of competence. However, in terms of modalities of conferral these were rather easy cases. The use of either legal basis, CCP or internal market, in any event implied a ‘full’ conferral of competence, thus simultaneously to both the EU and the autonomous EU legal order. Considered from a constitutional perspective²⁰ and maintaining inter-institutional balance, the stakes were surely important, but in retrospect not as high as they initially seemed. The above judgments were rapidly followed by more truly challenging cases in terms of conferral of competences post-Lisbon.

¹⁴ Article 207 TFEU expressly opens up the scope of the CCP to include commercial aspects of intellectual property rights, services and foreign direct investments.

¹⁵ Case C-414/11 *Daiichi Sankyo*, Judgment, EU:C:2013:520.

¹⁶ Case C-137/12 *Commission v Council*, Judgment, EU:C:2013:675.

¹⁷ See, *inter alia*, J Larik, ‘No Mixed Feelings: The Post-Lisbon Common Commercial Policy in *Daiichi Sankyo* and *Commission v. Council (Conditional Access Convention)*’ (2015) 52 *CML Rev* 779; L Ankersmit, ‘The Scope of the Common Commercial Policy After Lisbon: The *Daiichi Sankyo* and *Conditional Access Services Grand Chamber Judgments*’ (2014) 41 *Legal Issues of Economic Integration* 193.

¹⁸ *Daiichi Sankyo* (n 15) paras 52–53. The contextual criterion seemed very important in the *Daiichi Sankyo* case, thus begging the question of the legal basis for so-called ‘TRIPS+’ provisions in bilateral agreements. On such TRIPS+ obligations, see the respective contributions: M Aleman, ‘Impact of TRIPS-Plus Obligations in Economic Partnership and Free Trade Agreements on International IP Law’, and S Nadde-Phlix, ‘IP Protection in EU Free Trade Agreements vis-à-vis IP Negotiations in the WTO’, both in J Drexel *et al* (eds), *EU Bilateral Trade Agreements and Intellectual Property: For Better or Worse?* (Heidelberg, Springer, 2014) 61 and 133, respectively.

¹⁹ *Commission v Council* (n 16) paras 64–65.

²⁰ The CJEU consistently holds that the choice of legal basis has constitutional significance, see Opinion 2/00, EU:C:2001:664, para 5.

B. Conferral of Competence: To Give or To Grab ?

A degree of complexity was already added in the cases where the Member States pointed out that they clearly meant to reserve competence to themselves by virtue of the Lisbon Treaty. Such was the firm position of the Council and the Member States in both the *Broadcasting Organisations* case²¹ and Opinion 1/13.²² In both instances, they argued that the Member States, as masters of the Treaties, had on purpose only expressly inserted the *ERTA* test of ‘to affect internal measures or alter their scope’ in Article 3(2) TFEU. In other words, they claimed that the Lisbon Treaty only partially codified prior implied powers case law of the CJEU. The intended effect was thus to lead to a reversal of prior case law of the CJEU in the International Labour Organization (ILO)²³ and Lugano Convention²⁴ Opinions which introduced the test of ‘already covered to a large extent’.²⁵ It was spelled out to the CJEU that to reinstate the latter case law post-Lisbon would amount to an unlawful extension of the scope of Article 3(3) TFEU contrary to the principle of conferral.²⁶

This argument fully exposes the underlying quest for control over the principle of conferral through the introduction and formulation of the catalogue of competence in the Lisbon Treaty. Is EU competence for the Member States to give, and if so also to freely take back, by virtue of the Treaties? Or is conferral of competence a concept of EU law so that the CJEU may firmly grab control in order to safeguard a uniform and binding interpretation for all the Member States alike?

It does not come as a total surprise that the CJEU was clearly not inclined to follow the Member States in a textual interpretation of the Treaty provisions. Instead, it again turned to its habitual purposive method of interpretation of the Treaties, whereby it interprets individual EU law provisions in the light of the objectives of the EU Treaties.²⁷ As such, it pointed out that the ILO and Lugano Convention developments in implied powers reasoning were not new and separate tests but

²¹ Case C-114/12 *Commission v Council*, Judgment, EU:C:2014:2151.

²² Opinion 1/13, EU:C:2014:2303.

²³ Opinion 2/91, EU:C:1993:106.

²⁴ Opinion 1/03, EU:C:2006:81.

²⁵ Opinion 1/03 enlarges this to include ‘foreseeable developments’ of EU law, see para 126: ‘However, it is not necessary for the areas covered by the international agreement and the Community legislation to coincide fully. Where the test of “an area which is already covered to a large extent by Community rules” (Opinion 2/91, paragraphs 25 and 26) is to be applied, the assessment must be based not only on the scope of the rules in question but also on their nature and content. It is also necessary to take into account not only the current state of Community law in the area in question but also its future development, insofar as that is foreseeable at the time of that analysis (see, to that effect, Opinion 2/91, paragraph 25)’.

²⁶ *Commission v Council* (n 21) para 60.

²⁷ I have argued elsewhere that only a clear and express prohibition in the Treaties could limit the purposive method of interpretation, as the CJEU adopts a *pro-legem*, but not a *contra-legem* interpretation of the Treaties, see I Govaere, “Setting the International Scene”: EU External Competence and Procedures Post-Lisbon Revisited in the Light of ECJ Opinion 1/13’ (2015) 52 *CML Rev* 1277.

rather interpretations of the original *ERTA* test, which could thus still be applied post-Lisbon.²⁸ At least for the sake of clarity as to who controls the principle of conferral, it is to be welcomed that the CJEU, contrary, for instance, to Advocate General Jääskinen in his view on Opinion 1/13,²⁹ did not additionally search for the intention of the drafters of the Lisbon Treaty in order to guide its conclusions *in casu*.³⁰ It also firmly rejected the reference to Protocol No 25 by pointing out that this protocol only applies to Article 2(2) TFEU in relation to the exercise of shared competence, and cannot serve to limit the conferral of exclusive competence to the EU by virtue of Article 3(2) TFEU.³¹

Yet, what is then the meaning of the principle of conferral of competence for those cases? Rather than making an abstract assessment on the basis of the Treaty provisions, the CJEU indicated that, to answer this crucial question, an assessment of the *ERTA* criteria need to be made *in concreto*, in the light of each case. In the words of the CJEU:

That said, it is important to note that, since the European Union has only conferred powers, any competence, especially where it is exclusive, must have its basis in conclusions drawn from a specific analysis of the relationship between the envisaged international agreement and the EU law in force, from which it is clear that such an agreement is capable of affecting the common EU rules or of altering their scope (see, to that effect, Opinion 1/03, EU:C:2006:81, paragraph 124).³²

This forceful statement is most likely meant to act as a counterweight to the generous application and interpretation of the *ERTA* test. It is nonetheless difficult to disagree with Alan Rosas that the reasoning in Opinion 1/13 creates the impression of a low threshold for concluding as to an *ERTA* effect,³³ and thus to the conferral of competence to the EU.

The same reasoning was already applied in the *Broadcasting Organisations* judgment. A bit more puzzling, however, considering that it concerns a structural principle of constitutional significance, is that the CJEU in the *Broadcasting Organisations* case then proceeded to point to the burden of proof specifically in relation to the principle of conferral:

In accordance with the principle of conferral as laid down in Article 5(1) and (2) TEU, it is, for the purposes of such an analysis, for the party concerned to provide evidence

²⁸ For a detailed analysis in terms of implied powers reasoning, see *ibid.*

²⁹ Opinion 1/13, View of AG Jääskinen, EU:C:2014:2292, para 70.

³⁰ Yet note that in a very early post-Lisbon case, the CJEU did point to the intention of the drafters of the Treaties, see Case C-130/10 *European Parliament v Council (Financial Sanctions)* EU:C:2012:472, para 82: 'Nevertheless, the difference between Article 75 TFEU and Article 215 TFEU, so far as the Parliament's involvement is concerned, is the result of the choice made by the framers of the Treaty of Lisbon conferring a more limited role on the Parliament with regard to the Union's action under the CFSP'.

³¹ *Commission v Council* (n 21) para 73.

³² *ibid* para 74. Compare to Opinion 1/13 (n 22) para 74, which is very similar in formulation but with the added reference also to 'foreseeable developments' of EU law by reference to Opinion 1/03.

³³ A Rosas, 'EU External Relations: Exclusive Competence Revisited' (2015) 38 *Fordham International Law Journal* 1073, 1091.

to establish the exclusive nature of the external competence of the EU on which it seeks to rely.³⁴

Does the CJEU mean to say that there is a burden of proof solely in relation to the exclusive nature of EU competence, or with respect to the application of the principle of conferral itself? And on who rests such a burden of proof? Should the Commission *in casu* provide all the necessary evidence, so as to avoid the conclusion that (exclusive) competence is not transferred to the EU? If so, to what extent is it then really up to the Council and the Member States to prove that the negotiations ‘might also go beyond the EU *acquis*’ to support their claim that (exclusive) competence has not been conferred, rather than for the Commission to prove the contrary?³⁵

In spite of those questions, the key issue with this reference to the burden of proof lies elsewhere. It could be maintained that the application of such a crucial structural principle as the principle of conferral should not depend mainly or even exclusively on whether the EU institutions have done their homework sufficiently well. Could, or even should, it not be applied *ex officio* by the CJEU? Considering the similarity in reasoning of the CJEU in both cases, it is striking that Opinion 1/13, which was rendered about one month after the *Broadcasting Organisations* case, no longer mentions the burden of proof in relation to the principle of conferral. This may in part be due to the fact that here it concerned an advisory opinion rather than an adversary procedure, thereby clearly exposing the limits of the burden of proof approach adopted in the *Broadcasting Organisations* case. What those cases reveal, however, is that the CJEU has maintained the application of the principle of conferral firmly within its grasp also post-Lisbon. Yet in so doing, it appears to be struggling to ascertain the precise grounds for, and limits to, its exclusive jurisdiction.

III. Special Modalities of Conferral

In post-Lisbon practice, not many cases openly address the issue of whether or not external power is at all conferred to the EU, in spite of the theoretical importance of the question. More often, cases expressly or impliedly raise the issue of the precise modalities of the conferral,³⁶ with the added difficulty in terms of possible crippled and/or split conferral of competence.

³⁴ *Commission v Council* (n 21) para 75.

³⁵ *ibid* para 95.

³⁶ See, eg, the cases discussed in the previous section.

A. Crippled and Semi-crippled Conferral of Competence

Already before the Lisbon Treaty it was theoretically possible to determine a crippled conferral of competence, whereby competence would be conferred to the EU without the corresponding conferral to the autonomous legal system. Pre-Lisbon, both the CFSP and JHA pillars were to a large extent kept outside the scope of EU judicial and EU democratic control in favour of bundling such control at the level of the Member States. The practical effect thereof was, however, strongly mitigated by the clear statement in ex Article 47 TEU that the two EU pillars should not affect the European Community (EC) pillar. This allowed the CJEU to jealousy shield the external *acquis communautaire* against any unwarranted influence from those intergovernmental pillars.³⁷ Full conferral of competence to the EC was thus systematically favoured over a crippled conferral to the EU. The Lisbon Treaty has fundamentally altered this given.

(i) Redressing Full and Crippled Competence

The Lisbon Treaty at first sight simplifies the system. It formally abolishes the pillar structure which leads to the incorporation of the former third pillar into the autonomous EU legal order.³⁸ But at the same time it re-inserts the CFSP as a ‘horizontal pillar’³⁹ by stipulating in Article 24 TEU that ‘(t)he common foreign and security policy is subject to specific rules and procedures’. In essence, this implies that the intergovernmental approach still prevails for CFSP measures post-Lisbon, whereby also judicial and democratic control is largely kept at national level, thus outside the autonomous EU legal order.⁴⁰ With respect to CFSP, the major change in terms of conferral of competence is, however, to be found in Article 40 TEU which redrafts the former Article 47 TEU.⁴¹ It is still stipulated that the CFSP shall

³⁷ See especially Case C-91/05 *Commission v Council (ECOWAS)*, Judgment, EU:C:2008:288. On this case, see, eg, B Van Vooren, ‘EU–EC External Competences after the Small Arms Judgment’ (2009) 14 *European Foreign Affairs Review* 7.

³⁸ See section III B (i) below.

³⁹ On this concept, see I Govaere, ‘Multi-faceted Single Legal Personality and a Hidden Horizontal Pillar: EU External Relations Post-Lisbon’ (2010–2011) 13 *Cambridge Yearbook of European Legal Studies* 87.

⁴⁰ Article 24 TEU specifies: ‘It shall be defined and implemented by the European Council and the Council acting unanimously, except where the Treaties provide otherwise. The adoption of legislative acts shall be excluded. The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties. The specific role of the European Parliament and of the Commission in this area is defined by the Treaties. The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.’

⁴¹ Article 40 TEU (ex Art 47 TEU) reads: ‘The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union. Similarly, the implementation of the policies listed

not affect ‘other external EU action’ listed in the TFEU. But, importantly, a counterweight is added in the second paragraph stipulating that that ‘other external EU action’ may not affect the exercise of the Union competences under the CFSP.

In so doing, the Lisbon Treaty radically alters the prior approach as it removes the possibility to systematically favour full conferral over crippled conferral of competence.⁴² This was clearly illustrated already by the very first post-Lisbon case, the *Financial Sanctions* case, relating to a dispute between the European Parliament and the Council on the proper legal basis to adopt restrictive measures against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban.⁴³ The European Parliament had expressly drawn the CJEU’s attention to the continuing crippled nature of conferral of competence by virtue of the CFSP post-Lisbon. In particular, the European Parliament evoked the consequences in terms of the level of exercise of democratic control in case the legal basis for a full conferral, Article 75 TFEU, was rejected in favour of Article 215 TFEU.⁴⁴ This instance is nonetheless special for it only presented features of ‘semi-crippled conferral’ as it concerned the adoption of financial sanctions which, even under the CFSP, exceptionally come under judicial control of the CJEU.⁴⁵ As such, the only issue at stake was whether democratic control could be kept at the level of the Member States whilst conferring competence to the EU and exclusive jurisdiction to the CJEU.

In line with the newly formulated Article 40 TEU, the CJEU firmly rejected the reasoning that the prospect of a full or (semi-)crippled conferral of competence should determine the legal basis withheld. The Court held that the fact that the European Parliament is only informed and not a co-legislator under CFSP cannot determine the choice of legal basis.⁴⁶ Instead, it agreed with the Council that ‘it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure’.⁴⁷ The full importance of the renewed post-Lisbon setting in terms of conferral of competence was made clear by further underlining:

[T]he difference between Article 75 TFEU and Article 215 TFEU, so far as the Parliament’s involvement is concerned, is the result of the choice made by the framers of the Treaty of Lisbon conferring a more limited role on the Parliament with regard to the Union’s action under the CFSP.⁴⁸

in those Articles shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences under this Chapter’.

⁴² See also A Dashwood, ‘The Continuing Bipolarity of EU External Action’ in I Govaere, E Van Elsuwege, P Stanislas and S Lannon (eds), *The EU in the World, Essays in Honour of Marc Maresceau* (Leiden, Brill, 2014) 3.

⁴³ *Financial Sanctions* (n 30).

⁴⁴ *ibid*, para 32.

⁴⁵ Art 275 TFEU.

⁴⁶ *Financial Sanctions* (n 30) paras 79–80.

⁴⁷ *ibid* para 80.

⁴⁸ *ibid* para 82.

This clearly shows that all the Treaty legal bases relating to external relations are now on an equal footing and should be assessed on their own merit.

(ii) *Mixed Legal Basis CFSP: Other External Action?*

The above finding leads to the next question: if in a post-Lisbon setting full conferral of competence can no longer be systematically favoured over crippled conferral, is it then at all conceivable to determine a mixed legal basis of the CFSP and other EU external action? In other words, is it possible to combine full and crippled conferral of competence in relation to one and the same legal act? The common procedural provision for the conclusion of agreements inserted by the Lisbon Treaty, Article 218 TFEU, could perhaps seem to militate in favour of such a conclusion.⁴⁹ However, the *Financial Sanctions* case raises important considerations in this respect. The CJEU pointed to the absence of democratic control by the EU under the CFSP as compared to the full democratic control at EU level for other external action,⁵⁰ to conclude forcefully '(d)ifferences of that kind are such as to render those procedures incompatible'.⁵¹ The CJEU proceeded unequivocally to spell out the consequences:

It follows from the foregoing that, even if the contested regulation does pursue several objectives at the same time or have several components indissociably linked, without one's being secondary to the other, the differences in the procedures applicable under Articles 75 TFEU and 215(2) TFEU mean that it is not possible for the two provisions to be cumulated, one with the other, in order to serve as a twofold legal basis for a measure such as the contested regulation.⁵²

If it is fundamentally incompatible to combine semi-crippled and full conferral of competence because of the different level of democratic control, then it would surely not be logical to allow for a mixed legal basis including a CFSP provision

⁴⁹ The fact that both the CFSP and 'other' external relations agreements are to be concluded on the basis of Art 218 TFEU seems to set this question apart from the procedural issue in relation to 'mixed agreements' concluded on behalf of both the EU and its Member States. In relation to the latter, see Case C-28/12 *Commission v Council (Mixed International Agreements)*, Judgment, EU:C:2015:282, see especially paras 47–53. At paras 49 and 50, the CJEU points in particular to the following: '(49) First, that decision in fact merges two different acts, namely, on the one hand, an act relating to the signing of the agreements at issue on behalf of the European Union and their provisional application by it and, on the other, an act relating to the provisional application of those agreements by the Member States, without it being possible to discern which act reflects the will of the Council and which the will of the Member States. (50) It follows that the Member States participated in the adoption of the act relating to the signing of the agreements at issue on behalf of the European Union and their provisional application by it although, under Article 218(5) TFEU, such an act must be adopted by the Council alone. Moreover, the Council was involved, as an EU institution, in the adoption of the act concerning the provisional application of those agreements by the Member States although such an act falls within the scope of, first of all, the internal law of each of those States and, then, international law.' For a comment, see C Flaesch-Mouglin, (2015) *Revue Trimestrielle De Droit Européen* 617.

⁵⁰ *Financial Sanctions* (n 30) para 47.

⁵¹ *ibid* para 48.

⁵² *ibid* para 49.

other than Article 215 TFEU. A strong case can be made that truly crippled conferral under CFSP, whereby not only democratic control by the European Parliament but additionally all judicial control by the CJEU is excluded, can never go hand in hand with a finding of full conferral on the basis of other Treaty provisions. One and the same measure can hardly at the same time be within and outside the autonomous EU legal order. But such a conclusion would then entail that, instead, a clear and often difficult choice will need to be made between the CFSP and other EU external action as a legal basis where a measure has multiple objectives.

(iii) *Centre of Gravity Test*

This begs the question of what objective legal criteria could and should be used by the CJEU to determine the proper legal basis of the conferral. An easy answer is, of course, to point to the centre of gravity test to determine a full or crippled conferral of competence. But this is only half of the answer. The precise criteria to be applied to establish the gravity in each and every case may be less easy to pinpoint in a satisfactory manner. Again this was illustrated by the *Financial Sanctions* case. Here, the CJEU first invoked the centre of gravity test and proceeded to rule in favour of the CFSP as the sole legal basis. It held in essence that Article 215 TFEU provides for action to counter the threat of ‘international’ terrorism, in relation to persons in third countries.⁵³ This was held to be the case of the envisaged measure so that Article 75 TFEU, which should then be taken to refer to financial sanctions to counter threats ‘internal’ to the Area of Freedom, Security and Justice (AFSJ), was not withheld. Not surprisingly, much of the debate in legal doctrine has focused precisely on these criteria laid down by the CJEU,⁵⁴ as it seems especially difficult to isolate international from internal terrorism in practice.

The centre of gravity test was also put forward in the subsequent *Mauritius Agreement* case⁵⁵ which again opposed the European Parliament to the Council concerning a measure relating to both the CFSP and other external action of the EU. Yet, this time, the dispute did not concern the proper legal basis for the conferral of the competence as such. The European Parliament in fact expressly agreed with the use of the sole legal basis of Article 37 TEU to the extent that the other external relations objectives were merely incidental to the principle aim of the Agreement relating to the CFSP.⁵⁶ Instead, the European Parliament sought to

⁵³ *ibid* paras 55–66.

⁵⁴ See, eg, the respective contributions by C Hillion, ‘Fighting Terrorism Through the Common Foreign and Security Policy’ and J Czuczai, ‘The Powers of the Council Concerning the Emergency of International Terrorism after the Judgment in Case C-130/10 Parliament v. Council’ both in I Govaere and S Poli (eds), *EU Management of Global Emergencies: Legal Framework for Combating Threats and Crises* (Leiden, Brill, 2014) 75 and 97, respectively.

⁵⁵ Case C-658/11 *European Parliament v Council (Mauritius Agreement)*, Judgment, EU:C:2014:2025. For a comment, see P Van Elsuwege, ‘Securing the Institutional Balance in the Procedure for Concluding International Agreements: *European Parliament v. Council (Pirate Transfer Agreement with Mauritius)*’ (2015) 52 *CML Rev* 1379.

⁵⁶ *Mauritius Agreement* (n 55) paras 44–45.

alter the status of the Agreement from a crippled conferral to more of a full conferral through the backdoor of the unitary procedural provision for the conclusion of agreements, Article 218 TFEU.

(iv) *Reducing the Handicap*

The argument of the European Parliament in the *Mauritius Agreement* case first of all went that considering the underlying multiple objectives of the Mauritius Agreement it did not constitute an ‘agreement exclusively related to the CFSP’, so that the Parliament should have been duly consulted pursuant to Article 218(6) TFEU.⁵⁷ The CJEU, however, rejected this interpretation by reiterating that the substantive legal basis of a measure determines the procedure to be followed, and not vice versa, with the additional clarification that this includes the procedures under Article 218(6) TFEU.⁵⁸ In other words, if the sole legal basis legitimately withheld exclusively confers a crippled competence to the EU, then the handicap in terms of EU level democratic procedures cannot be remedied by pointing to other incidental (full) competence nor to the common procedural provision for the conclusion of agreements.⁵⁹

The second argument of the European Parliament was, however, more successful. The CJEU agreed that the Council had nonetheless infringed Article 218(10) TFEU by failing to immediately and fully inform the European Parliament at all stages of the procedure for negotiating and concluding the EU–Mauritius Agreement.⁶⁰ The CJEU refused to equate the European Parliament’s exclusion

⁵⁷ Article 218(6) TFEU reads as follows: ‘The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement. Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement: (a) after obtaining the consent of the European Parliament in the following cases: (i) association agreements; (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms; (iii) agreements establishing a specific institutional framework by organising cooperation procedures; (iv) agreements with important budgetary implications for the Union; (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required. The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent; (b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.’

⁵⁸ *Mauritius Agreement* (n 55) paras 57–58. The CJEU first reasoned in terms of symmetry in internal measures and international agreements, in compliance with the institutional balance, see also para 56.

⁵⁹ The CJEU further reasoned as follows in para 60: ‘That interpretation is justified particularly in the light of the requirements relating to legal certainty. By anchoring the procedural legal basis to the substantive legal basis of a measure, this interpretation enables the applicable procedure to be determined on the basis of objective criteria that are amenable to judicial review, as noted in paragraph 43 of the present judgment. That ensures consistency, moreover, in the choice of legal bases for a measure. By contrast, the interpretation advocated by the Parliament would have the effect of introducing a degree of uncertainty and inconsistency into that choice, insofar as it would be liable to result in the application of different procedures to acts of EU law which have the same substantive legal basis.’

⁶⁰ *Mauritius Agreement* (n 55) paras 75–76.

from the procedures for negotiating and concluding a CFSP-based agreement with a total absence of a right of scrutiny. Instead, it pointed out that the Lisbon Treaty precisely enhanced the importance of the exercise, at EU level, of democratic scrutiny of EU external action by inserting this information obligation applicable to all the types of procedures listed in Article 218 TFEU, including the CFSP. Article 218(10) TFEU was held to be an essential procedural requirement, breach of which necessarily leads to the annulment of the contested decision.⁶¹

Very importantly, in so doing, the CJEU also forcefully claimed its own jurisdiction to fully interpret the common procedural provision of Article 218 TFEU. It firmly rejected the argument of the Council that, since the CJEU in principle has no jurisdiction to control the CFSP, it also has no jurisdiction to rule on the legality of a measure adopted on the basis of the CFSP. The CJEU pointed out that Articles 24(1) TEU and 275(1) TFEU introduce a derogation to the rule of general jurisdiction of the CJEU laid down in Article 19 TEU, so that, like all derogations, they ‘must, therefore, be interpreted narrowly’.⁶² The CJEU concluded that:

[I]t cannot be argued that the scope of the limitation, by way of derogation, on the Court’s jurisdiction envisaged in the final sentence of the second subparagraph of Article 24(1) TEU and in Article 275 TFEU goes so far as to preclude the Court from having jurisdiction to interpret and apply a provision such as Article 218 TFEU which does not fall within the CFSP, even though it lays down the procedure on the basis of which an act falling within the CFSP has been adopted.⁶³

As a consequence, the CJEU may thus annul any decision, including exclusively CFSP measures, for breach of an essential procedural requirement listed in Article 218 TFEU. As a counterpart, this most likely entails that the CJEU would also claim jurisdiction to deliver a corresponding Advisory Opinion under Article 218(11) TFEU, not shying away from envisaged CFSP agreements. The recent statement by the CJEU that ‘Article 218 TFEU constitutes, as regards the conclusion of international treaties, an autonomous and general provision of constitutional scope’⁶⁴ appears to be foreboding in this respect.

As a result of such case law, which deftly explores the potential of the unitary procedural provision of Article 218 TFEU, the CFSP thus becomes a bit less of a crippled competence than it was most likely intended to be by the Member States in the Lisbon Treaty. One may discern an echo of pre-Lisbon case law, notably in

⁶¹ *ibid* paras 79–87. However, the CJEU added: ‘It must be acknowledged that annulment of the contested decision without maintenance of its effects would be liable to hamper the conduct of operations carried out on the basis of the EU–Mauritius Agreement and, in particular, the full effectiveness of the prosecutions and trials of suspected pirates arrested by EUNAVFOR’ (para 90).

⁶² *ibid* para 70.

⁶³ *ibid* para 73.

⁶⁴ Case C-425/13 *Commission v Council (Negotiating Directives)*, Judgment, EU:C:2015:483, para 62. The main issue in this case concerned Art 218(4) TFEU and institutional balance.

the *Kadi* cases,⁶⁵ where the CJEU already firmly claimed jurisdiction to perform a legality control, including of CFSP related measures for respect of fundamental rights.⁶⁶ But as important as it may be, case law merely reduces and cannot totally overcome the initial handicap for the application of the autonomous EU legal order in CFSP matters written into the Lisbon Treaty. At best, it qualifies the degree of crippled conferral short of turning it into a full conferral.

B. Split Conferral

A different problem is posed where most but not all of the Member States confer competence to the EU. Already prior to the Lisbon Treaty this was made possible by the insertion of the constructive abstention procedure as regards the CFSP.⁶⁷ A number of Member States may thus decide not to be bound by a CFSP measure but to allow the others to go ahead. For the latter, the conferral of powers takes place without the corresponding transfer to the autonomous EU legal order. Using a CFSP legal basis together with the constructive abstention procedure thus in fact amounts to a combined split crippled conferral which remains to a large extent outside the control of the CJEU.

(i) Post-Lisbon Split Conferral

The novelty of the Lisbon Treaty lies in the fact that the former third pillar is abolished and fully incorporated into the autonomous EU legal order, thus in principle leading to a full conferral of competence to the EU. The difficulty lies, however, in the fact that the opt-outs for the United Kingdom, Ireland and Denmark have been expressly confirmed to apply in a post-Lisbon setting.⁶⁸ Triggering the

⁶⁵ Joined Cases C-402/05P and C-415/05P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission (Kadi I)*, Judgment, EU:C:2008:461 and Joined Cases C-584/10P, C-593/10P and C-595/10P *Commission and others v Yassin Abdullah Kadi (Kadi II)*, Judgment, EU:C:2013:518; I Govaere, 'The Importance of International Developments in the Case-law of the European Court of Justice: *Kadi* and the Autonomy of the EC Legal Order' in M Hiscock and W van Caenegem (eds), *The Internationalisation of Law: Legislation, Decision-Making, Practice and Education* (Cheltenham, Edward Elgar Publishing, 2010) 187. Much has been written about these cases, see the doctrine mentioned in S Poli and M Tzanou, 'The *Kadi* Rulings: A Survey of the Literature' (2009) 28 *Yearbook of European Law* 533; M Avbelj, F Fontanelli and G Martinico (eds), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (London, Routledge, 2014).

⁶⁶ Codified in Art 275(2) TFEU by the Lisbon Treaty.

⁶⁷ Article 31 TEU.

⁶⁸ See Protocols Nos 21 and 22, respectively. This should be read together with Declaration 65: 'Declaration by the United Kingdom of Great Britain and Northern Ireland on Article 75 of the Treaty on the Functioning of the European Union. The United Kingdom fully supports robust action with regard to adopting financial sanctions designed to prevent and combat terrorism and related activities. Therefore, the United Kingdom declares that it intends to exercise its right under Article 3 of the Protocol on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice to take part in the adoption of all proposals made under Article 75 of the Treaty on the Functioning of the European Union.'

opt-outs with respect to external measures relating to the Area of Freedom, Security and Justice therefore amount to a straightforward split conferral under the control of the CJEU. This has induced a novel line of questioning in terms of external relations competence which, however, is still in a rather embryonic state.⁶⁹

The difficulty of coming to terms with those important variations of split conferral in a post-Lisbon era was not really acknowledged in the *Mauritius Agreement* case. Advocate General Bot did, however, expressly point to the necessity to delineate between the external action of (respectively) the EU as such, the Area of Freedom Security and Justice, and the CFSP but without analysing the different modalities of conferral involved.⁷⁰

(ii) *Split or Full Conferral?*

The issue of the split conferral was posed again in the *Philippines Agreement* case.⁷¹ Whereas it was not disputed that a double legal basis, the CCP and development cooperation, was indicated *in casu* nor that the Agreement should be concluded in a mixed form, ie on behalf of the both the EU and the Member States, the addition of other legal bases was a source of conflict and institutional bickering. The CJEU in essence agreed with the Commission that development cooperation should be broadly interpreted so as to ‘absorb’ the provisions in the Agreement relating to transport and environment, but also re-admission of third country nationals.⁷² In so doing, the CJEU downplayed the importance of the lack of conferral of competence by the United Kingdom, Ireland and Denmark by virtue of the opt-outs. Instead, it determined a full conferral to the EU by all the Member States under the development cooperation legal basis.

Contrary to the environment and transport chapters, the CJEU did acknowledge that the Agreement contained ‘specific obligations’ for the contracting parties as concerns re-admission of third country nationals. In particular, the CJEU pointed out that:

[the] Republic of the Philippines and the Member States undertake therein to readmit their nationals who do not fulfil, or no longer fulfil, the conditions of entry or residence on the territory of the other party, upon request by the latter and without undue delay once the nationality of those nationals has been established and due process

⁶⁹ See I Govaere and V Demedts, ‘Quelle définition de l’“externe” en matière d’ELSJ? Le cadre et les enjeux’ in C Flaesch-Mougin and LS Rossi (eds), *La dimension extérieure de l’espace de liberté, de sécurité et de justice de l’Union européenne après le traité de Lisbonne* (Brussels, Bruylant, 2013) 489; E Neframi, ‘L’aspect externe de l’espace de liberté, de sécurité et de justice: quel respect des principes et objectifs de l’action extérieure de l’Union?’ in *ibid* 510.

⁷⁰ Case C-658/11 *European Parliament v Council (Mauritius Agreement)*, Opinion of AG Bot, EU:C:2014:41, paras 106–8.

⁷¹ Case C-377/12 *Commission v Council (Philippines Agreement)*, Judgment, EU:C:2014:1903.

⁷² On this case, see M Broberg and R Holdgaard, ‘Demarcating the Union’s Development Cooperation Policy after Lisbon: Commission v. Council (Philippines PCFA)’ (2015) 52 *CML Rev* 547.

carried out, and to provide their nationals with documents required for such purposes. They also agree to conclude an agreement governing admission and readmission as soon as possible.⁷³

In spite of such clear and specific obligations pinpointed in the Agreement, the CJEU nonetheless justified the disregard of the opt-outs by reference to the absence of ‘detailed’ provisions for the implementation of the re-admission process. The fact that reference is made in the Agreement to the future conclusion of a readmissions agreement apparently served to support such a conclusion.⁷⁴ On this basis, the CJEU proceeded to state that:

the provisions of the Framework Agreement relating to readmission of nationals of the contracting parties, to transport and to the environment do not contain obligations so extensive that they may be considered to constitute objectives distinct from those of development cooperation that are neither secondary nor indirect in relation to the latter objectives.⁷⁵

This reasoning immediately triggers the question as to when ‘specific’ provisions on re-admission of third country nationals would be considered to be ‘sufficiently detailed’ and thus ‘sufficiently extensive’ so as to justify recourse to a split conferral legal basis.

(iii) *Mixed Legal Basis, Full and Split Conferral?*

A crucial underlying issue is whether, and if so when, the CJEU would allow a combined use of a full and split conferral as legal bases. It cannot go unnoticed that in the *Philippines Agreement* case, the Commission had forcefully spelled out that, in particular, the addition of Article 79(3) TFEU as a legal basis would produce unwarranted legal effects, both internally and externally. The Commission had warned that such a legal basis would trigger the opt-outs under Protocols No 21 and No 22, thereby leading not only to incompatible procedures but also to uncertainty about the degree of exercise of the EU’s competence under Articles 3(2) TFEU and 4(2) TFEU.⁷⁶ The Council had countered this argument

⁷³ *Philippines Agreement* (n 71) para 57.

⁷⁴ *ibid* para 58: ‘Whilst Article 26(3) of the Framework Agreement does admittedly contain wording stating how requests for readmission are to be dealt with, the fact remains that, as is apparent from Article 26(2)(f), the readmission of persons residing without authorisation is included in Article 26 as one of the matters upon which cooperation on migration and development will have to focus, without it being covered at this stage by detailed provisions enabling its implementation, such as those contained in a readmission agreement. It cannot therefore be considered that Article 26 of the Framework Agreement prescribes in concrete terms the manner in which cooperation concerning readmission of nationals of the contracting parties is to be implemented, a conclusion which is reinforced by the commitment, in Article 26(4), to conclude a readmission agreement very soon.’

⁷⁵ *ibid* para 59.

⁷⁶ *ibid* para 22. Article 3(2) TEU stipulates: ‘The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime’. Article 4(2) TEU reads: ‘The Union shall respect

by first of all reiterating the CJEU's statements in the above-mentioned 'crippled conferral' cases, namely that 'it is not procedures that define the legal basis of a measure but the legal basis of a measure that determines the procedures to be followed in adopting that measure'.⁷⁷ The Council also pointed out that the obligations of the various Member States may not vary all that much in practice, as the opted-out Member States may choose to opt in to a particular measure or to conclude similar obligations with the third country bilaterally. It is clear, however, that in the latter case they would only be bound by virtue of international law and not by virtue of EU law,⁷⁸ thus not resolving the unwarranted legal effect the Commission was referring to.

Subsequent case law has clarified that 'Protocol No 21 is not capable of having any effect whatsoever on the question of the correct legal basis for the adoption of the contested decision'.⁷⁹ At least, not in the sense that the United Kingdom could successfully claim the (additional) use of Article 79 TFEU as the correct legal basis for external measures as soon as it related to the situation of third country nationals. Already in the *EEA Agreement* and *Swiss Agreement*⁸⁰ cases, relating to social security for EEA and Swiss nationals respectively, the CJEU followed the interpretation of Advocate General Kokott,⁸¹ whereby Article 79 TFEU was held to strictly relate to the development of external borders measures, in terms of border checks, asylum and migration.⁸² This was held to be different from and even 'manifestly

the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State'.

⁷⁷ *Philippines Agreement* (n 71) para 31.

⁷⁸ This also follows from Recitals 2 and 3 in the Preamble to the contested decision in the *Philippines* case: '(2) The provisions of the [Framework] Agreement that fall within the scope of Part Three, Title V of the [TFEU] bind the United Kingdom and Ireland as separate Contracting Parties, and not as part of the European Union, unless the European Union together with the United Kingdom and/or Ireland have jointly notified the Republic of the Philippines that the United Kingdom or Ireland is bound as part of the European Union in accordance with the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice annexed to the [EU Treaty] and the [TFEU]. If the United Kingdom and/or Ireland cease(s) to be bound as part of the European Union in accordance with Article 4a of the Protocol (No 21), the European Union together with the United Kingdom and/or Ireland are to immediately inform the Republic of the Philippines of any change in their position in which case they are to remain bound by the provisions of the [Framework] Agreement in their own right. The same applies to Denmark in accordance with the Protocol (No 22) on the position of Denmark annexed to those Treaties. (3) Where the United Kingdom and/or Ireland has/have not provided the notification required under Article 3 of the Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, they do not take part in the adoption by the Council of this Decision to the extent that it covers provisions pursuant to Part Three, Title V of the [TFEU]. The same applies to Denmark in accordance with the Protocol (No 22) on the position of Denmark, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union'.

⁷⁹ Case C-81/13 *United Kingdom v Council (Turkey Agreement)*, Judgment, EU:C:2014:2449, para 37.

⁸⁰ Case C-656/11 *United Kingdom v Council (Swiss Agreement)*, Judgment, EU:C:2014:97.

⁸¹ Case C-431/11 *United Kingdom v Council*, Opinion of AG Kokott, EU:C:2013:187, paras 39–41.

⁸² Case C-431/11 *United Kingdom v Council*, Judgment, EU:C:2013:589, para 63.

irreconcilable⁸³ with the objectives of the EEA Agreement, as the latter means to extend⁸⁴ internal market measures to the third countries concerned.⁸⁵ Full conferral of competence under Article 48 TFEU was therefore withheld rather than a split conferral on the basis of Article 79 TFEU.

Interestingly, however, in the European Economic Agreement (EEA) Agreement cases, the CJEU also plainly rejected the reasoning of the United Kingdom invoking the use of Article 79 TFEU for other similar decisions in relation to other third countries. It was spelled out that each act must be assessed on its own aim and content in order to establish the proper legal basis.⁸⁶ In theory, this would then imply that similar decisions relating to different Agreements could have a different legal basis and thus also entail different modalities in terms of conferral of competence. Such a reverse reasoning was subsequently invoked by the United Kingdom in the *Turkey Agreement* case, in order to justify a different outcome here and to accept Article 79 TFEU as the correct legal basis. The CJEU, however, rejected this conclusion by pointing out that besides the objectives and content, also the ‘context’ of a measure needs to be taken into account, in particular where it concerns an amendment of rules adopted under an existing agreement.⁸⁷ *In casu*, the measure was adopted in the context of the EEC–Turkey 1963 Association Agreement, constituting a further step in the objective to progressively secure free movement for workers between the European Union and Turkey under the Association Agreement.⁸⁸

If the contextual setting was thus similar, the main difference was to be found in the different objective of the Turkey Association Agreement which falls short of the EEA Agreement objective to extend the internal market to the third country concerned. The CJEU therefore agreed with the United Kingdom that the contested decision could not legitimately be adopted exclusively on the basis of Article 48 TFEU.⁸⁹ But it disagreed that it was the split conferral legal basis of Article 79 TFEU that should be added. The CJEU conceded to the United Kingdom that:

it is true that Article 79(2)(b) TFEU empowers the European Union to adopt measures defining the rights of third-country nationals residing legally in a Member State,

⁸³ *ibid* para 64.

⁸⁴ For a recent assessment of the functioning of the EEA agreement, see H Fredriksen, C Franklin, ‘Of Pragmatism and Principles: The EEA Agreement 20 Years On’ (2015) 52 *CML Rev* 629.

⁸⁵ *United Kingdom v Council* (n 82) para 58. The CJEU further pointed out that to allow the opt-outs to be triggered in such a case would lead to two parallel regimes for the coordination of social security systems (para 65). Also in *Swiss Agreement* (n 80), the CJEU pointed out that the EU extended the application of its legislation concerning coordination of social security systems to the Swiss Confederation, see paras 55–67.

⁸⁶ *United Kingdom v Council* (n 82) paras 66–67.

⁸⁷ *Turkey Agreement* (n 79) para 38. The CJEU referred in this respect to *United Kingdom v Council* (n 82) para 48, and *Swiss Agreement* (n 80) para 50.

⁸⁸ *Turkey Agreement* (n 79) paras 43–45.

⁸⁹ *ibid* para 59: ‘As a rule, it is only in the sphere of the internal policies and actions of the European Union or of the external actions relating to third countries which can be placed on the same footing as Member State of the European Union, according to the case-law cited in paragraph 58 of this judgment, that Article 48 TFEU empowers the European Union to adopt measures in this area.’

including the conditions governing freedom of movement and of residence in other Member States⁹⁰

only to immediately limit the scope of application to serve strictly the purposes of Article 79(1) TFEU in terms of the common immigration policy.⁹¹ Instead, the CJEU held that the respect for the principle of conferral, which was at stake *in casu*, could be safeguarded by the addition of Article 217 TFEU which was also the legal basis for the initial Association Agreement. The latter legal basis provides full conferral of external competence to the EU in all the fields covered by the TFEU.

Neither of those cases thus allowed for a combined full and split conferral, instead the legal basis which led to a full conferral was systematically preferred by the CJEU. The context criterion might in practice serve to exclude the addition of a split conferral legal basis to any post-Lisbon measure adopted in the context of a pre-Lisbon agreement. Yet the *Philippines Agreement* case shows that it is also highly unlikely for the use of a double legal basis for conferral to become the standard procedure for post-Lisbon Agreements.

IV. Conclusion

The Lisbon Treaty has triggered a renewed line of questioning with respect to the principle of conferral which goes to a large extent still unresolved. Certainly, the CJEU has firmly asserted its exclusive jurisdiction to interpret this crucial structural principle so as to determine whether or not competence is transferred to the EU in any given case. But it appears to be more difficult to come to terms with the various post-Lisbon modalities of conferral of powers to the EU and the variations in terms of full, crippled and split conferral.

The CJEU recurrently states that it is the legal basis of a measure that determines the procedures to be followed, not vice versa. Such a statement does not always appear to be consonant with the impression created by the outcome of post-Lisbon case law. The above analysis of the cases rendered so far seems to indicate a systematic preference for conferral of competence to the EU and the autonomous EU legal order alike, be it under full conferral or a semi-crippled conferral. This is in spite of Article 40 TEU, which redresses the balance between the CFSP and other external EU action. The handicap in terms of pure crippled conferral under the CFSP, whereby control by both the CJEU and the European Parliament is in principle excluded, is as much as possible reduced by deftly

⁹⁰ *ibid* para 41.

⁹¹ *ibid* para 42: '[T]hat is to say for the purposes of the common immigration policy aimed at ensuring the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings'.

exploring the potential of the unitary procedural provision of Article 218 TFEU. It is most likely highly significant for future case law that the CJEU has recently labelled this procedural provision for the conclusion of agreements as ‘an autonomous and general provision of constitutional scope’.

The post-Lisbon importance of possible split conferral scenarios has also been downplayed so far by the CJEU. To do so, it pointed to the absence of sufficiently detailed provisions to warrant a split conferral or to the objective or context of the agreement which could justify a full conferral of competence.

The question is what will be the outcome if such a reasoning is no longer convincingly possible. Could one at all envisage mixed legal bases combining full, split and/or crippled conferral? So far, the CJEU has managed to steer away from this thorny issue but it is bound to arise in this difficult post-Lisbon setting—it is only a matter of time.

