

## Competence, Law-making and Policy-making

### **THE LEGAL ACTS OF THE UNION (Article 288 TFEU)**

#### **■ LEGAL ACTS**

--- REGULATION

--- DIRECTIVE

--- DECISION

#### **■ ACTS HAVING LEGAL EFFECT, BUT NOT HAVING BINDING FORCE**

--- OPINION

--- RECOMMENDATION

## **REGULATION**

### **■ DEFINITION**

**--- Of general application**

**--- Binding in its entirety**

**--- Directly applicable**

### **■ ONE-STAGE ACT**

**--- After entry into force, a regulation becomes part of Member States' law;**

**--- A Member State must not and cannot transpose a regulation with an internal act.**

### **■ PRESCRIBING ACT (Regulatory act)**

## **DIRECTIVE**

### **■ DEFINITION**

- Binding, as to the result to be achieved**
- Leaves to the national authorities the choice of form and methods**

### **■ TWO-STAGE ACT**

- Adoption and entry into force**
- Application by a Member State by the time foreseen in the directive**

### **■ UNIFYING ACT**

**e.g. internal market, environment, social policy**

## **DECISION**

### **■ DEFINITION**

**--- binding in its entirety**

**--- to whom it is addressed**

### **■ FIELD OF USE:**

**e.g. competition**

## THE LEGAL ACTS OF THE UNION

- **The EU legal acts are adopted:**
  - on the basis of the powers conferred in the Treaties, not exceeding those powers;
  - by a competent institution;
  - according to the prescribed procedure;
  - using the foreseen form.
  
- **Example: Article 114 TFEU**
  - **Competence?**
  - **Institution?**
  - **Procedure?**
  - **Legal act?**

## COMPETENCE

### ■ PRINCIPLE OF CONFERRAL OF POWERS

- The EU lacks Kompetenz-Kompetenz;
- Direct or indirect powers.

### ■ TEU and TFEU stipulate:

- Existence of a power
- Scope of a power
  - For example: Article 114 TFEU

### ■ May a competence have different bases?

**THREE BASIC TYPES OF EU COMPETENCES**

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<p><b>EXCLUSIVE EU COMPETENCES</b></p> <p><b>Art. 2(1) TFEU</b></p> <p><b>Few, listed in Article 3 TFEU</b></p>	<p><b>SHARED COMPETENCES BETWEEN THE EU AND THE MEMBER STATES</b></p> <p><b>Art. 2(2) TFEU</b></p> <p><b>Principal areas listed in Article 4 TFEU;</b></p> <p><b>All areas not covered by either Articles 3 or 6</b></p>	<p><b>SUPPORTING, COORDINATING OR SUPPLEMENTING EU COMPETENCES</b></p> <p><b>Art. 2(5) TFEU</b></p> <p><b>Few, listed in Article 6 TFEU</b></p>
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## **THE LIMITS OF EU COMPETENCES**

### ■ **Principle of Subsidiarity (Article 5 TEU)**

#### **--- CONDITIONS:**

**---- The area does not fall within the EU's exclusive competence;**

**---- 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.**

#### **--- REASONABILITY:**

**---- Requirement to give reasons;**

**---- Minimal substantive control.**

### ■ **Principle of Proportionality (Article 5 TEU)**

- **See also the Protocol on the application of the principles of subsidiarity and proportionality;**
- **National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in the afore named Protocol.**

## LIMITS TO THE EXERCISE OF EU COMPETENCES

### SUBSIDIARITY

#### Article 5(3) TFEU:

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.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

#### Article 12(b) TEU:

National Parliaments contribute actively to the good functioning of the Union [...] (b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality.

### PROPORTIONALITY

#### Article 5(4) TEU:

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.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

**Article 296(1) TFEU** about proportionality meaning hierarchy of norms:

Where the Treaties do not specify the type of act to be adopted, the institutions shall select it on a case-by-case basis, in compliance with the applicable procedures and with the principle of proportionality.

## LEGAL BASIS PROVISIONS AS THE TOOL FOR CONFERRING COMPETENCES ON THE EU

SPECIFIC LEGAL BASIS PROVISIONS	GENERAL LEGAL BASIS PROVISIONS
<p><b>For specific policy area:</b></p> <p><b>For example:</b></p> <ul style="list-style-type: none"> <li>● CFSP – Art. 28(1) TEU, read in conjunction with Art. 31 TEU</li> <li>● Free Movement of Workers – Art. 46 TFEU</li> <li>● Criminal Law - Art. 83(1) TFEU</li> <li>● Sex equality in employment &amp; occupation – Art. 157(3)</li> <li>● Public Health - Art. 168(4)-(6) -Protection of human health – only incentive measures possible, because there is no competence to harmonize – Art. 168(5) TFEU. -Health protection may be a side issue in other contexts – Arts. 9, 114(3), 168(1) TFEU.</li> </ul>	<p><b>Only three:</b></p> <ul style="list-style-type: none"> <li>● <b>Art. 114 TFEU</b></li> <li>● <b>Art. 115 TFEU:</b> derogation from Art. 114 TFEU</li> <li>● <b>Art. 352 TFEU:</b> only if no other legal basis provision is available</li> </ul>

## ISSUES DETERMINED BY LEGAL BASIS PROVISIONS

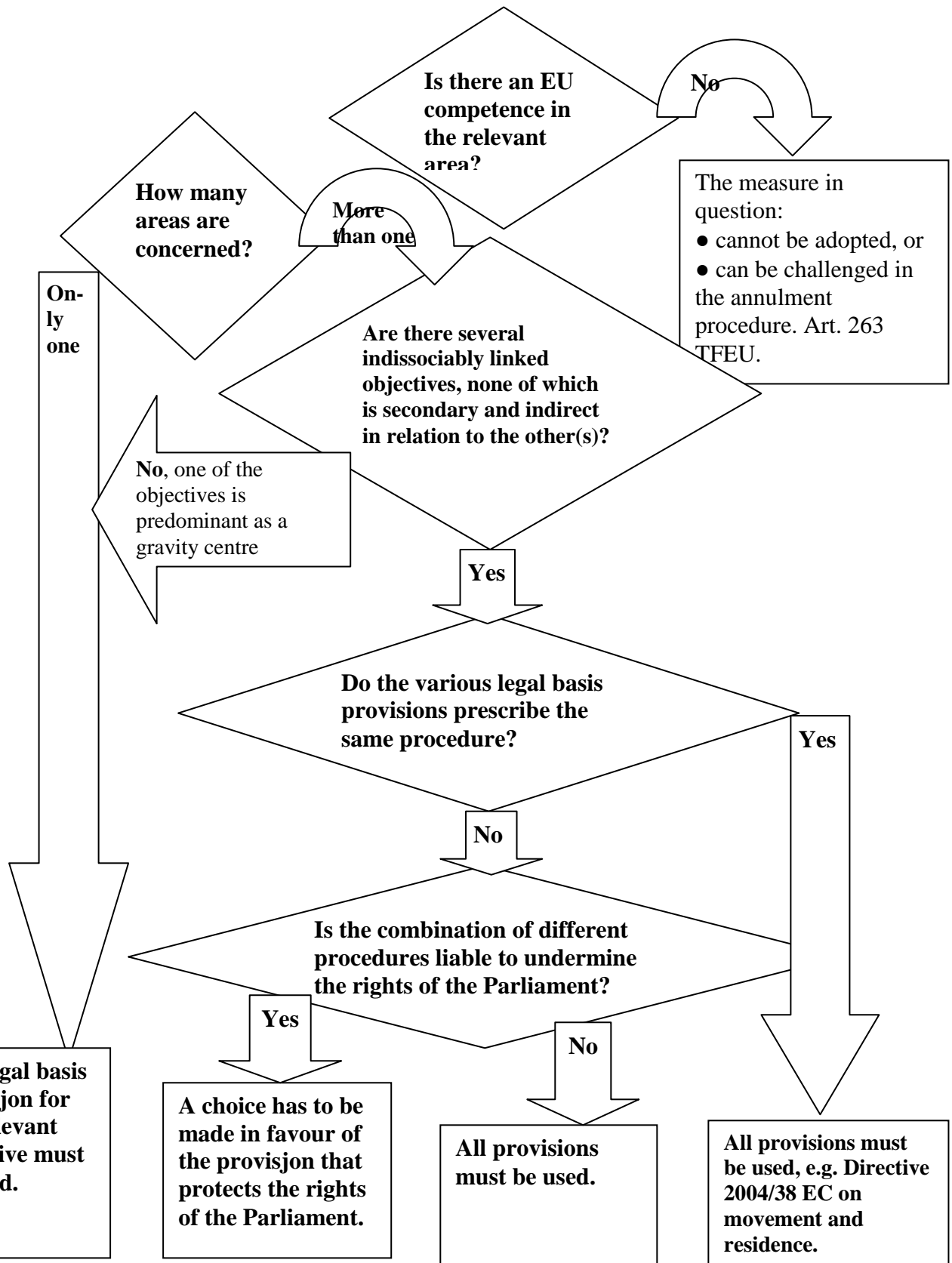
<p><b>The field in which EU action is possible</b></p>	<p>E.g.</p> <ul style="list-style-type: none"> <li>● Art. 115 TFEU: establishment and functioning of the internal market;</li> <li>● Art. 157(3) TFEU: sex equality in employment and occupation.</li> </ul>
<p><b>The type of act that is made possible</b></p>	<p>E.g.</p> <ul style="list-style-type: none"> <li>● Art. 153(2)(b) TFEU: directives only;</li> <li>● Art. 352 TFEU: “measures” in a general sense.</li> </ul>
<p><b>The procedure to be followed</b></p>	<p>E.g.</p> <ul style="list-style-type: none"> <li>● Arts. 46 and 114 TFEU: ordinary legislative (codecision) procedure;</li> <li>● Art. 115 TFEU: consultation procedure.</li> </ul>
	<p><b>The procedure is defined:</b></p> <ul style="list-style-type: none"> <li>● either directly, by describing it in the legal basis provision (e.g. Art. 103 TFEU);</li> <li>● or indirectly, through reference to the name of the procedure (e.g. Article 114 TFEU, referring to “the ordinary legislative procedure”, which is described in Art. 289(1) TFEU.</li> </ul>
<p><b>The degree of harmonization (rarely)</b></p>	<p>E.g.</p> <ul style="list-style-type: none"> <li>● Art. 83(1) TFEU (criminal law); minimum requirements;</li> <li>● Art. 153(2)(b) TFEU (social law); minimum requirements.</li> </ul>

## COMPARISON OF ARTICLES 114 AND 115 TFEU

	<b>Art. 114 TFEU</b>	<b>Art. 115 TFEU</b>
<b>Field of action</b>	<p>“Internal market”, except:</p> <ul style="list-style-type: none"> <li>● Fiscal provisions;</li> <li>● Free movement of persons;</li> <li>● Rights and interests of employed persons.</li> </ul>	<ul style="list-style-type: none"> <li>● “Internal market”</li> </ul>
<b>Type of act</b>	<p>“Measures” including e.g. regulations and directives.</p>	Directives
<b>Procedure</b>	Ordinary legislative procedure (codecision procedure).	“A special legislative procedure”
<b>Degree of harmonization</b>	<p>Not indicated. The possibility of a higher degree of protection in individual Member States is afforded through Art. 114(4) and (5) TFEU.</p>	Not indicated.

**CORRECT CHOICE OF A LEGAL BASIS**

The choice must be based on **objective criteria**, taking into account the **aim** and **content** of the measure.



## IMPLIED POWERS OF THE EU

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Sometimes, EU powers are not explicitly written to the Treaties, instead they are implied. Examples:

<b>Implied external powers – the ERTA-doctrine</b>	<b>Implied criminal law powers</b>
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