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The European Union's flexibility clause: an analysis of its interpretation, use and evolution over time.

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Introduction

Due to a lack of inherent powers of the European institutions, the European Union's legislative power is based on a system – said – of conferred competence according to which the policy areas over which the Union is legitimated to legislate must be explicitly laid down in the Treaties. In this sense, an expansion or even the 'creation' of competences is precluded. Nevertheless, alongside enumerated ones, the EU enjoys what are called 'general' competences[1], which do not refer to any specific legislative field but amply grants legislative powers for developing policies not expressly mentioned in the Treaties. Within this framework, the core argument addressed by this thesis is the specific question of the flexibility clause laid down in Article 352 of the TFEU which provides the so-called 'residual' competences to the Union institutions. This is said to be the most general competence of the EU legal order since it can be transversally employed in every Treaty area for the implementation of any kind[2] of legislative acts in accordance with the objectives and values of the Union. The result is a 'competence granter' which extends the European competences' scope unlimitedly. Therefore, the Member States have been rising several concerns regarding its use, above all the risk of revising the Treaties without passing through a formal amendment procedure as it is provided by Article 48 of the TEU. Nevertheless, despite its controversies, the clause has been present in the Treaties under Article 235 of the EEC since the Treaty of Rome (1957) and never removed since it fulfils a pivotal task for a system of conferred powers as the European one. In fact, as the name suggests it aims at making the Treaties less rigid – or flexible indeed – in the exercise of legislative power. In this sense, a legal system based on enumerated powers might run into the risk of being stuck into competences' specificity and consequently of an inefficient and inadequate legislative power for the very reason that is highly implausible that the treaty drafters were able to provide *a priori* every field where it would have been necessary to legislate on. In fact, it is instead rather likely that unforeseen issues may arise and require a legal basis for action in a specific policy field[3].

However, the issues surrounding the clause are various and multifaceted, and it would be reductive to relate them simply to an infringement of the revision procedure. In this respect, this thesis identifies two different levels of analysis regarding the clause. The first and most obvious is interpreting its provisions wording in a specific case. Indeed, many expressions of pivotal relevance for understanding the *modus operandi* and the limits of Article 352 are rather ambiguous and open to various interpretation so that a general rule for its use has been impossible to be identified. The CJEU tried on several occasions to define a clear use, but in

[1] Articles 114 and 352 of the TFEU.
[2] The flexibility clause literally mentions in its text the "appropriate measure".
[3] Lebeck talks of the clause as a tool for "crisis management", C. LEBECK (2008: 325).

the end those have always resulted into temporary jurisprudence that used to change from time to time according to the constitutional climate surrounding the EU and the Member States. The second level concerns the constitutional implications for the Union itself, specifically the European theory of competence allocation, the exercise of legislative power, and ultimately important considerations related the legal nature of the Union can be drawn. In fact, since the clause can be considered the exception to the European system of competence – as well as the most general competences granter from which the Union can enjoy boundless legislative power – "the [textual and conceptual] limits of Article 308 have ultimately come to coincide with the limits of the constitution itself"[4]. In this sense, the clause can be considered as one of the main indicators of the constitutional nature of the Union, which has always oscillated between a supranational organisation, following the example of a federal order, or an intergovernmental one, where the level of integration is necessarily limited. Therefore, in this thesis, the controversies related to the textual limits intertwine with the constitutional questions arising from the interpretations – mostly made by the Court – of these conceptual boundaries. That is why, after a theoretical – but necessary – premise and after presenting a general overview regarding the European system of competence as a whole[5], the development of this thesis chronologically follows the EU's constitutional history adding emphasis to three Treaty revisions and three landmark cases, deemed pivotal for the understanding of the clause's interpretation, use and evolution through the decades.

Finally, the last chapter addresses the issue of the recent fall of the clause into 'inflexibility' and attempts to propose an 'optimal use' for the latter in accordance with the conclusions drawn by Butler's *The EU flexibility clause is dead, long live the EU flexibility clause*[6].

[4] R. SCHÜTZE (2003: 103).
[5] With specific relevance given to the European doctrine of implied powers.
[6] G. BUTLER (2019).

Chapter I

EU and its competences, an overview

This first chapter aims at introducing the EU system of competences and at pointing out the role of Article 352 TFEU in this framework. This is pursued through a first paragraph which presents the question of competence conferral in the European legal order in more general and theoretical terms, underlining the firm bound between the constitutional nature of the EU and the devolution of legislative powers from the Member States to it. Then, the chapter proceeds with a more practical analysis of the EU competences and shows how the system works. It then moves on to the specific case of implied powers in EU law as an exception to the competences system. Finally, it concludes with a textual analysis of Article 352 by which the crucial expressions that make the interpretation of the article more controversial are dismembered and stressed.

1.1 The question of the EU constitutional nature

In order to pursue an in-depth analysis and a fully comprehension of the controversies arising from the so-called flexibility clause laid down in Article 352 TFEU[7], it is worth to have an overview of the constitutional nature of the EU legal system and ultimately of its competences. Indeed, although "legal literature on competence issues had almost exclusively focused on Article 235 EEC Treaty"[8] which is arguably the most problematic provision in this context, it will be demonstrated in the following paragraph that the article itself only represents the 'iceberg's peak' of a much more deep-rooted controversy regarding the transfer of powers from the Member States to the European Union.

The issue of conceiving a duality of powers on a single territory has been affecting and monopolizing the constitutional debate arguably for centuries. Indeed, when two authorities coexist the question of competence distribution becomes prominent and eventually problematic. In this circumstance, the legitimacy to exercise legislative power is directly

[7] This clause has been present in the Treaties since the Treaty establishing the European Economic Community in Rome (1957), but nevertheless its numbering and partially its text changed during the years: respectively from art. 235 of EEC (1957) to art. 308 of the Treaty Establishing the European Community (Amsterdam version, 1997) and finally to the current article 352 of Treaty on the Functioning of the European Union (Lisbon Treaty 2007). The purpose of this footnote is to points out that whenever, for example quoting from other authors, the reader comes across one of these numberings, the text is still referring to the flexibility Clause.

[8] L. AZOULAI (2014: 1).

influenced by the legal relationships[9] between the two sites of authority. Therefore, following this reasoning, an efficient definition and classification of these relationships will define the legal order within which the two authorities are acting and, as a direct consequence, will allow to develop and fully understand its allocation of competences. In fact, legal theorists tend to make this classification according to the level of centralization or decentralization of powers held respectively by the central government and by the sub-state entities[10]. This reasoning becomes more complex when applied to the European Union since it represents a *unicum* in the broad field of international law and organizations. This uniqueness appears to be motivated not only by the novelty of features presented by the EU legal order compared to any other international organization or sovereign state, but also by the high degree of divergence among the scholars in defining this legal order in well-known terms. Indeed, the legal literature has been struggling in the attempt of giving an exhaustive definition of the EU and ultimately locate it into a clearly identifiable legal category.

In this regard, this work shares the position taken in Azoulai's *The Question of Competence in the EU*[11], according to which a crucial issue for the right functioning and integration of the Union is the failure in elaborating a clear theory of competences allocation. In other words, even though the division and transfer of competences is largely treated and explicit in the Treaties such as in Article 2 of the TFEU or in Article 5 of the TEU, ambiguities in the exercise of the legislative powers have nevertheless always emerged. However, in the development of its analysis, the aforesaid work lays on an assumption – that this thesis largely shares and tries to adopt with the same efficacy – according to which for elaborating a suitable theory of competences allocation in EU the first issue to be addressed are not the competences themselves but to clearly determine the legal identity of the EU. which makes the Union "occupies a place somewhere in between an international organization of sovereign states and a nation state"[12]. Indeed, the former is a direct consequence of the latter. In other words, a necessary premise is to know and understand what kind of international organisation the Union is, in order to clarify what kind of relations the States and the European institutions are in. However, this clarification, despite being the focal point of the EU constitutional analysis, has been rather difficult to achieve in valid terms. It can be generally argued that the reason behind this unsatisfactory outcome is the often-conflictual relations between the two sides, i.e. the Member States and the Union's institutions. However, being more specific, two primary and correlated reasons can be identified: the States' conception of EU – and of international law in general – and their

[9] The term relationship is intended with a general meaning, covering the whole array of relations undertaken between a central and a sub-authority among which sovereignty transfer, competences and powers attribution.
[10] G. F. FERRARI (2018).
[11] L. AZOULAI (2014).
[12] R. SCHÜTZE (2018: 43).

willingness, which in many cases is absent, in devolving sovereignty to a higher authority. Therefore, in line with the reasoning of this short premise, the following paragraph aims at addressing the question of EU constitutional nature in order to derive from this analysis a sharp competences allocation theory for this legal order. To this purpose, a proposal of 'solution' to this decennial issue is presented at the end.

The question of legal nature has assumed the connotation of a 'clash' between a mere intergovernmental understanding and a fully supranational conception of the Union. In this regard, the Member States, or at least a relevant number of them, remain anchored to the "state-centred"[13] approach that is a conception of the international order – formally established with peace of Westphalia in 1648 – according to which a strict separation of the domestic sphere from the international one does exist and the primary purpose must be the preservation State sovereignty. As a result, intergovernmentalism became the pattern of international relation in the inter-State system during the Westphalian Age.

However, this conception came into crisis as it is currently emerging what can be called "Constitutional Pluralism"[14] whose the EU is one of the clearest evidence for this theoretical shift. In particular, the rising of new sites of authority has increased the constitutional claims in the legal arena where the nation States no longer have the monopoly of normative power but coexist with the several non-state actors that, due to their "direct or indirect proliferation"[15], have stood as an alternative site of authority and consequently threatened and rendered impossible the Westphalian founding idea of a "single autonomous political authority within a territory"[16]. Given that the EU can be reasonably considered the most striking example of an international non-state entity which nonetheless acts state-like, then the birth of the latter naturally exacerbated the disputes between the 'defenders' of State sovereignty and the pluralist and supranational counterpart. Indeed, the Constitutional Pluralism lays on the monist assumption that a "universal" legal order is possible[17].

In this respect, Walker differentiates between "constitutional denial" and "constitutional affirmation". The former refers to the "symbolic practice of Eurosceptics" according to which EU is absolutely rejected as an appropriate site for constitutional claims and consequently it lacks of legitimacy in exercising legislative powers with direct applicability in the domestic State order. Following this logic, it is deductible what is meant by "constitutional affirmation". In other words, in the EU context, it is possible to identify those who emphasises the role of the States as master of the treaties alike in any other traditional international treaty, organization, alliance while on the

[13] State-centred is just one of the several expressions which can be used to name this approach such as Westphalian Model or One-Dimensional Westphalian Configuration.
[14] N. WALKER (2002).
[15] S. REDDY (2012: 61).
[16] *Ibidem*.
[17] H. KELSEN (1960: 154).

other hand there are the ones who argues that a strict separation in the relation between domestic and international legal order has ceased to exist and hence the EU, being the "most accomplished case to date" , is able to make its "own independent constitutional claim alongside the existence of the nation State" .

This new understanding of the relationship between domestic legal orders and international ones is thus based on the possibility of coexistence of the two spheres, on the concept of supranationalism and lastly on the "heterarchy"[18] of constitutional sites rather than an exclusive sovereignty of the nation State. Supporting this thesis, other than Walker one of the most prominent writers of Constitutional Pluralism, who in 2002 published a homonymous article, there are several influential scholars that have shared this approach. In 1932 in his *Pure Theory of Law* Hans Kelsen had already predicted that "the ultimate goal of legal development [would have been the creation of] a universal world legal community"[19]. While, more recently, Millet was seriously critic of the dualist[20] theory of international law and argued that the latter is "no longer possible, nor even appropriate" to be adopted[21]. The scholars, who belong to this theoretical side, are thus suggesting that the world is moving towards a 'global government' or that is in place a process of "federalization of world"[22] since it is the political form which appears to give the most efficient solutions for the global scale matters thanks to the supranational character of the norms and regulations produced. Obviously, this appears as an utopian point of view since the world has not moved yet in that direction and despite certain remarkable exemptions – such as the EU itself – that can partly spread optimism in this respect, it seems that we are still far away from reaching a global and unique source of authority. Nevertheless, even in the European context the "F-Word is a taboo"[23].

Indeed, despite the high degree of similarities that can be found between EU and a federal legal order, the Member States have been rejecting this idea. Those communalities are claimed in the *The Question of Competence in the EU*[24] as well. Although this work brings together the testimonies and analyses of numerous scholars who address the questions from different terms, perspectives and with disparate conclusions; a remarkable point remains unvaried in several of the articles collected, that is

[18] N. WALKER (2002: 337); the author uses this term for describing the relationship between legal orders in the international legal system theorized by the constitutional pluralist approach. This term is used in contraposition with the vertical superiority of the domestic legal order, over the others, presented in the state-centred theory of international law.
[19] H. KELSEN (1960: 154).
[20] Dualism is a theory that, as the name suggests, asserts a dual relationship between the domestic and the international system, namely conceiving them as clearly distinctive legal orders. In this context, it is used as a 'synonym' for the "state-approach" of international law.
[21] F. X. MILLET (2014: 266).
[22] *Ibidem*.
[23] *Ibidem*, p. 267.
[24] L. AZOULAI (2014).

approaching the question of the constitutional nature in a comparative frame with the federal order.
Therefore: is the EU a federal order? Does it present a federal allocation of competence? In truth, the issue of conceiving a duality of powers on a single territory is traditionally answered by federalism. Given a general definition of federal system:

> "With some notable exception a state will be defined as federal if the Constitution contains a provision or clause listing the subject-matters on which the central government can legislate [..] thus leaving the so-called 'residual' subject-matters to the sub-state governments"[25].

According to this very basic understanding, a federal state presents a vertical allocation of competences[26] laid down *a priori* into a constitution where the competences not explicitly mentioned remain a prerogative of the nation State government. This comparison can be claimed to be well-founded and hence the outstanding similarities cannot be ignored. However, as said before, the idea of a federation has never been accepted and even discredited for two main reasons. Firstly, the great variety of existing federal States which possess their own unique constitutional characteristics[27] would make rise the question about 'which federal order comply the most with EU?', ultimately open another great discussion[28]. Secondly, a federal order and consequently a federal allocation of competence would rise the question whether the EU is actually a sovereign legal entity or not. If yes, considering the EU a new State on its own would entail a level of supranationalism higher than the Member States would agree and concede due to a 'total loss' of their sovereignty in favour of the supra-level European institutions. Nevertheless, until today this seems a non-undertakable path. On the other hand, if not, approaching the EU as a common international organization in the inter-State system would preclude an effective European legal integration and moreover this would not be the reality of facts. However, due to the potential threat that this debate could arise which could thus even lead to question the very existence of the "new legal order of international law"[29] represented by EU, the actors involved, over all the Court of Justice of the European Union (CJEU) has been avoiding giving an *aut-aut* answer, preferring a "mutual adjustment resolution"[30], namely facing any possible matter related to the legal nature of the Union only when it was truly necessary and in this occasion the EU and the Member States simply revise

[25] G. F. FERRARI (2018: 42).
[26] i.e. in a relation of superiority of the federation government over the federated ones.
[27] R. Schütze traces the issues to two basic federal model that in a broad sense can be respectively called American and German tradition.
[28] G. TUSSEAU (2014: 41).
[29] Judgment of the European Court of Justice, 5 February 1963, Case 26-62, *Van Gend & Loos v Netherlands Inland Revenue Administration*, hereinafter Judgment *Van Gend & Loos*.
[30] L. BOUCON (2014: 175-182)

their expectations towards one another[31]. On one hand, this has helped the Union to stay united but highly fragmented inside. On the other hand, this case-by-case approach has paradoxically ignored to solve the question – being aware of the political and constitutional 'earthquake' that could have followed. This resulted into an alternance of approaches in reading the Treaties and understanding of EU that had and still have a major and evident impact also for the interpretation of the flexibility clause. It can be concluded that hence the responsibility for the failure in defining the EU legal nature and consequently developing an accepted competence allocation theory cannot be exclusively casted off the nation States but it must be equally shared also within the EU's institutions.

In this regard, the EU has been escaping the scabrous constitutional question presenting itself as a unique and unprecedent union of sovereign States, in one word: a *sui generis* legal entity. This position asserts that the uniqueness of the EU and the compound features of its institution make the EU incomparable and not suitable in any existing legal category of the traditional international law. Indeed, until that time, an international organization used to maintain the traditional state-centredness character proper of the Westphalian age. Therefore, in front of the novelty of an 'international organisation' that presents supranational institutions alongside the classical intergovernmental ones; this theory has become prominent. Member States and the EU accepted this vision since it did not question neither the existence of the EU nor a total loss of sovereignty by the contracting States.

This theory finds evidence in the analysis of the Union's institutions and constitutional history in general. Indeed, the EU, born through the ratification of a treaty, is undoubtedly a union[32] of sovereign States which cooperate at the international level. Specifically, the European Coal and Steal Community (ECSC, 1952), which can be considered the first building block of the European integration, resembles the form of a traditional international law treaty-ratification. This was basically true also for the right following Treaty of Rome (1957) which established the European Economic Community (EEC) and the European Atomic Energy Community (EAEC). However, even though the shape could formally recall the one of an international agreement like many before, the supranational character of the Union's institutions was already rather pronounced with an incredible space for action in the decision-making and agenda setting given to the Commission. as the Article 9 of the ECSC used to regulate:

> "The High Authority shall consist of nine members, […] whose independence is out of doubt. […] In the performance of these duties, they shall neither seek

[31] S. J. BOOM (1995).

[32] The term Union was introduced only with the Maastricht Treaty in 1992. Previously, it was called Community.

> nor take instructions from any Government or from any other body. They shall refrain from any action incompatible with their duties" [33].

This key to lecture was shared by the European Court of Justice in the prominent Judgement *Van Gend en Loos*[34] (1963), where the novel and supranational character of the European Economic Community found for the first-time confirmation by the Court. Indeed, – without deepening into the dispute – this judgement not only legitimized without any precedents in an international context the direct effect of the European norms in the domestic legal system of the Member States, but, in addition, it was made the prominent statement which elevated the EU as a unique international legal order:

> "[The EEC] is more than an agreement which merely creates mutual obligations between the contracting states […] The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals"[35].

That was an outstanding step towards supranationalism. However, after that, the pattern of constitutional evolution in the EU did not proceed smoothly, but it became a sharp alternance of period of supranational and intergovernmental understanding of the Union, treaty revision after revision, case after case. For that reason, the Council has soon emerged as the site for national Government to safeguard their sovereignty before the supranational institutions of the Union. Indeed, a general attitude pursued by the of the Heads of States and Government was to give increasing relevance to the role of the Council in the legislative procedure of the Union in order to retain and control as much as possible the competences and the powers conferred to the Union. In this alternance of phases – punctuated by the Treaties revisions favourable to one side or the other – the relationship between the Council and the Commission – and the Parliament as well – has been described as an "us versus them"[36]. In this regard, the non-ratification of the European Defence Community (EDC, 1952) by France, the Luxembourg Compromise (1966), the Maastricht Decision (1993) and the Lisbon Decision (2009) issued by the German Federal Court and finally the European Union Act (2011) by United Kingdom represent only few of the most prominent examples of the Member States' perpetual political malaise and unwillingness to renounce to their sovereignty in favour of institutions of unclear legal nature.

Despite that, the critics for the *sui generis* approach are several. Legal literature[37] has been cautious in accepting this constitutional explanation because, despite having the noble intent of proposing an alternative approach

[33] The Commission used to be called High Authority in the ECSC.
[34] Judgment *Van Gend & Loos*.
[35] Judgment *Van Gend & Loos*, para. II, point B.
[36] G. TSEBELIS, G. GARRETT (2001: 363).
[37] R. SCHÜTZE (2018: 63).

to the comparative ones, the overall perception is that a crucial and controversial issue is attempted to be solved through an oversimplification of the question itself. The entire *sui generis* argument can be said to be based over a conceptual tautology, namely declaring the EU incomparable. In this way, it is impossible even to call it a legal theory because it gives no explanations but simply repeat in the predicate what is already said in the subject. In this way, the *sui generis* argument escapes and nullifies the constitutional discussion and lastly manages in defining the EU legal nature only in negative terms. In general, it can be asserted that the *sui generis* approach has failed both in defining the EU in theoretical legal terms and in finding a 'peaceful' mediation between the Member States and the EU's constitutional claims, that on the contrary have been constantly disputing over this issue. However, this approach had a key role in discrediting a compliance of the EU in a federal legal order, an association that the Member States want to firmly avoid.

Until now, we have presented two points of view which nonetheless failed, for different reasons, in the purpose of defining the EU legal nature. How to solve this theoretical question before moving into the allocation of competence? In this regard, this thesis openly accepts the points made by Tusseau[38] who contests the validity of the "vernacular expression of the federalism-talk"[39] such as federation, federalism, federal order of competences, and at the same time he critics the "resort to new concepts"[40] made by some authors such as the ones above mentioned like Constitutional Pluralism[41]. As a result, he encourages the reader to overcome the "undoubtedly suggestive and heuristic"[42] expressions and this kind of theoretical analysis, and instead he recalls that the role of the legal analyst is to base its studies on analytical and practical investigation. Moving away from the reality will lead to fashionable conclusions that do not succeed in solving any matter. In this regard, the attempt of accomplishing an ontological enquiry through scientific means for answering the question of 'What is the EU in legal terms?' does not bring any satisfying answer, on the contrary exacerbates the debate. In order to investigate the allocation of competence in the EU legal order it should be taken into account instead the practical question of 'How this competence has been conceived through the years by the EU institutions and the Member States?' and 'How did a specific interpretation of the provisions laid down in the Treaties change the pattern of European integration?'. In other words, if we know that when talking about the European Union we are generally in front of a legal order where two levels of political and legal authorities exist and must coexist, then it is more relevant to analyse how this transfer of competences and powers occurs and has occurred through an analysis of the Treaties, the

[38] G. TUSSEAU (2014: 39-62).
[39] *Ibidem*, p. 40.
[40] *Ibidem*.
[41] N. WALKER (2002).
[42] G. TUSSEAU (2014: 40).

European Court of Justice's (ECJ) judgements, Member States' declaration and intergovernmental conference which have been shaping the EU for the past 50 years. Furthermore, it is arguable that there cannot be a 'winning side' in this theoretical discussion since the ultimate choice in the interpretation of the international law and in the relations of nation State in the intra-State system, resides in the Nation States themselves. It is necessary to defer to the decisions of the national governments on which, being democratically elected by their own citizens, nobody is entitled to counterstrike their will (and of their people)[43].
In the end, it is a more valid and correct conclusion to simply acknowledge that there are different sides to the approach to international law and that these are maximally influenced by the orientation taken by nation States. To stop the investigation at theory would render the analysis incomplete. It is necessary to accept this opening to pragmatism and a partial dismissal from theory for the sake of this composition. It can therefore be concluded that, although it is true that an uncertain constitutional nature leads to an uncertain distribution of competences, it is nevertheless necessary to analyse what is provided for in the treaties and the case law issued in this respect in order to have an effective analysis of competences and the flexibility clause, otherwise one remains trapped in a game of theories. In order to reinforce this concept, it is hereby reported an high-impact quote from Tusseau who ruthlessly affirms: "'Is the EU order federal?', I would give the following answers: yes if you want; no if you do not. In either case, what you say is devoid of any precise legal meaning"[44].

1.2 EU competences

Clarified the correlation between competence attribution and constitutional nature of the EU and given the position taken in this regard by this thesis, the works moves into an analysis of the competence system provided by the Treaties. The latter is founded over some cornerstone principles which, nonetheless, from time to time appear insufficient to set clear limits, being in certain situations excessively subject to an open interpretation of their provisions.

Firstly, a linguistic clarification is needed. In fact, although the terms 'power' and 'competence' might be interchangeably used by some authors or in other case the former is indiscriminately preferred over the latter, this dissertation makes a distinction. The term power must be understood as a matter of relationships "both between the Union institutions and between the Union and the national bodies in the implementation of Union acts"[45]. In other words, it has a more practical dimension which regards the 'who does

[43] J. KLABBERS (2017: 320-322).
[44] G. TUSSEAU (2014: 61).
[45] L. AZOULAI (2014: 2).

what' and the means and instruments employed for the aforesaid implementation. In this sense, the EU's institutions are vested of legislative, executive and judiciary power which must be sharply and equally distributed for a correct and efficient exercise of them. Although, this last sentence might appear as a redundant specification, it is crucial to understand the difference between competence and power that is wanted to be underlined here. Indeed, the centenary notion of separation of powers is usually largely known even outside the constitutional discussion since it is a founding principle of the Rule of Law. However, in a nation State is rather rare to face issues of competences allocation while the separation of powers remains a pivotal concept for democracy. That is so because a national parliament derives its legitimacy to legislate from the constitution that empowers it with that prerogative which then results innate in the role of this institution as the ultimate representative of the citizens. In other words, a national parliament, where the legislative power is usually allocated, does not need to 'justify' its legislative acts, but instead it is vested with the so-called principle of Kompetenz-Kompetenz. This is "a traditional continental public law concept", that is hardly translated in other languages, according to which a national Parliament is legitimated to "change its own legal competency" or even to "extend" them and this makes the question of competence irrelevant in this context[46]. In easier terms, a legislative body has the competence of determining its own competences. That is why, in a nation State, it is generally possible to implement legislative acts over every subject-matter, which obviously comply with the constitution. This specific feature lacks in any international legal order and in the European one as well. Therefore, the term competence becomes prominent only when there is a devolution of powers and sovereignty from a nation State to another site of higher authority. In this sense, although the EU is a union of sovereign States this does not make it a sovereign State on its own.

Therefore, a competence can be generally defined as the "material field over which an institution is entitled to legislate"[47]. In this regard, it is possible to identify three fundamental dimensions comprised in the concept of competence: the scope, the governing principles for its use and the actual subject-matter of the competence. Given that, Azoulai talks of "issues of competence"[48] implying those controversies related to the limits setting and to the modalities according to which an institution is entitled to legislate. In other words, these issues can be summed up into two questions: what are the limits to EU competences? And how can a legislative body refer to a competence for a legislative procedure?

The answer to these questions is given by Article 5 of TEU. Indeed, it regulates on one hand the limits of the EU competence through the so-called 'principle of conferral', and on the other hand the *modus operandi* for the

[46] C. LEBECK (2008: 307).
[47] R. SCHÜTZE (2018: 229).
[48] L. AZOULAI (2014: 2).

use of the competences by the 'principles of subsidiarity and proportionality'.
However, ascertained that the European Union is devoid of the principle of Kompetenz-Kompetenz, as a consequence of the absence of inherent powers in its legal system, the principle of conferral become a benchmark in the competences system, being the ultimate 'instrument' for granting the Union institutions the legitimacy for legislating. In fact, it provides that "The Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States"[49]. In addition, this concept is even reinforced in Article 4(1) TEU where it is repeated the same last provision: "In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States". Therefore, in order to be legitimate a legal act must be based on a competence which is explicit in the Treaties and moreover an expansion of competences beyond the ones laid down shall be precluded, if not through an amendment procedure, which anyway is all a different story.
Furthermore, the centrality of the principle of conferral is also emphasised in the very first article of the TEU, which establishes the foundation of the Union itself:

> "By this Treaty, the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common"[50].

Therefore, already in Article 1 of TEU, we find that the transfer of competence from the Member States to the Union is identified as a determinant and founding character of the Union itself. Moreover, a first implicit limitation in the use of competences by the EU institutions can be identified in the formula "attainment of the objectives". Indeed, this is a recurring expression, which is present and highly influential for the comprehension of the flexibility clause itself. Here, the treaty drafters are introducing a concept that is as fundamental as it is controversial, that is the legislative power of the EU must be exclusively employed to pursue the common values and objectives, or in other words: 'purpose bound'. This is not a commonplace, but it has a great relevance for setting the limits for EU competences in those situations when a 'general competence'[51] is used as a legal basis for legislative acts. For this reason, the interpretation of this formula has been discussed and contested several times as it is shown in the next lines. However, the Treaties do not provide an article with a clear list of

[49] Treaty on the European Union, Article 5.
[50] Treaty on the European Union, Article 1.
[51] The adjective general is commonly used to describe those competences –provided for instance by the clause or Article 114 of TFEU – which are not included among the 'enumerated' ones.

subject-matters to draw from. Indeed this would have been a too strict textual limitation that would have undermined EU efficiency. Conversely, the expedient used by the drafters was to collect the competences in the Treaty on the Functioning of the European Union[52], specifically in Part III of TFEU, namely "Union Policies and Internal Actions", where each sequent Title contained in this part represents a material field subjected to legislative power, such as "Internal Market" (Title I), "Free Movement of Goods" (Title II) and all the others which are currently twenty-four in total. However, the result is a competence enumeration system which works as a list but that is open to broader interpretations and allows for a wider reading of the subject-matters, already providing a certain level of flexibility in the use of competences.

1.3 Teleological interpretation and the doctrine of implied powers

Therefore, the EU's legislative power is based on a system of competences attribution which lays on the principle of conferral and hence on enumerated powers[53]. As a result, competences which are not laid down in the Treaties, are not to be considered conferred and consequently exploitable. Therefore, a strict textual interpretation of Article 5 of the TEU would then deny any possible expansion of competences. Member States benefit from this strict understanding of conferral and indeed have tried on several occasions to promote its full establishment in the European legal order. Indeed, in their perspective, devolving only a clear and limited number of competences prevents and avoids any possible extension and thus abuse of legislative power by EU's bodies. Nonetheless, in this scenario, the EU actions and policies would be limited and ultimately lose efficiency. In this regard, Bridel argues that: "The tasks of the State are numerous and largely unpredictable. The Constitution does not list them all"[54]. The idea presented here is that a strict enumeration of subject-matters for exercising legislative power will inevitably present some 'gaps' that, at the time of the drafting, were "largely unpredictable" or not even existing. A nation State overcomes this problem through the aforesaid Kompetenz-Kompetenz principle. Indeed, despite the unpredictable evolutions that our world and society can undertake, a national government is usually able to act responsively in the pursuant of its citizens well-being. As a matter of fact, the first tool a national government can use for addressing national matters of any kind and at any moment is the issuing of legislative acts. It is enough to read the daily newspaper for verifying this assertion: 'Today the Italian

[52] Consistently with what it is stated in Article 1 of the TFEU: "This Treaty organises the functioning of the Union and determines the areas of, delimitation of, and arrangements for exercising its competences".
[53] R. SCHÜTZE (2003).
[54] M. BRIDEL (1965: 159).

Parliament votes for the legislative act X in order to address the problem Y'. However, if, before the implementation of a new norm, a legislative organ needs to go through an amendment procedure, then we will talk of an inefficient organization. This is the "inherent paradox" of EU legislative power identified by Lebeck, namely:

> "The EU is supposed to be able to handle certain limited tasks of public policy-making more effectively than national institutions, whereas the objective of effectiveness often leads to a need to overstep the boundaries established for functional integration"[55].

This excerpt sheds light on the intrinsic problem of the Union that is the pursuing of integration through the implementation of norms in a system that nevertheless amply limits an efficient exercise of legislative power. This is a pivotal contradiction to be understood since the European system of integration which is adopted and pursued is the so-called "Functional Integration". This theory elaborated by Haas in the mid-1950s was indeed inspired by the successful relations undergone by the European States in the ratification of the European Coal and Steel Community and then in the Treaty of Rome. The theory is based on the notion of "spill-over" according to which, at the international, level the growing cooperation in one area causes an enhance cooperation in another adjacent areas. This is exactly what has been happening in EU for the last decades. A typical piece of evidence is given by the common monetary policy which was adopted to facilitate the free trade in the Euro-zone. However, this integration process in the EU is inevitably linked to a supranational conception of the Union since, to pursue the cooperation outcome, it is presumed a delegation of legislative powers to the Union's institutions as indeed Haas asserts:

> "We call integration, the process whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations, and political activities toward a new and larger centre, whose institutions possess or demand jurisdiction over the pre-existing nation states"[56].

Therefore, some degree of elasticity in exercising the legislative power is needed for coping the lack of inherent powers in the EU legal order and foster integration. As mentioned above, it is unreasonable to think that a treaty can include every specific subject-matters over which it will be necessary to legislate about. In this respect, the flexibility clause can even be conceived as the "full reach of the EU competence […] allowing for the process of integration through law to be made more operative"[57], but it is equally valid to state that "in search for effectiveness, [the EU's functional integration] transcends its own boundaries"[58]. Anyway, Lebeck admits that this is also the ultimate reason why this system of competence is accepted by

[55] C. LEBECK (2008: 309).
[56] E. B. HAAS (1961: 366).
[57] G. BUTLER (2019); *infra* Chapter 2.1, Chapter 3.3.
[58] C. LEBECK (2008: 309).

the Member States. As mentioned before anything resembling a federal distribution of competences would be rejected due to national constitutional reasons.

But how then the EU can address this problem? What happens when a sensitive matter rises but it is out of the scope of the laid down competences? It is worth to introduce here the concept of textual and teleological interpretation. The former claims a strict compliance with the written text which does not allow for any other key to reading rather than the one that clearly emerges from the laid down provision. On the other hand, a teleological interpretation – from Greek '*telos*' which means end, aim – it is an interpretation that goes beyond the formal text and attempts to interpret the ultimate purpose of the provision. Indeed, in certain situations, a textual – and hence restrictive – lecture of the laid down provisions could impair the capacity of the Union to be responsive and maximize the *effet utile* in the attainment of its objectives and common values. Since the early years of the Union – or arguably since the famous judgement *ERTA* [59], the ECJ has used teleological interpretation as a tool in its hands to expand the Union's competence in case of reasonable necessity. Ultimately, this custom paved the way for the affirmation of the so-called doctrine of implied powers in the EU legal order.

The doctrine of implied powers consists in the act of going beyond the conferred and expressed competence and, to act so, the consequent arising powers are said 'implied' since they are not explicit but can be deduced and presumed from the context as a clear and necessary extension of what a provision aims at. It can be argued that this doctrine was born in the US federal order with the Article 1(8) of the Constitution also known as the "Necessity and Proper Clause" which is indeed highly comparable with the European flexibility clause itself. It regulates as follow:

> "Congress has the power to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof"[60].

This is the last sub-paragraph of an article which provides the list of Congress' enumerated powers. It immediately emerges the general character of this provision and the broad power given to the latter organ. Indeed, this eventually confers the Congress powers not expressly listed in the Constitution, only limited by the requirement of necessity and pertinence. In the EU context, the doctrine of implied powers assumes similar terms being those powers – or in this case we could talk of competences – not explicitly conferred by the Member States and not reported in the Treaties and therefore in open contrast with the principle of conferral. In other words, implied powers allow an extension of the legislative power of the Union. As

[59] Judgment of the European Court of Justice, 31 March 1971, Case 22-70, *Commission v Council*, hereinafter Judgment *ERTA*.
[60] Article I, section 8 of the US Constitution.

a result, in a system of conferred competence those powers are of central relevance not only because represent an exception in the exercise of the European legislative power, but also because – having, by definition, a broader scope of application – they become an instrument for indirectly defining the outer limits of European competence system, of its legislative power and ultimately the very constitutional nature of the EU.

The doctrine was said to be incorporated in the Treaties only in the last Lisbon revision for what regards the external powers of the EU under Article 216 of the TFEU, considered as a consequence of the *ERTA* which has set the standard of the doctrine for the European legal order. Setting aside the question of external powers, which is directly linked to this discussion but would move our focus away from the point that is wanted to be made here, the *ERTA* (1970) is the "first ever case in which the Commission and the Council faced off squarely before the Court over a question of competence"[61]. It immediately became a milestone in shaping the EU constitutional form. Briefly, the contentious regarded the signing of an international agreement, indeed the ERTA – i.e. the European Agreement concerning the work of crews of vehicles engaged in international road transport – by the Member States in an intergovernmental extra-union site which excluded the participation of the Union's institutions, precisely the Commission which at that time was the most supranational institution and that from its point of view should have been involved in the negotiations. Indeed, the Commission claimed that the Treaties already provided a legal basis for concluding international agreements as such. In specific terms, its arguments were based on the subparagraph 1(c) of Article 75 of the EEC comprised under Title IV, i.e. Transport, combined with Article 228[62] of EEC which regulates the procedures for concluding agreements with third countries. In accordance with Article 74[63] of the EEC which clearly enumerates a "common transport policy" within the objectives of the Union, the subparagraph 1(c) regulates:

> "With a view to implementing Article 74 and taking due account of the special aspects of transport, the Council, acting on a proposal of the Commission […] shall […] lay down: […]
> (c) any other appropriate provisions".

According to the Commission, the term "appropriate provisions", due to its broad and discretionary meaning, would comprise the conclusion of international agreements in the sphere of transport policy, even though this specific power was not explicit in the Treaties. In addition, the Regulation

[61] G. BUTLER (2021).

[62] Treaty establishing the European Economic Community, art. 228: "Where this Treaty provides for the conclusion of agreements between the Community and one or more States or an international organisation, such agreements shall be negotiated by the Commission. […]".

[63] Treaty establishing the European Economic Community, art. 74: "The objectives of this Treaty shall, with regard to the subject covered by this Title, be pursued by the Member States within the framework of a common transport policy".

No 543/69 provides that "the Community shall enter into any negotiations with third countries which may prove necessary for the purpose of implementing this regulation"[64]. An important – and recurring element – for the comprehension of the implied powers and then of the flexibility clause is contained in this provision, namely the expression "necessary for the purpose". The 'necessary requirement' is used here – alike in Article 352 of the TFEU – in an ambivalent position of conferring 'flexibility' to the use of the provision and at the same time to place a conceptual limit to it. In this case, the Commission claimed that concluding the ERTA agreement in the EU framework fulfils this requirement. But, what are the standards to comply with to be assessed as necessary? As it is shown in the excerpt of Regulation No 543/69, this expression is usually 'purpose bound'. In this case, the purpose regards the implementation of the aforesaid regulation, while for instance in the flexibility clause is the "attainment of one of the objectives set out in the Treaties". Nevertheless, these limits in the understanding of the 'necessity requirement' is not exempt from debate in its interpretation, especially in Article 352. That is why – alike in the Judgement *ERTA*–the EU legal order relies on the Court's assessments on a case-by-case basis.

On the other hand, relying on a strict interpretation of the principle of conferral, the Council contested the infringement of the EEC claiming the absence of specific provisions of the Treaty relating to the negotiation and conclusion of international agreements in the sphere of transport policy. Therefore, according to the Council the powers deriving from the Treaty cannot be assumed while on the other hand the Commission argued that the full effect of this provision would be jeopardized if the powers were not extended according to the attainment of the objectives of the Community. In this regard. the Court decided to set dispute as an issue of competence rather than of conflict – hierarchy[65] – of norms. Remarkably, the ECJ adopted a teleological interpretation in judging scope and range of action of Union competences, founding their reasoning on the purposes derived from the *ratio legis* of the Treaties provisions. The following is a pivotal passage of the sentence which tend to be quoted by scholars for underlining the overcoming of a treaty-basis reading and, as a result, the conferral to the EU institutions of more powers than the one explicitly laid down in the EEC:

> "[…] regard must be had to the whole scheme of the Treaty no less than to its substantive provisions. […] Such authority arises not only from an express conferment by the Treaty […] but may equally flow from other provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions"[66].

[64] Regulation of the Council, 25 March 1969, No. 543/69, *on the harmonisation of certain social legislation relating to road transport*, hereinafter Regulation *Road Transport*.
[65] Hierarchy between European and domestic legal orders in the repartition of their functions.
[66] Judgment *ERTA*, paras.15-16.

Therefore, the Court exhorted for an overall view of the question and of the Treaties. This entirety of reading allows for the arise of authority not explicitly expressed. Then, the Court continued taking into account Article 3 and 5 of the EEC for what regards respectively the enumeration of Community's objectives (among which the sphere of transport) and the latter for the fulfilment of Treaty's obligations and the facilitation of Community's objectives achievement by the Member States, claiming that:

> "If these two provisions are read in conjunction, it follows that to the extent to which Community rules are promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope"[67].

It is possible to draw two pivotal conclusions from this excerpt. Firstly and most significantly, given that the core of the dispute concerned the possibility of the EU entering into international agreements with third States, the Court underlined the presence of the sphere of transport within the enumerated objectives contained under Article 3 of EEC and assessed that even though there was no specific provision regarding this topic in conjunction with the conclusion of international agreements, the objective, i.e.: "(e) the inauguration of a common transport policy"[68], requires in order to be attained an expansion of competence in this direction. This was extremely relevant since the Court could easily identify the specific objective to be attained in the Treaties. This will be more controversial in the cases regarding the use of the flexibility clause which, for the very reason of being the provider of 'residual' competences, lacks of a direct reference in the Treaties. Secondly, given the first point, this is possible only through the cooperation and facilitation of the Member States, as Article 5 of EEC regulates: "They [Member States] shall facilitate the achievement of the Community's aims. […] They shall abstain from any measures likely to jeopardise the attainment of the objectives"[69]. Therefore, acting otherwise would be incompatible with the unity of the common market and the uniform application of Community law and ultimately would undermine the idea of a community itself. In this regard, the decision of acting outside the Union competences, although the transport was already regulated into a Regulation[70] and the sphere of transport policies were already included among the objectives of the EU; was a serious threat to the conception of a supranational Union. The Member States' intention was once again safeguarding their sovereignty avoiding negotiation at the supranational level. That is why Judgement *ERTA* "represents a further step away from the EU being a mere intergovernmental organisation"[71] through a different

[67] *Ibidem*, para. 22.
[68] Treaty establishing the European Economic Community, Article 3.
[69] Treaty establishing the European Economic Community, Article 5.
[70] Regulation *Road Transport*.
[71] G. BUTLER (2021).

understanding of competence allocation and the teleological interpretation which allows for the implied powers to emerges and be accepted as a valid doctrine in the European legal system.

The 'ERTA doctrine' is said to be a revolution for the constitutional nature of the EU and the following judgements issued by the ECJ which fostered an expansion of competences beyond the written provision, in a period which is called in chapter II of this dissertation of broad interpretation and intensive adoption of the doctrine of implied powers, ultimately pushed the European Community towards a supranational conformation. Indeed, only three years later, the prominent case, denominated Casagrande[72], occurred and the ECJ remained consistent with the just born 'ERTA doctrine'.

1.4 Article 352 of TFEU, a textual analysis

The implied powers in the EU legal order arise when a teleological interpretation of the Treaties is possible and ultimately needed for a full application and efficient functioning of the laid down provisions. Obviously, a wide range of interpretation of a norm mostly depends on its wording. The flexibility clause is said to constitute the "most general competence within the Treaties", consequently the maximum expressions of the rise of implied powers and amply subjected to the teleological interpretation due to its "porous wording" which does not allow for setting clear-cut limits to its use and that thus makes the interpretation of the provisions a "true discretionary exercise"[73]. This is a largely shared opinion which attributes the controversial and ambiguous nature of the clause to the terms used in its editing[74]. However, the clause is hereby reported:

> "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament"[75].

The residual character of the competences provided clearly emerges from its first paragraph, especially in the choice of certain terms such as "necessary",

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[72] Judgment of the European Court of Justice, 3 July 1974, Case 9-74, *Casagrande v Landeshauptstadt München*.
[73] R. SCHÜTZE (2003: 81); ID. (2018: 235).
[74] S. BARIATTI (2014: 2252).
[75] Treaty on the Functioning of the European Union, Article 352.

"objectives" and "appropriate" which already on their own are rather difficult to be sharply defined and pave the way for vagueness and controversies.

However, firstly, it is useful to compare the clause to Article 216 TFEU[76]. Indeed, this Article, which is said to have codified the 'ERTA doctrine', confers to the Union its external implied powers. It follows then that those two present similar wordings:

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

As it emerges from the text, Article 216 is subjected to the 'necessary' and 'objective attainment' requirement as well. However, it can be identified a relevant difference between them that once again underlines the greater general character of the flexibility clause compared to its 'cousin'. Indeed, the latter is comprised in the TFEU under Part V, "External Actions", specifically under the Title V, "International Agreements". This means that, although it calls for a scrutiny of its 'requirements', it is possible to derive some sharp limits in the employment of the Article. Firstly, it must be involved in the conclusion of an international agreement in accordance with objectives laid down in Article 21 of the TEU[77] in this regard. In this sense, on one hand, the 'ERTA Article' is subjected to a problem of textual interpretation of its requirements, but on the other hand unequivocally presents a boundary which at least relegate the question to a specific subject-matter and objective. Moreover, it is envisaged that the Union can conclude international agreement also when "is provided for in a legally binding Union act or is likely to affect common rules or alter their scope"[78]. This is crucial because both the alternatives would base the external competence over explicit and existing Union law. On the other hand, the flexibility clause is comprised under Part VII, "General and Final Provisions", of the TFEU and embodies the "residual" competences of the Union, namely those competences that are not specific within the enumerated powers and hence not expressly mentioned. Therefore, the clause may be employed in

[76] R. SCHÜTZE (2018: 276).

[77] Article 21 of the TEU regulates: "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. […] The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations […]".

[78] Treaty on the Functioning of the European Union, Article 216.

developing new policy area arbitrarily without a clear reference from the Treaties. However, this has not always been the case.

This is a suiting moment for opening a brief digression over the textual evolution and changes of the Article 352. Indeed, it must be noticed that the flexibility clause has been present in the Treaties since the very founding of the Union with the Rome Treaty in 1957. At that time, it was numbered as Article 235 under the Treaty establishing the European Economic Community (EEC) and then it changed in Article 308 with Amsterdam revision in 1997. However, rather than the different numbering, it worth to points out the partial change in its text with the last Treaty amendment in 2007. Indeed, previously, the clause referred exclusively to "the course of the operation of the Common Market"[79], while after the amendment in Article 352, it changed and further expanded its boundaries to an "action […] within the framework of the policies defined in the Treaties"[80], "which dramatically increased the subject matter covered by the implied powers"[81]. Was the operation of the Common Market a working limit for the clause? Many authors[82] reject this idea. Indeed, the change in the 'framework' can be argued to be due to the expansion of the EU as whole into new several other fields other than the economic one. Therefore, this can be seen as a natural evolution of the Clause hand in hand with the EU expanding towards new frontiers of European integration. Furthermore the "common market" requirement has never been interpreted particularly strictly but it has often given the opportunity to the legislative bodies to utilize the clause as legal basis in situation when there was only a "very tenuous link"[83] with the common market. A piece of evidence is given by the trade of military goods, which – despite their 'formal belonging' to the scope of national defence and hence a prerogative of the national sovereignty – "may affect the free flow of goods and thus would be sufficient to provide the necessary economic nexus"[84]. Lastly, despite the different scope in its use, it can be generally argued that for the past decades the *ratio* behind the clause has stayed largely consistent with its role of residual competences provider. Furthermore, it must be also noticed the addition of three new subparagraphs in the Lisbon revision which aimed at posing some limits to an uncontrolled use of the clause. Nevertheless, those are going to be treated further[85].

We are now moving into a capillary analysis of single individual elements of the text. The controversial wording outlined constitute the very textual limits other than the aforesaid more specific paragraphs (2-4) introduced with the Lisbon Treaty. The first controversial notion is an

[79] Treaty establishing the European Community, Article 308.
[80] Treaty on the Functioning of the European Union, Article 352.
[81] C. LEBECK (2008: 329).
[82] F. TSCHOFEN (1991: 480); T. KONSTADINIDES (2012: 229).
[83] T. KONSTADINIDES (2012:243).
[84] F. TSCHOFEN (1991:480).
[85] *Infra* Chapter 3.1.

"action prove necessary". With this expression, the article provides that the powers conferred by the clause may arise only when the precondition of necessity is fulfilled. According to Tschofen, "action is judged necessary whenever the actual pace of integration - i.e., the degree of realization of the Treaty's goals – falls short of the objectives set out in the Treaty". This is a highly discretionary standard in the hand of the Union's institutions that can claim to meet this requirement unlimitedly. Nevertheless, limits to the "necessary" requisite are provided by the Treaties with the principle of subsidiarity and proportionality laid down in Article 5(3-4) of the TEU, which respectively regulate:

> "3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union 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". […].
> 2. 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"[86].

Those principles are said to be used in order to foster cooperation within the European and domestic legislative bodies. Nonetheless, both possess a strong "sovereignty-safeguarding" character. Indeed, they were included in the Treaties after the Single European Act (1986) and thus after a period of broad recognition of implied powers' legitimacy by the Court. However, in order to limit the resort to those powers and to reinforce the principle of conferral of competences – amply undermined in those years – those principles ultimately imposed "that decisions should be taken at the lowest feasible political level, and that public measures should be minimally intrusive"[87]. In this sense, the subsidiarity principle is built over two 'tests', namely: the "national insufficiency" and the "comparative efficiency"[88] ones. The former envisages a Union action only when the Member States cannot sufficiently achieve the objectives of a proposed action. In addition to that, the latter provides for the intervention of the Union only when its action better achieves the objectives, hence excluding the possibility of EU involvement when simply possess means of action as efficient as the Member States.

On the other hand, the principle of proportionality lays down an important concept for the use of implied powers and consequently of the flexibility clause, that is the EU legislative action must be 'purpose-based' in accordance with the objectives and values comprised in the Treaties. Nonetheless, it can be concluded that the conceptual limit embodied by the "necessary" requirement is rather subject to a case-by-case assessment by the ECJ since the latter concept "has always been a notoriously elusive legal

[86] Treaty on European Union, Article 5.
[87] C. LEBECK (2008:314).
[88] R. SCHÜTZE (2018: 257).

fudge factor that grants a-more or less judicially controlled-degree of legislative or administrative discretion to the decision-making organs"[89].

Strictly linked to the "necessary", there is the expression: "attain one of the objectives set out in the Treaties". This thesis has already largely mentioned this formula and has identified it as a valid ground for many policies implementation and Union's actions. However, we deepen the question in this paragraph. Indeed, this is another term pivotal for providing conceptual limits to the clause but of difficult wording and scope-definition. Schütze identifies three major issues related to the interpretation of the term "objectives"[90]. Firstly, the boundary of objectives attainment appears in contrast with the fundamental principle of conferral according to which competences are conferred and explicitly laid down. Nevertheless, from this controversial formula, it emerges that the clause is providing that an objective can be used to derive a competence, in this way overcoming the system of enumerated powers. This is the exact reason why implied powers and as a consequence the flexibility clause are to be considered an exception to the European competence allocation system and enumerated powers. As a result, a broad interpretation of objectives will cause an enlargement of legislative power. In this sense, it seems that even literally applying the provision of the article, the system of competence allocation of the EU will be questioned somehow. Secondly, it is a rather difficult task to clearly identify the aforesaid objectives. In fact, even though it is true that those are generally listed in the Articles 3 of the TEU and 2-6 of the TFEU, others can also appear to be implicit or at least logically presumable from the general values of the Union. Therefore, it is risen the question whether conceiving the objectives as enumerated in the Treaties or in a "global sense"[91] of the reasonable path the Union should undertake. In this regard, it was even opened a debate whether the objectives laid down in the preamble were to be considered as an integrated part of the Treaties and hence the use of flexibility clause could be based on them. Lastly, by trying to define the scope of residual powers through the criterion of the objectives to be attained, we would run into the logical problem of defining the limits of the clause through a criterion which itself lacks clear and accepted limits and definition. In other words, those limits are based on a criterion which at the same time appears undefined and has fluctuating boundaries on its own. Once again, the case-by-case assessment will be the standard used for the judgment, but it is arguable that in this way no real standard is set[92]. For instance, if we broadly consider the "the promotion of closer relations between States"[93] as an objective then, by definition, every policy

[89] R. SCHÜTZE (2003:90).
[90] *Ibidem*, pp. 84-88.
[91] C. LEBECK (2008: 316).
[92] R. SCHÜTZE (2002:86).
[93] *Ibidem*.

implementation would fulfil this requirement and then the clause would become the Kompetenz-Kompetenz tool of the Union[94].

This leads to a third conceptual limit comprised in the provision: "the Treaties have not provided the necessary powers". This tells us that the clause can only be used when the Treaties fail to confer enough powers for the full attainment of the objectives. However, this last concept can be interpreted in two different ways according once again to the institutions and ultimately Court's evaluation. Therefore, this phrasing can entail both that the Treaties lacks a material competence and hence the resort to the clause would develop a new policy field otherwise not explicit – absent – or that a competence is present, but the Treaties fail to provide the sufficient instruments to fully exploit it and efficiently pursue the Union objectives. The difference between those two understandings in substantial and it does not only entail a different limits-setting, but it changes the nature of the clause as well. In the former case, we will talk of an exclusive[95] use of the flexibility clause that, for the capacity itself to develop new material competence, some authors[96] tend to call it a "catch-all" understanding. Indeed, in this way, if the 'objective requirement' is fulfilled then every subject-matter can fall under the prerogative of the clause. On the other hand, in the latter case, the clause performs a "subsidiary"[97] task, i.e. comes to supplement the implementation of legislative acts when textual *lacunae* prevent to efficiently do so. In this situation, we are not facing a creation of a "new policy area" but an "extension" of an existing one. In this regard, according to the key to reading given by the ECJ, it is possible to distinguish between a "soft" or a "strict" "subsidiary nature"[98] of the clause.

To conclude, this textual analysis has allowed to point out three pivotal individual elements which should represent the conceptual limits to the use of the clause. Nonetheless, no clear rule for this purpose is deducible from this wording. That constraints us to analyse its interpretation by the ECJ over the years as it is done in the following chapter.

[94] *Infra* Chapter 2.1.
[95] Therefore as the only legal basis for a legislative act.
[96] G. BUTLER (2019).
[97] R. SCHÜTZE (2003: 95-101).
[98] R. SCHÜTZE (2003: 99).

Chapter II

Evolution and interpretations of Article 352 TFEU from Rome to the Opinion 2/94

The following chapter briefly reviews the salient moment of the European constitutional history, along with the analysis of two cases and an opinion of the Court, which are deemed as essential to understand the evolution and the use of the clause over the years. In fact, the constitutional path outlined is pivotal to comprehend the judgements of the Court reported and the atmosphere around the Union institutions when they were called to judge the use of a clause that indeed has entailments which go beyond the specific case. However, before deepening into the ECJ's sentences, the first paragraph complies with the task of presenting the relation between the clause and the implied powers, outlining the different nuances of meaning Article 352 can assume according to a given interpretation of the provisions laid down in it, with specific emphasis given to "the Treaties have not provided the necessary powers".

2.1 Subsidiarity and the implied powers

As mentioned above, the dual interpretation of the limits entailed in the provision "the Treaties have not provided the necessary powers" has allowed for the rise of a dual understanding of the use of Article 352, respectively as 'gap-filler' or as a 'catch-all' clause. At this point of the analysis, the nature of the Article intertwines with the one of the Union implied powers. Indeed, according to some authors the flexibility clause is nothing more than a codification of the doctrine, others instead assert that Article 352 allows for an overcome of the traditional implied powers *dogma*[99].

Firstly, it is necessary to clarify this point. For instance, Lebeck explicitly mentions Article 308 EC as the "implied powers clause" and affirms that the latter represents the basis for the rise and exercise of implied powers as whole in the European legal order[100]. This argument is based on a strict interpretation of the aforesaid provision. Indeed, when a policy field is not specific in the Treaties, then there is no doubt that the "necessary powers" are failed to be provided. Similarly, according to this theoretical faction, if a competence is mentioned and specified, then there is no kind of failure and the quantum of powers attributed to the EU organs in that sector is provided. In this situation, the resort to the Article would infringe the

[99] S. BARIATTI (2014: 2252); R. SCHÜTZE (2003).
[100] C. LEBECK (2008: 315-316).

prerogatives envisaged by other articles to other institutions. In this case, the clause can be used to develop a new policy area not expressly present in Part III of the TFEU, which can be nonetheless presumable in accordance with the common values and – as we have seen in the previous chapter – the objectives of the Treaties. As a result, this conception envisages the use of the clause as catch-all, i.e. that everything could fall under its scope without the necessity of any amendment procedure for the very reason of fostering an exclusive use of the clause. However, in the act of creating new competences the Union can be questioned of illegitimately attributing itself the principle of Kompetenz-Kompetenz and elevating itself to a nation State level, determining its own competence. Or from another perspective, it can be argued that creating new competences would be like undertaking a treaty revision action outside the procedures established by Article 48 of TEU. Furthermore, from this understanding of the clause, other two relevant and correlated matters emerge. Firstly, the possibility for the Council to unanimously vote legislation on the basis of Article 352 creates a "democratic deficit"[101] according to which the use of a such unlimited legislative tool in the hands of the national executives would cause a lack of accountability in their decisions since every member of the Council is appointed and respond to its own citizens and nations. Before the Lisbon revision of 2007, scholars even talked about "executive federalism"[102], namely:

> "A constitutional structure consisting of states rather than a people as constituent parts, and where the constituent parts are represented at the federal or supranational level by representatives of their respective (usually indirectly elected) executives rather than through directly elected legislatures"[103].

This scenario has been limited by the introduction of '[European] Parliament's consent' as a requirement in text and made the decision-making in the Council more accountable. However, this involvement has not arguably countered the most serious question: the "constitutional deficit"[104]. In other words, through the resort to the clause, national executives acquire direct control over the implied powers and consequently control over EU competences limits. Hence the expansion of powers of the EU would have "a clear support by the national executives, but [lack of a] clear support in the Treaties"[105]. In this way, the Council is able to amply the scope of the Treaties and of the Union beyond the agreed constitutional limits and powers conferred. However, mainly for those above-mentioned reasons, the "catch-all" use has been remarkably limited[106]. On the other hand, from a soft

[101] C. LEBECK (2008: 315-316).
[102] *Ibidem*, p. 317.
[103] *Ibidem*.
[104] *Ibidem*, p. 312.
[105] *Ibidem*.
[106] *Infra* Chapter 2.5; judgment of the European Court of Justice, 26 March 1987, Case C-45/86, *Commission v. Council*.

interpretation of the 'necessary powers requirement', it emerges the subsidiarity nature of Article 352, which consequently entails a gap-filler understanding of the clause. In this situation, a competence does exist – i.e. it is explicit in the Treaties – but the legislative powers are assessed insufficient for a fully objective attainment. This is why it is said to have a subsidiary nature, since it practically fills any possible gap arising from the Treaties in compliance with the 'purpose boundary'. This conception envisages a joint use of the clause with other articles in order to supplement the only 'partial' legal basis provided by the former.

The concern for the clause as a gap-filler regards the question of a systematic resort to the clause as an instrument for the extension of the legislative powers parallel to the ordinary legislative procedure for the sake of better functioning and integration. It is precisely for this reason that the subsidiary nature represents an outgrowth of the doctrine of implied powers. In fact, in this way, the clause becomes an instrument for the reinforcement of the legislative power while the doctrine as such – based on a teleological interpretation – "cannot extend a competence but merely constitutes an interpretive tool to determine the extent of a competence"[107]. Indeed, Bariatti asserts that, in this way, the use of Article 352 takes the form of a "subsidiary procedure"[108] to be taken into account whenever clear legal basis lacks in the Treaties. This particular aspect, which could be claimed indistinctly, could imply the resort to the clause every time the means of implementation provided by the Treaties disregard an expected sufficient level of achievement. Indeed, it could be argued that a claim such 'it could have been done better' would be enough to trigger this subsidiarity character. However, this is only partly true, indeed, the ECJ's interpretation has a key role in confirming or rejecting this last characteristic of the Article[109].

Ultimately, all this discussion between 'gap-filler' and 'catch-all' clause could be nullified by the fact that even when the clause was judged to be correctly used as a gap-filler by the Court, in many cases the 'gap' to be filled was rather imaginative and the relationship with the Treaties' enumerated powers weak. For instance, the use of the clause initially coincided with the development of environmental policies that were not mentioned in the Treaties. The legitimacy of Article 352 as a legal basis for doing so was justified by the "essential purpose of constantly improving the living and working conditions of their peoples"[110]. It can be argued, however, that, under this broad interpretation of the objectives, anything could fall within the scope of the clause. Furthermore, the same approach

[107] R. SCHÜTZE (2003: 95).
[108] S. BARIATTI (2014: 2253).
[109] This point of view was rejected in the judgement *ERTA*: "Although Article 235 empowers the Council to take any 'appropriate measures' equally in the sphere of external relations, it does not create an obligation, but confers on the Council an option, failure to exercise which cannot affect the validity of proceedings".
[110] Treaty establishing the European Economic Community, Preamble.

was adopted in the Opinion 2/94[111]. In this case, the Court did not even mention the eventual *a priori* illegitimacy of deriving the powers for accessing the European Human Rights Convention as an implied objective "in the course of the operation of the common market". Here, despite the forcing seemed evident, the opinion was based on another reasoning instead, as it is analysed in the next paragraphs. To conclude, the point is that when an excessive broad interpretation of the "objective to attain" is adopted, then the border line between gap-filler and catch-all becomes blurrier. In other words, the idea of gap-filling itself can be undermined in favour a 'disguised' catch-all use.

2.2 The Paris Summit and the first steps of the clause

The interpretative clash between gap filler and catch-all is one of the reasons why the resort to Article 352 has been facing highs and valleys until the last Lisbon revision, which is said to have made the flexibility clause "inflexible"[112]. As we mentioned, a universal rule for its use has never been developed but instead it was left to the ECJ interpretation which nevertheless has never succeeded in a real "middle road"[113] between a limited use and an "abuse".

However, a widespread scepticism has accompanied the clause for the first years of existence since the European Economic Community. Indeed, it can be argued that the just born Community was addressing an adjustment period and question related to the residual competences and the enumerated powers were still marginal at that time. The competences provided were sufficient to pursue the first policies. In Pescatore's words, at the beginning the clause seemed "destined to remained death letter"[114]. The turning point occurred in 1972 with the Paris Summit. The latter was an intergovernmental conference of the Heads of States and Governments with the purpose of "giving a new dimension to the Community"[115]. It already emerged a certain lucidity in assessing the role of the Union and the ongoing changes which it would have to deal with:

> "Now that the tasks of the Community are growing, and fresh responsibilities are being laid upon it, the time has come for Europe to recognize clearly the

[111] Opinion of the Court, 28 March 1996, 2/94, *accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, hereinafter Opinion 2/94.
[112] G. BUTLER (2019).
[113] *Ibidem*.
[114] P. PESCATORE (1974).
[115] Bulletin of the European Communities, October 1972, No 10. Luxembourg: office for official publications of the European Communities, *Statement from the Paris Summit*.

> unity of its interests, the extent of its capacities and the magnitude of its duties […]"[116].

In this respect, Article 235 of EEC was identified as crucial for this development and indeed it was explicitly mentioned in the following statement:

> "For the purpose in particular of carrying out the tasks laid down in the different programmes of action, it was desirable to make the widest possible use of all the dispositions of the Treaties, including Article 235 of the EEC Treaty"[117].

In this way, the Summit provided a 'new tool' to be explored and exploited in accordance with the willingness of the founding States of widening the range of actions of the Community. Prior the Paris Summit, the clause was mainly employed as legal basis for agricultural policies on an average of five time per years, while afterwards the resort to the clause has strikingly increased on an average of twenty-seven legislative acts per year[118]. This emerging period, in the spirit of the Paris declarations, not only inaugurated the intensive use of the clause, but significantly affirmed its subsidiary nature. Indeed, from that moment on until approximately the 1986, "acts relating to the 'accompanying policies' of the Community – i.e., those actions not related to the core 'four freedoms' (goods, persons, services and capital) but which are essential for the achievement of the 'freedoms'"[119] and arguably presumable from those latter, found a legal basis in the clause. This broad interpretation found immediate accreditation in the landmark case *Hauptzollamt Bremerhaven v. Massey-Ferguson GmbH*[120], hereinafter *Massey-Ferguson*.

2.3 *Massey-Ferguson*, the milestone for intensive use

In this milestone judgement, the Court was called to sentence the authority for the Regulation No 803/68[121] on the valuation of goods for customs purposes. Indeed, briefly, the contentious regarded a 3% discount claimed by the Massey Ferguson GmbH for the clearing through customs of one hundred twenty-one tractors, that was denied by the Hauptzollamt, i.e.

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[116] Bulletin of the European Communities, October 1972, No 10. Luxembourg: office for official publications of the European Communities, *Statement from the Paris Summit*.
[117] *Ibidem*, p. 8.
[118] R. SCHÜTZE (2003:82).
[119] F. TSCHOFEN (1991: 475).
[120] Judgment of the Court, 12 July 1973, 8/73, *Hauptzollamt Bremerhaven v Massey-Ferguson GmbH*, hereinafter judgement *Massey-Ferguson*.
[121] Regulation of the Council, 27 June 1968, No 803/68/EEC, *on the valuation of goods for customs purposes*.

the principal customs office, of Bremerhaven (Germany), on the basis of Article 11(2) of the Regulation No 803/68 according to which the company should have furnished proof of the existence of a cash price different from the invoice price. When the Finanzgericht (judicial office competent in tax matters) annulled the previous decisions of the administrative authority (Hauptzollamt), the latter requested in turn the annulment of the last decision to the Federal Fiscal Court, Bundesfinanzhof. The Federal Fiscal Court concluded to ask the European Court of Justice for a preliminary ruling. The question which is more relevant for this thesis is certainly the first, namely whether Article 235 of the EEC represented a sufficient authority for the enforcement of Regulation No 803/68. In this regard, the Massey-Ferguson GmbH questioned the validity of the Regulation since it was founded on an article that should have been envisaged as a gap-filler rather than the exclusive legal basis for secondary legislation, and additionally pointing out that "a general formula" such as the flexibility clause is "not sufficient for implementing regulations"[122]. The Council and the Commission defended the validity of the Regulation, that they issued, by taking in consideration the possible alternative legal basis such as Article 27, 28, 100, 111, 113 of the EEC and in the end judging them as insufficient for the purposes. Obviously, they stayed consistent with their former choice of employing the clause as a legal basis, nevertheless they presented a strong argument for so. Specifically, the Council opposed the interpretation mentioned above[123] – according to which if the Treaty mentions a competence, then the quantum of powers in that specific area is defined and there is no *lacuna* – and claimed that: "if one followed the above argument[124] to its conclusion, it would result in Article 235 having practically no application whatsoever"[125]. This is a key passage since the Council was counterposing the use of the clause to a teleological interpretation of the provisions contained in the above-mentioned articles[126]. In other words, it was 'pressing' the ECJ to choose between flexibility clause or implied powers.

How did the Court advocate? Firstly, it verified the above-mentioned 'objectives attainment' requirement. It judged that this condition was fulfilled under Article 3(a) and (b) of EEC where the establishment of a customs union is enumerated among the objectives indeed[127].
Then, in paragraph 4, it comes the pivotal assertion for the whole judgement. It reads as follows:

> "If it is true that the proper functioning of the customs union justifies a wide interpretation of Articles 9, 27, 28, 111 and 113 of the Treaty and of the

[122] Judgement *Massey-Ferguson*, Observations submitted before the Court.
[123] *Supra* Chapter 2.1.
[124] I.e. use the above-mentioned Article 27, 28, 100, 111, 113 of the EEC which "partially" provided a legal basis to act.
[125] Judgement *Massey-Ferguson*, Observations submitted before the Court.
[126] I.e. Article 27, 28, 100, 111, 113 of the EEC.
[127] Judgement *Massey-Ferguson*, para. 3.

> powers which these provisions confer on the institutions […] there is no reason why the Council could not legitimately consider that recourse to the procedure of Article 235 was justified in the interest of legal certainty"[128]

The ECJ agreed with the position of the Council and preferred a resort to the clause rather than deriving implied powers from other articles provisions. However, the reasoning appears substantially unclear in its wording. It is largely accepted that in this case the Court's intent was to be consistent with the spirit of the Paris Summit but that the terms used in the sentence failed in providing sharp indications and constraints regarding the recourse to the Article as a supplementing legislative instrument. Furthermore, legal literature has been criticizing the action of the Court since it is argued that it would have been more reasonable and useful for the development of Article 235 to address the "full breadth of the matters relating to the clause"[129] , but instead it solely provided a clarification regarding the 'necessary requirement'. Especially, the reasons given for this interpretation are rather superficial. Indeed, asserting that "there is no reason [to not act in this way]" does not provide any reason at all. Moreover, the "interest of legal certainty" – or in other words "for the sake of completeness"[130] – paved the way to a dangerous wide interpretation of the clause. In fact, this notion encompasses the idea that in order to improve and thus make more efficient and satisfactory the legal basis for secondary legislation, the clause can be triggered. Therefore, on one hand, the ECJ attempted to give a new impetus to the clause after years of neglecting, while, on the other the vague and ambiguous wording ultimately conferred more extensive powers to the clause than the ones the drafters had probably envisaged. For those reasons, the Court has been accused of "active passivism"[131]. In other words, although the main task requested was to develop a new jurisprudence for the use of the clause based on its subsidiary nature which allows for gap-filling the Treaties, in the end, the ECJ did not take any sharp position, but, nevertheless, acting so indirectly paved the way for a confusing intensive use. As a result, with *Massey-Ferguson* the ECJ created a new legislative tool parallel to the ordinary procedure provided for in the Treaties that permits for the reinforcement of the legislative procedure. This function is even emphasized by the fact that the Council can "adopt the appropriate measure"[132] in the use of the clause. In the end, the ECJ was aware and afraid that acting otherwise "would have killed the clause at this stage"[133], but at the same time this case allowed for the rise of a soft subsidiary nature of the clause which gave to the EU institutions the possibility of legislating indistinctly with a low requirement fulfilment that arguably made the clause

[128] Judgement *Massey-Ferguson*, para. 4.
[129] G. BUTLER (2019).
[130] *Ibidem*.
[131] *Ibidem.*
[132] Treaty on the Functioning of the European Union, Article 352.
[133] G. BUTLER (2019).

unconstitutional as if it became the Kompetenz-Kompetenz tool of the Union[134]. This is one of those cases where a too wide interpretation can lead to a switch from gap-filler to catch-all.

2.4 The SEA and the fall of the clause

Crucial for outlining the evolution of the clause, it is to succinctly discuss the amendments brought about by the Single European Act (1986). The Single European Act (SEA) is the first revision thirty years later the ratification of the Treaty of Rome. It could be considered a fracture from intergovernmental developments of the previous three decades. In fact, this amendment led to two fundamental changes in the dynamics of the Union, which, as evidence of their great impact, indirectly influenced and reshaped the institutions-clause relationship.

Firstly, and more generally, it enlarged the scope of the Treaties, expanding the Community's competence in several other policy-fields. This can be considered as a first cause for the progressive 'fall' of the flexibility clause. Indeed, if until that moment its use was defined as gap-filler with a pronounced subsidiarity character due to a still primordial conformation of the Treaties, with the SEA new competences were included and legal basis provided so that the resort to the clause became in certain sectors unnecessary.

Secondly, with a major impact on the Union itself, the legislative procedure was revised and the Qualified Majority Vote (QMV)[135] was introduced as the main voting system in the Council. As a consequence, the unanimity vote was drastically reduced and a supranational conformation regained centrality after years of what can be defined 'legal nationalism'. Indeed, the unanimity vote was agreed and thereafter established with the so-called Luxembourg Compromise (1966). This Compromise, arranged in an intergovernmental conference, ceased the France absenteeism[136] from the Council, in exchange of the imposition of the aforesaid vote system. This meant that the Head of States and Governments, hence the Member States, had a veto power over secondary legislation. It follows that in those years before the SEA a limited number of acts were successfully implemented, and the form of a mere intergovernmental organization was fostered. The QMV, together with a role for European Parliament increasingly central, came to represent the stronghold of supranationalism in the legislative procedure, a

[134] R. SCHÜTZE (2003: 94).
[135] Article 16(4) of the TEU regulates: "qualified majority shall be defined as at least 55 % of the members of the Council, comprising at least fifteen of them and representing Member States comprising at least 65 % of the population of the Union".
[136] This was an action taken by France in order to obstruct the legislative procedures of the Council whenever it disagreed or wanted to make demands on the Union.

role which is still played nowadays. As it was widely mentioned, the Member States have been reluctant to accept a supranational Union and have been trying to retain their sovereignty as much as possible. After this constitutional changes, a circumvention instruments left in the States' hand was the flexibility clause indeed, which would have allowed to bypass the qualified majority voting and reacquire their veto power and full control over legislation. The gap-filler approach stated by the Court in judgement *Massey-Ferguson* was perfect for this aim. Indeed, arguing for a failure in the provision of the necessary powers, the Council could claim for a use of the clause as a joint legal basis with other articles in order to subsidy their shortcomings. Concerned about this risk in the immediate aftermath of the SEA coming into force, the Court pronounced the prominent judgement in case 45/86[137] – in stark contrast to the intensive use envisioned at the Paris Summit and in *Massey-Ferguson* – that became a symbol of this constitutional turn of the Union.

2.5 *Generalised Tariff Preferences*

In issuing a sentence with an outcome so opposed to the judgement *Massey-Ferguson*, the ECJ was clearly influenced by the very same spirit that gave the impetus to the Union for the revision of the SEA.

The contentious regarded the Community system of generalized preferences which entails the suspension of customs duties specified in the common customs tariff in order to facilitate the importation of certain products from developing countries. In 1986, the system was implemented through the adoption of three regulations regarding respectively industrial products in general[138], textile[139] and agricultural[140] ones. The dispute involved the Commission and the Council with regard to the legal basis of the first two regulations reported. Indeed, the Commission contended that the basis for these acts was to be found exclusively in Article 113 EEC, whereas the Council considered it insufficient and claimed that the latter should be used in conjunction with the clause. The arguments presented by the Council were based on the idea that Article 113 failed to fulfil the "objectives to attain" requirement, asserting that:

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[137] Judgment of the European Court of Justice, 26 March 1987, Case C-45/86, Commission v. Council, herein after judgement *Generalised Tariff Preferences*.

[138] Regulation of the Council, 17 December 1985, 3599/85/EEC, *applying generalized tariff preferences for 1986 in respect of certain industrial products originating in developing countries*.

[139] Regulation of the Council, 17 December 1985, 3600/85/EEC, *applying generalized tariff preferences for 1986 in respect of certain textile products originating in developing countries*.

[140] Regulation of the Council, 17 December 1985, 3601/85/EEC, *applying generalized tariff preferences for 1986 in respect of certain agricultural products originating in developing countries.*

> "The contested regulations had not only commercial-policy aims, but also major development-policy aims. The implementation of development policy goes beyond the scope of Article 113 of the Treaty and necessitates recourse to Article 235"[141].

At a first reading, given the previous approach adopted by the Court, this seems a 'familiar situation' with a likewise predictable outcome. Once again, the Council claimed for supplementation through the clause rather than a teleological interpretation of the "commercial-policy aims". However, the gap-filling function was rejected and for the first time a restrictive conception of "necessary powers provided" was given[142]. As a result, the reasoning was: if it is laid down in the Treaties, the powers are always sufficiently provided. This was possible through an overcoming of the strict "purpose bound" condition, as it is stated in paragraph 11: "[…] the choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review"[143].

Finally, after a period defined of "active passivism" and of unclear assessment of the use of the clause, this time unmistakable indications were given in this regard:

> "It follows from the very wording of Article 235 that its use as the legal basis for a measure is justified only where no other provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question"[144].

Here, the ECJ decided to adopt a teleological interpretation of the scope of the competence provided under the common commercial policy rather than a resort to the subsidiarity character of Article 235. This new judicial guideline can be considered the triumph of the idea according to which the flexibility clause is the maximum expression of the implied powers, suddenly paving the way for a catch-all understanding. Therefore, in case 45/86 the Court denied the subsidiarity nature of the clause and rejected its gap-filling function. As we saw, the clause as a gap-filler was a conception largely accepted by the Member States. The Court in an attempt to go along with this supranationalism turn – against a "decisional intergovernmentalism in the Council"[145] – has arguably issued a sentence which had a controversial impact to the relation between the EU and the nation States and their transfer of sovereignty. The exclusive use of the flexibility clause doubtless provided the Union with its Kompetenz-Kompetenz tool. That was not going to be

[141] Judgement *Generalised Tariff Preferences*, para. 10.
[142] It can be considered a 'step backward' in respect of the judgement *Massey-Ferguson* and its jurisprudence which had a broad interpretation of the aforesaid provision.
[143] Judgement *Generalised Tariff Preferences*, para. 11.
[144] *Ibidem*, para 13.
[145] R. SCHÜTZE (2003: 101).

accepted by the Member States.

2.6 The Maastricht Treaty and the mid-90s period.

We are gradually reaching the decisive Opinion 2/94 (1996). However, only three years earlier, another treaty revision which indelibly left its mark on the constitutional history of the Union, took place, i.e. the Treaty of Maastricht. Behind this digression, there is the belief that the evolution of the clause and the judgments that have addressed its use, are directly related to the European constitutional climate of the years in question. In this sense, the aforesaid opinion was issued in the middle of an extremely controversial period for the constitutional development of the Union whose consequences have been influential until the Lisbon revision.

The Maastricht Treaty was firstly conceived as a necessary and further advancement on the example traced by its predecessor, the SEA. It is generally accepted the idea that this amendment had the primary purpose of fostering European integration under a supranational framework. However, at that time, the situation was rather delicate for two main reasons: the further expansion of Community's competences and the EU enlargement to new countries. Firstly, the expansion of the Union competences implies a greater devolution of powers by the Member States that agree to concede a larger scope to the EU policies. Alike for the SEA before, this has harshened the relationships between the EU institutions and the Member States and has made the latent internal clash between supranationalism and intergovernmentalism more evident and struggling, since the Member States did not want to be deprived of their legislative functions. In this sense, the 'primary purpose' was partially failed and the Treaty signed in Maastricht represented a compromise between the two parties rather than a "new stage in the process of the European integration"[146].
In specific terms, the necessity for a new revision of the Treaty only six years after the SEA – when this first change had been waiting for thirty years – stares in four policies, also known as the "leftovers"[147] of the SEA, which indeed remained an intergovernmental prerogative and instead had to be included in the supranational framework. Those were respectively Economic and Monetary Union, Common Foreign and Security Policy, Justice and Home Affairs. For what regards the latter two, they maintained their merely intergovernmental character. On the other hand, the former became supranational policies "at the price of differential integration"[148]. The differential integration is a principle, firstly introduced in the Maastricht Treaty, which provides for 'multi-layered' and 'multi-speed' integration between the Member States. This principle was used for the promotion of

[146] Treaty on European Union, Preamble (1992 version).
[147] R. SCHÜTZE (2018: 23).
[148] R. SCHÜTZE (2018: 23).

monetary integration which in that very amendment came under the supranational policies of the Union. At that time, the resort to the differential integration was deemed necessary for a common acceptance of this new policy-field since joining the monetary union required some economic preconditions –four convergence criteria – to be fully implemented. The non-fulfilment of one of the criteria entailed the temporary non-participation of a State to the euro-zone and subjected it to a derogation for this policy until it could finally meet the economic requirements. At the same time, a different story was valid for Denmark and United Kingdom. Indeed, although they would have easily fulfilled the economic preconditions for the adoption of the common currency, categorically refused to renounce their sovereignty in the monetary area. In fact, due to a constant fear of an excessively federal turn and a departure from the intergovernmentalism of previous decades, United Kingdom was not only willing to block this integration measure by using its veto power in the Council[149], but drastically exacerbated the dialogue with the Commission, 'guilty' of promoting a too wide supranational integration. As a result, John Major, British Prime Minister at that time, obtained a constitutional "opt-out" from the single currency and the same was agreed to Denmark. Therefore, two protocols – Protocol No. 15 and 16 – were added to the Treaties that put into force these 'exclusions'. As a result, three distinctive level of monetary integration were created: euro-zone, States with derogations and the "opt-out" States.

This differential kind of integration has gained further centrality regarding the enlargement of the EU. Indeed, the fall of the Berlin wall and the consequent collapse of the Soviet Union rose at that time the question of entrance of the East-European countries which, after having been under the regime for more than fifty years, were now gaining independence. Indeed, what is known as the "Big Bang Enlargement" of 2004[150] can be argued to be based on the principle of differential integration first used in the Maastricht Treaty. In fact, a new Member State candidate must meet some criteria to join the EU, followed by a period of association, adaptation and adjustment. These new candidate countries did not give any insurance that had fulfilled or would have fulfilled in the future certain democratic and economic standards imposed by the EU. Nevertheless, they were admitted and joined the EU and, in this sense, the Maastricht Treaty had a key role, giving a major impetus for a multi-layered integration rather than a compact Union which proceeds altogether.

Therefore, "the foundations of an ever-closer union among the European peoples"[151] was maximally threatened in the 90s by this 'tug-of-war' between Member States and EU when strong intergovernmental

[149] As provided by Article 48(4) of the TEU: "[…] The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements".

[150] It was called "Big-Bang" due to the unprecedent entering of States which made the EU to almost double its members.

[151] Treaty establishing the European Community, Preamble.

component in the European dynamics was perceived as a necessary compromise for the peaceful existence and integration of the EU at that time when a grant of sovereignty in one field had to be matched by a retention in another. In other words, the EU to 'keep its parts together' had to accept compromises and become less rigid for the sake of integration. By doing so, it has fostered a multi-layered and at different speeds integration which kept the union 'alive' but highly fragmented. In this sense, the opt-out is only one piece of evidence of that.

This partial failed supranational integration caused the identification of the Treaty of Maastricht with the controversial and debated 'Greek Temple structure'. The name derives from the 'apparent' form of the legal structure of the EU which was organized in a "roof", i.e. the Common Provision, placed above the rest of the Treaties. Three pillars – alike temple's columns – over which the EU was sustained. The first pillar maintained a supranational character and comprised the EEC, the ECSC and the European Atomic Energy Community. The other two instead were indeed the Common Foreign Security Policy and the Justice and Home affairs. As "basement", there were the Final Provisions. The three pillars structure fostered a sharp separation of Union competences within a supranational structure or an intergovernmental one. The 'hybrid' nature of the EU did not only regard the institutions – whose relationships among each other have always been perceived as conflictual –but finally it found clear evidence in the Treaties as well. Indeed, it is largely shared the idea that this structure has caused a constitutional fragmentation for the EU since every pillar was subjected to its own rules. In this sense, the clause was relegated only to the attainment of the first pillar objectives. The change brought was astonishing. For more than thirty years the Union has been proceeding by gradual stage of integration – 'small steps altogether' – until it was decided to extend and specialize Treaties' competence to a level that was not sustainable by the EU as whole. As a consequence, the possibility of giving the Union an instrument to determine its own competences – the clause – was to be avoided altogether, in order to alleviate some pressures from the Union that had already been placed on it by the Member States due to its overly broad supranational character in the aftermath of the revision.

2.7 Opinion 2/94

If judgement *Massey-Ferguson* paved the way for an intensive use of the clause, Opinion 2/94 tend to be identified as the benchmarking case for its fall.

Indeed, from the judgement *Generalised Tariff Preferences* onward the clause became exclusively applicable in the absence of a *lex specialis* providing the powers for legislative implementation[152]. In this sense, the

[152] T. KONSTANTIDINES (2012: 238).

only interpretation possible was to abandon the idea of an 'extension' of competences and assign to the clause the task of creating new ones when the conceptual limits laid down in Article 235 would have not been infringed. Nevertheless, this has made the resort to the clause even more controversial somehow. Indeed, although the necessity of consistency to the SEA first and to the Maastricht Treaty then in a period of constitutional reform was crucial to be supported by CJEU; on the other hand, as some authors affirm, in this way the clause formally became the "mean of self-conferral [of competences]"[153] or "EU's own built-in expansion mechanism"[154]. In some ways, this was an outcome even more problematic to handle for the Union because of the growing resentment of the States who have not missed any chance to express it[155]. Nonetheless, after the judgement *General Tariff Preferences*, any subject-matter could be promoted through the clause. The need for new limits was strikingly evident. In this regard, the Court took the opportunity to further clarify its position when asked for its opinion on the Union's accessibility to the European Convention of Human Rights (ECHR).

Quoting *verbatim*, the core question of the Opinion 2/94 regarded whether "the accession of the European Community to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 [would] be compatible with the Treaty establishing the European Community". In short, the two factions consisted of those who considered the use of the clause for this purpose to be legitimate, including the Commission and the Parliament[156]; and those who denied this possibility and deemed that no article in the European legal system conferred the Union this competence as it would go beyond the objectives laid down in the Treaties. Not surprisingly, the latter party was led by France and United Kingdom[157] two countries that have emerged as the most committed protectors of national sovereignty at the expense of a supranational Union since the European Defence Community and the Luxembourg Compromise, passing through the introduction of the Discretionary Integration in the Maastricht Treaty and finally the recent Brexit which brought UK out of the EU. Lastly, Denmark, which in the afterwards of Maastricht has shared similar nationalist positions to United Kingdom, had a peculiar opinion regarding the accession to the ECHR, claiming that Article 235 could be a tool for the Union for entering in international agreement and that the aforesaid accession has political advantages filling a gap in the Treaties. Despite that, practical and legal problems would rise as well. Especially, the entrance into a convention exclusively composed by States would create uncertainties in the "position of the contracting parties"[158], starting with representation and

[153] *Ibidem*, p. 227.
[154] G. BUTLER (2019).
[155] See the Decision of the German Federal Constitutional Court, 12 October 1993, BVerfGE 89, 155, *on the Maastricht Treaty*.
[156] Belgium, Finland, Germany, Greece, Italy, Sweden and Austria.
[157] Spain, Portugal, Ireland.
[158] Opinion *2/94*, Summary, V – The legal basis of the envisaged accession.

accountability problem in the event of an infringement. In the end, Denmark proposed "that an agreement be concluded between the Community and the Contracting Parties to the Convention"[159].

However, the Commission and its 'accompanying' States basically presented two arguments. First of all, it was presented the very broad and general idea that the human rights protection is a crosswise principle and a fundamental prerequisite for every Union's activity, especially for "the proper functioning of the common market"[160], embracing a "global sense" of the objectives[161]. Secondly, in more specific terms, for what regards the resort to the flexibility clause, the 'purpose requirement' was fulfilled making reference to the Preamble of the Treaty on the European Union, especially in article F(2) which reads:

> "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

Furthermore, as additional evidence, it was mentioned the *Defrenne* case[162] where it was sentenced that "the objectives, within the meaning of Article 235 of the Treaty, may be made clear in the preamble of the Treaty"[163].

On the other hand, the counterpart refused the idea that the objectives comprised in the preambles can be considered as an integrated part of the Treaty and hence among the communitarian objectives. In this sense, it is argued that "neither the EC Treaty nor the Treaty on European Union contains any provision allocating specific powers to the Community in the field of human rights capable of being the legal basis of the envisaged accession"[164]. For this purpose, it was also recalled that embodiment of the principle of subsidiarity in the SEA has posed a formal constraint in the scope of the flexibility clause.

However, in Opinion 2/94, the position of the ECJ is marked by a search for accuracy in addressing the question, as it is shown between paragraphs 23 and 28 concerning the "Community's competence to accede to the convention". It is presumable that the ECJ wanted to be as precise as possible in judging this topic, distancing once again from the "active passivism" that paved the way for ambiguities and ultimately an uncontrolled use of the clause. In fact, before entering into the thorny question, emphasis is placed respectively on the principle of conferred and implied powers, thus reiterating that:

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[159] *Ibidem*.
[160] *Ibidem*, p. I-1773.
[161] C. LEBECK (2008: 316).
[162] Judgment of the Court, 8 April 1976, 43-75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena*.
[163] Sentence that nevertheless belongs to the 'previous period' of 'intensive use of the clause' and indeed this reference as a case law did not have consideration at all by the ECJ.
[164] Opinion 2/94, Summary, V – The legal basis of the envisaged accession.

> "[…] the Community is to act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein, […] [those] specific powers […] are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them"[165].

And it added that: "No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field"[166]. Until now, no striking position were taken but in a certain sense the obvious was stated. In the lights of this assertions, the Court provides the core of the opinion in paragraph 29 as follows:

> "Article 235 is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty"[167]

The interpretation furnished in judgement *Generalised Tariff Preferences* was fully confirmed and ultimately strengthened. Indeed, it was explicitly mentioned that the Treaties, in order to trigger the clause, must lack both of "express or implied powers to act". However, this conclusion alone would have allowed the clause to be used in the first place for access to the EHRC and generally for the development of new material competences beyond the Treaties. That is why, it was further specified in paragraph 30 that:

> "[the flexibility clause] cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and […] Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose".

In this sense, depriving of this possibility as well, in order to not infringe Article 48 regarding the Treaties revision, the ECJ was fostering a restore of the clause to a "provision with minimalistic intent"[168]. To sum up, *Generalised Tariff Preference* rejected the joint use of the clause in favour of implied powers instead, and in Opinion 2/94 its exclusive use was judged illegitimate if it resulted into an amendment procedure. Basically, non-use was recommended.

The main arguments given by the ECJ for this opinion are two. Firstly, strictly linked to the case in question, given the 'objectives' contained in the preambles, given that the human rights protection emerges "from the

[165] *Ibidem*, para. 23.
[166] *Ibidem*, para. 27.
[167] *Ibidem*, para. 29.
[168] Opinion 2/94, para. 30.

constitutional traditions common to the Member States"[169], which have promoted them at the international level and given that the human rights ultimately result as general principles of Community law, the ECJ held that "Respect for human rights is therefore a condition of the lawfulness of Community acts"[170].

Secondly, the Court considered that the accession to the EHRC would have entailed "a modification […] of constitutional significance […] [that] could be brought about only by way of Treaty amendment"[171]. Therefore, the constitutional deficit implied by a catch-all use[172] would have been too large to be sustained by the clause which would have thus overcome the constitution represented by the Treaties, making its use unconstitutional indeed[173]. Proceeding without a Treaty amendment would have allowed the Union to become a self-authenticating organization in the act of conferring itself the Kompetenz-Kompetenz prerogative.

With this Opinion, the Court was charged by Member States with a sensitive task to fulfil. In the end, the ECJ implemented a process of marginalisation of the clause for the next years, hand in hand with the constitutional development of the Union which at that time was criticised on all sides. The Court appeared "more concerned to affirm its loyalty to the principle of conferral"[174] and to appease the Member States' malaise regarding the last development of the Union. The minimalistic 'relegation' was the best way to achieve this outcome.

[169] *Ibidem*, para. 33.
[170] *Ibidem*, para. 34.
[171] *Ibidem*, para. 35.
[172] *Supra* Chapter 2.1.
[173] See R. SCHÜTZE (2003: 94), "The use of Article 308 will be unconstitutional where it goes beyond the constitution".
[174] T. KONSTANTIDINES (2012: 236).

Chapter III

The most recent evolution of the clause

As we have already briefly mentioned in chapter I, the Lisbon revision has brought about some significant changes to the text of the clause compared with the previous two versions laid down in Article 235 EC and then in 308 EEC. However, the time leap from Opinion 2/94 to the 2007 revision, which might appear considerable, coincides with a period of constitutional adjustment to the changes brought about by the three-pillar structure, the consequences of which were significant and soon required action to improve and ultimately abolish it. In this period, the pivotal question to be addressed remained unchanged: a sharp delimitation of competences for a transparent exercise of the legislative power. Given the importance of the issue, the task at hand was extremely ambitious and effortful. In fact, even though Maastricht Treaty provided the necessary impetus for this reform, the question of the constitutional nature is an inherent and long-standing a problem for the Union. Indeed, it has not been 'put aside' due to carelessness, but rather because only staying vague and open on the issue the functional integration of the Member States would have been able to take place. As a result, this period is called by Pescatore a decade of "legal bricolage"[175] when two Treaty revisions – Treaty of Amsterdam (1997) and of Nice (2001) – and one failed amendment – Constitutional Treaty (CT, 2004) – followed before ratifying the Lisbon Treaty.

In any case, between Nice and Lisbon, on the 15th of December 2001, the prominent Laeken Declaration "on the future of the European Union"[176] was issued. The latter was the fruit of an intergovernmental meeting which called for an urgent constitutional reform and put the basis for the topic to be treated in the "Convention on the Future of Europe" one year later.

In general aims terms, the Declaration identifies issues – dating back to Maastricht – that were for the first time formally recognised and acknowledged by the Member States such as the widening of the scope of the Treaties towards the foundation of a political union alongside the economic community and the enlargement of the Union itself in terms of actual membership. Moreover, the social unrest regarding the democratic deficit of resulting from the integrationist pattern of 'integration through legislation' was perceived as a 'too interventionist approach' for the domestic legal and political dynamics. As a result, the rising of a strong Eurosceptic wing in the political landscape was enumerated among the

[175] P. PESCATORE (2001: 265).

[176] Presidency Conclusions of the Laeken European Council, No 12, 14 and 15 December 2001, *on the future of the European Union*, hereinafter Laeken Declaration.

crucial issues to be coped. On the other hand, in more specific legal terms, "The Union need[ed] to become more democratic, more transparent and more efficient"[177]. In this regard, it addressed the following subjects: "the division of competences between the Union and its Member States, the simplification of the Union's legislative instruments, the maintenance of interinstitutional balance and an improvement to the efficacy of the decision-making procedure, and the 'constitutionalisation' of the Treaties"[178].

Other than a more transparent division of competences and powers themselves, the Declaration stressed the point that a "redefined division" must not lead to "a creeping expansion of the competence of the Union or to encroachment upon the exclusive areas of competence of the Member States and, where there is provision for this, regions"[179]. In this regard, it is explicitly recommended that Article 308 "should be reviewed for this purpose"[180]. Therefore, after the failure of the Constitutional Treaty (2004), the Lisbon Treaty amended the flexibility clause consistently with the objectives set in Laeken.

3.1 The Lisbon Treaty and the clause

The Lisbon Treaty represents an outstanding improvement towards the completion of the "post-Nice process"[181] of constitutional reform. In accordance with the Laeken Declaration, this revision concludes the precedent period of "pragmatic constitutional distortion"[182] and had the great merit of having 'tidied up' the decades-long "accumulation of texts"[183] by promulgating two Treaties that encapsulated the enormous amount of law produced previously. In this sense, there was no longer a distinction between the Community and the Union, the TEC and TEU. Finally, there was a departure from the constitutional fragmentation of Maastricht, which not only resulted in a fragmented constitutional structure within the framework of the three pillars, but the fragmentation was also evident at the level of integration between countries. In the words of Schütze, "the European Treaties had become constitutional law full of historical experience – but without much legal logic"[184].

Hence, a new dual Treaty basis was established, resulting respectively in the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), which had the same legal value and that both concern a single organization with a single legal personality.

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[177] Laeken Declaration, para. II.
[178] *Ibidem*, Caption.
[179] R. SCHÜTZE (2003: 111).
[180] Laeken Declaration, para. II.
[181] R. SCHÜTZE (2003: 111).
[182] R. SCHÜTZE (2018: 32).
[183] *Ibidem*.
[184] *Ibidem*.

Therefore, although some parts still were under an intergovernmental 'control' such as the Common Foreign and Security Policy, the EU had finally become a single legal entity and carried out a significant step towards a full political integration and a "ever closer Union"[185] within its members and its citizens, shaping even more deeply every aspect of the everyday life.

Considered the objectives stated in the Laeken Declaration, the "constitutionalization of the Treaties" was maximally fulfilled, even though a unique constitution, as it was envisaged by the 'failed' Constitutional Treaty, was not accomplished. However, it is widely shared the opinion that it was thanks to the dual treaty basis that the 2007 revision was made 'acceptable' and 'ratifiable' for those countries – France and the Netherlands – that rejected the CT instead. Indeed, a single constitution triggered the state-centric wing of the Member States that were concerned of the possible consequences of a European constitution. Enclosing the primary source of Community law under one single 'roof' would have been perceived as a clear shift towards a European federalism on the US model. Nevertheless, it can be argued that the dual Treaties saved the formality and allowed the Member States to keep claiming the role of masters of the Treaties in a classical international law conception. Nonetheless, the reality of facts is that the CT and the Lisbon Treaty are extremely similar either for what regards the contents and the *ratio* behind.

Moreover, for what regards the "more democracy, transparency and efficiency in the European Union" purpose, the increasing importance and involvement of the European Parliament – the direct representative of the European citizens – in the decision-making and in the legislative procedure can be claimed to have made achieve a full bicameralism where the Council embodies the indirect representation. This increasing democratic legitimacy, which has been lacking for a large period of the previous century, can be asserted to have provided the EU with a more pronounced federal character despite the willingness of the most conservator States.

However, how was the flexibility clause amended and placed in this new constitutional framework? First of all, as for the previous revision, it is still valid and highly influential the idea that the widening of Treaties' scope – and hence of competences – necessarily reduces the resort to the clause as the 'gaps' in the Treaties are then less likely to emerge. Furthermore, pursuing the purpose of a better division of competences, those were also reorganized within the Treaties, resulting into the distinction between exclusive, shared, coordinating and complementary competences under Articles 2-6 of the TFEU. This choice must be considered as hand in hand with the pivotal role that was conferred to Article 5 of the TEU, i.e. to the principle of conferral and subsidiarity. Secondly, as amply mentioned in chapter I, the "internal market" provision was detached in favour of a broader 'scope' of the clause which was then employable "within the

[185] Treaty establishing the European Community, Preamble.

framework of [any] the policies defined in the Treaties"[186]. As we have seen, although the internal market sphere was never strictly respected but interpreted in rather broad terms, this change can appear as a paradox in regard to the position held by Member States and unequivocally stated in the Laeken Declaration of a clearer division of competences. In this sense, it is evident than rather than a more marked delimitation of the clause's scope the latter was instead widened. Nevertheless, it must be considered that it was a necessary move due to the new Treaty organisation. With Lisbon, the Economic Community was no longer a separate Treaty but part of the wider framework of the dual Treaty basis. It was hence logical for the better functioning of the clause itself to update and widen its scope to any policy of the Treaties as the Union had become a single legal entity in itself. In Butler's view[187], this amendment basically brought the clause "back to the reality of practice that has been done for the previous decades", i.e. that even a "tenuous link"[188] with the internal market would have fall in its scope. Moreover, this change complies with the very founding idea of providing the Union with a tool for making the Treaties less rigid and hence flexible to adapt to an array of possible future matters.

In chapter I, it was mentioned that the textual changes carried out in Lisbon consisted, among the others, of the addition of three more paragraphs. Therefore, Article 352(2) regulates as follows: "Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article"[189]. It is ascertained that the Lisbon Treaty aimed at providing a new central role to the subsidiarity principle in the exercise of legislative powers in order to guarantee a greater degree of control during the legislative procedure and a sharper delimitation of competences. In this paragraph, it is recalled attention exactly on this point. That is, in line with the pursuing of democratic promotion, the EU Parliament which in the Lisbon revision basically acquires an equal role with the Council in the ordinary procedure, with the most outstanding change of obtaining a veto power over the proposal of Council to the resort to the clause. Furthermore, an additional subsidiarity limit is posed by the provision "the Commission shall draw national parliaments' attention". This stressed the idea of the clause as an exceptional tool in the end of the EU, entailing a procedure otherwise not conceivable with the ordinary ones. In this sense, despite the search for a better cooperation that the principle of subsidiarity should entail, the drafters have rather imposed a procedure of 'quasi-consultation' with national parliaments which is completely discordant with the very idea of an independent supranational Union.

[186] Treaty on the Functioning of the European Union, Article 352.
[187] G. BUTLER (2019).
[188] T. KONSTADINIDES (2012:243).
[189] Treaty on the Functioning of the European Union, Article 352(2).

This last additional provision appeared to the Member States as an opportunity not to be missed. Indeed, this resulted in the systematic claim by some States according to which, before issuing any act based on Article 352, scrutiny of constitutional legitimacy by national parliaments was necessary in order to monitor that no abuse of competences was taking place. The aim was to have a strong national check over the use of the clause for limiting its Kompetenz-Kompetenz character. That is the case of Germany and United Kingdom.

The so-called Lisbon Decision[190] is a judgment issued by the German Federal Constitutional Court that clarifies the terms of the adoption of the Treaty of Lisbon by the German legal system. Notwithstanding important reflections on the legal nature of the 'new' Union and the flexibility clause are reported. Firstly, it was firmly reaffirmed the state-centric position according to which:

> "Article 23 of the Basic Law grants powers to take part in and develop a European Union designed as an association of sovereign states (Staatenverbund). The concept of Verbund covers a close long-term association of states which remain sovereign treaty-based association which exercises public authority, but whose fundamental order is subject to the decision-making power of the Member States and in which the peoples, i.e. the citizens, of the Member States remain the subjects of democratic legitimation"[191].

For what regards the clause instead is acknowledged that "[due to the Lisbon revision] the European Union would have the competence to decide on its own competence (Kompetenz-Kompetenz) (Article 48.6 and 48.7 Lisbon TEU; Article 311, Article 352 TFEU)"[192] but that "in so far as the flexibility clause under Article 352 TFEU is used, this always requires a law within the meaning of Article 23.1 second sentence of the Basic Law"[193]. The second sentence regulates that:

> "[…] the Federation may transfer sovereign powers by a law with the consent of the Bundesrat. The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law or make such amendments or supplements possible, shall be subject to paragraphs (2) and (3) of Article 79".

Thus the possibility of an uncontrolled expansion of competences is formally denied especially under paragraph 2 of Article 79 of Basic Law, which indeed imposes the following condition also on the EU legislation: "Any such law shall be carried by two thirds of the Members of the Bundestag and

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[190] Decision of the German Federal Constitutional Court, 30 June 2009, BVerfGE 123, 267, on the *Act Approving the Treaty of Lisbon compatible with the Basic Law*, hereinafter Lisbon Decision.
[191] Lisbon Decision, headnotes.
[192] *Ibidem*, para. 112.
[193] *Ibidem*, para. 417.

two thirds of the votes of the Bundesrat", fostering a parliamentary intervention in this regard.

However, the issuing of the British European Union Act in 2011 surely had a more remarkable impact regarding the involvement of national parliament in the resort to Article 352. Indeed, the British Parliament expressly established a "prior authorisation mechanism" in section 8 "Decision under Article 352" where it is regulated that:

> "1. A Minister of the Crown may not vote in favour of or otherwise support an Article 352 decision unless one of subsections (3) to (5) is complied with in relation to the draft decision. […].
>
> 3. This subsection is complied with if a draft decision is approved by Act of Parliament. […].
>
> 5. This subsection is complied with if a Minister of the Crown has laid before Parliament a statement specifying a draft decision and stating that in the opinion of the Minister the decision relates only to one or more exempt purposes"[194].

Once again, United Kingdom confirmed itself as the most conservative country in terms of protecting state sovereignty by committing an *ad hoc* paragraph of the act to increase parliamentary control over the use of the clause by European institutions.

However, proceeding with the analysis of the subparagraphs, the third regulates that the clause "shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation". This appears to be extremely in accordance with the second paragraph on the 'monitoring of subsidiarity', given that the harmonisation of law can be defined as "the process by which Member States of the EU make changes in their national laws, in accordance with Community legislation, to produce uniformity, particularly relating to commercial matters of common interest"[195].

Finally, the fourth one provides that the Common Foreign Security Policy are to be considered excluded from the scope of the clause and no acts in this regard can found a legal basis in Article 352. This is in line with the special nature of the Union external powers that have been controversial and enjoyed special remarks since the Maastricht Treaty that committed an entire (intergovernmental) pillar to them.

Behind these amendments – that in this case have not only changed but in fact added more specifics – there is the ultimate aim of being clearer and of no longer leaving too much room for interpretation, but rather placing clear limits on the resort to the clause.

Following this line of reasoning, the Lisbon Treaty adds two annexed declarations on the use of the clause. Those are respectively the Declaration No 41 and 42. Before deepening their content, Lebeck rises a crucial

[194] Act of the British Parliament, 19 July 2011, c. 12, *European Union Act*.
[195] J. LAW, E. A. MARTIN (2014).

question regarding the legal validity of the latter in relation to the corpus of the Treaties[196]. Indeed, on a traditional public international law perspective, declarations are to be considered as soft law, hence 'quasi-legal' instruments which nevertheless "are not binding in themselves but are more than mere statements of political aspiration, they fall into a legal/political limbo between these two states"[197]. On one hand, Lebeck remains consistent with the provisions laid down in Article 31(2) of the Vienna Convention of the Law of Treaties ("General Rules for Application") where it is regulated:

> "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: […]
>
> b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty"[198].

In this sense, it cannot be denied that "declarations annexed to the Treaties are seen as having a political, rather than a legal role"[199] and hence a declaration cannot be considered a source of law. However, on the other hand, legal literature on this topic related to the EU context still significantly disagrees mainly due to the absence of a valid case law in regard.

However, what does these Declarations state? Generally, they appear as repetitive, with the evident purpose of clarifying as much as possible the provisions laid down in the clause. The Declaration No 41 regards the scope of the objectives to attain and specifies that with this expression the Article does not only refers to Article 3(1) of the TEU. The latter regulates that "the Union's aim is to promote peace, its values and the well-being of its peoples"[200]. Beyond any doubt, those objectives are too broad and general and the risk that every policy could fall in the scope of the clause – assuming a 'catch-all' character – is then extremely likely. For this reason the Declaration specifies that the objectives mentioned in the clause "refers to the objectives as set out in Article 3(2) and (3) of the Treaty on European Union and to the objectives of Article 3(5) of the said Treaty […]"[201]. In this way, the Member States attempted to make the 'objectives requirement' more specific so that the resort to an expanse interpretation of Article 3(1) TEU was not necessary but including those other subparagraphs the control would have been clearer and the delimitation of purposes sharper. However, it is arguable that this clarification could rise more problems than the ones that solves. Indeed, the ambivalent of amply objectives and specific one remains and this could cause confusion or even abuses in the use of the clause anyway. Finally, it reiterates what is stated in Article 352(4), namely

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[196] C. LEBECK (2008: 349-350).
[197] J. LAW, E. A. MARTIN (2014).
[198] Vienna Convention on the Law of Treaties, 23 May 1969.
[199] C. LEBECK (2008: 349-350).
[200] Treaty on the Functioning of the European Union, Annexed Declaration No 41.
[201] *Ibidem*.

that "legislative acts may not be adopted in the area of the Common Foreign and Security Policy"[202].

On the other hand the Declaration No 42 reaffirms what was already stated in Opinion 2/94, that is:

> "[the clause] being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Union powers beyond the general framework created by the provisions of the Treaties as a whole […] In any event, Article 352 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose"[203].

Therefore, the Declaration primary purpose is to address the most pressing concern about the clause, namely its potential Treaty revision function which would confer the latter the power of determining its own competences.

To conclude, the general outcome of these amendments and annexes is to have put into force a more severe and demanding check over the use of the clause that ultimately significantly reduced its employment as a legal basis in the implementation of legislative acts. Indeed, since the Lisbon Treaty came into force, only ten regulations were issued through the clause. In a sense, the amendments can be said to have 'worked' and the disputes over the clause have ceased as evidenced by the fact that the court was no longer called upon to determine how the provisions of the clause should be interpreted. On the other hand, however, this result can hardly be judged as a success. The changes made have not really solved the inherent problems of the clause - providing a 'building-competence tool' in a system of conferred competences - but rather the Member States have been concerned to put in place extremely strict procedures, in line with the idea of controlling subsidiarity, which have made extremely difficult for the clause to meet the consensus threshold for being employed in the legislative process.

This has two important implications. First of all, given that the conceptual textual limits have appeared rather volatile due to their ambiguous and controversial wording and thus subject to different interpretations, which can easily escape these limits or makes them stricter, with this revision the Member States have brought the question of the applicability of the clause back to a political rather than a legal/institutional level. In this sense, the limits of the clause now depend more than ever on the will of the States and of the Parliament's factions. Secondly, the near-zero involvement of the Court in ruling on this matter, since in the event of a possible dispute the issue would be quashed before it could even be brought before the ECJ, has caused a freeze in the judicial doctrine on the use of the clause, which is blocked at Opinion 2/94. Therefore, the jurisprudence adopted 30 years ago – which doubtless inspired the amendment – is rather

[202] *Ibidem*.
[203] Treaty on the Functioning of the European Union, Annexed Declaration No 42.

difficult to be changed.
In this regard, due to its decline, the clause's main purpose of making the Treaties less rigid was partially nullified. The latter is not only practically useful in order for the Union to be responsive, but it is truly necessary for an integrationist system based on 'integration through legislation', or functional integration. While, on the one hand, a national constitution is by definition drafted with a general wording, of broad meaning and interpretation in order not to run into a stalemate due to overly specific provisions; on the other hand, the Union has instead pursued, at least for a good part of its history, rather specific competences often due to the centrality of the economic sphere in the Treaties. In this sense, the clause replaces this general character and provides an outlet for the implementation of a broader field of policies that would otherwise have remained stuck in the specificity of competences.

3.2 The Lisbon Treaty: a minimalist use but full of meaning

This paragraph aims at deepening – reporting specific regulations and decisions – the use of the clause after the 2007 revision. Indeed, the argument for a flexibility clause that has become inflexible is extremely valid and well-founded, simply looking at the number of times that the Union's legislators have resorted to the latter for the past fourteen years. Nevertheless, the intention here is to emphasise the actual use made of the clause and not simply to stop at the numbers, which clearly testify its disuse.

In this regard, in the aftermath of Lisbon, not only the legislative acts decreased, but their content changed as well. Indeed, from a brief reading, the regulations and decisions issued appear on average more concise in their length and also relegated to more 'marginal' subject matters compared for instance to the "constitutional significance"[204] recognised by the Court in Opinion 2/94 for the accession to the ECHR. This is also evidenced by the recent debate over finding a suitable legal basis for the Commission's proposal for a European minimum wage[205]. In respect of this act, that would have a major impact on the nation States' prerogatives, Gill-Pedro points out that "it is worth noting that alternative legal basis, such as the flexibility clause in Article 352 TFEU would also appear to be problematic, as 'others' have pointed out"[206].

However, despite the limited contents and number of legislative acts issued that mark a clear step towards 'inflexibility', the clause has nevertheless preserved some of its founding features. In this regard, it is worth to analyse the specific policy area where the Article was employed in,

[204] Opinion 2/94, para. 34.
[205] Proposal for a Directive of the European Parliament and of the Council, 28 October 2020, COM/2020/682, *on adequate minimum wages in the European Union*.
[206] GILL-PEDRO (2020); PETRACHE, RUDOLPH (2020).

since important conclusions can be drawn. Indeed, the relevant role played by the clause in a system of conferred competences, i.e. to make the Union's legislators more efficient in the exercise of their power whenever unpredictable subject matters arise before the EU and require an expansion of competences for the full achievement of European objectives, is validated now – more than ever – by the constantly changing globalised world where we live. As a matter of fact, the unpredictable evolutions of the globalised word put before the Union unforeseen and unprecedent issues that will need to be promptly managed. In this respect, the higher and higher interconnection of States, companies and people, the new frontiers of economic development, the digitalization process, humanitarian and economic crisis, even pandemics have already become ordinary matters that must be faced at the supranational level by a responsive Union. That is why an instrument such as the clause must not be underrated for future actions and for a strong EU in the international arena. The recent use of the Article, mostly in an exclusive manner[207], has gone exactly in this direction. In this sense, the Decisions issued in those years were purely concerned with the international sphere, especially with regard to funding and economic aid for non-European states or, for example, to address issues such as the protection of human rights[208] and the fight against terrorism[209].

On the other hand, the more recent Regulations bring even clearer evidence of the use of the clause as "crisis management" tool[210]. For instance, the Regulation 2019/1197[211] employs the clause as a legal basis for regulating the "implementation and financing of the general budget of the Union in 2019 in relation to the withdrawal of the United Kingdom from the Union". To that end, the Regulation's articles list the conditions to be fulfilled in order to "continue to be eligible for Union funding for eligible expenditure incurred in 2019 following the date of withdrawal".

Another example is given by the Regulation 2018/2056[212] on the electronic publication of the Official Journal of the European Union. In this case, given the necessity of "an advanced electronic signature based on a qualified certificate and created with a secure-signature-creation device" and for "accelerating the procedure for the publication of the Official Journal on the

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[207] I.e. as opposed to a joint use.

[208] Decision of the Council, 11 March 2013, 252/2013/EU, *establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights*.

[209] Decision of the Council, 17 March 2015, (EU, Euratom) 2015/457, *repealing Decision 2007/124/EC, Euratom establishing for the period 2007 to 2013, as part of General Programme on Security and Safeguarding Liberties, the Specific Programme 'Prevention, Preparedness and Consequence Management of Terrorism and other Security related risks'*.

[210] CARL LEBECK (2008: 325); nevertheless, 'crisis' must be understood in general terms. With the latter it is meant the global scale matters which the Union needs to face in this century as the ones listed above.

[211] Regulation of the Council, 9 July 2019, (EU, Euratom) 2019/1197, *on measures concerning the implementation and financing of the general budget of the Union in 2019 in relation to the withdrawal of the United Kingdom from the Union*.

[212] Regulation of the Council, 6 December 2018, 2018/2056, *amending Regulation (EU) No 216/2013 on the electronic publication of the Official Journal of the European Union*.

EUR-Lex website", the clause was used here to amend a previous regulation in this field as new technology was required.

In the end, but most significantly, the Regulation 2020/699[213] revised the meeting schedules of the European companies (SEs) and of the European Cooperative Societies (SCEs) so that the meeting may be held "within 12 months of the end of the financial year, provided that the meeting is held by 31 December 2020". This Regulation was issued with specific purpose of "containing the outbreak of COVID-19". In this respect, it was acknowledged that:

> "1. […] Member States have put in place a series of unprecedented measures, in particular measures concerning confinement and social distancing of persons.
>
> 2. Such measures can prevent companies and cooperative societies from complying with their legal obligations under national and Union company law, in particular, by making it considerably difficult for them to hold general meetings".

On one hand, these three Regulations perfectly illustrate the downward parabola of the clause in terms of its use. On the other hand, they emphasise that, despite its fall, the clause has not lost its ability to adapt the Union's legislative power in any situation of need or unforeseeable crisis. Although it may seem trivial in itself, Regulation 2020/699 shows how, in the middle of a pandemic, hence a situation of uncertain outcomes, the clause enables the Union to act in certain areas that would have otherwise been precluded.

In the end, it can be concluded that, after the Lisbon Treaty, the resort to the clause drastically decreased according to the minimalist use fostered by the Court and indirectly by the Member States. Therefore, it is said, with good reason, that the Lisbon Treaty has made the flexibility clause inflexible. This turn to inflexibility stands in paradoxical contrast to the direction undertaken by the Lisbon Treaty. In fact, the ultimate aim of this revision, other than clarifying the constitution, was to move the Union towards a more marked supranationalism. Relegating the clause, one of the main instruments for this objective, to a minimalist use in defence of national sovereignty, appears to be in clear opposition with the widening of the scope of the Treaties, which have conferred on the Union – and thus taken away from the Member States – an increasing number of policy-fields.

[213] Regulation of the Council, 25 May 2020, 2020/699, *on temporary measures concerning the general meetings of European companies (SEs) and of European Cooperative Societies (SCEs).*

3.3 The constitutional matters related to the clause

The minimalist use, as mentioned above, seriously jeopardised the clause's essence and purposes and regrettably it did not affectively address the constitutional questions and implications that were the main reason for the disputes. Therefore, as in chapter I, a textual analysis was presented regarding its controversial wording and in chapter II how the interpretation of the provisions resulted in different sentences of the Court, in this paragraph instead an analysis of the constitutional matters related to the clause is given. In the previous pages, those were sporadically mentioned when needed, now they are more schematically presented. Remarkably, these issues have remained the same since the EU's foundation and are to be considered the ultimate reason for the constant scepticism around the clause.

Firstly, the clause appears to be in a paradoxical relation with the system of conferred competence over which the Union is based. In this regard, Schütze asserts that:

> "The wording of the provision already seems perplexing as it speaks of giving the Community a power 'where this Treaty has not provided the necessary powers' – suggesting that the Art. would somehow be 'outside' the Treaty framework. This circulus virtuosos has been one of the sources of conceptual trouble and confusion surrounding the provision"[214].

The general perception is that, in any acceptation, the resort to the clause would entail an infringement of the rule of the Treaties. This lays on the assumption that a 'competence expanding tool' in this legal system would only have an inappropriate use since it would inevitably create a parallel 'competence granter' to the one represented by the Treaties. In this sense, the clause cannot be considered other than an exception to the ordinary devolution of sovereignty conceded by the Member States. It follows that its exceptionality is manifested in the ultimate possibility of revising the Treaties escaping the ordinary procedure laid down in Article 48 TEU.

In common parlance, it is said that 'the exception confirms the rule', obviously this does not apply to the clause. In fact, given its exceptional nature, it could jeopardise not only the European system of competence but could even revise the entire constitutional nature of the Union. As Schütze asserts "Article 308 is not limited by the scope of the Treaty but to some extent represents and defines it"[215]. It is suggested here the idea that the clause has assumed the role of constitutional limits-setter for the European legal system and in this respect acquires a pivotal role in the dispute between a supranational Union and one with a strong intergovernmental character, as desired by the more conservative Member States. In this sense, by extending the competences of the Treaties, the clause can be understood as the way out

[214] R. SCHÜTZE (2003: 102).
[215] *Ibidem*, p. 108.

towards the establishment of a federal Union where the Constituent States are increasingly deprived of their legislative prerogatives and functions. This shift is already partly evident even under an extremely limited regime of the use of the clause. In this sense, the ECJ's interpretations, for example, already provides information and hints regarding the constitutional climate of the Union. As it is the current case, with the entry into force of a dual Treaty that elevated the Union to a single legal entity and largely extended its competences, the Member States tried to protect their sovereignty at least as far as the clause was concerned. In fact, as Butler asserts, they are exactly the ones in charge of the development of the clause and who can relegate it to a minimal or an intensive use according to their will[216]. In this context, the clause can be said to be part of the series of compromises between the EU and the States in order to bring about an integration that does not deprive the latter of all their functions, thus giving the institutions of the Union federal-type tasks.

Finally, it can be argued that it is precisely because of the question of the legal nature of the Union that the clause is itself controversial. Indeed, the clause has often been used as a scapegoat of the constitutional issue[217], but "even if the EU had no flexibility clause, there would have been the additional legal risk that legal basis would be used that would be incorrect and, in some cases, wholly inappropriate"[218]. Therefore, as long as the question of the constitutionality of the EU remains open, the clause will also be affected accordingly.

In any case, an analysis of the disputes concerning the clause also reveals a paradoxical ambivalence in the disputes themselves. In fact, if on the one hand it can be seen as the Union's constitutional limits setter, with the possibility of moving the threshold of supranationalism beyond the limits granted, on the other hand, as happened in the post-SEA era, recourse to the clause has turned out to be the expedient used by Member States to bypass the QMV and bring the Union back to a purely intergovernmental level. Thus, if from a more theoretical point of view, the clause intercedes on the question of the legal nature of the EU, it has also been used as a powerful tool in the hands of the executives to centralise control over legislative power. In any case, the latter danger lapsed when the consent of European Parliament was added, and by including a further check on its use, the clause itself lapsed.

In conclusion, the 'tug-of-war' between the Member States and the institutions does not allow for an 'optimal use' of the clause which, in spite of its recent disuse, still plays an important role in the European system of competence, since "constitutional perfection is impossible, 'folly', so that having a built-in flexibility mechanism is logic"[219].

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[216] G. BUTLER (2019).
[217] L. AZOULAI (2014).
[218] G. BUTLER (2019).
[219] G. BUTLER (2019).

3.4 An optimal use for the clause

After a crosswise analysis of the clause, the last question this works is addressing is whether there is an optimal use for Article 352 which should be fostered in the future. Three main uses were identified in this thesis: as Kompetenez-Kompetenz, as a minimalist one or a 'middle way'.

As we have seen, the first one, which coincides in part with the jurisprudence sanctioned in judgment *Massey-Ferguson* and then as an indirect result of the judgement *Generalised Tariff Preferences*, has the main problems of infringing the system of conferred competences and powers and to revise the Treaty out of the ordinary procedure. This is often described as an uncontrolled use or even an abuse.

Secondly, a minimalist understanding – i.e. the one which is currently accepted – that resulted after the Opinion 2/94, has the merit of preventing any misconduct in its resort but at the cost of distorting the very essence and nature of the clause. Therefore, even though the controversies related were drastically reduced, Article 352 had lost its primary purpose of making the Treaties less rigid to counter-measure unforeseen troubles. Hence, where is the point of including in the European legal system a flexibility clause which is in the end inflexible?

The third way finds widespread academic support. For instance Butler suggests that "the best use of the clause is arguably when it complements other existing, explicit legal bases"[220]. For many years, this idea has been coinciding with a joint use with other articles hence performing a gap-filling function, as it was the case in the 70s. This third use is considered optimal precisely because it does not create new competences but extends the scope of already existing ones, thus providing the necessary powers to pursue the objectives of the Treaties. Hence, this use is strongly 'purpose bound' and at the same time its subsidiary nature allows it not to assume the role of self-attributor of competences. For this reason, it can be defined as "partial Kompetenz-Kompetenz"[221] since from a partial lack of legislative powers – insofar as they are present in the Treaties but deemed insufficient – derives a partial self-determination of competences' scope. As mentioned in chapter II, this subsidiary nature can only emerge through a "soft interpretation"[222] of the provision "failed to provide the necessary powers", thus the assumption that if it is mentioned, then the power in that area is necessarily established and provided is not valid.

However, a question arises: 'when does the Treaties fail to provide the powers? or in another sense how do we recognise a gap in Treaties?' First of all, it must be accepted the premise that there may be some gaps. Secondly,

[220] *Ibidem*.
[221] R. SCHÜTZE (2003: 110).
[222] *Ibidem*, p. 95.

it is almost impossible to answer this abstract question because of the large range of interpretations of the "failed to provide the necessary powers" requirement. Indeed, as it is shown, the joint use of the clause was from time to time accepted by the Court and then dismissed.

However, it is fair to report that this approach is not exempt from concerns and risks. In fact, the gap-filling function has allowed for the rise of a theoretical side conceiving the clause as the bridging instruments "for the discrepancy between Community's jurisdiction-itself limited by its aims-and a partial or complete absence of powers for their realisation"[223]. Therefore, becoming the bridge between competences and legislative powers, the clause potentially creates a "gap-less system of competences"[224]. In the words of Schütze that best summarise this concept: "Article 308 would bridge the 'gap' between the scope of the Community's jurisdiction and the scope of its formal powers, since it provides a legal competence in all those areas in which no specific enumerated power is available"[225]. Therefore, does a "gap-less system" imply the Union have the power of determining its own competences? According to this perspective, it does not, but nevertheless preventing any lacuna to emerge would 'partially' anticipate the ordinary treaty revision in any case.

Despite that, according to a considerable number of scholars, the latter remains the optimal function performed by the Article. In fact, it allows the nature and purpose of the clause to be preserved intact. As it was shown, the resort to the clause would always imply – directly or indirectly – an overcoming of the system of conferred powers, but nonetheless, for this third approach, it would only consist in a 'partial infringement'. This is so because the competences provided by a gap-filling function "would seem to some degree 'immanent' in the Treaty, yet to some extent also 'new'"[226]. Indeed, although it is admitted that those are not explicit and thus enumerated, their 'creation' is nevertheless accepted since it derives from the necessity of attaining one of the Community's objectives.

In line with this perspective, we thus stand at a crossroads: whether the gap-filling function must be considered a 'half-way infringement' of the conferred powers or an 'imperfect' flexibility provider. Hence, the clause would always be in this 'limbo' which makes it fluctuates between abuse and its purpose denial, between violation and covering a relevant role in the competence system. Ultimately, the question whether the 'optimal use' is truly optimal rises. Indeed, in order to be optimal, should it be accepted what is here called an 'half-functionality'? As a matter of fact, this positioning between those two poles is a result of the political character assumed by the clause during the years which makes it constantly subject to compromise between the Member States and the EU. However, it can be concluded that currently the Treaties do not present a way for escaping the 'vicious circle'

[223] R. SCHÜTZE (2003: 105).
[224] *Ibidem*.
[225] *Ibidem*, p. 106.
[226] R. SCHÜTZE (2003: 106).

of the use of clause unless deferring – as many other aspects of the EU integration – to the Member States' will. In this regard, Butler suggests a future treaty revision could limit the clause as a gap-filler only in specific and explicit fields where, nonetheless, it can be employed without reserves. This can be seen as a different solution to the Opinion 2/94's jurisprudence, nevertheless its flexibility and subsidiarity nature would be always undermined.

Conclusion

Drawing conclusion for Article 352 is a difficult task, as evidenced by the large amount of literature on the topic, which has often been limited to a more descriptive analysis rather than prescriptive. The reason is that the questions to be answered are on the one hand extremely influenced by the parties involved and their personal interpretation of them, while on the other hand these issues can appear quite abstract so that a practical conclusion is almost impossible to be reached. This work has largely accomplished this descriptive task, while it is more cautious on the on the other side.

The clause interpretation and its consequent use has been especially shaped by the ECJ's key to lecture. As shown, the latter is partially influenced by the constitutional climate surrounding the Union. Indeed, it is not by case that milestone judgements such as the *Generalised Tariff Preference* or the Opinion 2/94, occurred, respectively, after the revision of the SEA and of Maastricht. Therefore, the Court, even if acting independently, has to take into account the Member States' position on the argument.

This leads us a to the Member States, the 'real master of the clause'. Indeed, as the resort to ECJ is currently made impossible by the latest amendments, the Member States are the only ones that can bring back the clause to an active role in the EU's legislation. However, as Klabbers asserts[227], the nation States' perspective and interpretation of the International law and in this case of the European Union law, are out of any range of action. Until 'legal conservative' is widespread an accepted among the Member States, the clause will be always 'difficult to be digested'. As Butler asserts, "as long as the clause continues to exist, its critics continue to lament it"[228]. Therefore, from a textual perspective, the conceptual limits laid down in the Article will always be subjected to a case-by-case interpretation, even though nowadays it is more likely to change the course of the clause through a revision rather than by the Court.

On the other hand, one of the three different uses[229], emerging from the different cases, outlined both theoretically and historically appear difficult to be fully accepted by all the parties involved. In this sense, a true meeting point between respecting the nature of the clause, the principle of conferral competences and the constitutional limits of the Union is almost impossible to find, if it existed at all. Someone will always be unhappy with the outcome, whatever it may be. In this respect, the EU's institutions and Member States have been avoiding renegotiating the constitutional terms of the Union because is a disadvantage for both. Therefore, the clause is only one aspect – surely the most evident – of the question of competences in EU. The latter can be undoubtedly countered through a further integration and

[227] J. KLABBERS (2017: 320-322).
[228] G. BUTLER (2019)
[229] Catch-all, minimalist and gap-filler.

thus devolution of sovereignty from the Member States to the Union. In this sense, moving towards an increasing federal organization the question of competences would be nullified.

In any case, only a mark position – whatever it will be – regarding the EU and its competences distribution with the States would give clear rule for the use and for the role of the clause within the Union's legislative powers. Currently, as Regulations no. 2020/699 shows, the clause is as necessary as it is a source of disagreement and constitutional uncertainty. Gap-filling in this sense can buy the EU time and at the same time provide relatively clear indications for its resort. In short, gap-filling would be a compromise – another one – that may work in the medium term but will need to be revised in the future, as will the clause itself.

To conclude, the clause had a complete journey form maximal to minimalist use. Nevertheless, the truly expansion period of the Paris Summit and *Massey-Ferguson* is over. Despite largely unpredictable, nowadays it seems impossible a come back to the passed *fasti*. However, the Opinion 2/94 cannot be considered the solution as well since it appears more like avoiding the question rather than solving it. Indeed, following its reasoning, the clause may be directly removed from the Treaties. In other words, fostering a fall of the clause does not address the more concerning constitutional implications of the dispute. However, despite a recent moderate optimism, Article 352 is currently alike 'dead'. It is only Member States' duty to decide what to do with it and eventually reintegrate it completely.

Finally, among the various constitutional uncertainties within the European legal order, the necessity of flexibility for the Treaties cannot be one of them.

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Abstract

Questo elaborato si pone l'obbiettivo di presentare un'analisi dell'evoluzione dell'Articolo 352 del Trattato sul Funzionamento dell'Unione Europea sia da un punto di vista dell'uso che ne è stato fatto, che dell'interpretazione che ne è stata data da parte delle istituzioni europee e degli Stati Membri nell'arco della breve ma intensa storia costituzionale dell'Unione. Di fatto, l'articolo, chiamato anche clausola di flessibilità (di seguito 'clausola'), è risultato essere al centro di molti dibattiti e polemiche che, anche a cause delle sue eccezionali disposizioni, lo hanno reso uno degli argomenti più delicati nel campo delle competenze europee.

Il potere legislativo dell'UE si basa su un sistema – detto – di poteri conferiti e sul principio di attribuzione delle competenze stabilito dall'Articolo 5 del TUE, secondo il quale i campi materiali sui quali l'Unione è legittimata a legiferare devono essere esplicitamente stabiliti nei Trattati in quanto trasferiti direttamente dagli Stati Membri che in questo modo rinunciano ad alcune delle loro funzioni e prerogative legislative in favore dei legislatori europei. Infatti, l'UE, non essendo evidentemente uno Stato sovrano bensì un'unione di essi, è priva di poteri legislativi innati. In questo senso, un parlamento nazionale non ha bisogno di 'giustificare' i suoi atti legislativi, ma è invece investito del cosiddetto principio *Kompetenz-Kompetenz*. Si tratta di un concetto tradizionale del diritto pubblico, difficilmente traducibile in altre lingue, secondo il quale un parlamento nazionale è legittimato a modificare le proprie competenze giuridiche o addirittura ad estenderle. In altre parole, un organo legislativo nazionale ha la 'competenza di determinare le proprie competenze'. Ecco perché, in uno Stato nazionale, è generalmente possibile adottare atti legislativi in ogni 'campo', che ovviamente sia conforme alla costituzione. Dunque, la 'creazione' di nuove competenze o anche solo l'estensione dell'ambito di queste è severamente precluso nell'ordinamento europeo. Tuttavia, accanto a quelle enumerate nei Trattati, l'UE gode a sua volta di competenze dette 'generali', cioè che non si riferiscono a nessun campo legislativo specifico ma concedono ampi poteri legislativi per sviluppare politiche non espressamente menzionate nei Trattati. L'Articolo 352 del TFUE fa parte proprio di quest'ultima categoria, fornendo anzi quelle competenze definite 'residue' che risultano essere le più generali dell'ordine giuridico europeo poiché possono essere impiegate trasversalmente in ogni campo previsto dai Trattati per l'attuazione di un qualsiasi tipo di atto legislativo, purché conformi agli obiettivi e ai valori dell'Unione. Dunque, se abusata, la clausola può divenire uno strumento nelle mani delle istituzioni per estendere illimitatamente la portata delle loro competenze. Di conseguenza può affermarsi come strumento legislativo parallelo a quelli ordinari ed in ultima analisi può ricoprire la funzione di emendare i Trattati bypassando le procedure ufficiali riportate nell'Articolo 48 del TEU.

Tuttavia, nonostante le dispute, la clausola è presente fin dal Trattato di Roma (1957), numerata come Articolo 235 della CEE, e non è mai stata

eliminata poiché svolge un compito fondamentale per un sistema di poteri conferiti come quello europeo. Infatti, come suggerisce il nome, mira a rendere i Trattati meno rigidi – o flessibili – nell'esercizio del potere legislativo. In questo senso, un sistema giuridico basato su poteri enumerati potrebbe incorrere nel rischio di rimanere bloccato nella specificità delle competenze e di conseguenza il potere legislativo risulterebbe in certe situazioni inefficiente e inadeguato poiché è altamente improbabile che gli estensori dei Trattati siano stati in grado di prevedere ogni campo in cui sarebbe stato necessario legiferare. Di fatto, è invece ipotizzabile il contrario, ovvero che di volta in volta possano sorgere questioni impreviste che richiedano una base giuridica per l'azione Europea in uno specifico campo che però non è menzionato.

Tuttavia, le questioni relative alla clausola sono varie e di diverso tipo, sarebbe dunque riduttivo ricondurle semplicemente a una violazione della procedura di revisione. A questo proposito, questa tesi identifica due diversi livelli di analisi. In particolare, distingue tra controversie meramente testuali e quelle invece 'costituzionali'. Le prime emergono direttamente dalle disposizioni contenute nel suo testo che, data la loro ampia e difficile interpretazione, hanno necessitato più volte l'intervento della Corte di Giustizia dell'Unione Europea per fare 'relativa' chiarezza. La CGUE ha cercato in diverse sentenze di definirne un uso chiaro, ma alla fine queste si sono sempre tradotte in una giurisprudenza temporanea soggetta al clima costituzionale che circondava l'UE e gli Stati Membri.
Dall'altra parte, le questioni costituzionali sorte nell'utilizzo della clausola hanno invece messo in dubbio il sistema di competenze Europee e conseguentemente l'esercizio del potere legislativo e la natura giuridica dell'UE stessa.

Per questo motivo, ai fini di una migliore comprensione, muovendosi dal caso generale a quello specifico, questo elaborato analizza innanzitutto il sistema delle competenze Europee così da introdurre le modalità con cui si svolge l'esercizio del potere legislativo nell'Unione per poi passare al caso speciale della clausola. In questo modo non solo risulta più facile collocare l'Articolo all'interno del sistema di competenze, ma è soprattutto possibile enfatizzare quei problemi di carattere generale nel trasferimento dei poteri dagli Stati Membri all'Unione. Nel fare ciò, si segue il seguente ragionamento: per elaborare un chiaro sistema di competenze in un ordine giuridico che presenta un dualismo di poteri legislativi su uno stesso territorio (Stati Membri-Unione), è necessario innanzitutto comprendere che tipo di relazioni ci sono tra le parti e dunque che tipo di organizzazione internazionale è l'UE. Purtroppo, questo è risultato un compito alquanto complesso. Infatti, nell'ambito comunitario, è possibile identificare coloro che sottolineano il ruolo degli Stati come "*Master of the Treaties*", come in ogni altro trattato, organizzazione, alleanza internazionale di stampo intergovernativo, e quelli che invece sostengono che una rigida separazione tra ordine giuridico interno e internazionale ha cessato di esistere e che quindi l'UE debba muoversi verso un'unione sovranazionale di stampo

federale. Tuttavia, a causa della minaccia potenziale che potrebbe sorgere da questo dibattito, che da una parte potrebbe mettere in discussione l'esistenza stessa dell'ordine giuridico Europeo o dall'altra privare completamente gli Stati della loro sovranità, le parti coinvolte, tra cui la Corte di giustizia dell'Unione europea, hanno evitato di dare una risposta definitiva, preferendo invece un "*mutual adjustment resolution*", vale a dire affrontare ogni questione relativa alla natura giuridica dell'Unione solo quando strettamente necessario e, in queste occasioni, hanno semplicemente rivisto le loro aspettative reciproche. In questo modo, ad oggi, l'Unione occupa un posto a metà strada tra un'organizzazione internazionale di stati sovrani e uno stato nazionale. Niente di più controverso per un sistema di competenze attribuite: di fatto l'UE non presenta una distribuzione federale, ma allo stesso tempo quest'ultime non sono giurisdizione esclusiva degli Stati Membri. Pertanto, controversie di questo genere emergono anche al di fuori del caso specifico della clausola che tuttavia ne è indirettamente influenzata. In effetti, questa è stata spesso usata come capro espiatorio per la questione delle competenze, ma anche se l'UE non avesse avuto alcuna clausola di flessibilità, il rischio che alcune basi giuridiche sarebbero state usate in maniera errata e, in alcuni casi, del tutto inappropriata, è fuori dubbio. In questo senso, la perpetua contrapposizione sulla questione della natura giuridica tra i fautori di un UE sovranazionale e quelli per una intergovernativa è una delle cause primarie per un uso problematico dell'Articolo 352. Perciò, nonostante fosse doveroso sottolineare questo aspetto dell'Unione quando si parla di competenze, data l'impossibilità a livello teorico di trovare un approccio soddisfacente, questo elaborato prosegue con un'analisi pratica di come il conferimento delle competenze avviene, secondo quanto riportato nei Trattati.

Di fatto, nonostante le competenze si basino sul principio di attribuzione, i Trattati non forniscono un articolo con una chiara lista da cui attingere. In effetti, questa sarebbe stata una limitazione testuale troppo rigida che ne avrebbe minato l'efficienza. Al contrario, l'espediente utilizzato dagli estensori è stato quello di raccogliere le competenze nel Trattato sul Funzionamento dell'Unione Europea, in particolare nella Parte III, cioè "Politiche dell'Unione e azioni interne", dove ogni titolo contenuto in questa parte rappresenta un campo materiale sottoposto al potere legislativo, come ad esempio "Mercato interno" (Titolo I), "Libera circolazione delle merci" (Titolo II) e così di seguito gli altri che sono attualmente ventiquattro in totale. Tuttavia, il risultato è un sistema di enumerazione delle competenze che funziona come una lista ma che è aperto a interpretazioni più ampie, fornendo già così un certo livello di flessibilità nel loro utilizzo. Tuttavia, un'interpretazione testuale rigorosa dell'Articolo 5 del TUE negherebbe ogni possibile espansione delle competenze ed in questo modo i Trattati presenterebbero inevitabilmente delle lacune che, al momento della stesura, erano largamente imprevedibili o addirittura inesistenti. Uno Stato nazionale supera questo problema attraverso il suddetto principio *Kompetenz-Kompetenz*. Questo è di fatto il paradosso

intrinseco della legislazione europea, cioè il perseguimento dell'integrazione attraverso l'attuazione di norme in un sistema che limita ampiamente un esercizio efficiente del potere legislativo. In questo senso, la clausola di flessibilità può anche essere concepita come la piena realizzazione del sistema di competenze dell'UE che permette di rendere più funzionale il processo di integrazione attraverso il diritto, ma è altrettanto valido affermare che nella ricerca dell'efficacia, "l'integrazione funzionale" trascende i suoi stessi confini.

Ma allora come può l'Unione affrontare questo problema? Cosa succede quando sorge una questione delicata ma esclusa dall'ambito delle competenze stabilite? È necessario introdurre il concetto di interpretazione teleologica. Dal greco '*telos*' che significa fine o scopo, è un'interpretazione che va oltre il testo formale e cerca di comprendere il fine ultimo della disposizione. Sin dalla famosa sentenza *ERTA*, la CGUE ha usato l'interpretazione teleologica come uno strumento per espandere le competenze dell'Unione in caso di ragionevole necessità. In definitiva, questa consuetudine ha aperto la strada all'affermazione della cosiddetta dottrina dei poteri impliciti nell'ordinamento europeo. La dottrina dei poteri impliciti consiste nell'atto di andare oltre la competenza conferita ed espressa e, nel fare ciò, i conseguenti poteri che ne derivano sono detti 'impliciti' in quanto possono essere dedotti dal contesto come una chiara e necessaria estensione di ciò che una disposizione si propone di attuare. Si può sostenere che questa dottrina è nata nell'ordinamento federale statunitense con l'articolo 1(8) della Costituzione noto anche come *Necessity and Proper Clause*. La sentenza *ERTA*, che si dice abbia dato inizio alla dottrina, rappresenta un ulteriore allontanamento dell'UE dall'essere una mera organizzazione intergovernativa attraverso una diversa comprensione dell'allocazione delle competenze e l'interpretazione teleologica che permette ai poteri impliciti di emergere.

I poteri impliciti nell'ordinamento europeo, dunque, sorgono quando un'interpretazione teleologica dei Trattati è possibile e in definitiva necessaria per una piena applicazione e un efficiente funzionamento delle disposizioni stabilite. Ovviamente, l'ampia gamma di interpretazioni di una norma dipende soprattutto dalla sua formulazione. Si dice che la clausola di flessibilità costituisca la competenza più generale all'interno dei Trattati, di conseguenza la massima espressioni dei poteri impliciti a causa della sua formulazione che non permette di porre limiti netti al suo uso e che quindi rende la lettura delle disposizioni un vero esercizio discrezionale. Dunque, quali sono le espressioni più controverse presenti nella clausola? La prima nozione problematica è "un'azione dell'Unione appare necessaria". Un'azione è giudicata necessaria ogni volta che il livello di integrazione raggiunto è inferiore agli obiettivi fissati nei Trattati. Si tratta di una condizione altamente discrezionale nelle mani delle istituzioni che possono affermare di soddisfare in modo incontrollato. Tuttavia, i limiti al requisito di necessarietà sono previsti dal principio di sussidiarietà e di proporzionalità stabiliti all'Articolo 5 (3-4) del TUE. Strettamente legata al requisito di

"necessarietà", c'è l'espressione "per realizzare uno degli obiettivi dei Trattati". Questo limite del raggiungimento degli obiettivi appare in netto contrasto con il principio fondamentale di attribuzione secondo il quale le competenze sono conferite ed esplicitamente stabilite. In questo senso, un'interpretazione ampia degli obiettivi si tradurrà in un allargamento del potere legislativo. Inoltre, è un compito piuttosto difficile identificare chiaramente i suddetti obiettivi, questi infatti possono anche apparire impliciti o logicamente presumibili da una lettura globale dei valori dell'Unione. In ultima istanza, cercando di definire la portata dei poteri residui attraverso il criterio degli obiettivi da raggiungere, ci si imbatterebbe nel problema logico di definire i limiti della clausola attraverso un criterio che manca lui stesso di limiti e definizioni chiare e accettate. In altre parole, questi limiti si basano su un criterio che allo stesso tempo appare indefinito. Questo ci porta a un terzo limite concettuale compreso nella disposizione "I Trattati non abbiano previsto i poteri di azione richiesti a tal fine". In questo modo, la clausola può essere utilizzata solo quando i Trattati non conferiscono poteri sufficienti per il pieno raggiungimento degli obiettivi. Tuttavia, questa formulazione può comportare sia che i Trattati manchino di una competenza materiale e quindi il ricorso alla clausola svilupperebbe un nuovo campo legislativo altrimenti non esplicito; sia che una competenza è presente, ma i Trattati non forniscono gli strumenti sufficienti per sfruttarla pienamente e perseguire efficacemente gli obiettivi. La differenza tra queste due concezioni è sostanziale e non comporta solo una diversa definizione dei limiti, ma cambia anche la natura della clausola. Infatti, secondo la prima interpretazione la clausola andrebbe a codificare i poteri impliciti. In questo caso, può essere utilizzata in maniera esclusiva per sviluppare un nuovo settore non espressamente presente nella Parte III del TFUE. Di conseguenza, questa concezione prevede l'uso della clausola come "*catch-all*", vale a dire che tutto potrebbe rientrare nel suo campo di applicazione senza la necessità di alcuna procedura di revisione. Tuttavia, nell'atto di creare nuove competenze si può contestare all'Unione di attribuirsi illegittimamente il principio della *Kompetenz-Kompetenz* e di elevarsi a livello di Stato nazionale, determinando lei stessa le proprie competenze. Dall'altra parte, da un'interpretazione 'meno rigida' ("*soft*") del "requisito dei poteri necessari", emerge il carattere sussidiario dell'Articolo 352, ossia come supplemento per basi legislative già esistenti, ricoprendo una funzione di "*gap-filler*". Letteralmente, colma ogni possibile lacuna derivante dai Trattati nel rispetto del "limite degli obbiettivi" attraverso uso congiunto della clausola con altri articoli. In definitiva, questa discussione tra clausola "*gap-filling*" e "*catch-all*" potrebbe essere vanificata dal fatto che anche quando la clausola è stata giudicata correttamente utilizzata come *gap-filler* dalla Corte, in molti casi il legame tra le competenze dei Trattati e il '*gap'* da colmare era piuttosto debole. Di fatto, quando si adotta un'interpretazione troppo ampia degli "obiettivi da raggiungere", allora la linea di confine tra queste interpretazioni diventa più sfumata. In altre parole, l'idea stessa di *gap-filling* può essere minata a favore di un uso *catch-all* 'nascosto'.

Date queste due interpretazioni dell'uso della clausola, l'elaborato ripercorre l'evoluzione dell'uso dell'Articolo 352 attraverso due sentenze e un'opinione della CGUE che hanno dato esiti diversi nonostante il testo dell'Articolo fosse rimasto invariato, suggerendo così come un approccio 'caso per caso' sia sempre stato favorito rispetto a definire delle regole generali di applicazione.

Nella sentenza *Massey-Ferguson* del 1973 la Corte tentò di dare un nuovo impeto all'utilizzo della clausola dopo anni di 'abbandono' e in questa direzione emise una sentenza per certi versi controversa. Di fatto, non riuscì ad adempiere al compito di sviluppare una solida giurisprudenza per la clausola, ma, accusata di "*active passivism*", stabilì che fosse legittimo il ricorso alla clausola piuttosto che un'interpretazione più ampia delle competenze di altri articoli. In poche parole, sancì la supremazia dell'Articolo 352 sui poteri impliciti e fornì all'Unione il suo strumento di *Komeptenz-Kompetenz,* senza imporre nessun limite specifico.

Quasi quindici anni dopo, la Corte cambiò drasticamente approccio nella sentenza *Generalised Tariff Preference*. Questo cambio è certamente dovuto al clima costituzionale all'indomani della ratifica dell'Atto Unico Europeo (1986) e della svolta sovranazionale dell'Unione. Per la prima volta, la Corte interpretò in maniera rigida il requisito "dei poteri necessari non forniti dai Trattati", ossia se una competenza è esplicitata allora la 'quantità' di potere in quell'ambito è conferito e non necessita supplemento da parte della clausola. Dunque, veniva così sancito che la clausola poteva essere utilizzata solo in maniera esclusiva per lo sviluppo di nuovi campi legislativi. Questo esito risulta a sua volta in contraddizione con il tentativo di rendere il ricorso all'Articolo meno frequente e più controllato. Di fatto, veniva data via libera per un uso *catch-all* e dunque allo sviluppo di nuove politiche non menzionate.

Tuttavia, nel 1996 la Corte ebbe nuovamente modo di ritornare sulla questione e di rettificare 'il mezzo di auto-attribuzione di competenze' che era stato precedentemente 'creato'. Così nell'Opinione 2/94 sentenziò che, lo allora Articolo 235 CEE, non potesse essere utilizzato come base legale per consentire l'accesso dell'Unione alla Convenzione Europea dei Diritti dell'Uomo, poiché l'obbiettivo dei diritti umani non era – allora – contenuto nei Trattati e dunque non 'formalmente' realizzabile. Inoltre, fu aggiunto che l'Articolo non poteva essere usato né per "allargare i poteri dell'Unione" né per "adottare delle disposizione il cui effetto sarebbe, in sostanza, di emendare il Trattato". Quindi, ricapitolando, *Generalised Tariff Preference* ha respinto l'uso congiunto della clausola con altri articoli in favore dei poteri impliciti, mentre nell'Opinione 2/94 il suo uso esclusivo è stato giudicato illegittimo se ne consegue una procedura di revisione. Entrambi gli utilizzi, come *gap-filler* e *catch-all*, erano dunque stati preclusi. Sostanzialmente, si raccomandava il non utilizzo, e così è stato.

Quindi, la CGUE attuò un processo di marginalizzazione della clausola per gli anni successivi, di pari passo con l'evoluzione costituzionale dell'Unione che in quel momento – in seguito al Trattato di Maastricht – era

stata aspramente criticata. A questo proposito, negli anni successivi, seguì un periodo così detto di "*constitutional adjustment*", ossia di riforme costituzionali per l'UE, che è culminato nel Trattato di Lisbona del 2007. Quest'ultima revisione ha per la prima volta emendato l'Articolo, così come era stato suggerito nella Dichiarazione di Laeken del 2001. Gli emendamenti, tra cui il più significativo ovvero la "previa approvazione del Parlamento europeo" per il ricorso alla clausola, hanno avuto l'esito generale di limitarne ulteriormente l'utilizzo imponendo delle procedure più ferree da superare perché si acconsentisse al suo impiego come base legislativa. In questo senso, i limiti della clausola dipendono ora più che mai dalla volontà degli Stati e delle fazioni del Parlamento. In secondo luogo, il coinvolgimento quasi nullo della Corte nel pronunciarsi su questo argomento, dato che in caso di un'eventuale controversia la questione verrebbe annullata prima ancora di essere portata davanti alla CGUE, ha causato un congelamento della dottrina giudiziaria sull'uso della clausola, che è rimasta bloccata all'Opinione 2/94. Pertanto, si può affermare che il trattato di Lisbona ha reso la clausola di flessibilità inflessibile. Infatti, dall'entrata in vigore di quest'ultimo, solo dieci regolamenti sono stati emessi attraverso l'Articolo. In un certo senso, si può sostenere che gli emendamenti hanno 'funzionato' e le controversie sono cessate. D'altra parte, però, questo risultato non può essere giudicato come un successo. Le modifiche apportate non hanno realmente risolto i problemi intrinsechi della clausola – ossia fornire uno "strumento di auto-attribuzione delle competenze" in un sistema di competenze attribuite – ma piuttosto gli Stati Membri si sono preoccupati solamente di farla cadere in disuso. L'uso minimalista ha seriamente compromesso l'essenza e gli scopi della clausola e purtroppo non ha affrontato efficacemente le questioni e le implicazioni costituzionali che erano la ragione principale delle controversie. In questo senso, la sua eccezionale capacità di definire l'ambito delle competenze europee, la porta tutt'ora ad essere il limite ai confini costituzionali dell'Unione. Si può concludere che è proprio il 'braccio di ferro' tra gli Stati Membri e l'UE che non ne permette un 'uso ottimale' che, nonostante il suo recente disuso, svolge ancora un ruolo importante nel sistema europeo, poiché la perfezione costituzionale è impossibile.

A questo riguardo, Butler suggerisce che l'uso ottimale della clausola sia quello di complementare altre basi legislative esistenti, ovvero di *gap-filling*, in quanto un uso a metà strada tra essere il *Kompetenze-Kompetenz* dell'Unione ed un non utilizzo. Infatti, premesso che il ricorso all'Articolo implicherebbe in ogni caso un diretto o indiretto superamento del sistema di competenze attribuite, se usata da *gap-filler* questo risulterebbe in 'una parziale violazione' del sistema dal momento che non creerebbe nuove competenze ma estenderebbe l'ambito di quelle già esistenti avendo dunque un riferimento nei Trattati. In questo senso, si potrebbe quasi definire un "*partial Kompetenz-Kompetenz*" poiché da un insufficiente – ma presente – potere legislativo dei Trattati ne risulterebbe solo una parziale

autodefinizione delle competenze. Un certo livello di controllo nei Trattati sarebbe assicurato e l'essenza della clausola non verrebbe snaturata.

In ogni caso, un vero punto d'incontro tra il rispetto della natura della clausola, il principio delle competenze attribuite e i limiti costituzionali dell'Unione è quasi impossibile da trovare, se mai esistesse. Qualcuno risulterà sempre scontento del risultato, qualunque esso sia. A questo proposito, le istituzioni dell'UE e gli Stati membri hanno evitato di rinegoziare i termini costituzionali dell'Unione perché è uno svantaggio per entrambi. Pertanto, finché la questione della costituzionalità dell'UE rimane aperta, anche la clausola sarà influenzata di conseguenza. Dunque, l'Articolo 352 è solo un aspetto – sicuramente il più evidente – della questione delle competenze nell'UE. Quest'ultimo può essere senza dubbio contrastato attraverso un'ulteriore integrazione e quindi devoluzione di sovranità dagli Stati membri all'Unione. In questo senso, andando verso una più demarcata organizzazione federale, la questione delle competenze sarebbe resa superflua.

Per concludere, la clausola ha compiuto un viaggio completo dal massimo al minimo utilizzo. Tuttavia, il periodo di vera espansione sancito da *Massey-Ferguson* è finito. Nonostante sia largamente imprevedibile, oggi sembra impossibile un ritorno ai fasti passati. Tuttavia, anche l'Opinione 2/94 non può essere considerata una soluzione percorribile, poiché sembra più evitare la questione che risolverla. Infatti, seguendo il suo ragionamento, la clausola potrebbe essere a questo punto eliminata dai Trattati. Tuttavia, nonostante un recente moderato ottimismo, l'Articolo 352 è attualmente 'morto'. Spetta solo agli Stati membri decidere cosa farne ed eventualmente reintegrarlo in una futura revisione dei Trattati.

Infine, tra le varie incertezze dell'ordine giuridico europeo, si può concludere che il bisogno di una clausola di flessibilità per i Trattati non può essere tra queste.