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The Constitutional Limits of EU Competition Law – United in Diversity

Dr Chris Townley and Professor Alex Türk*

Abstract

The allocation of legislative and executive competences in multi-level governance structures affects who controls norms. Over the last two decades we see a general trend in EU law, towards ‘flexibility, mixity and differentiation.’ Yet, many think that EU competition policy and enforcement marches to a different tune. Competence is rarely discussed there and, when it is, most assume that uniformity is desirable.

This paper discusses the EU constitutional system as it relates to competition policy and enforcement. It investigates what choices the EU Treaties make about diversity. As with many constitutional arrangements, the EU Treaties sometimes leave space for others to decide. In these spaces we advocate answers, based on our understanding of the constitutional settlement between the EU and the Member States. This has major implications for, amongst others: the Commission’s power to relieve the Member States’ competition authorities (NCAs) of their competence to apply Articles 101 and 102 TFEU; the vires of EU merger control outside of the remit of Articles 101 and 102 TFEU; Commission efforts to make the NCAs more independent of political influence; and the resolution of conflicts between EU and national competition rules.

I. Introduction

Many national and EU competition decisions in Europe today have cross-border effects.

The received wisdom is that increasing uniformity in these assessments (and the way that they are performed) is important.¹ Uniformity helps to provide legal certainty,

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¹ This is explicit in European Parliament, Resolution on the Commission White Paper on modernisation of the rules implementing Articles 85 and 86 of the EC Treaty (COM(1999) 101 & C5-0105/1999 & 1999/2108(COS)) (1999) ¶ 6; AG Mazák’s Opinion in Case C-375/09 Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. zoo, now Netia SA w Warszawie EU:C:2010:743 ¶ 14; Luis Ortiz Blanco & Alfonso Lamadrid de Pablo, *EU Competition Law Enforcement: Elements for a discussion on effectiveness and uniformity*, in INTERNATIONAL ANTITRUST LAW & POLICY: FORDHAM COMPETITION LAW 2011, Chapter 4, at 46-47; Firat Cengiz, *Multi-level Governance in Competition*

Policy: the European Competition Network, 35 EUROPEAN LAW REVIEW 661 (2010); ALISON JONES & BRENDA SUFRIN, EU COMPETITION LAW (5th ed., 2014); Philip Lowe, *The Role of the Commission in the Modernisation of EC Competition Law* (2004); Koen Lenaerts, *Modernisation of the Application and Enforcement of European Competition Law: an introductory overview*, in MODERNISATION OF EUROPEAN COMPETITION LAW at 36-37 (2002); Giuseppe Tesauro, *The Relationship Between National Competition Authorities and Their Respective Governments in the Context of the Modernisation Initiative*, in CONSTRUCTING THE EU NETWORK OF COMPETITION AUTHORITIES at 273 (Claus Dieter Ehlermann & Isabela Atanasiu eds., 2002); David Gerber, *Modernising European Competition Law: a developmental perspective*, 22 ECLR 122, 123-26 (2001); Suzanne Kingston, *A 'New Division of Responsibilities' in the Proposed Regulation to Modernise the Rules Implementing Articles 81 and 82 EC? A Warning Call*, 22 EUROPEAN COMPETITION LAW REVIEW 340 (2001); Alexander Schaub, *Modernization of EC Competition Law: reform of Regulation No. 17*, 23 FORDHAM INTERNATIONAL LAW JOURNAL 752, 764 (1999); and Richard Whish, *National Courts and the White Paper: a commentary*, in THE MODERNISATION OF EUROPEAN COMPETITION LAW: THE NEXT TEN YEARS at 77 (Claus Dieter Ehlermann ed., 1999).

Others seem to assume that uniformity is desirable, RICHARD WHISH & DAVID BAILEY, COMPETITION LAW at 288 (7th ed., 2012); John Temple Lang, *The Duties of Co-operation of National Courts under European Union Law: principles and unresolved issues*, in LINCOLN'S INN LECTURES ON EUROPEAN LAW AND HUMAN RIGHTS at 70 (Thomas Sharpe QC ed., 2012); OFT, *Article 101(3) - A Discussion of Narrow Versus Broad Definition of Benefits* at 3 (Office of Fair Trading ed., 2010); JOANNA GOYDER & ALBERTINA ALBORS-LLORENS, GOYDER'S EC COMPETITION LAW at 526 (5th ed., 2008); Ian Forrester, *Diversity and Consistency: can they cohabit?*, in CONSTRUCTING THE EU NETWORK OF COMPETITION AUTHORITIES at 342-43 (Claus Dieter Ehlermann & Isabela Atanasiu eds., 2002); Monti, in EUROPEAN COMPETITION LAW ANNUAL 2002 - CONSTRUCTING THE EU NETWORK OF COMPETITION AUTHORITIES at 8 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2002); Mario Siragusa, *The Commission's Position within the Network: the perspective of the legal practitioners*, in CONSTRUCTING THE EU NETWORK OF COMPETITION AUTHORITIES at 33, 256-57 (Claus Dieter Ehlermann & Isabela Atanasiu eds., 2002); Commission, *Commission Explanatory Memorandum, Proposal for a Council Regulation Implementing Articles 81 and 82 of the Treaty*, 6-7, 14 (2000); and, Hanns Nehl, *Changes in Legislation:*

achieve the internal market and reduces compliance costs. This may imply that central decision-making, or at least the uniform implementation of a centrally generated competition policy, is good.

Yet, competition assessments are riddled with value judgments (about goals, methods, procedures and institutional structures²). Monti reminds us that Member States have sometimes raised objections based on competence issues in the competition field, especially where the Commission has been driving towards liberalisation (think of telecoms or energy markets) or acting in sensitive areas (such as merger control), challenging Member States' powers to undertake industrial policy, for example.³ Different Member States (and their citizens) have different opinions on the appropriate balance between competing values. There are also many other benefits of diverse

constitutional reform and the role of the administrator, in *THE MODERNISATION OF EUROPEAN COMPETITION LAW: THE NEXT TEN YEARS* at 22-26 (Claus Dieter Ehlermann ed., 1999).

² Superficially, there is a lot of agreement amongst competition officials, practitioners and academics that the goals of the competition rules should focus on consumer welfare. However, there is significant disparity in the way that competition authorities in Europe interpret consumer welfare, such as whether to focus on short or long term gains, see, for example, NMa & ICN, *Competition Enforcement and Consumer Welfare: setting the agenda* (2011). In addition, the relevance of public policy goals in competition law, such as employment and environmental considerations, is also treated in different ways across the EU. For more details see CHRISTOPHER TOWNLEY, *A FRAMEWORK FOR EUROPEAN COMPETITION LAW: CO-ORDINATED DIVERSITY* at introduction and Part A (2018). The reference to 'methods' is about how best to achieve the competition law aims, once these are clear.

³ Giorgio Monti, *Legislative and Executive Competences in Competition Law*, in *THE QUESTION OF COMPETENCE IN THE EUROPEAN UNION* at 102 (Loïc Azoulay ed., 2014).

policy-making in competition law, such as the positive impact that this can have on learning, in the longer term, or Hayek's knowledge problem.⁴

This might mean that some Member State diversity is important, even in the application of Articles 101 and 102 TFEU (these provisions can be applied by the European Commission, as well as the Member States' courts and competition authorities).⁵ Nevertheless, there must be some balance between coherence, as a basic condition for the internal market, and respect for local preferences.⁶

So, the allocation of competition competences in multi-level governance structures, like the EU, is important. de Búrca and Scott have said that, in the EU, there has been a lot of talk about 'uniformity, homogeneity and one-dimensional integration'. Yet, since the 1990s, the focus is shifting more towards 'flexibility, mixity and differentiation.'⁷ Such a change can be seen in the EU free movement rules, economic policy, social

⁴ CHRIS TOWNLEY, *supra* note 2 at Part A.

⁵ Ulf Böge, *The Bundeskartellamt and the Competition Authorities of the German Länder*, in CONSTRUCTING THE EU NETWORK OF COMPETITION AUTHORITIES at 167 (Claus Dieter Ehlermann & Isabela Atanasiu eds., 2002); John Fingleton, *The Distribution and Attribution of Cases Among the Members of the Network: the perspective of the Commission/ NCAs*, in CONSTRUCTING THE EU NETWORK OF COMPETITION AUTHORITIES 180 (Claus Dieter Ehlermann & Isabela Atanasiu eds., 2002); Roland Sturm, *Networking in Uncharted Territory: the relationship between the members of the network and their national governments*, in CONSTRUCTING THE EU NETWORK OF COMPETITION AUTHORITIES at 174 (Claus Dieter Ehlermann & Isabela Atanasiu eds., 2002); although their focus is not disagreements on aims, but methods.

⁶ MAARTJE DE VISSER, NETWORK-BASED GOVERNANCE IN EC LAW at xxiii (2009); and TOWNLEY, *supra* note 2.

⁷ Gráinne de Búrca & Joanne Scott, *Introduction*, in CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY? at 2 (Gráinne de Búrca & Joanne Scott eds., 2000).

policy, labour law, culture and environmental protection.⁸ However, as we have seen, this is not a story that we find in competition policy and enforcement in the EU. Competence in this area is rarely discussed and when it is discussed, most of the literature proceeds from the (often unarticulated) assumption that uniformity is desirable.⁹ Many saw competition an area of shared legislative competence before the

⁸ Gráinne de Búrca and Joanne Scott, *ibid*; John Donahue & Mark Pollack, *Centralisation and Its Discontents: the rhythms of federalism in the United States and the European Union*, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION at 110-11 (Kalypso Nicolaïdis & Robert Howse eds., 2001); Catherine Barnard, *Flexibility and Social Policy*, in CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY? (Gráinne De Búrca & Joanne Scott eds., 2000); Gráinne de Búrca, *Differentiation within the 'Core'? The Case of the Internal Market*, in CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY? at 133-34, 140 (Gráinne De Búrca & Joanne Scott eds., 2000); Jo Shaw, *Constitutionalism and Flexibility in the EU: developing a rational approach*, in CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY? at 340 (Gráinne De Búrca & Joanne Scott eds., 2000); Stephen Weatherill, *Finding Space for Closer Co-operation in the Field of Culture*, in CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY? at 237-38 and 235-55 (Gráinne De Búrca & Joanne Scott eds., 2000); Catherine Barnard & Simon Deakin, *Market Access and Regulatory Competition* (Catherine Barnard & Joanne Scott eds., 2001); Imelda Maher & Dermot Hodson, *The Open Method as a New Mode of Governance: the case of soft economic policy co-ordination*, 39 JOURNAL OF COMMON MARKET STUDIES at 719, 722 (2001); John Peterson & Laurence O'Toole, *Federal Governance in the United States and the European Union: a policy network perspective*, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION at 312 (Kalypso Nicolaïdis & Robert Howse eds., 2001); and Peter Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: the example of the European Community*, 99 COLUMBIA LAW REVIEW 628, 670-71 (1999).

⁹ Two excellent exceptions are: Monti, *supra* note 3; and Yane Svetiev, *Networked Competition Governance in the EU: delegation, decentralisation, or experimentalist architecture?*, in

Lisbon Treaty 2007.¹⁰ There is a widespread belief that this treaty shifted the entire competition field to an area of exclusive EU legislative competence, which would be in line with a uniformity discourse.¹¹ Despite this, the Member States still legislate on substantive and procedural competition matters. This causes much confusion.

Confusion is understandable. While the distribution of power between the EU and the Member States is constitutionally guaranteed, neither the EU Courts,¹² nor the EU

EXPERIMENTALIST GOVERNANCE IN THE EUROPEAN UNION: TOWARDS A NEW ARCHITECTURE (Charles Sabel & Jonathan Zeitlin eds., 2010).

¹⁰ Monti, *supra* note 3 at 105-11 (legislative competences) and 114-18 (executive competence); and Laurence Idot, *L'application du principe de la subsidiarité dans le droit de la concurrence* at 5 (Georg Röss & Torsten Stein eds., 1993), except in relation to mergers and state aids; Michael Dougan, *The Convention's Draft Constitutional Treaty" a 'tidying-up exercise' that needs some tidying-up of its own*, THE FEDERAL TRUST FOR EDUCATION AND RESEARCH ONLINE PAPER 27/03, 6-7 (2003); Lucia Serena Rossi, *Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and Member States?*, in EU LAW AFTER LISBON at 99 (Andrea Biondi, et al. eds., 2012); Robert Schütze, *Dual Federalism Constitutionalised: the emergence of exclusive competences in the EC legal order*, 32 EUROPEAN LAW REVIEW 3, 20 (2007); Armin von Bogdandy & Jürgen Bast, *The Federal Order of Competences*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW at 306-07 (Armin von Bogdandy & Jürgen Bast eds., 2011); and FIRAT CENGİZ, *ANTITRUST FEDERALISM IN THE EU AND THE US* at 78-80 (2013).

¹¹ See e.g., Monti, *supra* note 3 at 106-07, and references made there; Robert Schütze, *From Rome to Lisbon: 'executive federalism' in the (new) European Union*, 47 CMLREV 1385 (2010); and Serena Rossi, *ibid* at 99.

¹² There are two courts of the EU that rule on competition matters, the Court of Justice of the European Union is the senior court and the General Court (together the EU Courts), see Article 251 TFEU and following.

Treaties,¹³ have a coherent, developed doctrine on competence allocation ‘in the sense of a self-standing, systematically-ordered construct’.¹⁴ Problems are compounded because ‘assignments of authority are often stated in vague terms’.¹⁵

This paper discusses the EU constitutional system as it relates to competition policy and enforcement today. It investigates what choices the EU Treaties make about diversity and what solutions they offer to the policy dilemmas seen above. As with many constitutional arrangements, the EU Treaties are an incomplete contract. This means that often they do not clearly make the relevant choices, instead leaving spaces for others to decide. In these spaces we advocate answers, based on our understanding of the constitutional settlement between the EU and the Member States in the EU Treaties.

In order to illustrate the importance of a constitutional assessment of the EU and the Member States’ competition powers we look at several specific competition issues:

¹³ The *Treaty on European Union* (TEU) and the *Treaty on the Functioning of the European Union* (TFEU) establish the EU, they were produced as a result of the Lisbon Treaty 2007. The TEU and the TFEU should be read together.

¹⁴ Christiaan Timmermans, *ECJ Doctrines on Competences*, in *THE QUESTION OF COMPETENCE IN THE EUROPEAN UNION* at 155 (Loïc Azoulay ed., 2014). Similarly, Loïc Azoulay, *Introduction: the question of competence*, in *THE QUESTION OF COMPETENCE IN THE EUROPEAN UNION* at 5, 14 (Loïc Azoulay ed., 2014); and from a competition policy perspective, Giorgio Monti, *supra* note 3 at 114.

¹⁵ HELEN WALLACE, ET AL., *POLICY-MAKING IN THE EUROPEAN UNION* at 29 (Sixth ed., 2010). Similarly, Michelle Everson, *The Crisis of Indeterminacy: an 'equitable' law of 'deliberative' European market administration?*, in *GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET* at 235-39 (Christian Joerges & Renaud Dehousse eds., 2002).

- the Commission's power to relieve NCAs (the competition authorities of the Member States) of their competence to apply Articles 101 and 102 TFEU through the initiation of proceedings to adopt a decision;¹⁶
- the vires of EU merger control outside of the remit of Articles 101 and 102 TFEU (as well as to investigate areas of the economy under Regulation 1/2003);¹⁷
- Commission efforts to make the NCAs more independent of political influence;¹⁸ and

¹⁶ Article 11(6), Council, Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty § OJ 2003 L1/1 (2003). The Commission clearly has such a power under article 11(6), Regulation 1/2003. However, we believe that the Council could change this and, for example, give the Member States the power to relieve the Commission of its competence to apply Articles 101 and 102 TFEU, if the Council thought that this would lead to more effective enforcement, *see* the discussion around note 86.

¹⁷ Article 2, Council, Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings § OJ 2004 L24/1 (2004). The issue is that the EU merger regulation is sometimes wider in scope than Articles 101 and 102, and so one might ask whether it applies their principles (and whether Article 352 TFEU can be used to help justify such an extension in this case). In fact, we argue that this is possible, *see* the discussion around note 131.

¹⁸ Articles 4 and 5, Commission, Proposal for a Directive of the European Parliament and the Council to Empower the Competition Authorities of the Member States to be more Effective Enforcers and to Ensure the Proper Functioning of the Internal Market (2017). In fact, we argue that the Commission proposal has over-reached here. Not only is political independence not problematic here (in fact, the EU Courts have implied that this might not be needed), but the Commission does not produce appropriate examples of when a lack of independence has proven problematic. In this regard, it might also be pointed out that the Commission itself is a political body, and so it cannot claim political independence in its competition decision-making. *See* the discussion around note 143.

- Resolution of conflicts between EU and national competition rules.¹⁹

While the EU constitutes a particular kind of transnational or federal constitutional system, the balance between uniformity and diversity in the making and enforcement of antitrust laws, as discussed here, are of relevance beyond the EU.²⁰ The debates about the virtues of centralised and decentralised control are bound up in constitutional and political discourses about the efficiency, effectiveness, and legitimacy of such control.²¹ Such debates are driven by clashes between different public interests at horizontal (federal or state), vertical (between federal and state), and diagonal (between different interests at federal and state) levels. Beyond the particularities of each constitutional system, the balance in federal systems between centralised and decentralised antitrust policy-making and enforcement is, however, rarely stable and often shifts over time.²²

¹⁹ Article 21, Council, Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings 2004; and article 3, Council, Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003. In fact, in our opinion, and within limits (and contrary to the normal EU rules of primacy), the Council has been given considerable room to allow national laws to ‘win’ in conflicts with Articles 101 and 102 TFEU and EU competition regulations and directives, *see* the discussion around note 192 and following.

²⁰ Fritz Scharpf, *Democratic Legitimacy under Conditions of Regulatory Competition: why Europe differs from the United States*, in *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* at 365 (Kalypso Nicolaïdis and Robert Howse, eds., 2001); and Emilio Varanini, *American and European Federalist Antitrust Enforcement: let one hundred flowers bloom and one hundred schools of thought contend*, *ANTITRUST REPORT*, 109-10 (2004).

²¹ Robert Inman and Daniel Rubinfeld, *Rethinking Federalism*, 11 *JOURNAL OF ECONOMIC PERSPECTIVES* (1997).

²² Helen Wallace et. al., *supra* note 15.

Within these, often wide, constitutional spaces diversity can therefore play a role in any federal arrangement.²³

One often splits analysis into legislative and executive competences.²⁴ So, section two of this paper looks at clashes in the EU generally; then, section three focuses on executive and judicial competences in EU competition law. Of particular importance in the competition field is to determine the extent of the Commission's executive powers under Article 105 TFEU; and the relationship between the Commission's executive function and that of the Member States. Then, section four looks at legislative competences in EU competition law. Of core interest here is the extent of the Council's legislative function under Article 103, particularly how that interacts with Article 105 and, more generally, with Article 291 TFEU (on the executive role of the Member States). All of these issues are debatable. Each answer chosen affects the space for diversity, from time to time. Both the EU and the Member States can (and do) have important roles in EU competition policy and enforcement.

²³ For example, in relation to antitrust law, diversity and the constitutional settlement in the USA see Barry Hawk & Laraine Laudati, *Antitrust Federalism in the United States and Decentralisation of Competition Law Enforcement in the European Union: a comparison*, 20 FORDHAM INTERNATIONAL LAW JOURNAL 18 (1996-7); and Florian Wagner-von Papp, *Comparative Antitrust Federalism and the Error-Cost Framework, or: rhetoric and reality: you protect competitors, we protect competition - except when we protect competitors* § II (N Charbit & E Ramundo eds., Institute of Competition Law, 2014).

²⁴ This paper uses 'legislative' in a non-technical way to basically mean making general rules, except through execution / application, rather than in the strict sense in Art. 289 TFEU (except when explicitly discussing Art. 289, around note 126).

II. General Competences in EU Law

The EU Treaties aim to bring more clarity to competence issues.²⁵ The Member States confer competences on the EU to attain their common goals, Article 1 TEU. The EU can only act ‘within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein’, Article 5(2) TEU. Article 2(6) TFEU adds, ‘the scope of and arrangements for exercising the Union’s competences shall be determined by the provisions of the Treaties relating to each area.’ Competences not conferred on the EU, remain with the Member States, Articles 4(1) and 5(2) TEU.

When it comes to the kind of power involved, Articles 2-6 TFEU outline five categories of competence: exclusive, shared, Member State co-ordinating, EU co-ordinating and parallel. A key aim is to limit EU influence. We focus on exclusive and shared competences, as they are particularly relevant in our discussion. In areas of exclusive EU competence ‘only the Union can legislate and adopt legally binding acts’, Article 2(1) TFEU. The same provision adds that, in such areas, the Member States ‘have no autonomous legislative competence and they cannot adopt any legally binding act.’²⁶

²⁵ European Council, Laeken Declaration at 21-22 (2001); the Convention on the Future of Europe, CONV 357/02, Brussels 21 August 2002; and PAUL CRAIG, THE LISBON TREATY, LAW, POLITICS, AND TREATY REFORM at 159 (2010). The EU’s website says the Lisbon Treaty’s ‘attempt at clarification [of EU competences] does not result in any notable transfer of competence.’, http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm.

²⁶ PAUL CRAIG, EU ADMINISTRATIVE LAW at 372 (2nd ed., 2012). ‘Where the Community has exclusive competence, this means that any action by a Member State in the same field is *a priori* in conflict with the Treaty.’, KOEN LENAERTS & PIET VAN NUFFEL, CONSTITUTIONAL LAW OF THE EUROPEAN UNION at para 5-026 (Second ed., 2005). Also, Opinion 2/91 *Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work* [1993] ECR I-1061 ¶ 8; Joined Cases

The sole exception is where they have been authorised to act by the EU. Schütze says that, at first, the Court of Justice of the European Union (CJEU) favoured a wide interpretation of exclusive competence. However, more recently it has interpreted such ‘competences restrictively.’ This is both in terms of the scope of exclusive competence powers, as well as in case of conflict with other non-exclusive powers.²⁷ Areas of EU exclusive competence include, Article 3(1) TFEU:

(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.

Shared competence is the second category. It appears in a wide range of areas such as the internal market, environment and consumer protection, Article 4(2) TFEU. In areas of shared competence, both the EU “...and the Member States may legislate and adopt legally binding acts...The Member States shall exercise their competence to the extent that the Union has not exercised its competence.”, Article 2(2) TFEU. If the EU has exercised its competence, then action by the Member States is pre-empted. Once the EU acts, then these measures have supremacy over prior or subsequent national rules.²⁸ Consequently, ‘the amount of shared power held by the Member State in these areas

3/76, etc. Kramer [1976] ECR 1279 ¶ 30-3; Case 804/79 Commission v. UK [1981] ECR 1045 ¶ 17; and Case C-405/92 Mondiet [1993] ECR I-6133 ¶ 12.

²⁷ ROBERT SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM: THE CHANGING STRUCTURE OF EUROPEAN LAW at 167-188 (2009).

²⁸ Alan Dashwood, *The Relationship between the Member States and the European Union/ European Community*, 41 COMMON MARKET LAW REVIEW 355, 370 (2004).

may diminish over time.²⁹ It can also grow, as Declaration No. 18 explains. When the EU:

Treaties confer on the Union a competence shared with the Member States in a specific area, the Member States shall exercise their competence *to the extent that* the Union has not exercised, or has decided to cease exercising, its competence.³⁰

The term ‘shared competence’ is an umbrella term. The precise configuration of power sharing can only be determined by considering the detailed pre-emption rules that govern the relevant policy area under the TFEU.³¹ The EU Treaties define other kinds of competences too, we do not focus on them here, as they have less relevance in competition.³²

According to Millet, the Lisbon Treaty made a valiant effort to set out the competences. However, there is no real clarity on what is retained by the Member States and what

²⁹ PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES AND MATERIALS* at 84-84 (Fifth ed., 2011).

³⁰ Declaration No. 18 is annexed to the EU Treaties. Declarations are not binding in EU law, but they offer useful interpretative assistance which the EU Courts can follow if they wish. The repatriation of power can be done in two ways: through ordinary legislation, or through a revision procedure, Serena Rossi, *supra* note 10 at 94. Further discussion in Timmermans, *supra* note 14 at 160-63.

³¹ CRAIG & DE BÚRCA, *supra* note 29 at 85; and CRAIG, *supra* note 26 at 380. There is a more detailed discussion around note 219.

³² For example: Member State co-ordinating, EU co-ordinating and parallel competences (other potential categories also exist, eg, a common foreign and security policy, Art 2(4) TFEU). For a discussion of these *see* ROBERT SCHÜTZE, *EUROPEAN CONSTITUTIONAL LAW* at 167-68 (2012); DAMIEN CHALMERS, et al., *EUROPEAN UNION LAW: CASES AND MATERIALS* at 212-13 (Third ed., 2014); PAUL CRAIG, *THE LISBON TREATY: LAW, POLITICS, AND TREATY REFORM* at 172-75 (2013); and CRAIG & DE BÚRCA, *supra* note 29 at 86-88.

happens with clashes between Member State retained and EU competences. He does not think that the EU Courts are likely to restrain themselves and the EU institutions.³³ In part this is due to their path-dependency, but also because they pursue an integrationist aim.³⁴

Three issues are normally the focus of both legislative and executive competence discussions: who has the power (or competence), the EU or the Member States; what sort of power is this (exclusive or shared); and, if it is shared, what happens when different decision-makers conflict in their answers. We start with a focus on executive and judicial competition competences of the EU and its Member States (III); then, we examine their legislative competences (IV). It is a little awkward to use this order. However, we deal with executive competences first, as we believe that decisions at the level of executive competences form the foundations of the ‘award’ of legislative competences, although the two are inter-related to some degree.

III. Executive and judicial competence

Under the EU Treaties, the EU principally has a legislative function, normally leaving it to the Member States to apply EU law or provide for this to happen with directly effective provisions. However, the EU (specifically the Commission) has been given

³³ François-Xavier Millet, *The Respect for National Constitutional Identity in the European Legal Space: an approach to federalism as constitutionalism*, in THE QUESTION OF COMPETENCE IN THE EUROPEAN UNION at 256-58 (Loïc Azoulay ed., 2014).

³⁴ By way of contrast, in Canada the courts have interpreted state powers widely and central powers narrowly, VICKI JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* at 932-33 (Second ed., 2006).

explicit executive powers in a few, limited areas, such as state aid, competition, and transport.³⁵

Executive and judicial competence refers to the ability of, respectively, authorities and courts to apply rules, often in individual situations. There is little discussion about executive and judicial competences in the EU legal order. We argue that there are broadly two kinds of executive action in competition. One, modelled on Article 105 TFEU, envisages the Commission as the leader of the application of the competition rules in a specific situation (i). Here the Member States may be involved, but merely as assistants of the Commission. Secondly, another kind of national enforcement of competition rules, which may not have been foreseen in the original EEC Treaty, has arisen (ii). Under this second kind of enforcement, the national bodies involved are not Commission assistants at all, although they are executing the EU Treaties. Finally, we ask what happens when these two kinds of executive action clash (iii).

i. The Commission as leader (Article 105 TFEU)

This is the first of two different perspectives under executive competence. The Commission leads the application of the competition rules in a specific situation, with the Member States as its assistants.

In relation to executive competences under this head, one has to assess the powers of the EU and the Member States. As regards the EU, one needs to examine three issues.

³⁵ The EU Treaties also allow the EU legislator to delegate to the Commission the power to amend or supplement EU legislation in accordance with Art 290 TFEU and EU acts can entrust the Commission, and exceptionally the Council, in accordance with Art 291 TFEU, to adopt implementing acts subject to the control of the Member States. Recently, the ECJ has also upheld the EU legislator's power to entrust EU agencies with the adoption of binding executive acts, *see* Case C-270/12 UK v. European Parliament and Council EU:C:2014:18.

First, we will see that the Commission has an executive competence in this area. Secondly, we discuss possible limits to this competence; and thirdly, ask whether the Council can restrict the Commission's executive competences here.

One of Commission's tasks is to 'ensure the application of the EU Treaties', Article 17 TEU. While this is considered insufficient as a basis for the conferral of executive competence in relation to competition, Article 105 TFEU explicitly, and within the scheme of the Treaties exceptionally, gives the Commission executive competence under Articles 101 and 102 TFEU:³⁶

1. Without prejudice to Article 104, the Commission shall ensure the application of the principles laid down in Articles 101 and 102. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, which shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

³⁶ Art 105(3) TFEU also allows the Commission to 'adopt regulations relating to the categories of agreement in respect of which the Council has adopted a regulation or a directive pursuant to Article 103(2)(b).' This is a legislative competence, *see* the discussion around note 108.

This provision explicitly empowers the Commission: to start competition investigations under Articles 101 and 102 TFEU on its own initiative, and then to investigate suspected infringements of these provisions. If it finds a suspected infringement, the Commission can propose a measure to bring it to an end; and, if these proposals are not followed, it can publish a reasoned decision. The Commission can also choose the measures (including their conditions and details) to remedy the situation. As regards the Member States, apart from their ability to ask the Commission to act, Article 105 appears to envisage them merely assisting the Commission. Member States co-operate with (and assist) the Commission in its investigations of suspected infringements; and are authorised to take the measures selected by the Commission to remedy infringements that have not been brought to an end.

This raises several questions about the limits of the Commission's executive powers under Article 105 TFEU, but in essence, we need to know how widely to interpret this provision. On the one hand, we might interpret it narrowly and say that the Commission only has the executive powers specifically listed above. For anything else (such as powers of inspection), it needs to get the Member States' assistance. This fits with the idea of a limited conferral of executive power on the EU, Articles 4(1) and 5(2) TEU. Alternatively, interpreting Article 105 TFEU widely, the Commission may use the Member States' assistance or it can inspect undertakings and impose fines itself. After all, it has been given the duty to 'investigate cases of suspected infringement' and this could include actually physically doing inspections, etc.

In support of a narrow interpretation, the EU's Charter of Fundamental Rights (the Charter) may be relevant.³⁷ This provides various rights to individuals (including undertakings).³⁸ The EU Institutions (including the Commission) and the Member States must respect the Charter when implementing EU law (Article 51(1) of the Charter). Article 52(1) of the Charter adds:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Competition investigations are likely to limit the exercise of Charter rights (raiding companies and demanding access to documents may impinge upon respect for private life, for example). Such action needs a legal basis, must be proportionate, necessary and genuinely meet EU objectives of general interest, Article 52. Article 105 TFEU may be a legal basis, but it is probably not sufficiently detailed to allow undertakings to know their rights.³⁹ This may be why the Member States are to co-operate and assist

³⁷ Although the Charter and general human rights protections were not evident in the EEC Treaty (they were introduced over time, often through EU Courts' case law), many Member States had human rights protection in their national orders and would have been keen that the EEC Treaty did not induce violations of such protections. This may be why they drafted Art. 105 in this way.

³⁸ Such as: the respect for private and family life (Art. 7), the right to property (Art. 17), the right to an effective remedy and to a fair trial (Art. 47), and the presumption of innocence and right of defence (Art. 48).

³⁹ In Case C-355/10 *European Parliament v. Council* EU:C:2012:516, the ECJ held that EU legislation provided an insufficient legal basis for the limitation of fundamental rights. Theoretically, provisions in the EU Treaties might be given more weight, but this seems unlikely on human rights issues.

the Commission (imposing a duty on them to ensure that they have a legal basis for providing this help).

Similarly, one could argue that Article 105 TFEU only gives the Commission a limited decision-making power for Articles 101 and 102 TFEU. Reading its wording narrowly, one might say that Article 105(1) TFEU only empowers the Commission to act where it finds ‘there has been an infringement’ and then to ‘record such infringement’ if the infringement is not brought to an end, Article 105(2) TFEU. This automatically empowers the Commission to make decisions finding an infringement of Articles 101 and 102 TFEU.⁴⁰ However, one could argue that it does not include the power to make commitment decisions and findings of inapplicability: the former does not ‘record’ an infringement, and the latter finds that there is no infringement.

However, in EU law the focus is less on the wording of specific provisions and a teleological approach is more important. The focus is more likely to be on what powers the Commission needs in order to ‘ensure the application of the principles laid down in Articles 101 and 102’ TFEU. This includes an executive power to apply regulations or directives made under Article 103(1) TFEU. If the Council feels that Article 105 TFEU gives insufficient direct executive competence to the Commission, then it may supplement the Commission’s powers through Article 103 regulations.⁴¹ The EU

⁴⁰ Art. 7, Reg. 1/2003, explicitly ‘gives’ the Commission the power to apply Art. 101 and 102 TFEU in specific matters, and to bring breaches of these provisions to an end through enforcement decisions. However, this simply seems to be confirmatory of its powers under Art. 105 TFEU, rather than constitutive of power.

⁴¹ *E.g.*, EU Regulation 1/2003 gives the Commission the power to take interim measures, make commitment and inapplicability decisions, Arts 8-10, Reg. 1/2003. The ECJ implied that the Commission’s power in art. 10, Reg. 1/2003 (inapplicability decisions) came by virtue of Reg. 1/2003,

Courts are likely to support a wide interpretation of such powers. For example, even if there are good (EU) reasons for limiting the Commission's power, due to Charter arguments, above, then the EU Courts are likely to allow the Council's Article 103 regulations to empower the Commission to limit undertakings' Charter rights, in ways that are proportionate, necessary and genuinely meet EU objectives of general interest.⁴²

However, the Council's power under Article 103 TFEU is not unlimited. As we see in the discussion of legislative competences, it can only act 'to give effect to the principles set out in Articles 101 and 102', for example. If the Council wants to give the Commission wider executive powers for competition, then it must make regulations using Article 103 TFEU and another legal basis in the EU Treaties. This has happened for the EU Merger Regulation, as well as with specific sectors of the economy.⁴³ The legislative discussion below highlights other limits.

rather than Art. 105 TFEU, *see* Case C-375/09 Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. z o.o., *devenue* Netia SA [2011] ECR I-3055 ¶ 24-25. Similarly, Reg. 1/2003 gives the Commission the power to request information, take statements, inspect business and other premises, art. 18-21, Reg. 1/2003.

⁴² There is also an argument that the EU Institutions *could not* provide 'by law' for such limitations under Art 103, because the European Parliament merely needs to be consulted, and this is an insufficient democratic input. However, the ECJ has now held that this is an incorrect interpretation of Art. 52(1) of the Charter, *see* Case C-130/10 Parliament v. Council EU:C:2012:472 ¶ 82.

⁴³ *See e.g.*, the EU merger regulation is based on both Arts 103 and 352 TFEU. As regards specific sectors of the economy, for many years, *e.g.*, maritime transport had a special competition regime, based on Arts 100(2) and 103 TFEU, *see* Council, Regulation laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport § OJ 1986 L378/4 (1986). This regime has now been repealed, *see* Council, Regulation (EC) No 1/2003 on the implementation of the rules on competition

The third point is whether the Council can *restrict* the Commission's Article 105 TFEU executive competence. Article 103 TFEU instructs the Council to make appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 TFEU. Amongst other things, this means defining 'the respective functions of the Commission and the European Court of Justice in applying the provisions laid down in...[Article 103(2) TFEU]', Article 103(2)(d) TFEU. Could the Council rely on Article 103 TFEU to restrict (or even remove) the Commission's executive competence under Article 105 TFEU? This has not been tried so far. The answer depends on the relationship between Articles 103 and 105 TFEU. Although the Council might not empower the Commission, by not giving it fining or further executive powers that Article 105 does not expressly give it (which is why understanding the limits of these is so important); it seems unlikely that the EU Courts would endorse the use of Article 103 TFEU to *remove* an explicit executive competence of the Commission (especially because Article 103(2)(d) TFEU seems to assume that the Commission applies Articles 101 and 102), even if this is a shared executive competence. However, the Council may be able to constrain when, and how, the Commission uses this power.⁴⁴

The analysis is similar for the Member States. Article 105 gives them a duty (and thus implicitly an executive competence) to co-operate with, and assist, the Commission when it applies the principles laid down in Articles 101 and 102 TFEU (whether the Commission is directly applying Articles 101 and 102 TFEU or Council regulations

laid down in Articles 81 and 82 of the Treaty (2003), Art. 32 as amended by Council, Regulation repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No 1/2003 as regards the extension of its scope to include cabotage and international tramp services § OJ 2006 L269/1 (2006), Arts 1-2.

⁴⁴ See the discussion around note 87.

laid down, at least in part, under Article 103 TFEU). It is unclear specifically what is demanded in this sort of ‘co-operation’ and ‘assistance’. Similarly, Member States must also take measures (the conditions and details of which are for the Commission to determine) that are needed to remedy infringements of the principles laid down in Articles 101 and 102 TFEU, Article 105(2) TFEU. No indication is given here of what remedies might be demanded. For example, could it include fines, periodic penalties, interim measures, compensation for individuals, even imprisonment of company directors? The Commission’s discretion is not absolute, for example, penalties must be proportionate and laid down in law.⁴⁵ Furthermore, unless there are explicit EU rules, then the Member States can use their own procedural rules (including for tasks such as assisting the Commission here) as long as they are ‘not less favourable than those governing similar domestic situations’ and as long as they do not make it ‘impossible in practice or excessively difficult’ to exercise their tasks.⁴⁶

One issue that is relevant in the discussion of legislative competences is whether the Council can use Article 103 TFEU to remove the Member States’ obligations to co-operate and assist with Commission investigations, as well as to take measures the Commission thinks are needed to remedy infringements of the principles laid down in

⁴⁵ See Art. 49 of the Charter on legality and proportionality of criminal offences and penalties.

⁴⁶ Case C-603/10 Pelati d.o.o. v. Republika Slovenija EU:C:2012:639 ¶ 23.

If there were some dispute about either the ‘effectiveness’ or ‘equivalence’ of a national procedure, the Commission could take an Art. 258 TFEU action against this Member State to the ECJ. Art. 258 TFEU reads ‘If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.’, see also Art. 260 TFEU.

Articles 101 and 102 TFEU. The Council can impose obligations on the Member States, in terms of how they assist the Commission. These obligations can limit the Member States' procedural autonomy (the Damages Directive is an example of this). For the reasons noted above, in relation to the Commission's Article 105 powers, we do not think that the Council can remove the Member States' obligations. However, as noted above, it can regulate the modalities of their exercise.

ii. National actors as enforcers in their own right

One needs to assess, when it comes to taking the lead in enforcement action (rather than merely acting as the Commission's assistant), whether the Member States can act themselves (in other words, has the EU been given an exclusive executive competence). The general rule of competences is that the EU shares competences with the Member States where the EU Treaties confer on the EU 'a competence which does not relate to the' areas of EU exclusive competence, Article 4(1) TFEU. Importantly, the Member States have residual competence, unlike the EU, which only has the competences that the EU Treaties give it, Article 2(6) TFEU. So, to see whether Member State competence has been 'removed' one must check whether the EU has an exclusive competence in the relevant area.

The EU has an exclusive competence for 'the establishing of the competition rules necessary for the functioning of the internal market', Article 3(1)(b) TFEU. Some support for the idea that this includes executive competences might be found in Article 2(1) TFEU which states that, in areas of exclusive EU competence, only the EU 'may legislate and adopt legally binding acts'. As Commission (and NCA) decisions are

legally binding acts,⁴⁷ this might prevent the Member States from executing Articles 101 and 102 (or Council regulations and directives laid down under Article 103, when they are covered by Article 3(1)(b) TFEU too).

However, there are four reasons why we do not believe that Article 3(1)(b) TFEU generates an exclusive EU executive competition competence. First, unlike all the other areas of exclusive EU competence in Article 3 TFEU, Article 3(1)(b) only refers to ‘the establishing of the competition rules’. This implies that only the *establishment* (rather than the application) of these rules, is within the EU’s exclusive competence (the rest being a shared competence, under Article 4(1) TFEU).⁴⁸ Secondly, Articles 2-6 TFEU only seem to relate to general acts. If correct, this supports the idea that individual acts, such as Article 101 or 102 decisions aimed at specific undertakings, are not covered by Article 3(1)(b) TFEU’s exclusive competence.⁴⁹ Thirdly, Schütze says that ontological reasoning has been used to justify making something an exclusive competence. The ontological rationale applies when ‘legal action at the state level is conceptually impossible.’⁵⁰ However, we see no ontological reasons for exclusive EU action here.

⁴⁷ For example, Commission decisions in the field of competition law (and elsewhere) are ‘binding’ upon the parties to whom they are addressed, Art. 288 TFEU.

⁴⁸ See also, CRAIG, *supra* note 32 at 160-61; and Monti, *supra* note 3 at 107.

⁴⁹ For example, the French and the German versions of the EU Treaties, make clear that Art 3(1)(b) TFEU relates to general acts, not individual ones (like Commission competition decisions). The French version reads ‘*l’établissement des règles de concurrence nécessaires au fonctionnement du marché intérieur*’; and the German version reads ‘*Festlegung der für das Funktionieren des Binnenmarkts erforderlichen Wettbewerbsregeln*’. This argument receives additional, contextual support from the fact that otherwise Arts 290 and 291 TFEU would make little sense.

⁵⁰ Schütze, *supra* note 10 at 21. By way of example, he refers to trade and citizenship. While the Member States could legislate on either matter, the EU seems the natural body to legislate on trade between

While it is conceptually difficult to allow Member States to judge the legality of any State aid they grant to undertakings,⁵¹ this does not apply to their assessment of arrangements by private undertakings.⁵² Finally, another clue that this is not an EU exclusive executive competence is that the Member States retain some control over Commission Article 101 and 102 decisions.⁵³ However, this is a weaker argument as

Member States or EU citizenship. This seems to be the logic in Dashwood, *supra* note 28 at 371-72, for example.

Schütze also says that functional justifications for exclusive competence have also been made. The idea is that the EU will have an exclusive competence if exclusion of the national level is necessary ‘for the defence of the common interest of the Community’, *Opinion 1/75 (Draft Understanding on a Local Cost Standard)* [1975] ECR 1355. In other words, this is some form of self-defence justified by constitutional necessity, Schütze, *supra* note 10 at 23. This also seems to be the logic in Dashwood, *supra* note 28 at 370. This idea also causes problems. Whenever the Member States act this creates the potential for diversity and thus has the potential to distort competition. Assessments along these lines would certainly be controversial and political (but then ignoring the issue is too). Accordingly, Schütze believes that ‘only “existential” threats to a [EU] policy should justify the total exclusion of national autonomy within a policy field.’, Schütze, *id* at 23-25. In the light of the above, Schütze suggests that legislative pre-emption should be preferred over constitutional pre-emption, Schütze, *id* at 27. Of course, the logic also works the other way too. Perhaps existential threats to important national policies should justify the total exclusion of EU autonomy within a policy field, except on the basis of unanimity.

⁵¹ Serena Rossi, *supra* note 10 at 99.

⁵² In any event, the EU Treaties seem to reject the ontological rationale. Art 4(2)(a) TFEU classifies the internal market as an area of shared competence, for example. This makes sense, in particular to diagonal clashes, Schütze, *supra* note 10 at 22; and Monti, *supra* note 3 at 108. Diagonal clashes also occur in competition law.

⁵³ The Commission must consult the Advisory Committee (made up of the NCAs) prior to taking an Art 101 or 102 TFEU decision and take the utmost account of its opinion, *see* art. 14, Reg. 1/2003. This relates to Commission decisions of the types referred to in Arts 7-10, 23, 24(2) or 29(1), Reg. 1/2003.

Regulation 1/2003 came into force before the Lisbon Treaty (and Article 3(1)(b) TFEU).

If the EU does not have an exclusive executive competence, then the Member States may be able to independently enforce Articles 101 and 102 TFEU, rather than (or as well as) merely as Commission assistants. Directly effective provisions in the EU Treaties can (and must) be applied in a domestic court or administrative proceedings.⁵⁴ Insofar as Articles 101 and 102 TFEU are directly effective, then the Member States have a duty to apply them; in which case, an exclusive EU executive competence is inappropriate.

The Member States' executive competence for Articles 101 and 102 TFEU seems to have changed over time. Article 104 TFEU envisaged the execution, by the Member States, of both national and EU competition law prior to regulations or directives being laid down under Article 103 TFEU. The first of these, Regulation 17, said that the Commission could apply Articles 101 and 102 TFEU in their entirety. The same applied to national courts and NCAs, except that they could not apply Article 101(3) TFEU.⁵⁵ The EU Courts then held that Articles 101(1) and 102 TFEU were directly effective.⁵⁶ Article 101(3) TFEU's position is less clear. The EU Courts have not pronounced on

⁵⁴ Bruno de Witte, *Direct Effect, Primacy, and the Nature of the Legal Order*, in *THE EVOLUTION OF EU LAW* at 323 (Paul Craig & Gráinne De Búrca eds., 2011). For administrative proceedings, Case 103/88 *Costanzo* [1989] ECR 1839 ¶ 30-32.

⁵⁵ Reg. 17, Art 9(1).

⁵⁶ See respectively Case 13/61 *Kledingverkoopbedrijf de Geus en Uitdenbogerd v. Robert Bosch GmbH and Maatschappij tot voortzetting van de zaken der Firma Willem van Rijn* [1962] ECR 45; and Case 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH v. Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V.* [1989] ECR 803 ¶ 32-33.

whether it is directly effective or not. Regulation 1/2003 currently says that the national courts and NCAs ‘have the power to apply’ Articles 101 and 102 TFEU.⁵⁷ Perhaps this means that Articles 101(3) TFEU is now directly effective too. If so, then NCAs have an automatic executive competence to apply both Articles 101 and 102 TFEU in full. So, the Member States share executive competence for Articles 101 and 102 TFEU. Now we consider the same issue under any regulations or directives laid down by the Council under Article 103 TFEU (such as Regulation 1/2003), or laid down on a dual basis using Article 103 TFEU and some other provisions in the EU Treaties (such as the EU Merger Regulation, or the Damages Directive). Article 2(1) TFEU says that the Member States can implement EU acts. The EU Courts have interpreted ‘implementation’ as the drawing up of general and individual acts.⁵⁸ This implies that the Member States have executive competence even in areas of EU exclusive legislative competence.⁵⁹ Consequently, the Member States have a power (and a duty) to implement Council regulations and directives, including those made under Article 103 TFEU (or on a dual basis). If the Council does not want the Member States to apply the

⁵⁷ Council, Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003, recitals 4, 6, 7 and arts 5 and 6. The position on Art 101(3) is much debated, CHRISTOPHER TOWNLEY, *ARTICLE 81 EC AND PUBLIC POLICY* at 97-98 (2009) and the references made there, as well as Okeoghene Odudu, *Article 81(3), Discretion and Direct Effect*, 23 ECLR 17, 22 (2002); Rein Wesseling, *Subsidiarity in Community Antitrust Law: setting the right agenda*, EUROPEAN LAW REVIEW 35, 36 (1997); and CRAIG, *supra* note 26 at 404 (although not specifically talking about competition law, just the kind of language found in Art 101(3)).

⁵⁸ See Case 16/88 Commission v. Council EU:C:1989:397 ¶ 11.

⁵⁹ Similarly, the mere ‘application and enforcement of Union acts does not fall under this [Art 3 TFEU] prohibition, as confirmed by Article 2(1) TEU’, von Bogdandy & Bast, *supra* note 10 at 289; and Schütze, *supra* note 11 at 1411.

act, it ought to explain this in the act itself.⁶⁰ The legislative discussion highlights other limits.

Some may argue that Article 291(2) TFEU might limit the Council's ability to prevent the Member States implementing its regulations. In fact, Article 291(2) TFEU is not applicable to regulations and directives made by the Council under Article 103 TFEU where these rules relate to the powers of the Commission or the Member States set out in Article 105 TFEU (however widely this is defined). That said, Article 291(2) applies outside of this (for example, when Article 103 TFEU and another legal basis are used).

⁶⁰ *E.g.*, the EU merger reg gives the Member States various powers and duties, such as the art 12 inspection power by NCAs. It also prohibits them from doing certain things, such as applying the EU merger reg themselves, or their national laws when there is a concentration with a Community dimension, *see* recital 18 and art. 21, Reg.139/2004.

The Council might not even have to be explicit. The ECJ held that Member States could not make inapplicability decisions when Reg. 1/2003 only gave this power explicitly to the Commission, and said nothing about the Member States, Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. z o.o., devenue Netia SA* [2011] ECR I-3055 ¶ 19-30. So, for the Member States, at least, Reg. 1/2003's provisions seem to be a minimum as well as a maximum empowerment, WOLF SAUTER, *COHERENCE IN EU COMPETITION LAW* at 147 (2016). We disagree with the ECJ's judgment in *Tele2*. Insofar as Arts 101 and 102 are directly effective, the Member States automatically have a right to say that these provisions apply and that they do not apply. Although we believe that the Council has the power to remove this ability under Art. 103, this should be explicit (because Art. 103 regulations or directives are not giving the Member States such a power, they are removing this power which is already there). It is unclear whether the Council can remove the Member States' ability to make inapplicability decisions. It needs an explicit power to remove these directly effective national powers. It certainly seems possible for Art. 101(3) TFEU, due to Art. 103(2)(b) TFEU. It may also be that Art. 103(2)(e) TFEU is deemed sufficient to give the Council this power for the whole of Arts 101 and 102 TFEU.

Article 291(1) TFEU gives Member States the power (and duty) to adopt national rules necessary to implement binding EU acts.⁶¹ Schütze sees this as an example of the duty of sincere co-operation, Article 4(3) TEU.⁶² However, Article 291(2) TFEU then adds that sometimes ‘uniform conditions for implementing legally binding Union acts are needed’. In such cases, the Commission (and sometimes the Council) shall have implementing powers.

Article 291(2) TFEU seems to restrict the Council’s ability to give the Commission an exclusive executive competence. This can happen where ‘uniform conditions for implementing legally binding Union acts’ are needed. Could Article 291(2) TFEU limit the award of exclusive EU executive competence under Article 103 TFEU? The answer depends on one’s understanding of the relationship between general and specific executive rules in the EU Treaties. Schütze says that wherever

the Treaties establish a special regime for the implementation of European law [such as EU competition law, Article 105 TFEU]...the latter will take constitutional priority over Article 291 TFEU.⁶³

For this reason, we do not think that Article 291(2) TFEU constrains the Council when awarding the Commission executive competence for the regulations that it makes under Article 103 TFEU (in order for the Commission to execute the duties that it has been set in Article 105 TFEU). Furthermore, when one reads Article 105 TFEU, it does not state that the Commission can only act when uniform conditions are necessary.

⁶¹ Art. 291 TFEU is irrelevant when applying Arts 101 and 102 TFEU, they are not EU ‘acts’.

⁶² Schütze, *supra* note 11 at 1397-98.

⁶³ *Id.* at 1399.

However, we are potentially confronted with a constitutional space in the EU Treaties here too. For example, if one were to give the Commission's Article 105 TFEU powers a wide reading, then the Council would have wide powers to give it the ability to inspect undertakings on its own account, and to make inapplicability decisions, etc. However, if one were to give Article 105 TFEU a narrow reading, one might say that the Commission does not automatically have such powers under Article 105 TFEU.⁶⁴ Although the Council could award it such wider powers under Article 103 TFEU (insofar as this would help to 'give effect to the principles set out in Articles 101 and 102') the award of such powers would be outside of the Article 105 TFEU provision. Under such a reading, one might argue that Article 291(2) TFEU should apply to such an extension.

In any event, Article 291(2) TFEU does apply in relation to regulations or directives based on Article 103 TFEU in combination with another provision in the EU Treaties (ie with a dual basis).

iii. Clashes between the Commission and the Member States and these two different kinds of executive action

We have now discussed two of the key issues in relation to executive competences: who has the power to execute the relevant competition rules; and what sort of competence do they have (shared or exclusive). When the Commission and the Member States are both acting in the same space, then we need to know how to deal with clashes, actual or potential.

Where diversity is possible, understanding who has competence is particularly important. Allowing the Member States to enforce Articles 101 and 102 TFEU opens

⁶⁴ See the discussion around *supra* note 37.

the door to more diversity. A diverse set of procedural rules and institutional structures is likely to further contribute to substantive diversity in the application of these provisions.

Three kinds of clashes are relevant here (vertical, horizontal and diagonal). First, in relation to vertical clashes, these might occur when EU and NCAs interpret EU competition law in decisions or judgements (for example, when applying Articles 101 and 102 TFEU, or when applying EU competition regulations), or when they apply national and EU competition law. Clashes might occur because of disagreements on aims (perhaps different actors disagree on whether to take account of another EU (like environmental protection) or national (like culture) policy goal within their EU competition decision or judgment).

The EU Treaties do not explicitly discuss what to do when clashes take place in the execution of the competition provisions (whether applying national or EU competition law). There are many EU tools that can help us here, these include primacy, subsidiarity, proportionality, and the duty of sincere co-operation under Article 4(3) TEU. We look at each of these in turn, our focus is the application of Articles 101 and 102 TFEU. The EU Courts often defer to political bodies (like the Council) on such matters. The implication is that a core function of the Council under Article 103 TFEU is to decide how conflicts in this area should be resolved.

Primacy

Starting with the issue of primacy, NCAs and national courts are not allowed to come to a decision *in a specific matter*, different from the Commission, when that specific matter is already the subject of a Commission decision. The primacy of EU law over national law means that Commission decisions (whether applying Articles 101 and 102

TFEU, or a Council regulation with shared executive competence) have supremacy over national court judgments or NCA decisions enforcing these provisions. The binding nature of Commission decisions governs the appropriate way to challenge EU acts.⁶⁵ It is not about the Commission's superiority over national actors.⁶⁶ Commission decisions do not bind national actors, outside of the specific case in question. Nevertheless, as Sauter notes: 'Uniformity and primacy (supremacy) are principles of EU law that enhance coherence and favour hierarchy and centralisation at EU level.'⁶⁷

Subsidiarity

Article 5(3) TEU incorporates the subsidiarity principle in EU law. This provision states that, outside of areas of exclusive EU competence, the EU

shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The subsidiarity principle is normally discussed in relation to legislative acts, so the first question to resolve is whether it applies to executive action too. Schütze writes that Article 5(3) TEU is understood to apply to executive action too (even in areas of exclusive EU *legislative* competence).⁶⁸ Tavares concurs that subsidiarity is relevant

⁶⁵ Member States can challenge Commission competition decisions under Art. 263 TFEU.

⁶⁶ Schütze, *supra* note 11 at 1405.

⁶⁷ SAUTER, *supra* note 60 at 14.

⁶⁸ Schütze, *supra* note 11 at 1411; SCHÜTZE, *supra* note 32 at 248; and HERWIG HOFMANN, et al., ADMINISTRATIVE LAW AND POLICY OF THE EUROPEAN UNION at 127-28 (OUP, 2011).

for executive acts too.⁶⁹ We agree that subsidiarity should apply to executive competences. We do, however, note that the EU Courts seem reluctant to apply subsidiarity to executive acts.

We think that the EU Treaties support Tavares and Schütze. The subsidiarity principle is highlighted in the Preamble to the TEU. There the Member States resolve to continue creating an ever-closer union amongst the peoples of Europe ‘in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity’. Where the EU has shared executive powers, the implication is that subsidiarity applies. In fact, the Lisbon Treaty sought to give more teeth to the subsidiarity principle.⁷⁰ Article 5 TEU (headed ‘fundamental principles relating to competences’), sets out the subsidiarity principle in more detail. It is not explicitly restricted to legislative acts. Article 5 TEU states that the EU institutions shall apply Protocol (no.2) on the application of subsidiarity and proportionality.⁷¹ Article 1 of this protocol says each EU ‘institution shall ensure constant respect for the principles of subsidiarity and proportionality, as laid down in Article 5 of the Treaty on European Union.’ The reference to ‘constant respect’ seems quite all-embracing.

⁶⁹ Mariana Tavares, *A Constitutional Analysis of Multi-jurisdictional Conflicts in the EU Legal Order Confirms that Diversity is Possible in EU Competition Law*, King’s College London, 82-85 (2018), more generally see her discussion at 77-85.

⁷⁰ See e.g., Protocol No. 2 to the EU Treaties, Art. 6, discusses the role national parliaments and Art. 8 the role of the EU Courts.

⁷¹ Like Declarations, Protocols are also annexed to the EU Treaties. However, unlike declarations, protocols are legally binding.

Having said that, the EU Courts have not tended to take this view in most areas.⁷² The issue of subsidiarity has been raised several times before them. The Commission has argued that the subsidiarity principle cannot remove its (Article 105 TFEU) executive competence and the EU Courts have largely accepted this. For example, in *France Télécom SA v Commission*, which was judged before the Lisbon Treaty came into force, the Commission wanted to conduct an inspection when an NCA was investigating. France Télécom argued, amongst other things, that this did not respect the subsidiarity principle. The General Court notes that Regulation 1/2003 refers to subsidiarity (to indicate that it complies with the principle). The General Court then continues:

[T]he protocol on the application of the principles of subsidiarity and proportionality annexed to the EC Treaty states in paragraph 3 that the principle of subsidiarity does not call into question the powers conferred on the Community by the Treaty, as interpreted by the Court of Justice (Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-6451, paragraph 102). Therefore, that principle does not call into question the powers conferred on the Commission by the EC Treaty, which include the power to apply the competition rules, and in particular the right to carry out inspections to assess any suspected infringements.⁷³

⁷² Although there are exceptions, such as State aids and emission allowance cases, *e.g.*, HOFMANN, et al, *supra* note 68 at 127-28.

⁷³ Case T-339/04 *France Télécom SA v. Commission* [2007] ECR II-521 ¶ 89.

The General Court rejects the whole plea.⁷⁴ Unfortunately, it was not appealed. There is reason to question the General Court's approach. First, the case that the General Court refers to (*Alliance for Natural Health and Others*) does not seem relevant for this principle. In that case, the Court was asked whether a provision in a directive had properly taken account of subsidiarity. Before assessing whether this was the case, the Court highlights the relevance of the protocol on subsidiarity annexed to the EC Treaty at that time. As the Court rightly noted, this stated that:

The principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice. The criteria referred to in the second paragraph of Article 3b of the Treaty [⁷⁵] shall relate to areas for which the Community does not have exclusive competence. The principle of subsidiarity provides a guide as to how those powers are to be exercised at the Community level. Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified.⁷⁶

⁷⁴ Case T-339/04 *France Télécom SA v. Commission* [2007] ECR II-521 ¶ 89-91. In any event, the General Court adds, the Commission had not yet relieved the NCA of its competence, as the Commission had not yet formally initiated proceedings, so art. 11(6), Reg. 1/2003 did not apply.

⁷⁵ Which reads 'In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.'

⁷⁶ Joined Cases C-154/04, etc. *Alliance for Natural Health and Others* [2005] ECR I-6451 ¶ 102.

In other words, this is merely saying that subsidiarity does not apply in areas of exclusive competence. As the directive (in *Alliance for Natural Health and Others*) was not in an area of exclusive competence, the Court went on to review it for subsidiarity. Today, Article 5(3) TEU makes a similar statement. As executive action under Articles 101 and 102 TFEU is not an area of exclusive competence,⁷⁷ subsidiarity is relevant. Secondly, applying the subsidiarity principle here does not remove the Commission's power, it just prevents it applying them in this case, *if the NCA wants to act* (as long as the Commission is not the most appropriate enforcer under the subsidiarity principle, of course). As a consequence, EU rights can still be protected.

Schütze also criticises the result in *France Télécom SA v Commission*. It is too generous to the Commission. He does not think that the EU Courts have provided a real check. According to Schütze, they see subsidiarity as a political notion; and, as a result, they give the EU legislator a wide discretion. This emphasises the role of the other EU institutions, rather than the EU Courts, in the definition of executive subsidiarity.⁷⁸

⁷⁷ See the discussion around *supra* note 47.

⁷⁸ 'Indeed, the idea of an independent subsidiarity analysis for the executive function has been reinforced under the Lisbon Treaty. According to Article 291 TFEU, the Commission will only possess implementing powers "[w]here uniform conditions for implementing legally binding acts are needed". While this provision concerns the competence of the Commission to adopt executive acts, it betrays the clear intention to subject the executive function to a subsidiarity rationale. This idea would be undermined if the European legislator could transfer wide implementing powers to the Commission, the exercise of which would not be subjected to judicial review. The European Courts should therefore look beyond the legislative expressions of subsidiarity and apply an independent judicial review of the question of executive subsidiarity.' Schütze, *supra* note 11 at 1415. One weakness with this argument is that Schütze also argues that Art. 291 should not apply to regulations and directives exclusively based on Art 103 TFEU, *see* quote at *supra* note 62.

Proportionality

Monti suggests that it may have been more effective if the appellant in *France Télécom SA v Commission* had pressed the General Court on proportionality. As he rightly puts it, ‘it appears wasteful [for the Commission] to duplicate the efforts of the NCA.’⁷⁹ In *Toshiba*, AG Kokott highlighted the proportionality principle when looking at article 11(6) of Regulation 1/2003. She said it

militates against an interpretation of Article 11(6) of Regulation No 1/2003 to the effect that the national competition authorities are permanently and definitively relieved of their competence to apply national antitrust law once the Commission itself brings proceedings. That principle, to which the EU legislature expressly referred in the preamble to Regulation No 1/2003,(1) has fundamental, not to say constitutional, significance within the Treaty system. It states that the content and form of Union action must not exceed what is necessary to achieve the objectives of the Treaties. The aim of Regulation No 1/2003 is to contribute towards the effective enforcement of competition rules through a decentralised system,(2) whilst at the same time ensuring the uniform application of EU law.(3) This does not require that the competition authorities of the Member States should be permanently and definitively relieved of their competence to apply their domestic antitrust law. It is sufficient to relieve them of that competence for the duration of proceedings initiated by the Commission

⁷⁹ Monti, *supra* note 3 at 115.

and to oblige them to comply with the Commission's decision after those proceedings are concluded.(4)⁸⁰

(1) Recital 34 in the preamble to Regulation No 1/2003.

(2) See recitals 8 and 34 in the preamble to Regulation No 1/2003 and, additionally, recitals 1, 5 and 6 in that preamble.

(3) Recitals 17 and 22 in the preamble to Regulation No 1/2003.

(4) See in this regard the aforementioned Article 16(2) of Regulation No 1/2003.

This emphasis could be re-constituted to argue that exposing an undertaking to multiple investigations on the same matter by multiple competition authorities in Europe is disproportionate. However, the EU Courts principally focus on checking that the Commission follows the legislative structure here. So, this seems like a political notion too.⁸¹

The division of powers and the duty to co-operate in good faith

In *France Télécom SA v Commission* the General Court was also asked to assess whether the Commission had infringed the division of powers or the duty to cooperate in good faith with the NCAs.⁸² As regards the division of powers between the

⁸⁰ Opinion of AG Kokott in Case C-17/10 Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže EU:C:2012:72 ¶ 90. The ECJ did not discuss proportionality.

⁸¹ Similarly, in relation to legislative competence and proportionality the EU Courts only say that an EU regulation or directive is disproportionate when it is 'manifestly appropriate', deferring to the Council matters which are political, social or economic, *see* discussion at note 217. We may get a similar effect here, the EU Courts seek solace by referring back to the underlying legal framework.

⁸² Case T-339/04 *France Télécom SA v Commission* [2007] ECR II-521 ¶ 78. *See* Commission Notice, on co-operation within the Network of Competition Authorities (2004); and Council & Commission,

Commission and the NCAs, the General Court observed that as the scheme of Regulation 1/2003 relies on a close co-operation network between the Commission and the NCAs, the Commission was left to establish the detailed rules of this network. Regulation 1/2003 does not call into question the general power the Commission enjoys in the case law.⁸³ The General Court observes that Regulation 1/2003 gives the Commission wide powers of investigation and to initiate complaints, including removing cases from NCAs. The Commission retains a leading role in investigating infringements. The system of co-operation does not prevent the Commission from inspecting if an NCA is dealing with a matter, indeed Article 11(6), Regulation 1/2003 allows the Commission, subject to consultation with the NCA, to initiate proceedings itself, even if an NCA is dealing with this matter already. So, the Commission must be able to carry out an inspection, as this is a preliminary step to dealing with a case.⁸⁴ As Regulation 1/2003 does not contain a system for allocating competences, the General Court rejected this part of the complaint.

Then the General Court turned its mind to the ‘obligation to cooperate in good faith with the national competition authorities under Article 11(1) of Regulation No 1/2003’, which is also a manifestation of the duty of sincere co-operation under Article 4(3) TEU. Article 11(1) states that there must be close co-operation, but the General Court says that it does not mean that the Commission cannot carry out inspections (indeed the General Court thought that article 11(6) implied that inspections could happen in

Council and Commission Joint Statement, on the Functioning of the Network of Competition Authorities (2002).

⁸³ The General Court refers to Case C-344/98 Masterfoods [2000] ECR I-11369 ¶ 46 and 48.

⁸⁴ The General Court holds that art. 20(1), Reg. 1/2003 ‘expressly provides that, in order to carry out the duties assigned to it by that regulation, the Commission may conduct all necessary inspections’ at ¶ 81.

parallel, at least at the preliminary stages of a case). So, the General Court concluded that the infringement here had not been established either.⁸⁵

This is a classic clash between the two systems (Commission as enforcer and Member States enforcing in their own right). Many believe that Regulation 1/2003 maintains the Commission's central role, as the General Court observes. The EU Courts certainly seem to focus on the impact on Commission powers, rather than those of the NCAs.⁸⁶ However, the implication appears to be that if the Council had allocated powers differently in Regulation 1/2003, removing the Commission's central role, then the General Court would have supported this too.⁸⁷

Asking the Council to resolve conflicts between the EU and the Member States is a difficult task because, when we ask the Council to resolve these conflicts, it has to trade off two very different methods of executive action (as well as, perhaps unintentionally, the relative benefits of uniformity and diversity).⁸⁸ In one, the EU Treaties assign the

⁸⁵ Case T-339/04 *France Télécom SA v. Commission* [2007] ECR II-521 ¶ 86.

⁸⁶ Similarly, in Case C-375/09 *Prezes Urzędu Ochrony Konkurencji i Konsumentów v. Tele2 Polska sp. z o.o., devenue Netia SA* [2011] ECR I-3055 ¶ 27-28, the ECJ held that if NCAs could make findings of inapplicability for Arts 101 and 102 TFEU it risks undermining the uniform interpretation of these provisions and 'would call into question the system of co-operation established by the Regulation [Reg. 1/2003] and would undermine the power of the Commission.' As Monti notes, the ECJ's focus is on the harm 'to the Commission's powers, but what about other NCAs? Moreover, the guarantor of uniform application is the Commission. Co-operation indeed!', Monti, *supra* note 3 at 116. Tavares, *supra* note 69 at 231-33, attacks this judgment for similar reasons under the principle of executive subsidiarity.

⁸⁷ Case T-339/04 *France Télécom SA v. Commission* [2007] ECR II-521 ¶ 79-83.

⁸⁸ A related issue is, should the answer be different when it is a national court that potentially clashes with the Commission, rather than an NCA? On the one hand, respect for the independence of the judiciary might mean that the Commission is less likely to prevail in clashes, especially because national courts

Commission, with help from the Member States, the execution of the principles in Articles 101 and 102 TFEU. This system puts the Commission ‘in the driving seat’ and favours uniformity. In the second system, the Member States have been asked to help to protect individuals’ rights and obligations under the EU Treaties. In large part, this was because the Commission was unable to achieve sufficient enforcement outcomes alone under Articles 101 and 102 TFEU (in other words, direct effect is directly contributing to more effective enforcement).

We believe that the Council can decide how these two methods of executive action interact in a regulation based on Article 103 TFEU.⁸⁹ The Council should have quite a lot of freedom to define what it thinks is best, in the light of the principles of Articles 101 and 102 TFEU. However, the Council is also constrained by: higher ranking law (such as Article 105 TFEU, the Charter and general principles of EU law). In addition, the Council must also lay down the essential elements of the task at hand.⁹⁰ If the

can ask the EU Courts about EU law, in times of doubt, Art. 267 TFEU. On the other hand, insofar as the Commission is better able to organise its relationship with the NCAs, there may be less need for it to intervene against them (whereas national courts are harder for the Commission to control). Reg. 1/2003, art. 11 states that the Commission and the NCAs apply the EU ‘competition rules in close co-operation’. In addition, under recital 15 they: ‘should form together a network of public authorities applying the Community [now EU] competition rules in close cooperation. For that purpose, it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States.’

⁸⁹ Sometimes the EU Courts have filled this gap with special rules of pre-emption. *E.g.*, they have held that national courts must also avoid giving judgments that would conflict with a decision contemplated by the Commission in proceedings it has initiated, Case C-344/98 *Masterfoods* [2000] ECR I-11369 ¶ 58 (this is wider than the primacy rule applying to NCAs, *see above*).

⁹⁰ Case C-355/10 *European Parliament v. Council*, EU:C:2012:516.

regulations have a dual basis, or the Council steps beyond Article 105 TFEU's remit, Articles 290 and 291(2) TFEU also apply.⁹¹

The Council might choose to bridge this gap through pre-emption, for example, by saying that the national actor must stop enforcing Articles 101 and 102 TFEU once the Commission has started an enforcement action, or once it has investigated, or once it has adopted a final decision. Or it might say that the national actor cannot make a decision that contradicts an actual or potential Commission decision, once the Commission has started acting, for example (the Council can choose one of these, or another test entirely). For example, Monti says that Regulation 1/2003 is designed to bridge this gap. It seeks more involvement from various decision-makers, while maintaining a uniform interpretation of Articles 101 and 102 TFEU. The Council uses two paths to get more uniformity, transparency and vigilance on the one hand (Article 11(1)-(5) of Regulation 1/2003), and the Commission's power to remove NCA cases under article 11(6) of Regulation 1/2003, on the other hand.⁹² Alternatively, the Council might restrict the Commission in similar ways once an NCA has started an action or taken a decision. Or, the Council could impose an obligation on the Commission or the Member States to consult each other when taking a decision under Articles 101 or 102 TFEU, for example. As we have noted, its remit is wide.

Our focus so far has been vertical clashes, between the Commission and the Member States in their application of Articles 101 and 102 TFEU. Two kinds of horizontal clashes are also relevant. The first comes from clashes between EU competition law and other goals relevant to the EU, such as environmental protection or public health.

⁹¹ See the discussion around *supra* note 64.

⁹² Monti, *supra* note 3 at 117-18.

Different Member States (and the Commission) deal with these clashes differently. A similar set of issues arises in relation to disagreements on methods and procedure, too. These kinds of clashes have already been considered above, as different interpretations here are one of the reasons for clashes between EU and national execution of Articles 101 and 102 TFEU. The second kind of horizontal clash arises where national competition laws, or their application, conflict. Once again, this may be due to disagreements on aims, methods and procedure (and institutional structure). In relation to mergers, clashes between national merger regimes are possible, even without a Community dimension. If this happens, there is a power (but not a duty) to refer these matters to the Commission.⁹³ Once again, this is just a feature of the current regulations; it does not mean that competence has to be allocated this way. Article 4(3) TEU would likely govern clashes between the application of different Member States' national competition laws.

The third kind of clash to consider is a diagonal clash. Imagine an agreement between book publishers and retailers, where the retailers agree not to sell new books below the agreed price. This might raise the prices, especially for popular books. On the other hand, there might be a cultural benefit, in the sense that retailers would make more profit on the popular books, and then could stock a wider range of books. This could have a cultural benefit to readers, or at least some of them (we have seen that the empirical evidence here is ambiguous). If this sort of arrangement affects trade between Member States, it could breach Article 101 TFEU, especially if the sole goal is consumer welfare. On the other hand, where there are cultural rules encouraging these

⁹³ See e.g., Council, Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings. Art 4(5).

kinds of arrangements, then EU competition law is potentially infringing on the cultural area, which is a Member State competence. As has already been discussed above, diagonal policy clashes of this kind could inspire vertical executive clashes where one actor thinks that cultural considerations should be incorporated into the EU competition law analysis, and others do not.

The EU Courts have been reasonably respectful of the national orders in this regard, because they have often allowed them to legislate in ways which would undermine competition.⁹⁴ Having said that, the EU Courts could give the Member States even more room here. The EU Courts do not seem to think that any of the Treaty limits on legislative competences (in relation to subsidiarity) apply to their judicial interpretations, through negative integration.⁹⁵ It is worth reconsidering this.⁹⁶ Then, the Court might be even more willing to accept diversity between the Member States when applying EU law; as well as allowing national laws to interfere with EU law.

We have seen that there is potentially a lot of space for diversity for executive and judicial acts. In terms of the ability for a diverse range of actors to pursue different aims and methods, there seems to be plenty of scope for this in widely phrased provisions like the competition rules. Diversity for executive and judicial acts is particularly important. It can be hard to foresee precise horizontal, vertical and diagonal conflicts, especially as competition law develops over time. So, legislators might not understand

⁹⁴ *E.g., see Monti, supra* note 3 at s. II.2.

⁹⁵ Grainne de Búrca, *Reappraising Subsidiarity's Significance after Amsterdam*, HARVARD JEAN MONNET WORKING PAPER 7/99, SIII (1999).

⁹⁶ Although through the Art. 267 TFEU preliminary reference procedure the ECJ does vary the latitude it gives to national courts, leaving them some discretion in deciding the case, see the discussion on direct effect below in s. 6.

all of the conflicts that could arise when they promulgate a law. Hindsight could usefully temper such problems. We have seen that the EU Courts seem keen to leave it to ‘political actors’, like the Council. For this reason we now consider legislative competences.

IV. Legislative competences

Three factors are relevant: when does the EU have legislative power (competence), the type of power conferred on the EU, and what happens in clashes between EU and national legislative competences.

When does the EU have legislative competence?

Let us start by discussing when the EU has legislative competence. One has to find provisions in the EU Treaties that confer such a competence. The first question is, where can one look for them? For the purposes of Article 2(6) TFEU and in relation to competition, the Court explains, in *Spain and Italy v Council*, which the relevant provisions of the EU Treaties are. It held that:

The scope of, and arrangements for, exercising the Union’s competences in the area of ‘competition rules necessary for the functioning of the internal market’ are determined in Part Three, Title VII, Chapter 1 of the FEU Treaty, in particular in Articles 101 TFEU to 109 TFEU.⁹⁷

To be clear, we are checking whether any competition provisions give the EU the power to legislate (and about what). We start by briefly discussing Articles 101, 102, 104 and 106 TFEU, then we turn to Articles 103 and 105 TFEU (Articles 107-9 TFEU deal with State aid and so are outside the scope of this work). First, Articles 101 and 102 TFEU do not confer any legislative competence (instead, they are prohibitions themselves).

⁹⁷ Joined Cases C-274/11 and C-295/11 *Spain and Italy v. Council*, EU:C:2013:240 ¶ 24.

The EU Courts have found that Articles 101(1) and 102 TFEU are directly effective and therefore empower and oblige national authorities to apply them.⁹⁸ The EU Courts have not pronounced on whether Article 101(3) TFEU is directly effective, although Regulation 1/2003 says that both the national courts and NCAs ‘have the power to apply’ Articles 101 and 102 TFEU in their entirety.⁹⁹ Article 106 TFEU deals with public undertakings and undertakings to which Member States grant special or exclusive rights. Article 106(2) TFEU is directly effective.¹⁰⁰

This only leaves Articles 103 and 105 TFEU as provisions potentially conferring EU legislative competition competence within the parameters of this work. Article 103 TFEU confers legislative competence on the EU. It establishes that:

⁹⁸ See the discussion around *supra* note 56.

⁹⁹ Reg. 1/2003, Arts 1, 5 and 6. The position on Art. 101(3) is much debated, *see* the references at *supra* note 57. Until the entry into force of provisions under Art. 103 TFEU, Art. 104 TFEU allows the Member States to apply Arts 101 and 102 TFEU. It also underlines their legislative competence for ‘agreements, decisions and concerted practices and on abuse of a dominant position in the internal market’. This has less relevance since regulations have been adopted pursuant to Art 103 TFEU (first, Reg. 17 and then Reg. 1/2003). However, Art. 104 may become relevant again if the regulations or directives laid down under Art. 103 TFEU were to lapse, or be revoked in some way, without being replaced, Tavares, *supra* note 69 at 241-42. For an application of this argument in relation to Art. 104 and the EU Merger Regulation, *see* references at note 230. Such an interpretation is against a normal reading of the wording in Art. 104, which, on its face, implies that it is only relevant up until the first of these Art. 103 rules is adopted. Having said that, if this were true, then there would have been no need to retain Art. 104 in the EU Treaties.

¹⁰⁰ Case 127/73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v. SV SABAM and NV Fonior* [1974] ECR 313. There is some discussion of this view, for more details *see, id.* at 165-68. Art. 106(3) generates a legislative and an executive competence for the Commission, but a further discussion of such matters is not within the scope of this work.

1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.

2. The regulations or directives referred to in paragraph 1 shall be designed in particular:

(a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments;

(b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;

(c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102;

(d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph;

(e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.¹⁰¹

¹⁰¹ As we saw in our discussion on executive competence, Art. 105 TFEU focuses on the Commission's executive competence to 'ensure the application of the principles laid down in Articles 101 and 102.' So, it is not relevant in this discussion of EU legislative competences, except that Art. 105(3) gives the Commission a competence to legislate detailed rules for the application of Art. 101(3) TFEU for categories of agreement in relation to which the Council has adopted a regulation or directive under Art. 103(2)(b) TFEU, *see* the discussion around note 108.

Article 103(1) TFEU demands Council regulations or directives¹⁰² to give effect to Article 101 and 102 TFEU's principles (although we are not told precisely what these principles are). Council legislation must at least deal with the five issues listed in Article 103(2) TFEU,¹⁰³ but it is wider than this, as these are only examples ('in particular'). So, we start by examining these five Article 103(2) TFEU issues in a little more detail; then, we discuss the limits of Article 103(1) TFEU.

First, provision must be made for fines and periodic penalty payments, Article 103(2)(a) TFEU.¹⁰⁴ Through imposing fines and periodic penalties, the Council can ensure a more effective enforcement of the principles of Articles 101 and 102 TFEU (it helps to deter undertakings from infringing these principles and punishes them when they do).¹⁰⁵ As discussed above, in order to provide undertakings with sufficient legal certainty,

¹⁰² Art. 288 TFEU explains that regulations are binding in their entirety and directly applicable in the Member States. Directives are 'binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

¹⁰³ The English 'shall', the French '*sont établis*' and the Spanish '*adoptará*' imply that the regulations or directives will deal with all of these topics. This does not seem optional, although it has not always been followed. Council Reg. 17 did not deal with Art. 103(2)(e) TFEU, for example.

¹⁰⁴ Reg. 1/2003, Arts 23 (fines), 24 (periodic penalty payments) and 25 (limitation periods for the imposition of penalties) are examples of work that seems to fall under this provision.

¹⁰⁵ Art. 103(2)(a) does not explain who should be able to issue these 'fines and periodic penalty payments'. As noted in the discussion of executive competences, there are essentially two enforcement models. In one, the Commission is lead enforcer (the NCAs co-operate and assist it); and, in the other, the national courts and NCAs act in their own right. Under the first model, the original intention seemed to be that the Commission authorises the Member States to take specific measures to remedy any infringements that it identifies which have not been brought to an end (the conditions and details of which the Commission determines). In the second model, the Member States impose their own fines. Art. 103(2)(a) seems flexible enough to accommodate both models.

Article 52 of the Charter likely imposes a duty to explain at least the range of fines and periodic penalties in advance.¹⁰⁶ Article 103(2)(a) TFEU could be used in order to comply with such an obligation.

Secondly, the Council must lay down detailed rules for the application of Article 101(3) TFEU, Article 103(2)(b) TFEU. This has both a procedural and a substantive dimension (in the sense that the Council can supplement Article 101's substance). In terms of the procedure, there has been much debate about whether Article 101(3) TFEU is directly effective or requires the Commission (or some other body) to apply it in an administrative action. The first procedural rules from the Council, Regulation 17 (which was passed in 1962 when most Member States did not have competition laws), principally gave the Commission the responsibility for applying Article 101(3) TFEU, normally once undertakings had notified relevant arrangements to it. By 2003, most Member States had NCAs and competition principles were better understood by firms throughout the EU. Regulation 1/2003 removed the Commission's notification regime, also allowing national courts and NCAs to apply Article 101(3) TFEU.¹⁰⁷

Many firms had found it complex to apply Article 101(3) TFEU by themselves (so called 'individual exemptions'). The consequences of misjudgement can be dramatic, in terms of fines and the nullity of the arrangement, Article 101(2) TFEU. One of the techniques that the Council has employed to help undertakings, has been producing

¹⁰⁶ See the discussion around *supra* note 38.

¹⁰⁷ Compare Reg. 17, arts 4-6 and Reg. 1/2003, Arts 1 and 3-6. Also see the discussion at *supra* note 60, which argues that Art 103(2)(b)'s express wording is clear enough to empower the Council to remove executive competence from Member State actors, even if Art. 101(3) is directly effective. The Council could also ask NCAs to apply Art. 101(3) even if it is not directly effective (although this is more problematic for national courts).

block exemption regulations (the Council can empower the Commission to do the same, Article 105(3) TFEU).¹⁰⁸ Arrangements that fall within the terms of a block exemption regulation, are normally automatically exempted from Article 101(1) TFEU. The power to make block exemption regulations is a limited substantive power. The Council is tightly constrained in what it can do here, its general rules can merely supplement the substance of Articles 101 and 102 TFEU, and their principles. Article 103(2)(b) TFEU states that block exemption regulations or directives ‘lay down detailed rules for the application of Article 101(3)’. Block exemptions cannot be wider than Article 101(3) TFEU¹⁰⁹ although, if they are (in the context of a particular case), then legal certainty means that undertakings should be able to rely on them where their arrangements fall within the block exemption’s wording and spirit. While the benefits of block exemptions can be withdrawn in this instance,¹¹⁰ this is only prospectively, and it must be proportionate (which may be important where the undertakings involved have

Similarly, one might ask whether the Council could remove the Commission’s power to apply Art. 101(3) TFEU under Art. 103(2)(b). Once again, this depends upon the relationship between Arts 103 and 105 TFEU, *see* discussion around *supra* note 44. When using Art. 103 the Council cannot contradict higher-ranking EU provisions (such as the EU Treaties, including Art. 105). So, it is unlikely that the EU Courts would allow the Council to limit the Commission’s Art. 105(1) power to ‘ensure the application of the principles laid down in Articles 101 and 102.’ unless there were clear wording in the EU Treaties to this effect. There is clear wording vis-à-vis Art. 101(3) TFEU, *see* Art. 103(2)(b), however, there is no such wording for Arts 101(1) and 102 TFEU.

¹⁰⁸ Examples of current Council and Commission block exemptions can be found at <http://ec.europa.eu/competition/antitrust/legislation/legislation.html> .

¹⁰⁹ Commission, Guidelines on the application of Article 81(3) of the Treaty (2004) ¶ 35-6.

¹¹⁰ The Commission and the NCAs can withdraw block exemptions under certain circumstances, Reg. 1/2003, art 29.

reasonably relied on the block exemption and have high sunk costs, for example). Firms can also always rely on Article 101(3) TFEU, even if their arrangements fall outside a block exemption.¹¹¹

Article 103(2)(c) TFEU empowers the Council to define, if need be, the scope of the provisions of Articles 101 and 102 TFEU in the various branches of the economy.¹¹² Tavares rightly calls this a substantive legislative competence.¹¹³ Having said that, the power is quite limited, it merely allows a determination of the scope of Articles 101 and 102 TFEU in various branches of the economy, rather than a new and original definition of competition law in these areas. Other language versions of the EU Treaties are clearer on this point than the English version, as they refer to the field of application of Articles 101 and 102 TFEU.¹¹⁴

¹¹¹ Case C-439/09 *Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi* [2011] ECR I-9419 ¶ 48-50, for example.

¹¹² For many years, *e.g.*, maritime transport had a special regime, *see* Council, Directive concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP § OJ 1999 L175/43 (1999). This regime has now been repealed, *see* Council, Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Art. 32 as amended by Council, Regulation repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and amending Regulation (EC) No. 1/2003 as regards the extension of its scope to include cabotage and international tramp services, Arts 1-2.

¹¹³ Tavares, *supra* note 69 at 129.

¹¹⁴ *E.g.*, the French version reads 'de préciser, le cas échéant, dans les diverses branches économiques, le champ d'application des dispositions des articles 101 et 102'; the German version reads 'gegebenenfalls den Anwendungsbereich der Artikel 101 und 102 für die einzelnen Wirtschaftszweige näher zu bestimmen'; and the Spanish version reads 'precisar, eventualmente, respecto de los distintos sectores económicos, el ámbito de aplicación de los artículos 101 y 102'.

In addition, Article 103(2)(d) TFEU allows the Council to define the functions of the Commission and the EU Courts when applying the provisions laid down in Article 103(2) TFEU. The scope of this provision is unclear.¹¹⁵ A narrow and a wide interpretation are possible. Its focus is to define the functions of the EU Courts and the Commission, at least insofar as they relate to each other (for the provisions laid down in Article 103(2) TFEU).¹¹⁶ The narrow interpretation, which is still potentially far-reaching, is that the Council here could fundamentally re-write the functions of these EU Institutions, *insofar as they relate to each other in this area*, under provisions such as Articles 258-60 (method for the Commission to challenge Member State failure to act before the ECJ), 261 (EU Courts can be given unlimited jurisdiction with regard to penalties in certain regulations),¹¹⁷ 263-64 (EU Courts' review of the legality of Commission acts), 265 (EU Courts' review of failures to act by the Commission), and 279 TFEU (ability of EU Courts to apply interim measures against the Commission).¹¹⁸

¹¹⁵ This focus is also unclear, does it mean when applying the five paragraphs in Arts 103(2), or does it mean when applying the provisions in the regulations or directives made in order to implement the rules under these five paragraphs. It is also unclear why it does not apply to the rules laid down under Art. 103(1), which are wider than the five paragraphs in Art 103(2).

¹¹⁶ This emphasis on their respective functions also comes through in the French 'de définir le rôle respectif de la Commission et de la Cour de justice de l'Union européenne', Spanish 'definir las respectivas funciones de la Comisión y del Tribunal de Justicia de la Unión Europea' versions of Art. 103(2)(d) TFEU.

¹¹⁷ *E.g.*, could the Council, under Art. 103(2)(d), state that the Commission had unlimited jurisdiction to set fines, with the EU Courts only able to review the legality of the fines the Commission imposes, rather than being able to impose their own fine where they disagree?

¹¹⁸ Note that Art. 13(2) TEU states that the EU Institutions will act 'within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out

Instead, the ECJ has interpreted the provision more widely, ignoring the relative focus on the relationship between the Commission and the EU Courts. Against Article 103(2)(d) TFEU's wording, it has used this provision to allow the Commission to be empowered to act within Article 105 TFEU more generally. The ECJ has held that the competition rules are based

on the premise, which finds expression in particular in Articles 87(2)(d) and 89 [now Articles 103(2)(d) and 105], that it is for the Commission to ensure the rules on competition are applied by undertakings and to determine, where necessary, whether there has been an infringement of those rules.¹¹⁹

This has led the EU Courts to hold that Article 103(2)(d) TFEU confers competence on the EU to legislate on the procedural rules that the Commission uses when applying Articles 101 and 102 TFEU. As a result of this wide reading, the EU Courts imply that the Council has competence to create procedural rules on matters such as: the Commission's powers of inspection,¹²⁰ the procedure for hearings, time limits for

in them. The institutions shall practice mutual sincere cooperation.' This is an argument against such an interpretation. However, it may be possible to interpret Art. 103 TFEU as explicitly allowing changes to these articles.

¹¹⁹ Case 7/82 *Gesellschaft zur Verwertung von Leistungsschutzrechten mbH v. Commission* [1983] ECR 483 ¶ 22. Similarly, Case T-69/04 *Schunk GmbH and Schunk Kohlenstoff-Technik GmbH v. Commission* [2008] ECR II-2567 ¶ 48.

¹²⁰ The ECJ was apparently referring to Art 103(2)(d) TFEU when it held 'As far as concerns the principle of conferred powers, it must be stated that the rules of procedure with respect to competition law, as set out in Article 14 of Regulation No 17 and Article 20 of Regulation No 1/2003 [the Commission's powers of inspection in cases under Arts 101 and 102 TFEU], are part of the provisions necessary for the functioning of the internal market whose adoption is part of the exclusive competence

replying to statements of objections and other rights of defence, for example. This may be too wide a reading of Article 103(2)(d) TFEU; however, a similar result can be achieved through the interpretation of Article 103(1) TFEU, see below.

Fifthly, Article 103(2)(e) TFEU allows the Council to create rules about the relationship between Articles 101-106 TFEU (or regulations or directives laid down under Article 103 TFEU) and national laws. We discuss this provision in more detail below.¹²¹

Having looked at the five issues under Article 103(2) TFEU, we can now turn to the Council's power to make regulations or directives under Article 103(1) TFEU. We know that this power is wider than the five issues in Article 103(2) TFEU, but how wide is it? A starting point is to compare Article 103(1) TFEU with the equivalent State aid provision, Article 109 TFEU which states:

The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure.

Whereas Article 109 TFEU focuses on making regulations for the application of the State aid provisions (as well as block exemptions), Article 103 TFEU seems to be wider, dealing with application of the principles of Articles 101 and 102 TFEU (and block exemptions), but also dealing with fining, the scope of Articles 101 and 102 TFEU, and the relationship with national laws.

conferred on the Union by virtue of Article 3(1)(b) TFEU.', Case C-550/07 P *Akzo Nobel Chemicals and Akros Chemicals v. Commission* [2010] ECR I-8301 ¶ 116-17.

¹²¹ See the discussion around note 173.

To aid the clarity of the discussion, let's split the analysis into two categories, the Council's power to make regulations or directives on: general rules that supplement the substance of Articles 101 and 102 TFEU, and their principles; and wider operational and procedural issues. We believe that the Council's room for manoeuvre is quite wide here.¹²² While Article 103(2) TFEU lists specific powers that the Council can exercise by virtue of its competence under Article 103(1) TFEU, the word 'in particular' makes it clear that the competence of the Council goes beyond such listed powers. Having said that, the EU Courts' case law on the interpretation of such lists states that 'new competences' 'discovered' outside of listed examples must be of the same type.¹²³

When Council regulations give actors executive powers (whether solely based upon Article 103 TFEU, or on a dual basis), the scope and arrangements for their executive powers are determined by: the limits of the articles in the EU Treaties upon which the regulation is based; higher ranking law (such as Article 105 TFEU, the Charter and general principles of EU law), as well as the regulation itself. In addition, the doctrine of essential elements requires the EU legislator to lay down the essential elements of

¹²² At least within some of the five categories the ECJ leaves the Council a wide 'discretion'. Under Art. 103(2)(b), the ECJ has held that it is for the Council to decide whether a particular block exemption regulation is 'appropriate', for example. This may imply a wide 'discretion' for the Council here (although this case dealt with the specific category of block exemption which the Council explicitly has the power to adopt), Case 32/65 Italy v. Council and Commission [1966] ECR 389. Perhaps it would do the same when it comes to extending the list of five as well.

¹²³ See the analysis in Case 25/70 Köster [1970] ECR 1161 ¶ 15-19.

the task at hand.¹²⁴ Where the regulations have a dual basis, Articles 290 and 291(2) TFEU also apply.¹²⁵

Let's start with substantive issues (widely understood), by which we mean can the Council use Article 103 TFEU to make regulations or directives that affect the principles set out in Articles 101 and 102 TFEU? With one exception, we do not think that this is possible, not least because Article 103(1) TFEU specifically aims to give 'effect to' these principles. The nature of Article 103 TFEU's procedure supports this view. Article 103 TFEU explains the procedure that the EU Institutions must adopt when making regulations or directives in this area. This procedure does not follow either the ordinary, or a special, legislative procedure, set out in Article 289 TFEU. So, a regulation or directive laid down under Article 103 TFEU is not 'a legislative act.[footnote: See Joined Cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* EU:C:2017:631, para 62.]'¹²⁶ This matters. By implication, non-legislative acts seem more about operationalising other norms and policy choices, rather than making them themselves (in our case, Articles 101 and 102 TFEU). The difficulty with this argument is that, as noted, Article 103(2)(c) TFEU explicitly allows the Council to define, in various branches of the economy, 'the scope of the provisions of Articles 101 and 102' (something that is normally seen as a legislative activity).

Article 103(2) TFEU only explicitly relates to the substance on one occasion (Article 103(2)(c) TFEU). Given the clear, explicit wording in Article 103 TFEU, there is little

¹²⁴ Case C-355/10 *European Parliament v. Council*, EU:C:2012:516.

¹²⁵ See the discussion around *supra* note 61.

¹²⁶ Alexander Türk, *Primary Legislation and Legislative Procedures*, in OXFORD PRINCIPLES OF EUROPEAN UNION LAW, VOLUME 1: THE EUROPEAN UNION LEGAL ORDER at 706 (Robert Schütze & Takis Tridimas eds., 2018).

doubt that the Council can define the scope of Articles 101 and 102 TFEU. However, allowing fundamental substantive issues to be decided outside of Article 289 TFEU legislative acts (as well as the fact that Article 103 TFEU is for ‘giving effect to the *principles* set out in Articles 101 and 102’, our emphasis), is significant. So, the EU Courts may interpret Article 103(1) TFEU restrictively in this regard and only allow regulations or directives made under it to deal with substantive issues within the limited confines of Article 103(2)(c) TFEU, i.e. defining the scope of Articles 101 and 102 TFEU in various branches of the economy.

If the EU Courts were to limit the Council’s Article 103 TFEU powers in this way, then it would have no (or perhaps, limited) competence to produce substantive competition legislation (affecting the principles of Articles 101 and 102 TFEU). So, it would be unable to introduce new kinds of competition laws, such as merger rules, market studies, or rules on economic dependence, unless it can find an additional legal basis in the EU Treaties to support this.¹²⁷ As a result, one might question the legal basis for a power, such as that in article 17, Regulation 1/2003, which allows the Commission to investigate sectors of the economy, even if there is no actual or suspected breach of Articles 101 and 102 TFEU. A power such as this does not seem to fall within Article 103 TFEU and should be laid down on a dual basis.¹²⁸

Let’s quickly outline the rules of when a dual legal basis is possible, and what can be achieved through one, then we analyse three examples (the EU Merger Regulation, a

¹²⁷ Examples of national laws which protect this are given in Commission staff working paper accompanying the Communication from the Commission to the European Parliament and Council, Report on the functioning of Regulation 1/2003 (2009) ¶ 162-69.

¹²⁸ Furthermore, Art. 291(2) TFEU would then limit the scope of Commission executive action, *see* the discussion around *supra* note 64.

sector specific competition provision and the draft Directive on Effective Enforcement). Türk highlights two related issues when considering whether a dual legislative basis is necessary (or possible):

First, the question arises as to whether the measure falls within the scope of one or more legal bases. Whether a measure falls within the scope of a single provision will be determined either on the basis of the *lex specialis* rule or that of predominant purpose...If, however, the measure falls within the scope of more than one provision and this cannot be resolved through either rule, then both legal bases need to be employed. In the latter case a second issue arises, namely as to which procedure should be used, where the provisions provide for different procedures for the adoption of the act. In this case two conflicting principles, representing also different power dynamics, come into play. The first of these is the principle of attributed powers, which in certain provisions allocates the decision-making power to Council and thereby protects the prerogatives of the Member States in the legislative process.⁽¹⁾ The second principle in play is that of democracy, which favours the use of the provision, which grants the greatest power to the European Parliament. Post-Lisbon it seems obvious that the conflict has been resolved in favour of the second principle.⁽²⁾ The prerogatives of the Council are, however, protected to the extent that unanimity is required in the Council, where one of the legal bases so requires.⁽³⁾¹²⁹

¹²⁹ Türk, *supra* note 126 at 711-12, *see also* 706-12. In addition, the ECJ has ‘made it clear that an act will only be annulled if the error in the choice of legal basis (bases) is not a “purely formal defect”.’, *see* Case C-491/01 British American Tobacco [2002] ECR I-11453 ¶ 98. *See also* Case C-81/13 United Kingdom v. Council EU:C:2014:2114 ¶ 67.

(1) See also Opinion of AG Kokott in Case C-178/03 *Commission v Parliament and Council* [2006] ECR I-107, para 61.

(2) See the opposing view of AG Kokott in her Opinion in Case C-178/03 *Commission v Parliament and Council* [2006] ECR I-107, para 61. It should, however, be made clear that her approach does not make much difference in practice. Incompatibility of the procedures would lead, in her view, to a single legal basis being required, which would have to be based on the procedure that involves greater participation of the European Parliament...

(3) See Case C-166/07 *European Parliament v Council* [2009] ECR I-7135.

For example, the EU Merger Regulation (which contains both procedural and substantive rules, which, in part, overlap with Articles 101 and 102 TFEU, but also go beyond them)¹³⁰ is based on both Articles 103 and 352 TFEU.¹³¹ Note that the EU

¹³⁰ This is because the EU merger reg. can apply even when there is no arrangement between undertakings (necessary under Art. 101 TFEU) and where there is no dominant position (necessary under Art. 102 TFEU), *see* art. 2, Reg. 139/2004.

¹³¹ As recital 7 of the EU merger reg. explains ‘Articles 81 and 82 [now Arts 101 and 102 TFEU], while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Reg. should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty [now, respectively, Arts 103 and 352 TFEU], under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the Treaty.’ Art. 352 TFEU relates to the internal market, which is a shared competence. Council, Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, recital 7. This recital also hints at the relevance of Common Agricultural Policy goals, another area of shared

Merger Regulation is not merely extending the Article 101 and 102 TFEU principles into new areas, but potentially affecting the 101 and 102 TFEU principles in the areas where they already apply. Whether Article 352 TFEU allows for this is controversial.¹³²

In addition, the Council has also made, from time to time, special rules for certain sectors of the economy. Some contain substantive provisions. For example, in relation to maritime transport, Council Regulation 4056/86 was based on Articles 100(2) and 103 TFEU. Article 2 of this regulation, stated that Article 101(1) TFEU shall not apply to: ‘agreements, decisions and concerted practices whose sole object and effect is to achieve technical improvements or cooperation by means of:...(e) the consolidation of individual consignments’.¹³³

competence, Art 4(2)(d) TFEU. The recitals of Council, Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings § OJ 1989 L395/1 (1989) had similar wording. *See also*, Tavares, *supra* note 69 at 134-35.

¹³² Art. 352 TFEU only applies if there is no specific legal basis in the EU Treaties. However, it cannot apply where a specific provision excludes harmonisation, Art. 352(3). This seems to be fulfilled where a provision expressly excludes any harmonisation, think of Art. 168(5) TFEU, for example. It may also be possible where this happens implicitly. If this is correct, then we would need to assess whether Art. 103 TFEU is an exhaustive provision, in terms of operationalising Arts 101 and 102 or not. If we say it is exhaustive that may also have consequences for horizontal clashes, as another legal basis (*e.g.* Art. 114) could not then limit Arts 101 and 102. In the end, the EU Courts would probably hold that Art. 103 does not stand in the way of operationalising the scope of Arts 101 and 102 through other legal bases.

¹³³ Council Regulation (EEC) No. 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport. This regime has now been repealed, *see* Council, Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, art 32 as amended by Council, Regulation repealing Regulation (EEC) No 4056/86 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, and

The recitals of Regulation 4056/86 explained this intervention by saying that it sought a balance between ensuring that competition is not ‘unduly distorted’ and avoiding ‘excessive regulation of the sector’. While defining ‘the scope of’ Articles 101 and 102 TFEU the regulation claimed to have taken into account the ‘the distinctive characteristics of maritime transport’. More specifically, it added that: ‘certain types of technical agreement, decisions and concerted practices may be excluded from the prohibition on restrictive practices [Article 101(1) TFEU] on the ground that they do not, as a general rule, restrict competition’.

This seems to be an attempt (and there is an admission of this) to amend Article 101(1) TFEU, because such arrangements, seem likely to ‘share markets or sources of supply’. This is explicitly sighted as a ‘restriction of competition’, Article 101(1)(c) TFEU. Note that this provision does not fall within Article 103(2)(c) TFEU (which only relates to the scope of Articles 101 and 102 TFEU, rather than changing their content),¹³⁴ and thus Article 103 TFEU was not a sufficient legal basis in terms of this kind of intervention. For a change in Article 101 TFEU of this nature to be acceptable, one needs strong language in Article 100(2) TFEU (and other transport provisions in the

amending Regulation (EC) No. 1/2003 as regards the extension of its scope to include cabotage and international tramp services, arts 1-2.

¹³⁴ See the discussion around *supra* note 112.

EU Treaties) to explicitly support changing the competition rules in this way.¹³⁵ This language does not appear to be present.¹³⁶

¹³⁵ By way of example, Art. 42 TFEU allows the European Parliament and Council to determine the extent to which the Chapter relating to the EU rules on competition applies to production of and trade in agriculture products within the framework of Art. 43(2) TFEU. This has been done in European Parliament & Council, Regulation (EU) No 1308/2013 of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (2013), Part IV, Chapter I.

¹³⁶ Tavares gives a third example, from the Draft Directive on Effective Enforcement. This directive notes the definition of ‘undertaking’, used when applying Arts 101 and 102 TFEU, in line with the case law of the EU Courts. It goes on to say that: ‘Member States shall ensure that the notion of undertaking is applied for the purpose of imposing fines on parent companies and legal and economic successors of undertakings’, Commission, Proposal for a Directive of the European Parliament and the Council to Empower the Competition Authorities of the Member States to be more Effective Enforcers and to Ensure the Proper Functioning of the Internal Market (2017), art 12(3). *See* also the discussion in Tavares, *supra* note 69 at 233-38. This (draft) directive has a dual legislative basis, Arts 103 and 114 TFEU. It goes beyond merely giving effect to the principles set out in Arts 101 and 102 TFEU, in part, because it also applies to national competition laws. As the Commission explains: ‘Ensuring that the NCAs have the means and instrument to be more effective enforcers of Articles 101 and 102 TFEU falls within the ambit of Article 103(1) TFEU as it is conducive to ensuring the full effectiveness of the competition rules. Article 103(1) empowers the Council to adopt regulations or directives “to give effect to the principles set out in Articles 101 and 102”. In particular, such measures can be adopted pursuant to Article 103(2)(e) TFEU “to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article” and to Article 103(2)(a) “to ensure compliance with the prohibitions laid down in Article 101(1) and Article 102 by making provision for fines and periodic penalty payments”. However, this legal basis does not in itself suffice, because both the aim and the content of the proposed Directive transcend this legal basis. The proposed Directive has an independent objective of seeking to bolster the functioning of the internal market by: (1) tackling national rules which prevent NCAs from being effective enforcers thereby creating more equal protection

The second category that we had to investigate was the Council's ability to use Article 103(1) TFEU to make procedural regulations or directives. This certainly seems acceptable as regards fining and periodic penalty payments (Article 103(2)(a) TFEU) or the procedural rules for dealing with Article 101(3) TFEU (Article 103(2)(b) TFEU). Note that neither provision explains which actor, the Commission or the NCAs, for example, should benefit from these powers.

Beyond this, Article 103 TFEU regulations and directives that implement Article 105 TFEU's schema are appropriate. This might include setting out the Member States' powers when they co-operate with or assist the Commission, as well as dealing with the Commission's own powers for investigations and decisions. It is possible for the Council to 'upgrade' the powers of the Member States or the Commission (go beyond the powers set out in Article 105 TFEU); however, it can only do this to 'give effect to the principles in Articles 101 and 102 TFEU'.¹³⁷ Having said that, what counts as an 'upgrade' is open to debate. As we have seen, Article 105 TFEU could be interpreted

of companies and consumers in Europe; (2) ensuring that the same guarantees and instruments are in place for national competition law when it is applied in parallel to Articles 101 and 102 TFEU to ensure legal certainty and a level playing field; and (3) putting in place effective rules on mutual assistance to safeguard the smooth functioning of the internal market and the system of close cooperation within the ECN.', Commission, Commission Staff Working Document, Implementation Plan - Accompanying the document Proposal for a Directive of the European Parliament and of the Council, to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (2017) at 5. Nevertheless, we do not see the provision relating to undertakings as one that is substantive (in the sense that we do not think that it can affect the principles of Arts 101 and 102 TFEU, in a way beyond that acceptable in Art. 103(2)(a)).

¹³⁷ In this case, Art. 291(2) TFEU also applies and so uniform conditions for implementing these provisions must be 'needed' in order for the Council to confer powers on the Commission.

in a wide or narrow way. If interpreted widely, then probably any procedural law which assists the Commission's application of the principles in Articles 101 and 102 TFEU could fall within the Council's legislative competence in Article 103(1) TFEU. Early on a decision was taken to widen the powers that the Commission was given in Article 105 TFEU, furnishing it with the procedural competences so that it could investigate and enforce Articles 101 and 102 TFEU itself, such as powers to demand documents and the ability to make commitment decisions, for example. The EU Courts often accept that the Council can use Article 103(1) TFEU as the sole basis for providing the Commission with procedural powers of this nature.¹³⁸

On the other hand, the Council has spent relatively little time awarding procedural powers to the Member States (the Council can also do this under Article 103(1) TFEU). In part, this may be because the principle of procedural autonomy is considered to be particularly important, making it hard to agree the imposition of uniform procedural rules on the Member States (Article 291(2) TFEU would become relevant, so uniform rules must be 'needed'). The EU Courts seem to be getting more relaxed about imposing at least minimum standards in this area, based on the powers of the Commission. The Council has sought to go even further. Its directives on both damages actions and effective enforcement (the latter is a draft) have a dual legislative basis, Articles 103 and 114 TFEU.¹³⁹ This is because both sets of rules go beyond merely

¹³⁸ See Case C-550/07 P *Akzo Nobel Chemicals and Akros Chemicals v. Commission* [2010] ECR I-8301 ¶ 116-17, for example.

¹³⁹ See European Parliament & Council, Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (2014); and Commission, Proposal for a Directive of the European Parliament

giving effect to the principles set out in Articles 101 and 102 TFEU.¹⁴⁰ By way of example, in its draft Directive on Effective Enforcement, the Commission seeks to introduce minimum independence requirements for the NCAs (at the moment we saw that the amount of independence in the Member States' institutional structures varies considerably). Article 4 of the draft directive states:

To guarantee the independence of national administrative competition authorities when applying Articles 101 and 102 TFEU, Member States shall ensure that they perform their duties and exercise their powers impartially and in the interests of the effective and uniform enforcement of these provisions,

and the Council to Empower the Competition Authorities of the Member States to be more Effective Enforcers and to Ensure the Proper Functioning of the Internal Market (2017).

¹⁴⁰ *E.g.*, see the Commission's explanation to the draft directive on effective enforcement, at *supra* note 135. Also, Commission, Commission Staff Working Document, Implementation Plan - Accompanying the document Proposal for a Directive of the European Parliament and of the Council, to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (2017) at 5. Similarly, Parliament & Council, Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (2014), recital 8 explains 'Undertakings established and operating in various Member States are subject to differing procedural rules that significantly affect the extent to which they can be held liable for infringements of competition law. This uneven enforcement of the right to compensation in Union law may result not only in a competitive advantage for some undertakings which have infringed Articles 101 or 102 TFEU but also in a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is enforced more effectively. As the differences in the liability regimes applicable in the Member States may negatively affect both competition and the proper functioning of the internal market, it is appropriate to base this Directive on the dual legal bases of Articles 103 and 114 TFEU.'

subject to proportionate accountability requirements and without prejudice to close cooperation between competition authorities in the European Competition Network.

Recitals 13 and 14 justify the need for independence in the following terms:

Empowering NCAs to apply Articles 101 and 102 TFEU impartially and in the common interest of the effective enforcement of European competition rules is an essential component of the effective and uniform application of these rules.

The independence of NCAs should be strengthened in order to ensure the effective and uniform application of Articles 101 and 102 TFEU. To this end, express provision should be made in national law to ensure that when applying Articles 101 and 102 TFEU NCAs are protected against external intervention or political pressure liable to jeopardise their independent assessment of matters coming before them. For that purpose, rules should be laid down in advance regarding the grounds for the dismissal of the members of the decision-making body of the NCAs in order to remove any reasonable doubt as to the impartiality of that body and its imperviousness to external factors.

Many believe in the need for independent NCAs.¹⁴¹ However, Townley has argued that the reasons that are normally given to justify independence (such as to avoid political interference and to deal with a commitment problem) are not persuasive overall, from a theoretical perspective. In addition, relying on empirical data looking at the

¹⁴¹ For example, see William Kovacic, *Competition Agencies, Independence, and the Political Process*, in *COMPETITION POLICY AND THE ECONOMIC APPROACH: FOUNDATIONS AND LIMITATIONS* (Josef Drexler, et al. eds., 2011); and ANNETJE OTTOW, *MARKET AND COMPETITION AUTHORITIES: GOOD AGENCY PRINCIPLES* at 22-26 and chapter 6 (2015).

performance of NCAs and other independent bodies (such as central banks) Townley also argues that independent institutions do not seem to be more effective enforcers.¹⁴²

Good evidence would normally be expected to justify such an emphasis on independence because unless these provisions fall within Article 105 TFEU's ambit (however interpreted), then Article 291(2) TFEU will also apply. This means that Council regulations or directives can only limit implementation by the Member States where uniformity is 'needed'. It looks as though the Commission has fallen short in terms of the 'bar' here. The Commission does not, to our knowledge, marshal any examples of when a lack of independence undermined effective enforcement or the single market. Most of the discussion that it has is purely theoretical.¹⁴³ It might also be questioned whether political independence, at least, is so important, given the Commission's own institutional structure (the competition directorate cannot take final Article 101 or 102 TFEU decisions independently of other EU Directorate Generals, which focus on other goals, such as the environment and health and so likely consider other, 'non-competition' factors in their decision-making).¹⁴⁴

Unless legislative competence is transferred to the EU, the Member States retain it. This might mean producing national competition laws that closely track the language and ideas in Articles 101 and 102 TFEU, such as sections 2 and 9 of the UK Competition

¹⁴² TOWNLEY, *supra* note 2 at chapter 3.

¹⁴³ See e.g., Commission, Commission Staff Working Paper - Enhancing Competition Enforcement by the Member States' Competition Authorities: institutional and procedural issues (2014), s. 2.

¹⁴⁴ In cases such as Case C-309/99 *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577 ¶ 108, the ECJ implies that a lack of political independence might be acceptable, given that it allows different Member States to come to different balances in the application of Articles 101 and 102 TFEU.

Act 1998 (which would be of assistance if there is no appreciable affect on trade between Member States, and so Articles 101 and 102 TFEU do not apply). However, they also apply to other kinds of national competition laws, such as the UK power to do market investigations;¹⁴⁵ or national rules on economic dependence.¹⁴⁶ The Member States may also want to legislate for procedural matters (and both of their executive roles demand this) as well as on institutional structures for their NCAs. We do not know what freedom the Member States have to legislate in these areas until we see what kind of legislative competence the EU has been given here, and whether (in the case of shared competence) this has been exercised so as to pre-empt the Member States. In addition, we need to consider Article 103(2)(e) TFEU;¹⁴⁷ and the Member States' other EU obligations, such as sincere co-operation under Article 4(3) TEU.¹⁴⁸

What type of legislative competence does the EU have?

This opens the door to a discussion of our second issue, the kind of legislative competence that the EU has been given when it has legislative competence. The Lisbon Treaty made progress on clarifying the kind of EU legislative competence, but there is still considerable opacity. Article 3(1)(b) TFEU makes 'the establishing of the

¹⁴⁵ Enterprise Act 2002, s. 131.

¹⁴⁶ Examples of national laws which protect this are given in Commission, Staff Working Paper - Report on Regulation 1/2003 (2009) ¶ 162-69.

¹⁴⁷ See the discussion around note 173. The discussion of Art. 103(2)(e) TFEU comes later as it relates to the relationship between Member State laws and Arts 101 and 102 TFEU.

¹⁴⁸ E.g., in Case 13/77 SA G.B.-INNO-B.M. v. Association des détaillants en tabac (ATAB) [1977] ECR 2115 ¶ 27-33 the ECJ held that the EC Treaty (now the EU Treaties) imposes a duty on Member States not to jeopardise the EU Treaties' objectives. So, they cannot adopt or maintain in force any measure that deprives Arts 101 and 102 of their effectiveness (e.g., national laws which allow undertakings to escape the constraints of Arts 101 and 102 TFEU). Also see later discussion around note 181.

competition rules necessary for the functioning of the internal market’ an area of exclusive EU legislative competence.

Rossi says this grants the EU exclusive legislative competence on substance and procedure whenever establishing the competition rules ‘necessary for the functioning of the internal market’.¹⁴⁹ If true, this would be out of line with a key aim of the Lisbon Treaty, limiting the competence creep, by limiting the transfer of further competences to the EU.¹⁵⁰ However, the position is more complex than Rossi claims, as we have to map the nature of the legislative competence on to the scope of the legislative competences. Shared competence is the general residual category; unless the EU Treaties provide otherwise, competence is shared, Article 4(1) TFEU. This means that,

¹⁴⁹ Rossi, *supra* note 10 at 99. She seems to find support for this in Case C-550/07 P Akzo Nobel Chemicals and Akcros Chemicals v. Commission [2010] ECR I-8301 ¶ 45. Rossi criticises this position as being out of step with the pre-Lisbon case law. She adds that it seems out of step with Protocol No. 27 to the TEU, which notes that the internal market, as set out in Art. 3 TEU, includes a system ensuring that competition is not distorted. It then continues that, to this end the EU ‘shall, if necessary, take action under the provisions of the Treaties, including under Art. 352 TFEU.’ As Rossi rightly points out ‘An exclusive competence should not need authorisation to use the flexibility clause.’

However, Tavares gives a better explanation of Case C-550/07 P Akzo Nobel Chemicals and Akcros Chemicals v. Commission [2010] ECR I-8301. The ECJ does not talk about substantive legislative competence there, but merely the adoption of procedural rules under Art. 103(2) TFEU relating to the Commission’s powers on inspections, *see also* Monti, *supra* note 3 at 110. Tavares adds that this is in line with pre-Lisbon case law in this area, such as Case 155/79 AM & S Europe Limited v. Commission [1982] ECR 1575 ¶ 18-22. Tavares, *supra* note 69 at 47-51. Even when adopting procedural rules allowing the Commission to act, the Council has proven sensitive to some national requirements, even in ways that produce diversity, particularly when there are diagonal conflicts, *see e.g.*, Reg. 1/2003, art. 20(7).

¹⁵⁰ *See* references in *supra* note 25.

insofar as the exclusive competition competence under Article 3(1)(b) TFEU maps onto the EU legislative competence, it is exclusive. Insofar as the EU's legislative competence is wider than Article 3(1)(b) TFEU, it is shared with the Member States.¹⁵¹

We briefly now discuss the possible limits of Article 3(1)(b) TFEU (and thus trace the border between the EU exclusive and shared legislative competence). However (and this is unusual), in many ways the relevance of shared or exclusive competence is significantly limited for competition as the Council has been explicitly given a rule for dealing with conflicts between EU competition rules and national laws in Article 103(2)(e) TFEU.¹⁵² The exception is EU legislation with a dual basis, one of which is Article 103 TFEU.¹⁵³

Article 3(1)(b) TFEU's wording is not particularly clear. It refers to establishing rules 'necessary for the functioning of the internal market'. As a starting point, competition rules that do not affect the *functioning* of the internal market should fall outside of the exclusive EU legislative competence. While this wording is not clear on its face, it appears several times in the EU Treaties, such as Articles 26 and 114 TFEU. The Court has interpreted these words to mean that action must be intended 'to improve the conditions for the establishment and functioning of the internal market.' This does not mean that the EU can generally regulate the internal market, as this is contrary to the provisions cited and the principle of conferral, Article 5 TEU. The aim must genuinely be to improve the establishment and functioning of the internal market. This might mean removing actual obstacles, or even potential ones: 'to prevent the emergence of

¹⁵¹ Similarly, Tavares, *supra* note 69 at 62-66.

¹⁵² See discussion around note 175.

¹⁵³ For examples of this see *supra* note 131.

future obstacles to trade resulting from multifarious development of national laws. However, the emergence of such obstacles must be likely and the measure in question must be designed to prevent them.’¹⁵⁴ The Court has also held that it is insufficient that there are ‘disparities between national rules and...[that there is an] abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom’.¹⁵⁵

Applying this approach to Article 3(1)(b) TFEU, means that the EU’s exclusive legislative competence only arises where its action aims to remove existing obstacles or prevent the likely emergence of future obstacles to the four freedoms or distortions in competition. It is not enough that EU action would remove differences in national

¹⁵⁴ In *Germany v European Parliament and Council*, the ECJ explained what ‘establishing or ensuring the functioning of the internal market’ means. At stake there was a directive concerned with approximating Member State rules relating to the advertising and sponsorship of tobacco products. Germany argued that the directive, that had been based in part on Art. 100a EC (now Art. 114 TFEU) actually undermined the internal market (rather than contributing to it), generating new obstacles to trade that did not previously exist. Its point being that a directive that did that, could not be based on Art. 100a, Case C-376/98 *Germany v. European Parliament and Council* [2000] ECR I-8419 ¶ 23-24. The ECJ noted that Art. 100a(1) EC Treaty [now Art. 114 TFEU] empowers the Council, under certain conditions ‘to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.’ To aid it in its interpretative task, the ECJ referred to two other provisions, Art. 3(c) EC Treaty [now removed] ‘the internal market is characterised by the abolition, as between Member States, of all obstacles to the free movement of goods, persons, services and capital.’ Secondly, Art. 7a EC (now Art. 26(2) TFEU) which calls the internal market ‘an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of’ the EU Treaties.

¹⁵⁵ Case C-376/98 *Germany v. European Parliament and Council* [2000] ECR I-8419 ¶ 83-89.

rules where there is an abstract risk of obstacles to the fundamental freedoms or to distortions of competition. This test still seems quite wide, which would give the EU's exclusive legislative competence a wide remit (when it overlaps with the conferral of legislative powers for the EU). However, three further points must be borne in mind when considering this issue. First, Article 3(1)(b) only grants an exclusive EU competence for establishing rules *necessary* for the functioning of the internal market. This seems to be a higher bar than merely helping the functioning of the internal market.¹⁵⁶ So, there might merely be a shared legislative competence for competition even in areas where the functioning of the internal market is affected, as long as national laws do not interfere with arrangements *necessary* for the internal market's functioning. Secondly, Article 114 TFEU can only be used where the distortion of competition is appreciable.¹⁵⁷ Thirdly, where a Council regulation or directive is based upon a dual competence, there must be an exclusive competence under both bases, otherwise, if one

¹⁵⁶ Monti suggests that 'necessary' is probably redundant, 'insofar as the proportionality test is only applied in fields of shared competence.', Monti, *supra* note 3 at 107. However, Art. 5(4) TEU says 'Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.' Unlike subsidiarity, proportionality is not restricted in areas of exclusive competence. Furthermore, it is not clear to me that this is an application of the proportionality test. As I discuss above, s. 4, the proportionality test is normally used as a way of limiting the exercise of an existing competence; here it is used as a way of defining the scope of the competence itself.

¹⁵⁷ Case C-376/98 Germany v. European Parliament and Council [2000] ECR I-8419 ¶ 106. This does not seem to apply though to obstacles to trade, *see* Case C-380/03 Germany v. European Parliament and Council, EU:C:2006:772.

has an exclusive basis and one a shared basis then the legislation as a whole will be dealt with as one with a shared EU and Member State competence.¹⁵⁸

Applying this to some practical examples, laying down detailed rules for the application of Article 101(3) TFEU, or defining the scope of Articles 101 and 102 TFEU in various branches of the economy, are likely to be exclusive EU legislative competences. Otherwise, distortions of competition seem likely to result. A common set of competition rules seems necessary ‘to improve the conditions for the establishment and functioning of the internal market.’ As a result, Member States cannot legislate to reduce the scope of Articles 101 and 102 TFEU in certain sectors of their economy, for example. However, depending upon the benefits of diversity, some might contest how readily ‘necessary’ internal market action arose.

Similarly, when the Council legislates to set fines and periodic penalty payments, then this is a shared legislative competence, unless establishing rules ‘necessary for the functioning of the internal market’. When it comes to setting the level of fines, for example, if the maximum level of fines for breaches of Articles 101 and 102 TFEU were not the same throughout the EU, then there is certainly a real risk of disparate levels of fining in the various Member States, which would lead to distortions of competition. One common set of fining rules seems necessary ‘to improve the conditions for the establishment and functioning of the internal market.’ If this were accepted, then the Council would have an exclusive legislative competence to set this level. When it comes to the Commission imposing fines and periodic penalty payments

¹⁵⁸ See Joined Cases C-274/11 and C-295/11 *Spain and Italy v. Council*, EU:C:2013:240 ¶ 24; and the discussion around *supra* note 97.

that has been accepted.¹⁵⁹ However, the Member States have been setting fines at different levels. The Commission is now trying to change this, claiming that not all NCAs can ‘impose effective fines’ and that, in some Member States, national law

prevents NCAs from imposing effective fines on companies for infringements of the EU competition rules. Infringing companies present in Member States where NCAs lack effective fining powers are thus sheltered from sanctions and have little incentive to act in compliance with EU competition rules. This reinforces market distortions through-out Europe and undermines the internal market.¹⁶⁰

If this is correct, then the Council could have achieved this through Article 103(1) TFEU (Article 103(2)(a) TFEU seems ideally suited to this) and under its Article 3(1)(b) TFEU (exclusive) legislative competence (and the Member States should not have been able to legislate on this in their national orders). However, as we saw above, the Commission claimed that it needed a dual legislative basis to deal with this problem, which is what has happened in the draft Directive on Effective Enforcement.¹⁶¹ In relation to fining, that may only have been necessary insofar as the draft Directive applies to national competition laws.

In fact, insofar as Council regulations and directives relate to the five examples in Article 103(2) TFEU, they may be considered ‘necessary for the functioning of the

¹⁵⁹ Reg. 1/2003, art. 23.

¹⁶⁰ Commission, Proposal for a Directive of the European Parliament and the Council to Empower the Competition Authorities of the Member States to be more Effective Enforcers and to Ensure the Proper Functioning of the Internal Market (2017) at 5.

¹⁶¹ See the citation at *supra* note 140.

internal market' and thus fall within the exclusive EU legislative competition competence, although this depends on how far one embraces diversity in the single market.

By a similar logic, the Commission powers ought to be the same throughout the EU, otherwise its ability to intervene will be uneven.¹⁶² The extent of the Council's exclusive legislative competence depends upon our interpretation of the Commission's Article 105 TFEU powers (as well as how far we think that these can be extended in order to 'achieve the principles under Articles 101 and 102 TFEU' (Article 103(1) TFEU) where uniform conditions are 'needed' (Article 291(2) TFEU)).¹⁶³ Regulation 1/2003 relies on a broad interpretation of the Commission's Article 105 TFEU powers;¹⁶⁴ and the Court has supported the notion that these are exclusive legislative competences.¹⁶⁵

It is also possible for Council regulations or directives to lay down common rules for the Member States to assist the Commission in its investigations. This would also be an exclusive legislative competence, otherwise it is likely that the Commission would

¹⁶² 'It makes no sense for this competence [how the Commission in its capacity as a competition authority should act] to be shared.', Monti, *supra* note 3 at 107.

¹⁶³ See the discussion around *supra* note 150.

¹⁶⁴ Examples of this can be seen in Reg. 1/2003, arts 18 (requests for information), 19 (power to take statements), 20 (powers of inspection), 21 (inspection of other premises). Note though that Reg. 1/2003, art. 20(7) allows for some differences to develop in the EU, and this is hard to reconcile with the underlying logic of the schema (although one can see how this might have been a difficult issue upon which to get sufficient agreement in the Council).

¹⁶⁵ Case C-550/07 P Akzo Nobel Chemicals and Akros Chemicals v. Commission [2010] ECR I-8301 ¶ 116-17.

be unable to intervene equally throughout the EU.¹⁶⁶ Once again, there is a real risk of undermining ‘the conditions for the establishment and functioning of the internal market.’ The same would apply to the more general competition procedural powers of the Member States when they enforce Articles 101 and 102 TFEU in their own right (even outside of fining and periodic penalty payments), as long as uniform conditions are ‘needed’ (Article 291(2) TFEU). Once again, this is an exclusive Council legislative competence where EU rules are ‘necessary for the establishment and functioning of the internal market.’

Clashes between EU and national legislative competences

The third (and final) issue to consider is what happens when EU competition legislation conflicts (vertically, horizontally or diagonally) with legislation in other areas. The problem with EU exclusive competence (and even shared competence once there is pre-emption) is that there is no space for the Member States to legislate, which restricts diversity (although we saw that executive and judicial powers provide the Member States with a lot of space for diversity). This becomes more problematic (and more important), the more one focuses on legitimacy (not just efficiency and effectiveness). As Lindseth explains, the persistent:

‘socio-political/ socio-cultural attachment to national constitutional bodies as the privileged expressions of democratic legitimacy is an empirical reality that simply cannot be theorized away. This attachment is a background constraint

¹⁶⁶ Examples of this can be seen in Reg. 1/2003, arts 18(6), 19(2), 20(5)-(8), 21(3)-(4), 22(2).

so fundamental as to be sometimes overlooked in non-hierarchical theories of EU governance.’¹⁶⁷

The EU’s website claims that ‘the boundaries between the competences of each [the EU and the Member States] are clearly defined.’¹⁶⁸ This is optimistic, generally, and particularly in relation to diagonal clashes. According to Scharpf, the democratic deficit, along with vertical, horizontal and diagonal conflicts means that we need to more narrowly define the areas of EU intervention. He says that objectively unnecessary ‘over-co-ordination’ at the EU level ‘is even more damaging in the European Union than it is in German federalism’.¹⁶⁹ The ‘proper functioning’ of the

¹⁶⁷ Peter Lindseth, *Delegation is Dead, Long Live Delegation: managing the democratic disconnect in the European market-polity*, in GOOD GOVERNANCE IN EUROPE’S INTEGRATED MARKET at 142-143 (Christian Joerges & Renaud Dehousse eds., 2002). Also, Wallace, et al., *supra* note 15 at 127; Oliver Gerstenberg & Charles Sabel, *Directly-Deliberative Polyarchy: an institutional ideal for Europe?*, in GOOD GOVERNANCE IN EUROPE’S INTEGRATED MARKET at 301-05 (Christian Joerges & Renaud Dehousse eds., 2002); Donahue & Pollack, *supra* note 8 at 76; Giandomenico Majone, *Regulatory Legitimacy in the United States and the European Union*, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION at 267-68 (Kalypso Nicolaïdis & Robert Howse eds., 2001); and MIGUEL POIARES MADURO, WE, THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION at 113, 153 (1998). Resentment is increasing, Wallace, et al., *supra* note 15 at 484; and Fritz Scharpf, *Democratic Legitimacy under Conditions of Regulatory Competition: why Europe differs from the United States*, in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION at 360-62 (Kalypso Nicolaïdis & Robert Howse eds., 2001).

¹⁶⁸ http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm .

¹⁶⁹ Fritz Scharpf, *Community and Autonomy: multi-level policy-making in the European Union*, 1 JOURNAL OF EUROPEAN PUBLIC POLICY 219, 238 (1994).

single market and the Member States' diverse preferences may diverge.¹⁷⁰ Many commentators find such issues problematic.¹⁷¹ The EU Treaties do not really explain what to do when these clashes occur.

In the end, our answer about how best to deal with conflicts is likely to be motivated by our own vision of the EU, on the type of system that we prefer there (and the relative importance of the Member States in this system). There are three types of conflicts that we have to consider here (these might be vertical or diagonal conflicts): conflicts between Articles 101 and 102 TFEU and national laws; conflicts between national laws and EU exclusive legislative competition competence; and conflicts between national laws and EU shared legislative competition competence.

i. Conflicts between Articles 101 and 102 TFEU and national laws

Let us start by underlining that this particular discussion (unlike the following two) is not about conflicts of *legislative* competence. It is a discussion about conflicts between national law and primacy obligations in the EU Treaties. As such, this is normally dealt with through the principles derived from the Court's judgment in *Costa v ENEL*. In that case, an Italian court asked the Court whether various national rules conflicted with certain EEC Treaty provisions and what the consequences of such conflicts might be. The Court held that:

The integration into the laws of each Member State of provisions which derive from the Community [now the EU], and more generally the terms and the spirit

¹⁷⁰ Jacques Pelkmans, *The Economics of Single Market Regulation*, 2012 BRUGES EUROPEAN ECONOMIC BRIEFINGS at 105 (2012). Similarly, POIARES MADURO, *supra* note 167 at 105.

¹⁷¹ CRAIG & DE BÚRCA, *supra* note 54 at 78-79; CRAIG, *supra* note 32 at 160-61; CENGİZ, *supra* note 10 at 81; and SCHÜTZE, *supra* note 27 at 167-88.

of the Treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one state to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited by article 7.

The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories. Wherever the Treaty grants the states the right to act unilaterally, it does this by clear and precise provisions...[such as Article 107(2) TFEU, for example]¹⁷²

It is possible that the normal position in relation to primacy of EU law applies in relation to conflicts between Articles 101 and 102 TFEU and national laws. However, Article 103(2)(e) TFEU appears to give the Council a special power to determine the relationship between national laws (including national competition laws) and Articles 101 and 102 TFEU. Article 103(2)(e) TFEU was not used until Regulation 1/2003.¹⁷³ We are just about to discuss the position under Regulation 1/2003 (for vertical and

¹⁷² Case 6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECR 585. This idea of primacy has been explicitly incorporated into the EU Treaties through Declaration No. 17.

¹⁷³ Until the entry into force of Council regulations or directives passed under Art. 103(1) TFEU, Art. 104 TFEU makes it clear that national competition laws can apply alongside Arts 101 and 102 TFEU. There is no indication of what to do if there is a clash between them. The first procedural regulation in the area of competition law, Council Reg. 17, which was first implemented in 1962, did not deal with this relationship between national laws and Arts 101 and 102 TFEU.

diagonal conflicts). However, before we do that, we discuss the Court's interim case law. Then, after the Regulation 1/2003 discussion, we look at how much discretion the Council might have, in principle, under Article 103(2)(e) TFEU.

Until Regulation 1/2003, the Court was left to explain the results of clashes between national competition laws and Articles 101 and 102 TFEU. *Walt Wilhelm v Bundeskartellamt* was the first case dealing with this. There are many competing theories about how clashes between EU and national competition rules should be resolved (for example, some argued that EU law should prevail, some that national law should, others argued for a double barrier theory¹⁷⁴). In the end, the Court held that Member States retained substantive legislative competence in the field of competition law, even when there was an appreciable affect on trade between Member States, because national and EU competition rules considered competition from different perspectives. However, the Court added that so long as a regulation adopted pursuant to Article 103(2)(e) TFEU

has not provided otherwise, national authorities may take action against an agreement in accordance with their national law, even when an examination of the agreement from the point of view of its compatibility with Community law

¹⁷⁴ For example, the EU merger regulation states that national competition rules cannot be applied when the EU merger regulation applies, Council, Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (2004), art. 21(3), although there are some limits to this. Some scholars even suggested that the EU had an exclusive competence, which excluded all Member State competence, once there was an affect on trade between Member States, MICHAEL WAELEBROECK & ALDO FRIGNANI, *CONCURRENCE* at 4 (Second ed., 1997). By way of contrast, in the AG Roemer's Opinion in Case 14/68 *Walt Wilhelm and others v. Bundeskartellamt* [1968] ECR 17, at 22-24, we see him adopting the double barrier theory.

is pending before the Commission [under what are now Articles 101 or 102 TFEU], subject however to the condition that the application of national law may not prejudice the full and uniform application of Community law or the effects of measures taken or to be taken to implement it.¹⁷⁵

In other words, Member States retain substantive legislative competence on competition issues, even when there is an appreciable affect on trade between Member States, but the *application* of national competition laws ‘may not prejudice the full and uniform application of Community [now EU law] law or the effects of measures taken or to be taken to implement it.’ This means that national competition law cannot seek to ‘revive or allow’ arrangements prohibited under Articles 101 or 102 TFEU. However, national competition laws can be applied in situations where the Commission has decided not to act under Article 101 TFEU.¹⁷⁶ It is assumed that a similar position arises in relation to Article 102 TFEU. However, the Court left open the issue of whether national competition law can be applied where the Commission has granted an exemption under Article 101(3) TFEU, or the behaviour falls within a block exemption regulation.¹⁷⁷ One assumes that this is impossible.¹⁷⁸

¹⁷⁵ Case 14/68 *Walt Wilhelm and others v. Bundeskartellamt* [1969] ECR 1 ¶ 9.

¹⁷⁶ Joined Cases 253/78, etc. *Procureur de la République v. Giry and Guerlain* [1980] ECR 2327 ¶ 14.

¹⁷⁷ *See e.g.*, Joined Cases 253/78, etc. *Procureur de la République v. Giry and Guerlain* [1980] ECR 2327 ¶ 17 and 18.

¹⁷⁸ Following a similar logic to *Walt Wilhelm*, the EU Courts would find primacy of any EU act (be it Commission decisions or Council/Commission block exemption regulations) over national acts, *see* discussion around *supra* note 67.

Tavares basically agrees with the Court's position in respect of vertical conflicts between national competition laws and Articles 101 and 102 TFEU.¹⁷⁹ She says:

More lenient competition laws conflict with EU competition law as they contradict it. Therefore, they should be set aside under the primacy principle. Stricter national competition laws do not. Stricter national competition laws do not 'interfere with the proper functioning' of the EU competition laws, obstacle pre-emption does not occur.¹⁸⁰

As regards diagonal conflicts between national laws (that are not competition laws) and Articles 101 and 102 TFEU, the Member States' duty of loyal co-operation under Article 4(3) TEU (in conjunction with Articles 101 and 102 TFEU) is important here. The relevant law was synthesised by the Court in *van Eycke v ASPA*, in relation to Articles 4(3) TEU and Article 101 TFEU to say:

It must be pointed out in that regard that Articles 85 and 86 of the Treaty [now Articles 101 and 102 TFEU] per se are concerned only with the conduct of undertakings and not with national legislation. The Court has consistently held,

¹⁷⁹ Basing her argument on pre-emption for shared legislative competence, which for the reasons noted around *supra* note 173, we do not think is correct for conflicts with Arts 101 and 102 TFEU.

¹⁸⁰ Tavares, *supra* note 69 at 214. Monti argues that national competition laws may even help the development of the internal market 'It would be hard to deny the fact that the enforcement of national competition law helps the development of the internal market. Two concrete examples among many may be offered. German law penalizes bid rigging with criminal sanctions and the relevant provisions have been applied frequently: opening up the German procurement market must serve to enhance competition across the EU, as foreign participants are more likely to compete. Second, many of the market investigations carried out by the Competition Commission [now the Competition and Markets Authority] in the UK are likely to have had pro-competitive effects across the EU.', Monti, *supra* note 3 at 109.

however, that Articles 85 and 86 of the Treaty, in conjunction with Article 5 [now Article 4(3) TEU], require the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings. Such would be the case, the Court has held, if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or to reinforce their effects, or to deprive its own legislation of its official character by delegating to private traders responsibility for taking decisions affecting the economic sphere.¹⁸¹

This gives the Member States considerable leeway to enact legislation in their fields of (non-competition) competence as long as it does not push undertakings to infringe Articles 101 or 102 TFEU.¹⁸² This leeway is sensible for diagonal conflicts. Otherwise, the EU competition competence could cause problems in (unforeseen) areas where achieving national legislative aims may not be possible at the EU level (due to a lack of EU competence in these fields).¹⁸³ Furthermore, given that it is possible to consider public policy concerns within Articles 101 and 102 TFEU, there is still leeway for

¹⁸¹ Case 267/86 *Pascal Van Eycke v. ASPA NV* [1988] ECR 4769 ¶ 16. The EU Courts have repeated similar sentiments many times, *see* several references at RICHARD WHISH & DAVID BAILEY, *COMPETITION LAW* at 231 (Eighth ed., 2015).

¹⁸² A possible further restriction might have been imposed by the ECJ in Case 229/83 *Association des Centres distributeurs Édouard Leclerc and others v. SARL "Au blé vert" and others* [1985] ECR I ¶ 20, where it seems to imply that if purely national systems had been made subject to a specific EU competition policy relating to that area, then Art. 5 EC (now Art. 4(3) TEU) would prevent Member States from jeopardising that through their use of otherwise legitimate legislation (in that case France had told publishers to impose prices for their books and retailers to follow these prices).

¹⁸³ *See* Tavares, *supra* note 69 at 218-19.

disagreements on methods (Member States have some room to choose whether public policy goals will be achieved through their own legislation or by encouraging private actors). One advantage of using Articles 101 and 102 TFEU is that the impact upon competition is balanced against the public policy factors. Given the importance of competition in the EU legal order, we favour this approach.¹⁸⁴

The current procedural regulation, Council Regulation 1/2003, article 3, now explicitly deals with the relationship between national laws and Articles 101 and 102 TFEU, as Article 103(2)(e) TFEU expressly envisaged.¹⁸⁵ When Member States apply their national competition laws to arrangements within the meaning of Articles 101(1), which may affect trade between Member States within the meaning of that provision, or to any abuse prohibited by 102 TFEU, they must also apply Articles 101 and 102 TFEU, respectively.¹⁸⁶ In terms of vertical conflicts, Article 3(2) then goes on to state:

¹⁸⁴ TOWNLEY, *supra* note 57 at Part C.

¹⁸⁵ According to the Council, Reg. 1/2003, art. 3 is an example of what was envisaged in Art. 103(2)(e) TFEU, *see* Reg. 1/2003, recital 8. However, this (and the statement in the main text that Reg. 1/2003, art. 3 was ‘expressly envisaged’ by Art. 103(2)(e)) is not entirely correct. Art. 103(2)(e) deals with the relationship between national laws (ie acts of general application) and, amongst others, Arts 101 and 102; rather than the *application* of national laws, which is what Reg. 1/2003, art. 3 does. Support for this view can be found in the French (*‘les législations nationales’*), German (*‘innerstaatlichen Rechtsvorschriften’*) and Spanish (*‘las legislaciones nacionales’*) language versions of Art. 103(2)(e) which clearly refer to general acts. However, even if this is correct, this does not matter too much, constitutionally, in the sense that, Art. 103(1) TFEU gives the Council the power to deal with wider issues than those listed in Art. 103(2), as long as they are of the same type, which is how I think *application* would be seen.

¹⁸⁶ Art. 3(1), Reg. 1/2003. *See* also Case C-17/10 Toshiba Corporation [2012] ECR ¶ 77; and Case C-226/11, Expedia Inc. v. Autorité de la concurrence and Others, EU:C:2012:795 ¶ 18.

The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty [now Article 101(1) TFEU], or which fulfil the conditions of Article 81(3) of the Treaty [now Article 101(3) TFEU] or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.¹⁸⁷

Article 3(1) and (2) of Regulation 1/2003 relate to national competition laws that closely track the language and ideas in Articles 101 and 102 TFEU, such as sections 2 and 9 of the UK Competition Act 1998.¹⁸⁸ However, they also apply to other kinds of national competition laws, such as UK market investigations; or national rules on economic dependence.

In addition, Regulation 1/2003, article 3(3) sets out the relationship between national merger laws (and other national laws more generally) with Articles 101 and 102 TFEU

¹⁸⁷ The ECJ has since held that ‘Under Article 3(2) of Regulation No 1/2003, the application of national competition law may not lead to the prohibition of such agreements if they do not restrict competition within the meaning of Article 101(1) TFEU. It follows that the competition authorities of the Member States can apply the provisions of national law prohibiting cartels to an agreement of undertakings which is capable of affecting trade between Member States within the meaning of Article 101 TFEU only where that agreement perceptibly restricts competition within the common market.’, Case C-226/11, Expedia Inc. v. Autorité de la concurrence and Others, EU:C:2012:795 ¶¶ 19 and 20.

¹⁸⁸ See the references around *supra* note 145.

(this is partly about vertical conflicts insofar as national merger rules overlap with Articles 101 and 102 TFEU, it is also about diagonal conflicts). Article 3(3) states:

Without prejudice to general principles and other provisions of Community law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws nor do they preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU].¹⁸⁹

This implies that the Member States can still legislate, in relation to competition, in purely internal situations;¹⁹⁰ as long as they act in line with their duty of sincere co-operation (and other EU obligations).¹⁹¹ Regulation 1/2003 does not discuss either kind of horizontal clash that we have highlighted (clashes between Member States' competition laws or between EU competition legislation and EU legislation in other areas, such as environmental protection).

When there is an effect on trade between Member States, in some ways article 3 of Regulation 1/2003 may be more generous to national competition laws than *Walt Wilhelm* (explicitly allowing the application of stricter national laws on unilateral conduct), and in other ways it may be less generous (clarifying that the application of national competition laws cannot prohibit conduct within an EU block exemption

¹⁸⁹ See also Reg. 1/2003, recital 9.

¹⁹⁰ LENAERTS & NUFFEL *supra* note 26 at 5-027 make the same point, prior to the Lisbon Treaty.

¹⁹¹ Monti, *supra* note 3 at 119. Making a similar point for the free movement provisions, Schütze, *supra* note 10 at 22. See also, Roger Van Den Bergh, *Economic Criteria for Applying the Subsidiarity Principle in the European Community: the case for competition policy*, 16 INTERNATIONAL REVIEW OF LAW AND ECONOMICS 368-69 (1996).

regulation). The specifics do not necessarily matter to us here. More important from our perspective is that there is space here for many different conflict rules. The appropriate conflict rule must flow from one's constitutional understanding of the EU legal order.

So, one might ask, how much discretion should the Council have under Article 103(2)(e) TFEU, to determine the relationship between national laws and Articles 101 and 102 TFEU? For example, could the Council allow national competition laws to prevail when they conflict with Articles 101 and 102 TFEU? In our opinion, and subject to what we say below, Article 103(2)(e) TFEU gives the Council freedom to do this, or to allow Articles 101 and 102 TFEU to prevail over national laws, or to follow some middle road. Yet, some read the Court's judgment in *Walt Wilhelm* to say that such a radical proposition is impossible. There the Court noted the power of the Council under Article 103(2)(e) TFEU (and the implication that national rules and Articles 101 and 102 TFEU could exist side by side), and then held:

However, if the ultimate general aim of the Treaty is to be respected, this parallel application of the national system can only be allowed in so far as it does not prejudice the uniform application throughout the common market of the Community rules on cartels...Any other solution would be incompatible with the objectives of the Treaty and the character of its rules on competition. Article 85 of the EEC Treaty [now Article 101 TFEU] applies to all the undertakings in the Community whose conduct it governs either by prohibitions or by means of exemptions, granted - subject to conditions which it specifies - in favour of agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress. While the Treaty's primary object is to eliminate by this means the obstacles to the free

movement of goods within the common market and to confirm and safeguard the unity of that market, it also permits the Community authorities to carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activities within the whole Community, in accordance with Article 2 of the Treaty [now Article 3 TEU]. Article 87(2)(e) [now Article 103(2)(e) TFEU], in conferring on a Community institution the power to determine the relationship between national laws and the Community rules on competition, confirm the supremacy of Community law.¹⁹²

Tavares, for example, seems to interpret the judgment in this way. She does not think that the Council could use Article 103(2)(e) TFEU ‘to establish a general rule according to which national laws prevail over EU competition laws, as that will go against the primacy principle.’¹⁹³ In which case, one might wonder what is the point of Article 103(2)(e) TFEU, if the primacy principle is inviolable. Tavares’ answer is that Article 103(2)(e) TFEU allows the Council to determine the relationship between EU procedural rules for applying Articles 101 and 102 TFEU and national procedural rules for applying national competition laws (*e.g.* the Council can tell an NCA to suspend its

¹⁹² Case 14/68 *Walt Wilhelm and others v. Bundeskartellamt* [1969] ECR I ¶ 4.

¹⁹³ Tavares, *supra* note 69 at 137. In a similar direction, Faull and Nikpay argue that art. 3, Reg. 1/2003 does not interfere with the normal primacy principles. In order to arrive at this position they highlight the text in art. 3(2) that says ‘Member States shall not *under this Regulation* be precluded [my emphasis]’. The point being that the primacy principle might preclude them. Similarly, art. 3(3), Reg. 1/2003 is without ‘prejudice to general principles and other provisions of Community law’, which Faull and Nikpay say would include the primacy principle, JONATHAN FAULL & ALI NIKPAY, *THE EC LAW OF COMPETITION* at 2.54 (2nd ed., 2007).

investigation under national competition law if the Commission is investigating the same facts under Articles 101 or 102 TFEU).¹⁹⁴

Buried within Tavares' argument (and her reading of this Court judgment), is an idea about the EU's constitutional make-up. However, we are not persuaded by her argument here. First, Tavares interprets Article 103(2)(e) TFEU in the light of the primacy principle; yet, this original wording in the EEC Treaty predates the Court's judgment in *Costa v ENEL*, so it is perfectly plausible that this article was inserted to deal with substantive as well as procedural conflicts.¹⁹⁵ Secondly, the Court in *Walt Wilhelm* explicitly makes its conclusions subject to the use of Article 103(2)(e) TFEU. In other words, it acknowledges that it is being forced to step in because the Council had not yet used this provision, but it clearly implies that other solutions are possible (so long as an Article 103(2)(e) TFEU regulation 'has not provided otherwise'). What

¹⁹⁴ Tavares points to the principle of procedural autonomy, which allows Member States to use equivalent and effective national procedural rules to apply EU competition law if there are no common EU rules. However, she says that this only covers the enforcement of EU law, not national laws. Under this logic, a Member State can be required to stop investigating Arts 101 and 102 (*e.g.*, if the Commission starts investigating the same matter using these provisions). However, she says that EU procedural law cannot stop Member States investigating the same matter under national competition laws as 'EU procedural rules can only be applicable to the enforcement of EU law. Article 103(2)(e) TFEU however goes beyond what is established by the principle of procedural autonomy of the Member States. It allows the Council to determine the relationship between EU procedural rules applicable to the enforcement of EU competition provisions and the national procedural rules applicable to the enforcement of the national competition laws.', Tavares, *supra* note 69 at 139-40.

¹⁹⁵ This is especially so given that this is one of the few areas in the EEC Treaty where the Community could both legislate and apply the rules, so a risk of conflicts was a particular problem, especially for dualist countries like France and Germany with their own competition laws.

is acceptable depends on our understanding of the EU's constitutional settlement. It should be noted that *Walt Wilhelm* comes five years after *Costa v ENEL*.¹⁹⁶

In conclusion, contrary to the normal EU rules of primacy, Article 103(2)(e) TFEU gives the Council a wide discretion to allow, national laws to prevail over Articles 101 and 102 TFEU, or the other way around, or some middle path (within the limits of the principles of Articles 101 and 102 TFEU). Having said that, we suspect that the EU Courts would impose some limits, otherwise it is hard to reconcile with Article 105 TFEU.¹⁹⁷ Nevertheless, we have seen that the EU Courts place a lot of reliance on political authority in this field. It may be that clear statements from the Council might persuade the EU Courts to be more open to diversity than they normally would. This seems particularly important in the light of Articles 101 and 102 TFEU's wide footprint (and thus the facility with which they conflict with values in Member States' general laws and their competition laws); as well as the unusual executive role that the Commission has been given in this part of the EU Treaties. Indeed, in competition law, room has explicitly been carved out for a special constitutional settlement. This may change over time, along with the optimal balance between EU and national rules, our

¹⁹⁶ Furthermore, Tavares' approach could create problems if conflicting national competition laws are cut down through EU primacy and yet the EU has no general substantive legislative competition competence. This means that, if Member States lose their legislative competence (or it is seriously curtailed), then the EU cannot legislate to fill these gaps (unless one amends the EU Treaties). Tavares believes that the EU has no general substantive legislative competition competence. We disagree with this, as we explain in our discussion so far on legislative competences.

¹⁹⁷ Perhaps, the Member States could be allowed to invoke their own competition rules subject to certain safeguards, for example.

views on the relative benefits of uniformity and diversity, and the EU constitutional settlement.

Is there any need to encourage diversity here? One might say, for example, that the Member States are aligning their national competition laws with Articles 101 and 102 TFEU. To the extent that this is true, perhaps this demonstrates that Member States do not want diversity.¹⁹⁸

However, even if national laws are becoming closer to Articles 101 and 102 TFEU, this does not mean that their interpretation is.¹⁹⁹ There is a lot of opportunity for the

¹⁹⁸ While the UK amended much of its competition regime to be more in line with Arts 101 and 102, that seems to have been more to do with reducing firms' compliance costs with two sets of norms, rather than belief in the EU system, Stuart Wylie & Barry Rodger, *Taking the Community Interest Line: decentralisation and subsidiarity in competition law enforcement*, EUROPEAN COMPETITION LAW REVIEW 485, 488 (1997) and Van Den Bergh, *supra* note 191 at 371. Two further points might be made: many Member States (including the UK) do not pursue the single market in their national laws. To the extent that the single market is an important goal (and it is within the EU legal order) then one may want to retain a role for Arts 101 and 102 even if we allow national competition laws. Secondly, Member States that have recently joined the EU have been told that they have to adopt competition laws similar to the EU model. So, even if we see more uniformity, this does not necessarily mean it is what these states wanted.

¹⁹⁹ Nevertheless, even in recent judgments, the EU Courts continue to repeat that 'Competition rules at European and at national level view restrictions on competition from different angles (Case 14/68 Wilhelm and Others [1969] ECR I ¶ 3; Joined Cases C-295/04 to C-298/04 Manfredi and Others [2006] ECR I-6619 ¶ 38; Case C-550/07 P Akzo Nobel Chemicals and Akcros Chemicals v. Commission [2010] ECR I-8301 ¶ 103) and their areas of application do not coincide (Case C-505/07 Compañía Española de Comercialización de Aceite [2009] ECR I-8963 ¶ 52) [I have added fuller case references where helpful].', Case C-17/10 Toshiba Corporation and Others v. Úřad pro ochranu hospodářské soutěže, EU:C:2012:72 ¶ 81.

Commission and Member States (often NCAs, and to some extent courts) to achieve diversity covertly. For example, through administrative priority decisions;²⁰⁰ by disguising the underlying reasons for their decisions; they might use commitment or merger notifications to negotiate changes, without these becoming public;²⁰¹ and different procedural rules might also affect the substance.²⁰² Furthermore, Member States might under-resource competition authorities in order to restrict their impact.²⁰³ Secondly, the case is not quite so clear-cut as national competition laws sometimes do things that Articles 101 and 102 TFEU do not do. Think, for example, about the UK power to do market investigations; or national rules on economic dependence.²⁰⁴ Thirdly, at the moment, only the benefits of more uniformity are being discussed. If the benefits of diversity were brought to the fore, and if these were seen as good and legitimate reasons for embracing diversity (ie diversity were seen as acceptable, rather than a transgression) more Member States would probably think about, adopting and declaring different approaches. Covert ‘diversity techniques’ create problems for firms, their understanding and certainty; as well as legitimacy problems for society. If we were

²⁰⁰ Wylie & Rodger, *supra* note 198 at 487.

²⁰¹ Conor Talbot, Competition Law in Times of Crisis: case studies of the European passenger airline sector and the Irish beef industry at 116-9 (European University Institute, 2016).

²⁰² Pierre-Vincent Bos, *Towards a Clear Distribution of Competences between EC and National Competition Authorities*, EUROPEAN COMPETITION LAW REVIEW 410, 415 (1995).

²⁰³ In environmental legislation, rather than competition (but a similar point applies), Scharpf warns, the ‘price of imposing uniform rules on non-uniform economic constellations is then paid in terms of non-uniform patterns of implementation that are very difficult to control and which, if not controlled, are likely to undermine the willingness to enforce, or to obey, European rules in other countries as well.’, FRITZ SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? at 173 (1999).

²⁰⁴ Commission, Staff Working Paper - Report on Regulation 1/2003 at 162-69 (2009).

to bring this diversity out into the open, we could have a proper discussion about how much diversity we want and we could more easily learn from what everyone is doing.

ii. Conflicts between national laws and EU exclusive legislative competence

There are three key areas where the EU has exclusive legislative competence here (insofar as this is ‘necessary for the functioning of the internal market’, Article 3(1)(b) TFEU): to organise the procedural powers of the Commission when applying Articles 101 and 102 TFEU, under Article 105 TFEU;²⁰⁵ to organise the procedural powers of the Member States when co-operating with (or assisting) the Commission, under Article 105 TFEU; and in certain areas of substantive competition law, such as the production of block exemptions.²⁰⁶

Here, we ask whether an exclusive EU legislative competition competence in an area totally excludes the Member States’ power to legislate in this area (using the example of the procedural powers of the Commission when applying Articles 101 and 102 TFEU). We argue that it does not. Then, we look at possible limits to the EU’s²⁰⁷ and the Member States’ ability to legislate in an area of exclusive EU legislative competition competence.

Normally, as we have seen, Member States cannot legislate, or adopt legally binding acts, in areas of exclusive EU legislative competence, unless empowered by the EU (‘or for the implementation of Union acts’), Article 2(1) TFEU. In some places the EU

²⁰⁵ See the discussion around *supra* note 166.

²⁰⁶ We have argued that the EU has exclusive legislative competence in significantly more areas than these, of course, *see* the discussion above.

²⁰⁷ Use of an exclusive EU legislative competence must also be proportionate, Art 5(4) TEU; *see* the discussion around note 217.

Treaties explicitly empower the Member States to legislate in areas of exclusive EU competence. One example is Article 346(1)(b) TFEU.²⁰⁸ Secondly, under Article 291(1) TFEU, the Member States are obliged to adopt ‘all measures of national law necessary to implement’ legally binding EU acts.

Even more interestingly, from our current perspective, when giving effect to the principles in Articles 101 and 102, Article 103(2)(e) TFEU allows the Council (in regulations or directives) to ‘determine the relationship between national laws’ and the provisions contained in Articles 101-106 TFEU (or adopted under Article 103 TFEU). Under Article 103(2)(e) TFEU, the Council seems to be able to over-ride the normal doctrines of exclusive EU legislative competence, within the limits of the principles set out in Articles 101 and 102 TFEU.

Cengiz believes that, if it is possible for the Council to define the relationship between national laws and the provisions contained in Articles 101-106 TFEU, this would be ‘poor constitution-making technique’ and a ‘politically dangerous outcome’. This is because it allows the EU to remove Member State competences with a single legislative amendment.²⁰⁹ Similarly, Tavares does not think that the EU can grant part of its own

²⁰⁸ Art. 346(1)(b) TFEU says that the EU Treaties do not preclude any Member State from taking ‘such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.’ This is an example of the EU expressly empowering Member States to take measures, even if they conflict with the EU’s exclusive legislative competence. Art. 348 TFEU provides the Commission and the Member States with a path of legal redress where they think that Art. 346 TFEU has been used inappropriately.

²⁰⁹ CENGIZ, *supra* note 10 at 78-80. Even if such an interpretation of Art. 103 introduces poor constitution making technique, that does not necessarily rule it out.

exclusive powers back to the Member States in secondary legislation, like Regulation 1/2003, as this would ‘be to allow a secondary legislative act to change the structures of the competences provided for in the [EU] Treaties. This runs against the principle of conferral.’²¹⁰ We agree that such a power is unusual in the EU Treaties. As noted above, our understanding of Articles 2(1) TEU and 103(2)(e) TFEU, read together, is that this was, however, explicitly provided for in the EU Treaties.

Unfortunately, most of the time, neither Council procedural regulation (neither Regulation 17, nor Regulation 1/2003), in breach of Article 103(2)(e) TFEU, determines ‘the relationship between national laws and the provisions...adopted pursuant to’ Article 103 TFEU.²¹¹ Where there are no EU legislative rules in areas of exclusive EU legislative competence (as we have said is often the case), then we can no longer fall back on *Walt Wilhelm* (remember that Member States cannot legislate in areas of exclusive EU legislative competence unless explicitly authorised to do so by the EU,²¹² such as to implement a Council Article 103 TFEU directive, for example). This means that important gaps might occur. So, we have to be clear about the limits of this exclusive competence.²¹³

²¹⁰ Tavares, *supra* note 69 at 46.

²¹¹ Although we have just seen that Reg. 1/2003 implements Art. 103(2)(e) TFEU as regards clashes between national laws and Art. 101 and 102 TFEU, *see* above.

²¹² Although, on rare occasions the EU Courts have allowed the Member States to legislate, even in areas of exclusive EU legislative competence, when they have found implicit approval.

²¹³ Importantly, when it comes to the Council making regulations or directives under Art. 103 which relate to the Member States’ procedural rules for applying Arts 101 and 102 TFEU in their own right, we have seen that Art. 291(2) TFEU is also relevant. This means that the Council can only give implementation powers to the Commission where uniform conditions are ‘needed’, *see* the discussion around *supra* note 138. Where this is not the case, then the Council can control the Member States’

Having said that, there are exceptions. For example, when it comes to laying down procedural rules for the Member States assisting the Commission in its action under Article 105 TFEU. Article 20 of Regulation 1/2003 relates to the Commission's powers of inspection (treated as an area of exclusive EU legislative competence). Where an undertaking opposes an inspection ordered pursuant to the Commission's powers under Article 20 of Regulation 1/2003, the local Member State must assist the Commission, so as 'to enable them to conduct their inspection.' Setting out rules for the Member States to assist the Commission in its enforcement of Articles 101 and 102 TFEU is also an area of exclusive EU legislative competence (as long as it is 'necessary for the functioning of the internal market'). Under article 20(7) of Regulation 1/2003, if the Member States' assistance: 'requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.'

This provision allows Member States to revert to their national procedural rules on the necessity for judicial authority in such circumstances. This will generate differences across the EU, but the Council has decided, under Article 103(2)(e) TFEU that this is acceptable. This is a sensible compromise in the face of a diagonal conflict with (what are often considered to be) important, national judicial checks on the abuse of power.

Similarly, when it comes to the substance of national competition rules, we have seen that the EU has an exclusive legislative competence for the provision of block exemptions from Article 101(1) TFEU.²¹⁴ So, Member States cannot make their own

procedural powers, where proportionate, etc (but it cannot confer powers on the Commission). Furthermore, this is an exclusive EU competence when Art. 3(1)(b) TFEU applies.

²¹⁴ See the discussion around *supra* note 161.

block exemptions from Article 101(1) TFEU. However, there is a further problem in relation to national competition law. Many national laws also apply where there is an effect on trade between Member States. This means that national competition laws may overlap with Articles 101 and 102 TFEU, and we have discussed that above. However, block exemptions are Council or Commission regulations (see Articles 103(1), 103(2)(b) and 105(3) TFEU). As these are made in an area of exclusive EU legislative competence, it seems that national competition laws transgress when they come within the ambit of these (even if they are in line with the block exemptions).²¹⁵ This seems to breach Article 2(1) TFEU. However, under its powers within Article 103(2)(e) TFEU the Council allows national competition laws to exist in this area. As we have seen, Regulation 1/2003, article 3, implicitly allows national competition laws, however, they must not prohibit arrangements which are ‘covered by a Regulation for the application of Article 81(3) of the Treaty [now Article 101(3)].’²¹⁶

Article 5(4) TEU demands that EU acts are proportionate, even in areas of exclusive EU competence. As a result, EU acts must be appropriate, necessary and not excessive. The EU Courts often use a ‘manifestly inappropriate’ test here, which defers to the Council to make decisions that entail political, economic and social choices unless they are manifestly disproportionate. The Court has explained this test in the following way:

According to settled case-law, the principle of proportionality requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is necessary in order to achieve those objectives; when there is a choice between

²¹⁵ *E.g.*, Competition Act 1998, s. 10, creates a system of parallel exemptions in the UK.

²¹⁶ *See* the discussion and citations around *supra* note 187.

several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, judgments in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 122; *ERG and Others*, C-379/08 and C-380/08, EU:C:2010:127, paragraph 86; and *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraphs 67 and 91).

With regard to judicial review of the conditions referred to in the previous paragraph, the EU legislature must be allowed broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in that area can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institutions are seeking to pursue (see, to that effect, judgment in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraph 123).²¹⁷

Once again, one has the impression that if the Council were to decide that the ECN ‘system’ needed to be changed to accommodate more diversity, through more Member States action, then the EU Courts may well accept this, as long as the position adopted did not manifestly undermine EU values.

iii. Conflicts between national laws and EU shared legislative competition competence

Insofar as the EU has a shared legislative competence (this applies to all areas of EU legislative competition competence which are wider than Article 3(1)(b) TFEU) then

²¹⁷ Case C-358/14 Poland v. European Parliament and Council, EU:C:2016:323 ¶ 78-79.

the Member States share legislative competence with the EU, as long as EU legislation does not pre-empt them. As a result, it is important to understand the EU rules about pre-emption. We start by discussing these, then note the unusual position under Article 103(2)(e) TFEU, once again. Thirdly, we discuss three examples of pre-emption, and examine their limits; and then, finally, the subsidiarity and proportionality principles, as both are relevant here.

There has been much debate about how far the EU must go to pre-empt the Member States from acting. For example, just because the EU legislates in a field, this does not automatically pre-empt all national legislation in that field. Protocol (No 25) on the Exercise of Shared Competence, states, with reference to Article 2(2) TFEU: ‘when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.’

Nonetheless the EU can exclude Member States from all legislative exercise in an area, if the EU legislation is comprehensive enough, and provided that the Union could do so under the relevant Treaty provisions.²¹⁸ Timmermans talks of three basic approaches to pre-emption of shared competence in the EU Courts’ case law. These three approaches can even be found in the same case sometimes.²¹⁹ Where the relevant EU competence relates to market organisation, for example, the Common Agricultural Policy or the Common Transport Policy (and has been exercised), then the Member States must not legislate (unless expressly empowered), even to support the EU (or

²¹⁸ CRAIG & DE BÚRCA, *supra* note 54 at 84.

²¹⁹ Timmermans, *supra* note 14 at 156-59. No ECJ judgment explicitly mentions pre-emption and so these three categories are academic made, with some reliance on US constitutional theory, Tavares, *supra* note 69 at 205.

providing more detailed rules).²²⁰ This is close to making it an area of exclusive competence. However, it does not seem as though the EU legislative competence in competition is of this kind of all encompassing nature, whether in relation to substantive or procedural issues. The second approach that Timmermans highlights is more like a conflict rule. Member States can legislate, even in areas covered by the EU regime, but the EU Courts are vigilant. The rule of conflict is widely drawn. Conflicts exist if the national measure impedes the aims or functioning of the EU rules (or creates exceptions to them). There is no need here for EU legislation to exhaustively regulate the area.²²¹ The third approach to shared competences works more like a classical conflict rule. Here the Court controls for the national measure's compatibility with the text of the EU rules. Unless the national rule actually conflicts with the EU rule, then it should be allowed.²²² A nice example of this can be seen in *Gallagher*, where EU legislation stated that health warnings must cover at least 4 per cent of the surface area of tobacco products. The UK rule implementing the EU directive had a higher minimum of 6 per cent. The Court saw no pre-emption:

The expression 'at least' [in the EU directive]...must be interpreted as meaning that, if they consider it necessary, Member States are at liberty to decide that the indications and warnings are to cover a greater surface area in view of the level of public awareness of the health risks associated with tobacco consumption.²²³

²²⁰ E.g., Case 22/70 *Commission v. Council* [1971] ECR 263.

²²¹ Case 31/78 *Francesco Bussone v. Ministro dell'agricoltura e foreste* [1978] ECR 2429 ¶ 43.

²²² SCHÜTZE, *supra* note 32 at 367.

²²³ Case C-11/92 *The Queen v. Secretary of State for Health, ex parte Gallaher Ltd, Imperial Tobacco Ltd and Rothmans International Tobacco (UK) Ltd.* [1993] ECR I-3545 ¶ 20.

It is clear from the above that the kind of pre-emption doctrine applied by the EU Courts in relation to competition affects the amount of diversity that the Member States can introduce through their national competition legislation.

However, as noted above, unusually, when giving effect to the principles in Articles 101 and 102 TFEU, Article 103(2)(e) TFEU allows the Council (in regulations or directives) to ‘determine the relationship between national laws’ and the provisions contained in Articles 101-106 TFEU (or adopted under Article 103 TFEU). The Council seems to have the power to over-ride the normal doctrines of shared EU legislative competence (as well as exclusive EU legislative competence), within the limits of the principles set out in Articles 101 and 102 TFEU.

In all areas where the EU has not acted under Article 103(2)(e) TFEU, or pre-empted the Member States in some other way, then the Member States are free to pass national laws, although the application of those laws will then be governed by the executive competence rules, insofar as they clash with the application of Articles 101 and 102 TFEU, or EU acts.

We start by outlining the normal position in competition law. If the Council wants to make a regulation or directive relating to the Member States’ procedural powers when applying Articles 101 and 102 TFEU, it can use Article 103 TFEU.²²⁴ In order to understand the scope for Member State action here, we need to understand exclusive

²²⁴ If these procedural powers are outside of the scope of Art. 105 TFEU (where the Member States act as assistants to the Commission in its enforcement actions) then Art. 291(2) TFEU will also apply. This means that where uniform conditions are ‘needed’, then powers should be transferred exclusively to the Commission, otherwise the Member States can act). In the latter case (no uniform conditions necessary), the Council can, however, act to control the Member States’ procedural powers; however, what it cannot do here is to confer powers to the Commission.

EU legislative competence, under Article 3(1)(b) TFEU. The Council only has exclusivity for determining national procedural powers where this is ‘necessary for the functioning of the internal market’ (where this condition is fulfilled, then the Member States cannot lay down procedural rules). However, even within the remit of Article 3(1)(b) TFEU, Article 103(2)(e) allows the Council to let national procedural rules prevail if it wishes. Where EU ‘organised’ procedural powers are not ‘necessary for the functioning of the internal market’ then there is a shared (EU and national) competence to make procedural rules for the Member States to follow when they apply Articles 101 and 102 TFEU. The easier it is to achieve the ‘necessity’ threshold, the less space the Member States have to make their own procedural rules. Even if there is a shared competence, the Member States lose their powers once pre-empted by the EU.

Let’s examine three further examples where shared competence seems to be relevant: resolving tensions between the two systems of application of Articles 101 and 102 TFEU (the Commission acting under Article 105 TFEU, and the Member States acting on their own account); the substantive application of the EU Merger Regulation (passed on a dual basis); and Member States’ procedural rules when applying Articles 101 and 102 TFEU. In addition, in areas of shared competence, EU action should be in line with the subsidiarity and proportionality principles, Article 5(3) and (4) TEU. The position vis-à-vis proportionality is as above, for exclusive competences.²²⁵ As regards subsidiarity, the EU Courts have, in some areas, interpreted Regulation 1/2003 as if it dealt with some procedural clashes between EU and national competition laws, implicitly under Article 103 TFEU. The EU Courts have always treated these conflicts as operating in an area of shared legislative competence (although the cases I will refer

²²⁵ See the discussion around *supra* note 217.

to are before the Lisbon Treaty and competition was widely felt to be an area of shared legislative competence before then, so this is not surprising). What is interesting though, is that they have also insisted on applying the subsidiarity principle, although they also seem to treat this as a largely political question, leaving a lot of leeway to the Council (essentially accepting that if the Commission acts in line with Regulation 1/2003, then there is no breach of the subsidiarity principle).²²⁶

An important set of issues for the Council is resolving the tensions between the two types of enforcement of Article 101 and 102 TFEU (Commission led (with Member State assistance) and Member States acting in their own right). This is likely to be challenging. An example can be found in Regulation 1/2003, article 11. It deals with co-operation between the Commission and the NCAs' when applying Articles 101 and 102 TFEU in individual cases. They do this in 'close co-operation.' However, as a backstop, article 11(6) explicitly states:

The initiation by the Commission of proceedings for the adoption of a decision under Chapter III [Articles 7-10, Regulation 1/2003] shall relieve the competition authorities of the Member States of their competence to apply Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU]. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.

This is the Council's way of resolving the ultimate tension between the two types of enforcement of Article 101 and 102 TFEU. We saw in the discussions of executive competence that the EU Courts are reluctant to interfere in what they seem to see as a

²²⁶ See e.g., Case T-339/04 *France Télécom SA v. Commission* [2007] ECR II-521 ¶ 79-89.

largely political issue, best resolved by the Council. The implication being that, if the Council were to embrace more diversity, then it could also change this method of resolving tension. In terms of the proportionality test here, we have seen AG Kokott apply it specifically to Article 11(6) already, to ensure that NCAs can act once the Commission has finished acting (and if there is a Commission decision to NCAs, then they must comply with it).²²⁷

Another example can be found in the EU Merger Regulation (which has a dual basis, Articles 103 and 352 TFEU), and is in an area of shared competence. This explicitly envisages the Member States producing merger legislation and other national laws that might conflict with the EU Merger Regulation. However, Member States are not allowed to apply their national rules unless the EU Merger Regulation provides for this. There are complex jurisdictional thresholds in order for the EU Merger Regulation's substantive and procedural rules to apply (these are different from the appreciable effect on trade between Member States test from Articles 101 and 102 TFEU). Below these thresholds the Member States can apply their competition laws.²²⁸ Furthermore, in terms of diagonal conflicts, the EU Merger Regulation states that: 'Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.'²²⁹

The pre-emption rule with national substantive competition rules seems clear in Regulation 139/2004; national merger rules can exist, but cannot be applied where there

²²⁷ See the discussion around *supra* note 80.

²²⁸ Reg. 139/2004, recital 18 and art. 21(3).

²²⁹ Reg. 139/2004, art. 21(4).

is a concentration with a Community dimension. Where there is no Community dimension, then national competition rules can apply as well.²³⁰ The EU Merger Regulation claims that it complies with both the subsidiarity and proportionality principles (recital 6), no reasons are given to support this assertion in the regulation. Since the EU Treaties came into effect, it also has to comply with Article 291(2) TFEU, so uniformity must be ‘needed’ before the Member States can be prevented from implementing the EU Merger Regulation. This seems unlikely for competition provisions like these.

²³⁰ Similarly, Member States cannot apply their ‘national legislation on competition to any concentration that has a Community dimension.’, EU merger reg, art. 21(3), unless the EU merger reg explicitly permits it, *see* Reg. 139/2004, arts 4, 9, 21 and 22. Recital 17 says ‘The Commission should be given exclusive competence to apply this Reg, subject to review by the Court of Justice.’

This raises an interesting conundrum. The EU merger reg applies once there is a concentration (this is a defined term, but essentially means merger); and Reg. 1/2003 is disapplied (whether or not the concentration has a ‘Community dimension’, *i.e.* even if the Reg. 139/2004, art. 1 turnover thresholds do not apply). Reg. 139/ 2004, art. 21(1) states that this reg ‘alone shall apply to concentrations as defined in Article 3, and Council Regs (EC) No 1/2003 [and others]...shall not apply [except in relation to joint ventures]’. The Commission (subject to the EU Courts) has sole jurisdiction to take decisions under Reg. 139/2004; and Member States cannot apply their national law to any concentration with a Community dimension, arts 21(2) and (3), Reg. 139/2004. It is generally agreed that Reg. 139/2004’s turnover thresholds are higher than the Art. 101 and 102 TFEU’s ‘appreciable affect on trade between Member States’ test. This means that in this ‘gap’ there is no. Reg. 139/2004 and no Reg. 1/2003. Some believe that in this space, Art. 104 TFEU is revived and that enforcement action under Arts 101 and 102 is possible for the Member States (Art. 104) and the Commission (Art. 105), PETER ROTH, *EUROPEAN COMMUNITY LAW OF COMPETITION* at 6-270-74 (Fifth ed., 2001), citing this also as the Commission’s view.

A third example comes from the draft Directive on Effective Enforcement (which has a dual basis of Articles 103 and 114 TFEU and so is an area of shared competence). We have seen that this instrument purports to interfere in the independence of NCAs by imposing minimum institutional requirements, as well as in various aspects of their procedural and fining practices. Outside of the specific, narrow confines, of the rules in this draft directive there would probably be no pre-emption (there is reason to think that pre-emption would be narrow here because otherwise one might end up with gaps where limitations on Charter rights had not been explained ‘by law’ (making them incompatible with the Charter)). This would allow the Member States to diverge outside of these specific rules, as long as they act in line with their wider EU obligations (*e.g.* Article 4(3) TEU).

V. Conclusion

This paper has asked what spaces have been left for diversity in competition law in the EU. The way that the EU Treaties are ordered is not consistent and there are plenty of gaps in the existing framework. In part, this is because filling in all gaps in advance is hard, given the political conflicts and the (understandable) lack of foresight of the Member States. As is normal in constitutional arrangements, the EU Treaties are incomplete contracts, leaving a lot of difficult work for the EU Courts to do. We have seen that the Member States have considerable room in both legislative and executive competition competences.

In terms of the legislative competence, the EU has a wide set of powers. It may well have an exclusive legislative competition competence in the five Article 103(2) TFEU areas, as well as for granting the Commission the powers which allow it to act effectively under Article 105 TFEU (and to the Member States so that they can assist the Commission here). With limited exceptions (related to Article 103(2) TFEU) EU

exclusive legislative competence does not cover the substance of Article 101 and 102 TFEU themselves though, as these are not EU acts. So, the Member States share legislative competence in large areas too, often, for example, relating to generating their own procedural rules to enforce Articles 101 and 102 TFEU in their own right. Similarly, in terms of executive competences, both the Commission and the Member States have wide powers here, including a shared competence to enforce Articles 101 and 102 TFEU.

In any event, the precise remit of shared and exclusive competence is less important here, given the Council's highly unusual power (Article 103(2)(e) TFEU) to be able to 'determine the relationship between national laws and the provisions contained in' Articles 101-106 TFEU or adopted pursuant to Article 103 TFEU. This is a tool for allowing more diversity, as it could give Member State competition laws primacy over Articles 101 and 102 TFEU, for example. In addition, the Council can use Article 103(2)(e) TFEU to organise the relationship between the Commission and the Member States as the two sets of enforcers of Articles 101 and 102 TFEU.

In the end, the space that we find for diversity depends upon our meta-constitutional values. For too long, these have focused on the benefits of uniformity, with insufficient regard to diversity. As EU law confronts real value conflicts we need a new approach. The various actors must take responsibility for the future of integration. A sense of trust is needed between them. This requires more than a federal order of competences. We also need a set of conditions and principles

capable of organising and fostering mutual trust among the Member States and between the Member States and the European institutions. We see some of these principles timidly emerging in sensitive areas of application of EU law: the principle of loyalty, a duty of convergence as regards basic values, a due

consideration of possible impact on others' sphere of autonomy and identity[.]²³¹

It is important that diversity should not undermine trust in our system. This is a real risk. It is also possible that, unless the status quo changes, the emphasis on uniformity will increasingly become a problem. This is because states may seek difference in the shadows. If no space is left for genuine difference, decision-makers may seek to achieve unstated aims, secretly. This contributes to legal uncertainty;²³² which, in turn, frustrates our ability to learn and debate which rules are best. Yet, if we embrace diversity more fully, then we can shine a light on difference, bringing learning and understanding to all.

²³¹ LOÏC AZOULAI (ED.), *THE QUESTION OF COMPETENCE IN THE EUROPEAN UNION* at 16 (2014).

²³² Neil Walker, *Flexibility within a Metaconstitutional Frame: reflections on the future of legal authority in Europe*, in *CONSTITUTIONAL CHANGE IN THE EU: FROM UNIFORMITY TO FLEXIBILITY?* at 28 (Gráinne de Búrca & Joanne Scott eds., 2000).