DOES THE LISBON TREATY EFFECTIVELY LIMIT THE POWER OF THE EUROPEAN UNION?

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Abstract

Although the Lisbon Treaty recognises the necessity to limit the power of the European Union, some of its limitations are poorly expressed. As a result, the European Commission has the possibility to act arbitrarily by expanding Union power. The position of the Commission is pre-eminent, notably with respect to the drafting of EU measures. Not only can the Commission expand Union power, but it may also favour certain actors at the expense of the principals (Member States and their citizens). Indeed, the Commission may apply definitions of the 'common European interest' that go beyond the preferences of the principals.

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1. Introduction

The Member States of the European Union (EU), which derive their power from their citizens, have renounced much of this power in favour the EU. These transfers of power from the principals (Member States and/or EU citizens) to the agent (the Union) constitute the keystone of organisation of the EU. When the principals renounced power in favour of the Union, they expected that the Union's role would have precise limits, and that the Union's actions could not ignore the principals' choices. The non-arbitrariness of EU behaviour is thus the cement of the EU's principal–agent relationship. It is what underlies EU society. However, the trust that the principals placed in the agent has not been respected. The agent has the capacity to expand the limits of its role at its own discretion – and the ultimate principal, the citizen, has been the loser.

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The foundation of the EU's regulatory power is not immediately evident from the Lisbon Treaty (2009), which comprises the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). However, the Treaty asserts the principle of conferred powers. Article 5(1) TEU states that 'the limits of Union competences are governed by the principle of conferral' and Article 5(2) TEU states that 'under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.' In addition, the Treaty actually touches on the non-arbitrary aspect: according to Article 1 TEU the Union has been created in order to attain the objectives that the Member States 'have in common'. This means that Union action cannot be based on objectives other than those which the Member States have in common.

Articles 1, 5(1) and 5(2) TEU thus seem to indicate an aversion to arbitrariness. Moreover if powers were not allocated between the Member States and the Union in order to avoid arbitrariness, EU power would have been based on an arbitrary foundation.

The EU agency relationship is thus centred on non-arbitrariness, and the Czech constitutional court explained why treaties featuring an article without precise limitations ('definiteness') is not consistent 'with the requirements for normative expression of a legal text that arise from the principles of a democratic, law-based state' (Czech Constitutional Court 2008, para. 186). It stated that 'even though the constitutional court recognises that the requirements for precision in an international treaty […] cannot be interpreted as strictly as in the case of a statute, it nevertheless concludes that an international treaty must also meet the fundamental elements of […] definiteness […] of a legal regulation' (Czech Constitutional Court 2008, para. 186).

Although the Treaty recognises the necessity to limit the Union's role, some of its provisions express poorly defined limits. And if EU power is not properly contained, it fails to respect the foundation of the EU agency relationship. However, it is fair to point out that the lack of limitations in certain articles (authorising the Union's intervention) could be resolved by other provisions of the Treaty or by European Court of Justice's (ECJ) definitions. This paper analyses whether the Union's power is in fact circumscribed and examines the European Commission's role in EU policymaking.

2. EU regulatory power: a limitation issue

In order to assess whether the Union's power is confined, the organisation of power within the Union needs to be set out (see Table 1). In some areas of activity only the Union can act (exclusive competences). In other areas the Union and the Member States share regulatory power (shared competences). In addition, the Union can undertake what may be called complementary action with supporting, coordinating and supplementing competences. Furthermore, it should be stressed that, in relation to non-allocated areas, Member States maintain their regulatory prerogatives (Articles 5(2) and 4(1) TEU). These areas are further developed in Treaty titles and chapters including provisions (articles). Treaty provisions are further divided into normal Treaty provisions and legal bases, the latter authorising EU action.

Table 1: Organisation of regulatory power in the European Union

Exclusive competences	Shared competences	Competences to support, coordinate or supplement actions of the Member States
Article 3 TFEU	Article 4 TFEU The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6 [TFEU]	Article 6 TFEU
Customs Union	Internal market	Protection and improvement of human health
The establishment of competition rules necessary for the functioning of the internal market	Social policy, for the aspects defined in the Treaty	Industry
Monetary policy for the Member States whose currency is the euro	Economic, social and territorial cohesion	Culture
		Tourism
The conservation of marine biological resources under the common fisheries policy	Agriculture and fisheries, excluding the conservation of marine biological resources	
Common commercial policy	Environment	Education, vocational training, youth and sport
Special rules on international agreements	Consumer protection Transport	Civil protection Administrative cooperation
	Trans-European networks	
	Energy	
	Area of freedom, security and justice	
	Common safety concerns in public health matters, for the aspects defined in this Treaty	

In practical terms, if the Union desires to regulate an issue, it examines whether a legal basis is available to authorise it to intervene. If the desired Union action corresponds to an area of exclusive power, then the Member States cannot act unless the Union authorises them to do so. If the Union wants to regulate a matter that falls within the category of shared competences (power which does not relate to a fixed power allocation), the Union has likewise to find a legal basis authorising it to regulate. Although power is shared, once the Union regulates a shared power matter, the Member States cannot intervene as long as an EU measure is in force. However, the Union's taking over of a field (EU pre-emption) depends on whether the Union assesses that a measure complies with the EU principle of subsidiarity, which is formulated as follows: '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, […] but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level' (Article 5(3) TEU).

The EU subsidiarity principle was meant to enable a sound allocation of power. Nevertheless, in practice EU pre-emption is associated with a limitless exercise of power. Concretely, the allocation of power according to the EU subsidiarity principle has been based on the Union's ability to harmonise Member States' measures more efficiently than the Member States, which cannot adopt a common rule alone in case there are impediments to the operation of the internal market (such impediments being easily discovered by the Commission and by the Court). The ECJ's power allocation is exemplified in the British American Tobacco case (C-491/01, 'BAT', R v Secretary of State [2002] ECR I-11 453, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd). In this case the Court declared:

> the Directive's objective is to eliminate the barriers raised by the differences which still exist between the Member States' laws […] on the manufacture, presentation and sale of tobacco products […]. Such an objective cannot be sufficiently achieved by the Member States individually and calls for action at Community level. It follows that, in the case of the Directive, the objective of the proposed action could be better achieved at Community level. (BAT, paras181–83)

What is striking about this EU application of subsidiarity is that it implies that Union pre-emption is always going to be possible: regulation can always be better achieved by the Union if it is accepted that Member States cannot harmonise alone while the Union can do so.

Therefore this application fits in with the needs of the Union to take over the field, but it certainly does not correspond to an allocation of power with precise limits.

Analysing the Member States' 'sufficiency' of regulatory action appears to be particularly deceptive. First, the sufficiency of Member States' action has no limits, and thus poses a problem for the non-arbitrary allocation of power. Second, it can be difficult for the Union to balance the desire for common rules with the capacity of Member States' regulatory instruments, which while possibly complying with the objectives of the measure do not correspond to the adoption of common rules. In a nutshell, the analysis of the sufficiency of Member States action depends on what the Union wants for itself. The organisation of power according to the EU subsidiarity principle is thus deceptive and opaque for Member States (let alone for EU citizens). The real limitation on the Union's ability to allocate power to itself can rest only on the conferred power principle. To limit the Union's regulatory action, it is thus necessary that legal bases circumscribe the Union's power. These legal bases can be clarified as follows.

There exist two categories of legal bases: specific and general. Very simply, the former covers particular types of activity (such as transport, health protection, energy), while the latter are linked to the pursuance of Treaty objectives. There are three general legal bases: Articles 114, 115 and 352 TFEU. We examine Articles 114 and 352 TFEU.

Article 114 TFEU is formulated thus: 'save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26 TFEU'. Article 26 TFEU states that 'the Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties'. Article 352 TFEU stipulates that the Union can adopt the appropriate measures '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 limits entailed by these articles constitute the outer limits to EU regulatory power, and they are poor delimitations.

Before we analyse other delimitations of these articles set out by other Treaty provisions or by case law, further details on both provisions need to be considered. Regulatory action authorised according to Article 114 TFEU is less broad than that allowed by Article 352 TFEU. Article 114 TFEU is used to pursue the objective of the 'establishment and the functioning of the internal market', while Article 352 TFEU can be resorted to in connection with 'the objectives set out in the Treaties' and not only in relation to the internal market. Another major difference is that Article 114 TFEU relates to the harmonisation of

Member States' measures, while Article 352 TFEU 'shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation' (Article 352(3) TFEU).

The Member States and national parliaments ratified the Treaty, the provisions of which can serve as a better definition for the objectives of Articles 114 and 352 TFEU. Additionally, Member States' executives expressly decided to erect supplementary safeguards in order to ensure that EU regulatory power was circumscribed. It must therefore be considered whether such provisions can sufficiently limit EU functions. Article 114 TFEU in itself does not truly restrain such EU action.[1] Title I of the Lisbon Treaty, entitled 'the internal market', provides information about the fundamental freedoms of the internal market (e.g. the free movement of goods, services and capital), but this does not limit EU action. Similarly, Treaty-specific provisions pertaining to the internal market do not constitute a real barrier to EU regulatory action. Besides, the coexistence of Article 114 TFEU (harmonising across the activity areas) and the specific legal bases can trigger a conflict between the use of legal bases (which not only authorise the Union to act, but also entail particular voting conditions within EU institutions). Further, the precision explicitly required by the Member States is not very helpful in restraining EU action. The Member States have attached to the Lisbon Treaty the Protocol (No. 27) on the Internal Market and Competition, which specifies that 'the internal market […] includes a system ensuring that competition is not distorted'. Though necessary, this is not sufficient.

The expansion of EU power has been better envisaged by the Member States in Article 352 TFEU. Since the barrier provided by the Article was not convincing, additional safeguards were created. Concretely, the barrier originally provided by the Article was simply based on the necessity of EU action ('if action by the Union should prove necessary […] to attain one of the objectives set out in the Treaties'), whereas the Treaty did not provide the necessary power to perform the action. It should be noted that this barrier is not very efficient, because it rests only on the objectives of the Treaty.

The 'flexibility provision' has frequently been used in a manner that could be characterised as expansionist. For instance, the ECJ has justified the EU external competence (international agreements) by reference to the doctrine of the implied power. Concretely, the Court has derived an external competence from the internal competences that the Union possesses (Case 22-70, 'ERTA', Commission v Council of Ministers [1971] ECR 263). Although the expansionist capacity of the flexibility provision has been reduced over the years, notably because of the multiple Treaty revisions that have increased the number of

legal bases available to the Union, Article 352 TFEU is still poorly delineated. Such poor delineation induced the Member States to strengthen the barrier by introducing other safeguards, such as Declarations 41 and 42 (Annexes of the Treaty).

Declaration 41 restrains the objectives that can be used in order to base an EU measure on Article 352 TFEU. The Declaration states that '[t]he reference in Article 352(1) [TFEU] to objectives of the Union refers to the objectives as set out in Article 3(2) and (3) [TEU] and to the objectives of Article 3(5) [TEU]', as well as to the objectives of 3(1) TEU.

Declaration 42 adds that Article 352 TFEU 'cannot serve as a basis for widening the scope of Union powers beyond the general framework[2] created by the provisions of the Treaties'. Thus, other provisions of the Treaty can indeed furnish crucial guidance to action pursuing Union objectives. But even with these limits uncertainty remains as to whether the safeguards can completely prevent the expansion of EU power. Ambiguities remain in connection with the definition of the authorised objectives, so discretionary regulations can be framed to achieve those objectives. Since certain objectives have no clear or fixed limits, there is doubt as to when the Union can resort to them, especially because the framework of the Treaty may not be helpful. For instance, hardly any fixed limitation exists in connection with the following objective mentioned in Article 3(3) TEU: 'The Union […] shall work for the sustainable development of Europe based on […] a highly competitive social market economy'. By virtue of EU's vindication of this open-ended objective, far-fetched associations can be authorised.

Such associations were formed in connection with recent Kadi case under Article 308 TEC (former Article 352 TFEU). In this case, the Union passed Regulation 881/2002 based on Article 308 TEC in order to implement United Nations Security Council resolutions demanding that states freeze the funds of any person assumed to be connected with Osama bin Laden. Article 2 of Regulation 881/2002 stated that funds 'belonging to […] natural and legal persons […] designated by the Sanction Committee and listed in Annex 1 shall be frozen'. The annex mentioned the name of an individual (Mr Kadi), whose assets were thus frozen. Mr Kadi requested the annulment of Regulation 881/2002, and his request was granted. However, when the act was finally repealed, it was not because the ECJ judged that the Regulation corresponded to an inappropriate expansion of EU power. The Court ruled that the EU measure had an 'economic nature' and the ECJ linked such a nature to 'the operation of the common market' in order to justify the use of Article 308 TEC (joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of Ministers [2008] ECR I-6351, para. 229). Associating the 'economic nature' of a measure

with the operation of the internal market makes it easy for the Union to resort to arbitrary legislative power.

Not all the associations with Treaty objectives can be as wide as the one in the Kadi case, and the ECJ is not likely to make the same generous association (the connection of the 'economic nature' of a measure with the establishment and functioning of the internal market) again. However, the fact that commentators have considered this association to be generous does not prevent the provision from leading to far-reaching regulatory action. This risk is still present even though the area of common foreign and security policy excludes the use of this Article, and even though the procedural safeguard, namely the Early Warning System (see below), may not be sufficient to address the Union's expansionist actions.

To return to the objective described in Article 114 TFEU, the ECJ has defined it in an open-ended manner. Therefore, such definitions enable the Union to resort to a wide-ranging power in the name of the functioning of the internal market. On the one hand the Court imparted a more precise definition to the Article: the objective is achieved through the removal of the obstacles to free movement or[3] of undistorted competition. Thus harmonisation of national measures is allowed on condition that undistorted competition or obstacles to free movement are removed. On the other hand, the ECJ ruled that the Union was authorised to regulate pursuant to this Article, if a measure addresses 'appreciable distortions' of competition in the internal market (C-376/98, 'Tobacco Advertising I', Federal Republic of Germany v European Parliament and Council of Ministers [2000] ECR I-8419, para. 112). The possibility of Union expansionism relying on Article 114 TFEU is strong, because restrictions on its use depend on the assessment of the word 'appreciable' ('appreciable distortions') – and this word is open-ended. Significantly, open-ended vocabulary is present throughout case law determining the scope of Article 114 TFEU. Weatherhill (2011, p. 832) stresses that 'the Court places enormous weight on slippery adjectives and adverbs in its attempt to define the limits of Article 114 TFEU'. This is evident with 'appreciable'. Other examples of broad limits can also be furnished. For instance, the 'recourse to Article [114 TFEU] as a legal basis is possible if the aim [of the measure] is to prevent the emergence of future obstacles to trade resulting from multifarious development of national laws' and if the emergence of the future obstacles is 'likely' (Case C-376/98, 'Tobacco Advertising I, para. 86). Therefore, the Union can harmonise by simply assessing that obstacles to free movement are likely to arise. As a result, the authorisation for resorting to power is particularly broad. With such definitions, it appears difficult to bar the Union from using Article 114 TFEU when it desires to harmonise measures. Weatherill underlines the 'expansionist' approach of the

Court in relation to the assessment of measures based on Article 114 TFEU (2011, p. 839). The author considers that '[t]he reality […] is a proliferation of generous judicial approval of wide-ranging regulatory intervention conducted by the EU in the (in practice) unverifiable name of market-making harmonisation' (2011, p. 849).

In sum, the limitations to Articles 352 and 114 TFEU are to be considered weak. The outer limits of conferred power are deficient. Real limitations are not provided through the mere erection of apparent barriers. Thus, if conferred power is respected, it does not mean that discretionary EU regulatory actions are impossible. The absence of precise limitations enables the Union to adopt an expansionist approach, since EU action can be easily justified. If the Union wants to intervene while having no competence, it can still decide to use either Article 352 TFEU by appealing to the sustainable development objective based on a highly competitive social market economy, or Article 114 TFEU whose limits may not even exist because the 'appreciability' of a competition distortion is a very subjective consideration.

With regulations constructed on such poorly limited provisions, it can be difficult to challenge the legitimacy of the Union's action, because the restrictions provided in the two articles have unclear barriers or hardly any limit. Indeed, their definitions leave plenty of leeway for the Union to decide what regulatory action corresponds to the authorised power. Additionally, EU power expansion grounded on open-ended concepts or definitions can make it difficult for Member States not just to issue warnings about power expansion but even to notice it, because if the associations with Treaty objectives are well constructed no question regarding possible power extensions can ever arise. Of course, any explanation may not fit in with the authorised objectives, and the Court would be unlikely to resort again to the strongly criticised approach adopted in the Kadi case. Importantly, it should be borne in mind that with broad power definitions, the work of the ECJ is not made simple. In fact, the Court may authorise power expansion, especially if a draft measure is formulated particularly convincingly and if there is no clear existing definition of power. The Court may rely only on the explanations of the European Commission.

To sum up, the unclear outer limits of EU action make possible not merely the expansion of power, but precisely the discretion to expand power that Member States in principle wish to deny. Deficient definitions of power may lead to EU policy-making à la carte, where the menu may not respect Member States' and above all EU citizens' choices. This discretion violates the trust placed by the principal in the non-arbitrary exercise of the agent's function.

3. The European Commission's role in materialising EU policy

How can power expansion occur especially if the unanimous support of Member States ministers in the Council of Ministers is required to adopt a measure? Even if the European Parliament is strongly involved in the regulation process, such as in the procedure pertaining to Article 114 TFEU, Member States' executives or EU citizens' representatives (the European Parliament) can still support an EU measure extending EU power. As previously explained, unclear definitions or lack of definitions may be a reason for such extension – as also may regulatory action under Article 352 TFEU. As for harmonisation as addressed in Article 114 TFEU, there is nothing concrete in the provision impeding representatives from supporting harmonisation measures, even if a measure addresses public health protection (see for instance Tobacco Advertising I, para.88), which is a competence that clearly cannot be harmonised (according to Article 2(5) TFEU).

In addition, given poorly defined legal bases, it can be easy for the European Commission to convince Member States' and EU citizens' representatives that power has been correctly allocated.

Moreover, it may be difficult for the European Parliament and the Council of Ministers to block an EU measure for subsidiarity reasons, because EU subsidiarity is an ill-defined principle enabling discretion. It may be difficult for the European Parliament to be sure that the regulatory action is better undertaken at the national level, and the European Parliament may not want to block a draft measure because the Commission has been authorised to use a convenient justification for its power. Further, the issue of the level of power allocation may not be a subject of primary interest for EU representatives: in 2011 out of 12,000 questions the European Parliament submitted to the Commission, only 32 (0.002 per cent) were related to subsidiarity (and proportionality) (European Commission 2012a, p. 5).

More generally, factors other than the poor delineation of provisions can impede the critical examination of EU actions which are inconsistent with the Lisbon Treaty's allocation of powers. For instance, the Council of Ministers and the European Parliament may show support for a draft measure by the Commission, and the Council of Ministers and the European Parliament may not wish to impede its adoption by objecting to it. Other political factors can also come into play so that a draft measure is accepted even if action at the EU level infringes power as delimited by the Treaty. It is no doubt because of such phenomena that the United Kingdom's national parliament decided to try to exert stronger control over its

executives' decisions made on the basis of Article 352 TFEU. For instance, 'a Minister of the Crown may now not vote in favour of or otherwise support an Article 352 decision unless' one of the conditions mentioned in the Act is fulfilled (Clause 8 of the European Union Act 2011). One of the conditions is the approval of the decision by an Act of Parliament.

Therefore, the EU institution that initiates an EU measure has remarkable power. The Council of Ministers and the European Parliament may indeed be bogged down by the complexity of articles, by political routine and so on. The initiating institution is the European Commission. It is this EU institution that first assesses whether an EU measure can be based on Treaty provisions. Therefore, the exercise of the Union's discretion is triggered not only by deficient delimitation of power, but also by the position of the Union's key institution.

The crucial position of the Commission is visible not only at the adoption stage of EU draft measures, but also at the early, examination stage, when subsidiarity is reviewed through the Early Warning System (EWS) (this process is also used in connection with Article 352 TFEU). In practical terms, the EWS enables national parliaments to object to EU draft measures that they believe to violate the EU's subsidiarity principle. And the outcome of the system to a large extent depends on the Commission. More precisely, if a national parliament, by at least one-third of votes allocated to it (or one-fourth in the case of proposals based on Article 76 TFEU), agrees to object to an EU draft measure, then the Commission will unilaterally decide whether to maintain, amend or withdraw a draft. If the objections are made by a 'simple majority' within national parliaments, and if the Commission decides to maintain the proposal, then the European Parliament and the Council of Ministers will vote (Articles 7(2) and 7(3) of Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality (Lisbon Treaty)). Therefore, in the case of a simple majority of votes within a national parliament, the preponderance of the Commission is less evident. However, it maintains a pivotal role in the workings of the EWS. In addition, it is crucial to note that what counts is not the content of the national parliaments' objections but majorities within national parliaments. As a result, even if the content of national parliaments' objections raises major problems regarding the application of EU law (such as the expansion of EU power), it is not a major factor.

Take, for example, the first draft measure ever to be withdrawn by the EWS, in September 2012. The Commission wished to regulate collective action, while Article 153(5) TFEU prohibits the harmonisation of Member States' measures addressing strikes (to be precise, Article 153(5) TFEU excludes EU action in this field), and Article 352(3) TFEU states that '[m]easures based on this Article shall not entail harmonisation of Member States'

laws or regulations in cases where the Treaties exclude such harmonisation'. National parliaments had signalled crucial problems relevant to the application of Article 352 TFEU. However, national parliaments' 'reasoned opinions' appear not to have counted in the Commission's decision. When the Commission removed the draft measure, it declared that it was doing so because it had assessed that the draft measure was 'unlikely to gather the necessary political support […] to enable its adoption' (see European Commission 2012b). The Commission has crucial importance in relation to the assessment of the Union's power to regulate. Moreover, it generally exercises a strong influence on the content of EU measures. The Commission has therefore significant power in the materialisation of EU policy. And, as previously examined, the Commission can use its discretion (especially with the assistance of poorly defined legal bases) to draft EU acts without being effectively thwarted.

With respect to the content of measures, the Commission plays the key role because it is in charge of drafting EU measures. This means it is this EU institution which materialises EU policy. By way of comparison, while the European Council (composed by Member States' heads of government) provides the Union with 'general political directions' (Article 15(1) TEU), the Commission materialises EU policy through the drafting of EU measures, it develops policy ideas (House of Lords European Union Committee 2008, p. 27). Also, the Commission is crucial in the shaping of EU policy before the drafting of EU measures. The Commission is thus strongly involved in the decision-making process. For instance, the President of the Commission is a member of the European Council and an active participant in the deliberations of the European Council (House of Lords European Union Committee 2008, p. 26). Article 16(6) TEU recognises the paramount role of the Commission: the President of the Commission partakes in the preparation and the follow-up of meetings of the European Council. The House of Lords report on the initiation of EU legislation also evidences the significant role of the Commission. In fact, 'many of the calls for action in European Council Conclusions originate in ideas and preparatory documents submitted by the Commission' and 'on the big issues, the Commission will provide a paper which sets the scene for the Member States to have a debate' (House of Lords European Union Committee 2008, p. 27). Such an influential role reinforces the power of the Commission to shape the content of EU policy. This means that the Commission has considerable leeway in the materialisation of EU policy.

The Commission has a pre-eminent role: it can hold an influential position in the pre-drafting phase, it has the opportunity to use its discretion at the moment of the drafting of EU measures, and again to influence or take advantage of certain phenomena during the process

whereby measures are adopted. Commentators have confirmed this predominant role. The Commission 'can act as a broker' between and 'outmanoeuvre' actors (Schmidt 2000, cited in Chalmers, Davies and Monti 2010, p. 61). Significantly, the Commission can cause 'other institutions to adopt its proposal as the lesser evil by threatening to use other powers at its disposal, such as bringing a Member State before the Court of Justice' (Schmidt 2004, cited in Chalmers, Davies and Monti 2010, p. 62); and financial sanctions can be applied to Member States as a result of enforcement actions brought against them (Articles 260 TFEU). Moreover, as Chalmers, Davies and Monti (2010, p. 61) underline, 'nothing can happen without the Commission deciding to make a proposal in the first place'; the Commission 'can frame the terms of both debate and legislation', and it can retract a draft measure at any time.

What is particularly striking is that the Commission has the opportunity to select the elements it wishes to be part of EU policy, an opportunity enhanced by the difficulty of ascertaining the source of a measure (House of Lords European Union Committee 2008, p. 9) and by the fact that actors non-representative of EU citizens or EU Member States can invite the Commission to take action. The Commission has indeed already based draft measures on requests from actors that are not representatives of the principals, for example certain economic actors (House of Lords European Union Committee 2008, p. 15). The Commission can favour certain actors over others, and this should be a decidedly inappropriate exercise of EU agency. In particular, the Commission has the opportunity to favour ideas from non-representative actors and interest groups over those proposed by Member States and citizens' representatives. This situation remarkably contrasts with the procedure relating to citizens' initiatives, which requires the signatures of at least one million EU citizens to be collected in order to invite the Commission to draft measures (Article 11(4) TEU). In brief, then, the Commission's opportunity to draft the content of EU measures in a manner not corresponding to principals choices runs counter to the idea of EU agency.

4. Conclusion

The European Commission has the opportunity to act arbitrarily, by stretching EU power or by favouring certain actors over others in the materialisation of EU policy (i.e. when EU measures are drafted). The possible extension of EU power by this institution can be explained by the definitional weaknesses of the limits of the Union's regulatory functions. In addition, EU power is stretchable because the Commission has the opportunity to make decisions non-conforming to principal's choice at the stage when EU measures are drafted. At

the stage when EU measures are adopted, the Union can also benefit from the dynamics preventing objections to measures that are not consistent with the Treaty's allocation of power. In sum, the possibility of the Union expanding its regulatory power ignores the principle that the EU should be the agent of the Member States and their citizens.

EU agency is even more affected in that the Commission practices 'the test of the common European interest' (House of Lords European Union Committee 2008, p. 87), that is, the selection of the elements of EU measures that in the Commission's opinion correspond to the common European interest. The problem is that the identity of the beneficiaries of EU action may not be evident, and the beneficiaries may not be the principals of EU agency. Significantly, this test also underlines the fact that the Commission's decisions may not be representative of the choices of national legislatures. Finally, by this test the Commission implies that it can know better what is in the interest of the principals than the principals themselves (the Member States and EU citizens) or than their representatives (notably national parliaments).

The possibility of the Union regulating in an arbitrary manner is all the more problematic since it is difficult to challenge EU measures at the European Court of Justice. The Member States and above all EU citizens suffer from this difficulty. For EU citizens it is almost impossible to get the ECJ to repeal an EU measure. Only in exceptional cases can citizens request the annulment of an EU measure, for instance if the measure is addressed to them or is of direct and individual concern to them.[4]

Notes

1. Even though Article 114 TFEU does not address issues relating to taxation, to the free movement of persons and to the rights and interests of employed persons (Article 114(2) TFEU). With respect to these issues, EU intervention is authorised by Article 115 TFEU.

2. The Brussels European Council of 21–22 June 2007 gave further details about the 'general framework created by the provisions of the Treaties'. The corresponding report stated that 'Article 308 [former Article 352 TFEU], 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 and, in particular, by those that define the tasks and the activities of the Union' (Council of Ministers 2007, p. 22).

3. A measure does not need to meet both conditions. See, for instance, case C-380/03, 'Tobacco Advertising II', Germany v European Parliament and Council [2006] ECR I-11573; C-210/03, R v Secretary of State for Health [2004] ECR I-11893, ex parte Swedish Match AB.

4. See, for instance, case C-25/62, Plaumann v Commission[1963] ECR 95; case 11/82, Paraiki-Patraiki v Commission [1985] ECR 207.

References

Chalmers, D., G. Davies and G. Monti (2010) *European Union Law* (2nd edn), Cambridge: Cambridge University Press.

Council of Ministers (2007) Brussels European Council of 21–22 JUNE 2007 1177/1/07 REV 1. Available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf (accessed 26 February 2013).

Czech Constitutional Court (2008) *Decision PL.ÚS. 19/08 Concerning the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 26 November. Available at http://www.concourt.cz/clanek/pl-19-08 (accessed 21 February 2013).

European Commission (2012a) *Report from the Commission on Subsidiarity and Proportionality, 19th Report on Better Lawmaking Covering the Year 2011, COM (2012) 373*. Available at http://ec.europa.eu/governance/better_regulation/documents/com_2012_0373_en.pdf (accessed 1 December 2012).

European Commission (2012b) *Commission Decision to Withdraw the Proposal for a Council Regulation on the Exercise of the Right to Take Collective Action within the Context of the Freedom of Establishment and the Freedom to Provide Services.* Available at (accessed 1 December 2012).

House of Lords European Union Committee (2008) *Initiation of EU Legislation Report with Evidence*, *22nd Report of Session 2007–8.* Available at http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/150/150.pdf (accessed 1 December 2012).

Schmidt, S. (2000) 'Only an Agenda-Setter? The Commission's Power over the Council of Ministers', *European Union Politics*, 1, 37–61.

Schmidt, S. K. (2004) 'The European Commission's Powers in Shaping European Policies', in D. Dimitrakopoulos (ed.), *The Changing European Commission*, Manchester: Manchester University Press.

Weatherill, S. (2011) 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has Become a Drafting Guide', *German Law Journal*, 12(03), 827–64.