1. Introduction

In the preparation of the abortive Treaty establishing a Constitution for Europe and later of the Treaty of Lisbon, the clarification of the question of competence was declared to be an important objective: when is the Union exclusively competent, when is competence shared between the Union and its Member States, and when are the Member States either exclusively or predominantly competent to deal with a matter without Union interference? These questions have been regarded as particularly important and sensitive for the handling of foreign policy and external relations in general. In this area, Member States’ political and administrative elites are often especially keen on preserving a space for national decision-making and posturing.

The Lisbon Treaty, and to be more precise, the Treaty on the Functioning of the European Union (TFEU), certainly brought some clarification or at least reaffirmation of the law relating to the division of competence in external relations. Articles 2–4 TFEU are particularly important in this respect. Also Articles 21–46 of the Treaty on the European Union (TEU) and Articles 205–222 TFEU contain provisions which are directly or indirectly relevant for the question of competence in external relations.

Article 3(1) TFEU provides for ‘a priori exclusivity’ in reaffirming that the Union shall have exclusive competence in the areas of, inter alia, ‘monetary policy for the Member States whose currency is the euro’, ‘the conservation of marine biological resources under the common fishery policy’ and ‘the common

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commercial policy’. Article 3(2) clarifies that the Union shall also have exclusive competence (sometimes referred to as ‘implied’ exclusive competence although ‘supervening exclusivity’ is to be preferred) for the conclusion of an international agreement “when its conclusion may affect common rules or alter their scope” (the famous AETR/ERTA principle) or “when its conclusion is provided for in a legislative act of the Union” or “is necessary to enable the Union to exercise its internal competence”.

While referring to the common commercial policy as an exclusive competence is a mere reaffirmation, the scope of this policy as defined in Article 207 TFEU constitutes an important extension: With the exception of transport services, it now includes fully the areas of services, the trade-related aspects of intellectual property rights as well as foreign direct investment. As to the ‘supervening exclusivity’ referred to in Article 3(2) TFEU, it is noteworthy that the provision, whilst reaffirming the AETR/ERTA principle, also refers to situations where the conclusion of an agreement “is provided for in a legislative act of the Union” or “is necessary to enable the Union to exercise its internal competence”. Whilst the necessity criterion introduced by Opinion 1/76 of the European Court of Justice (ECJ) was probably originally conceived simply as a possible ground for Union competence whatever its nature (exclusive or non-exclusive), it has later been cited by the Court as a ground for exclusive competence, an approach now confirmed in Article 3(2) TFEU.

Article 4(1) TFEU contains a general and broad definition of shared competence. According to this provision, the Union shall share competence with the Member States if one of the basic Treaties confers on it a competence that does not relate to the areas of either exclusive competence or so-called supporting competence (on the latter notion see below). Article 4(2) TFEU provides a fairly long but non-exhaustive list of areas of shared competence. Whilst most of the examples given are readily associated with Union internal policies, many of them

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3 Ibid., p. 360.
5 On the trade-related aspects, see Case C-414/11, Daiichi Sankyo et Sanofi-Aventis Deutschland, 18 July 2013, nyr. Art. 133 TEC, as amended by Nice, was much more complex and less straightforward, see Opinion 1/08, re General Agreement on Trade in Services [2009] ECR I-1129.