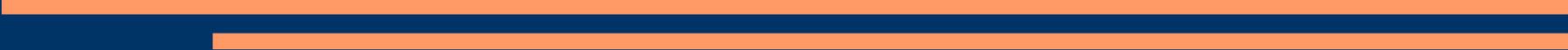


# External action of the EU (I)

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# Legal personality of the EU

## Article 47 TEU

‘The Union shall have legal personality’



# EC legal personality in pre-Lisbon ECJ case law

*Case 22/70 Commission v Council (AETR or ERTA) :*

This provision, placed at the head of Part Six of the Treaty, devoted to 'General and Final Provisions', means that in its external relations the Community enjoys the capacity to establish contractual links with third countries over the whole field of objectives defined in Part One of the Treaty, which Part Six supplements.

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# EU external competence

## **(1) Attribution of competence to the EU**

= Does the EU competence exist?

= How is this competence conferred?

## **(2) Nature of EU competence**

= What implications for Member States?

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# Existence of EU (external) competence

## Article 5 TEU

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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.

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# Multifarious conferral

Three types of (attribution of) competence:

- express
  - implied
  - subsidiary
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# Express competence, e.g.

## Article 3 TFEU

(1) The Union shall have exclusive competence in the following areas:

- (a) customs union;
  - (b) the establishing of the competition rules necessary for the functioning of the internal market;
  - (c) monetary policy for the Member States whose currency is the euro;
  - (d) the conservation of marine biological resources under the common fisheries policy;
  - (e) common commercial policy.
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# Express competence: CCP

## Article 207 TFEU (ex Articles 133 EC/113 EEC)

1. The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.
  2. The Commission shall submit proposals to the Council for implementing the common commercial policy.
  3. Where agreements with one or more States or international organisations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Council and the Commission shall be responsible for ensuring that the agreements negotiated are compatible with internal Community policies and rules...
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# Express EU (external) competence

= External competence that Treaty provisions explicitly confer on EU (see Arts 2-6 TFEU) eg:

## - *TFEU (ie ex Community competence)*

- CCP (Art 3(e) and Arts 206-207)
- Association (Art 217)
- Development cooperation (Arts 4(4) and 208-209)
- Humanitarian Aid (Arts 4(4) and 214)

Other substantive legal basis for external competence:

eg Arts. 165(3) (education), 166(3) (vocational training); 167(3) (culture); 168(3) (pub health); 219(3) (Monetary policy)

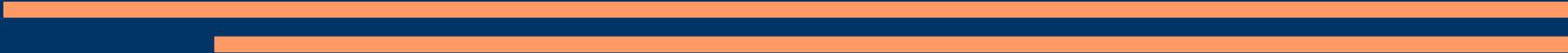
## - *TEU*

- general provisions on the EU external action (ch 1)
  - specific provisions on CFSP (ch 2)
  - neighbourhood policy (Art 8)
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# Multifarious conferral

Three types of (attribution of) competence

- express
- implied
- subsidiary



# Implied competence in EU primary law

## Article 216(1) TFEU

The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

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# Implied competence in ECJ pre-Lisbon case law

## Case 22/70 *Com. v Council (AETR/ERTA)*

15. to determine in a particular case the Community's authority to enter into international agreements, regard must be had to the whole scheme of the treaty no less than to its substantive provisions.
  16. such authority arises not only from an express conferment by the treaty - as is the case with articles 113 and 114 for tariff and trade agreements and with article 238 for association agreements - but may equally flow from other provisions of the treaty and from measures adopted, within the framework of those provisions, by the Community institutions
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# Multifarious conferral

Three types of (attribution of) competence

- express
- implied
- subsidiary



# Subsidiary EU external competence

## Article 352 TFEU (ex Art 308 EC/235 EEC)

1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.
  2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.
  3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.
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# Subsidiary competence (pre-Lisbon)

## Opinion 2/94 *ECHR* [1996] ECR I-521

Article [308 EC] (now Art 352) is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of its objectives laid down by the Treaty.

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# Nature of EU external competence

## a) Exclusive EU competence

- i. *a priori* exclusivity
- ii. Conditional exclusivity

## b) Shared competence (EU-MS)

- i. Concurrent
  - ii. Coexistent
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# Exclusive competence

## Article 2(1) TFEU

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.

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# *A priori* exclusivity

## Article 3 TFEU

1. The Union shall have exclusive competence in the following areas:
    - (a) customs union
    - (b) the establishing of the competition rules necessary for the functioning of the internal market
    - (c) monetary policy for the Member States whose currency is the euro
    - (d) the conservation of marine biological resources under the common fisheries policy
    - (e) common commercial policy
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# EU exclusive competence

i. *a priori* exclusivity

ii. Conditional exclusivity



# Conditional exclusivity

## Article 3(2) TFEU

The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.

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# The 'ERTA effect'

## Case 22/70 *Com. v Council (ERTA)* [1971] ECR 263

to the extent to which community rules are promulgated for the attainment of the objectives of the treaty, the member states cannot, outside the framework of the community institutions, assume obligations which might affect those rules or alter their scope.

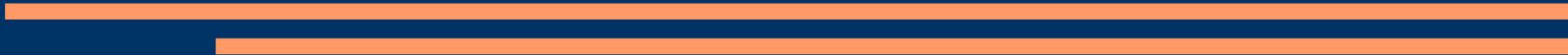
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# Member States and EU competence

- a) Exclusive powers
  - i. *a priori* exclusivity
  - ii. “ERTA effect”

- b) Shared powers**
  - i. Concurrent
  - ii. Coexistent



# Shared competence

## Article 2(2) TFEU

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.

(...)

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# Shared (concurrent) competence

## Article 2(2) TFEU

(...)

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.

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# Shared (concurrent) competence

## Article 4 TFEU

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
  2. Shared competence between the Union and the Member States applies in the following principal areas:
    - (a) internal market;
    - (b) social policy, for the aspects defined in this Treaty;
    - (c) economic, social and territorial cohesion;
    - (d) agriculture and fisheries, excluding the conservation of marine biological resources;
    - (e) environment;
    - (etc)
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# Shared (coexistent) competence

## Article 4(4) TFEU

In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

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# Implications of limited EU external competence

## - Key importance of choice of legal basis

In principle: “**Centre of gravity**” test, see eg:

Case C-137/12 *Commission v Council* (*Cond. access*)

Exceptionally: “**dual**” legal basis

## - Mixed agreements

Where the international agreement covers both matters falling within Community competence and matters within Member States competence, the agreement will in principle have to be concluded jointly by the Member States and the Community’

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# Duty of Cooperation

e.g. **Opinion 2/91 ILO [1993] ECR I-1061**

(...) when it appears that the subject-matter of an agreement or contract falls in part within the competence of the Community and in part within that of the Member States, it is important to ensure that there is a close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into. This duty of cooperation, to which attention was drawn in the context of the EAEC Treaty, must also apply in the context of the EEC Treaty since it results from the requirement of unity in the international representation of the Community.

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# Principle of sincere cooperation

## Article 4(3) TEU (ex Article 10 EC)

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.

The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

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# Mandatory cooperation

## Case C-266/03 *Commission v Luxembourg*

The adoption of a decision authorising the Commission to negotiate a multilateral agreement on behalf of the Community marks the start of a concerted Community action at international level and requires, for that purpose, if not a duty of abstention on the part of the Member States, at the very least a duty of close cooperation between the latter and the Community institutions in order to facilitate the achievement of the Community tasks and to ensure the coherence and consistency of the action and its international representation

### **Duty of abstention?**

Case C-246/07 *Commission v Sweden (PFOS)*

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