Division of competences between the European Union and its Member States concerning immigration

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Abstract
The European Union has a shared competence for developing a common immigration policy. This note examines the division of internal and external competences between the European Union and its Member States, the intensity of the Union’s intervention and the limits to it. The common immigration policy is developing, but is not leading to the loss by the Member States of their own competences. However, the Member States have a duty to exercise their competence in compliance with the acts and objectives of the Union’s migration policy.
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**AUTHOR**
Eleftheria Neframi, Professor at the University of Paris 13, Jean Monnet Chair

**ADMINISTRATOR RESPONSIBLE**
Mrs Cristina Castagnoli
Administrator
DG IPOL, Policy Department C: Citizens’ Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: cristina.castagnoli@europarl.europa.eu

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To contact the Policy Department or to subscribe to its monthly newsletter please write to: poldep-citizens@europarl.europa.eu

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1. INTRODUCTION

1.1. The principle of conferral

'The limits of Union competences are governed by the principle of conferral' (Article 5(1) TEU).

'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’ (first sentence of Article 5(2) TEU).

The principle of conferral thus includes two aspects.

On the one hand, the Union only acts within the framework of the competences conferred and in accordance with the conditions laid down in the Treaties. The Member States have taken pains to stress the significance of this principle in the Treaty of Lisbon, although it is inherent in the nature of international organisations. Thus, the second sentence of Article 5(2) TEU and the declaration in relation to the delimitation of competences annexed to the Treaty of Lisbon states that ‘[c]ompetences not conferred upon the Union in the Treaties remain with the Member States’.

On the other hand, the Union only exercises its competences to attain the objectives allocated to it in the Treaties. Article 1 TEU stipulates that the Member States confer competences on the Union to attain objectives they have in common. The relationship between objectives and competences has a dual significance. Firstly, the objectives allocated to the Union are only pursued by virtue of the competences conferred and may not be invoked with a view to removing competences of the Union. Secondly, the Union only pursues its objectives by virtue of the competence conferred upon it for that purpose and in accordance with the methods laid down. However, interference is inevitable, in so far as the exercise of a competence may affect other spheres.

1.2. Competence on migration issues within the area of freedom, security and justice

One of the objectives common to the Member States, and assigned to the Union, is the creation of a common immigration policy. This policy brings together measures directed towards third-country nationals who establish themselves permanently (either legally or illegally) in the European Union1.

Title V of Part 3 of the Treaty on the Functioning of the European Union, on the area of freedom, security and justice, devotes chapter 2 to policies on border checks, asylum and immigration, specifies the objectives pursued and confers on the Union the competence to attain them.

The Union’s competence concerning immigration was originally conferred upon it by the Treaty of Maastricht, within the former third pillar, and was placed within Community competence by the Treaty of Amsterdam, in Title IV TEC (Article 63(3) TEC). The Treaty of Lisbon, in line with the constitutional treaty, clarified the division of competences between the Union and its Member States. The Union thus has a shared competence in the sphere of the area of freedom, security and justice (Article 4(2)(j) TFEU); the details of its objectives

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1 E. Barbe, Justice et affaires étrangères dans l'Union européenne, La documentation Française, 2002, p. 54.
and the methods for its exercise are set out in Title V of Part 3 of the Treaty on the Functioning of the European Union.

The Union’s competence regarding migration issues falls within the area of freedom, security and justice. It is an autonomous competence which differs, in terms of its objectives, from the competence relating to border checks and the competence regarding asylum. Of course, the management of migration flows, which is an objective of the Union in relation to immigration, is dependent upon the policy on border checks. However, this is a preliminary stage which does not, strictly speaking, form part of migration policy.

1.3. The development of a common immigration policy

In contrast to ex Article 63(3) TEC, which refers to measures on immigration policy, Article 79 TFEU stipulates that the Union shall develop a common immigration policy. Similarly, according to Article 67(2) TFEU, covering the general provisions of the Title on the area of freedom, security and justice, the Union ‘shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals’.

The use of the term ‘common policy’ is not neutral. This term does not equate to sole competence on the part of the Union, and it is used in a way which does not always match the legal situation. However, it bears witness to the political desire to pursue a comprehensive integration process and to organise a division of competences between the Member States and the Union in a direction which increasingly favours the latter. This desire, which was gradually sketched out is now clearly stated in the Treaty, and this is likely to promote the exercise of the Union’s competence and its justification in terms of the principle of subsidiarity. However, the Union’s competence will have to co-exist together with that of the Member States. In a sphere as sensitive as immigration, the Member States are reluctant to allow their competence to be lost.

1.4. Questions raised

Since the conferral of competence to the Union on migration issues does not result in the Member States losing their own competence, several questions arise:

- What is the division of competences between the Union and its Member States on migration issues? What are the issues that can be regulated by the Union? Are there issues to be handled solely by the Member States?
- What is the nature of the Union’s competence on migration issues and what resources are available to it? To what extent and under what circumstances may the Union act in the international arena?

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2 For example, the common foreign and security policy is largely based on the intergovernmental method, whereas the common agricultural policy is a genuine integration policy, and has led to the Member States losing their competence.

3 Y. Pascouau, La politique migratoire de l’Union européenne, LGDJ, 2010, p. 25. According to V. Constantinesco, a common policy is a policy which implements a process of division of competences through the intervention of the Member States and the Community, with the ultimate goal of transferring the exercise of the competence, where neither the scope nor the date may be set in advance. V. Constantinesco, Compétences et pouvoirs dans l’Union européenne, LGDJ, 1974, p. 287.

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• What obligations ensue for the Member States from the exercise of the Union’s competence? To what extent is the exercise of national competence on migration issues managed?

This study note answers these questions, bearing in mind the fact that the Union’s competence is both internal and external and covers both legal and illegal immigration.

2. THE UNION’S OBJECTIVES ON MIGRATION ISSUES

Knowing what the European Union may do on migration issues is a question of the objectives conferred upon it in the Treaty.

The objectives pursued by the Union are expressed in Article 79(1) TFEU: ‘The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings’. These objectives are part of the wider objective of offering European citizens an area of freedom, security and justice, without internal borders (Article 3(2) TEU, Article 67(1) TFEU).

These objectives express the ultimate objective of Union action, which is the management of immigration across Europe and the integration of third-country nationals residing legally in the Union. The objectives of internal action by the Union (2.1) are different from the objectives of its external action (2.2).

2.1. Internal action

According to the European Pact on Immigration and Asylum of 24 September 2008, and the European Council’s Stockholm Programme of 10/11 December 2009, international migration can contribute to the economic growth of the European Union. It can be an opportunity because it is a factor of human and economic exchange. However, there is a need to manage immigration in a manner that takes account of Europe’s reception capacity in terms of its labour market, housing and health, education and social services, while protecting migrants against possible exploitation by criminal networks.

The Union’s priorities on migration issues do not coincide with those of its Member States. The ultimate objective of the Union’s migration policy is, as can be seen from the various ‘soft law’ acts and instruments, the integration of third-country nationals residing legally in the Union. However, the Member States link migration issues to issues of security, employment policy and social policy. The result is that the objective of integration cannot be a direct objective of Union action without affecting sensitive spheres within which the Member States wish to retain their competences.

The ultimate objective of integration is not a competence conferred upon the Union. The competences of the Union on migration issues express the allocation of prior objectives, such as the management of migration flows, the regulation of the rights of third-country nationals residing legally in the Union and the prevention and combating of illegal immigration. The objective of integration can only be pursued indirectly, through support of and respect for national competences.
2.2. **External action**

In terms of international action, the Union has adopted a global approach to migration\(^5\).

Cooperation with third countries aims to combat illegal immigration, but also to promote the development of the countries involved\(^6\). The Union assists third countries in the management of migration flows and supports the provision of resources to migrants and to their countries of origin.

The link between development cooperation and migration issues enables the Union to include the latter within the framework of comprehensive action internationally. The global approach of competences promotes consistency of action and the affirmation of the Union as a global, influential player.

3. **THE NATURE AND EXERCISE OF THE UNION’S COMPETENCE**

In order to attain its objectives, the Union may act, pursuant to Article 79(2) TFEU, in the following spheres:

a) ‘the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunification;’

b) **the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;**

c) **illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;**

d) **combating trafficking in persons, in particular women and children’.**

We shall draw a distinction between internal competence (3.1) and external competence (3.2).

3.1. **Internal competence**

Internally, the Union has a shared normative competence (3.1.1), but also an operational competence involving support and coordination (3.1.2).

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3.1.1. Shared normative competence

Within the context of immigration policy, the Union may adopt legislative acts. Legislative acts, regulations, directives or decisions may be adopted in accordance with the ordinary legislative procedure, or pursuant to a special legislative procedure.

On migration issues, unilateral acts are adopted in accordance with the ordinary legislative procedure (Article 294 TFEU), jointly by the Council and the European Parliament. This represents a development of the Treaty of Lisbon, since, under the former arrangement, measures relating to legal immigration were adopted unanimously by the Council following consultation of Parliament. Now, the ordinary legislative procedure applies for the adoption of any measure referred to in Article 79(2) TFEU, which covers both legal and illegal immigration.

It should be noted that Article 68 TFEU emphasises the role of the European Council in defining the general guidelines to guide intervention by the institutions. According to that provision: ‘[t]he European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice’. The power of the European Council to define the general directions of the various policies forms part of its responsibilities, according to Article 15 TEU⁷. On migration issues, the conclusions of the Tampere European Council of 15 and 16 October 1999 have played a pivotal role. However, Article 68 TFEU confers upon the European Council the power to define the guidelines for the institutions’ operational intervention, in terms of the enactment of legislative acts, even if one may take the view that the European Council will not interfere with the responsibilities conferred upon the FRONTEX agency and will avoid getting involved in the details of operational implementation.

It is during the adoption of legislative acts, which contain the essential elements of normative activity, that the question of the nature and extent of the Union’s competence arises. It should be noted that legislative acts may provide for the adoption by the Commission of delegated acts to supplement or amend certain non-essential elements of the legislative act (Article 290 TFEU). In addition, by way of derogation from the principle of indirect administration (see below), the Commission may adopt implementing acts (Article 291 TFEU). So, the issue of the division of competences between the Union and its Member States arises in regard to the adoption of legislative acts, since delegated acts or implementing acts are not able to extend the Union’s normative intervention pursuant to the basic act. The following observations thus apply to the adoption of legislative acts.

According to Article 4(2)(j) TFEU, the Union’s competence in the sphere of the area of freedom, security and justice is a shared competence.

Article 2(2) TFEU stipulates: ‘When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence’.

The classification of the Union’s competence as shared promotes the competence of the Member States. More specifically:

⁷ ‘The European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof. It shall not exercise legislative functions’.
3.1.1.1. Normative action by the Member States is not ruled out

If the Union has exclusive competence, the Member States may act only if given authorisation by the Union (with regard to formulating legislation), or only in terms of implementation, in order to implement the common rules (Article 2(1) TFEU). On the other hand, in a sphere where competence is shared, the Member States retain their normative competence, which is exercised as long as the Union does not act or, in the event of intervention by the Union, in so far as the common rules leave them room for manoeuvre.

3.1.1.2. Intervention by the Union is dependent on the application of the principle of subsidiarity

According to the first sentence of Article 5(3) TEU, ‘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 Union’s acts concerning migration must thus be justified in terms of the principle of subsidiarity.

Respect for the principle of subsidiarity is monitored by the national Parliaments and the Court of Justice.

Draft legislative acts must include a statement indicating the financial impact of the act and the reasons for concluding that the specific objective of the action undertaken can be better achieved at Union level, based on qualitative and, if possible, quantitative indicators. The national Parliaments, to which the draft legislative act is forwarded, issue an opinion on whether the draft act complies with the principle of subsidiarity, and the Commission has an obligation to review its proposal in the event of it being opposed.

The Member States may bring an action for annulment against acts which do not comply with the principle of subsidiarity.

3.1.1.3. The exercise of the Union’s competence, once subsidiarity has been verified, has a pre-emptive effect on the Member States

The Member States lose their own competence once the Union intervenes. However, the pre-emptive effect depends upon the exact scope and intensity of the Union’s intervention.

According to Protocol No 25 on the exercise of shared competence, ‘when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area’.

The Union’s competence on migration issues is a harmonising competence. The institutions adopt minimum common rules by means of directives, which the Member States have a duty to transpose. The Member States may pass legislation on issues not covered by the European Union act.
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directives, and may also derogate from the common rules, in so far as the directives allow this.

For example, Directive 2003/86/EC of 22 September 2003\textsuperscript{12} determines the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member States. One of its stipulations is the principle that a third-country national residing lawfully in the European Community has a right for his children to join him within the context of family reunification.

The fact that the common rules restrict themselves to harmonisation does not rule out the placing of substantive obligations upon Member States. Thus, the directive on family reunification creates a real subjective right to family reunification for children aged under 12.

Directive 2003/86 allows the Member States to implement certain derogations\textsuperscript{13}. The implementation of these derogations must not conflict with respect for fundamental rights.

3.1.1.4. Legislative intervention by the Union is subject to the obligation to respect fundamental rights, pursuant not only to Union law but also in accordance with international law and the European Convention of Human Rights

The Court of Justice has held, in the Kadzoev judgment\textsuperscript{14} that Directive 2008/115 on common standards and procedures in Member States for returning illegally staying third-country nationals serves the purpose of limiting the deprivation of third-country nationals’ liberty in a situation of forced removal, taking into account the principle of proportionality as interpreted by the European Court of Human Rights.

The Court of Justice has held that the institutions must respect fundamental rights when granting derogations to the Member States. In the case Parliament v Council\textsuperscript{15}, the Court of Justice looked at the validity of Directive 2003/86 on family reunification. It examined the possible derogations of which Member States may avail themselves, in relation to the fundamental rights of third-country nationals, specifically the right to family life and the principle of non-discrimination. The Court, referring to the general principles of Community law as a source of obligations for the institutions, took into account the European Convention on Human Rights, the United Nations International Covenant on Civil and Political Rights, and the United Nations Convention on the Rights of the Child, as well as the Charter of Fundamental Rights, even though this did not yet have legal binding force. The Court concluded that none of the derogating provisions may be considered as conflicting with the rights in question, but the intervention of the Member States is for the national courts to supervise (see below).

\textsuperscript{12} OJ L 251, 3.10.2003.
\textsuperscript{13} The relevant issues are: the possibility of verifying whether a child aged over 12 years and arriving independently from the rest of his/her family meets a condition for integration; the possibility of stipulating that an application for family reunification be submitted before the child turns 15; the possibility of providing for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.
\textsuperscript{14} ECJ, 30 November 2009, C-357/09 PPU, \textit{ECR} p. I-11189.
3.1.1.5. The Treaties do not restrict the shared competence of the Union on migration issues to the harmonisation of the laws and regulations of the Member States

In the absence of any specific provision in the Treaty, the intensity of intervention by the Union depends on the application of the principle of proportionality.

Article 5(4) TEU stipulates: ‘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’. Acts by the Union must be justified in terms of the principle of proportionality, which can be monitored by the courts. Article 5(4) TEU makes it clear that ‘[t]he 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’.

If more intensive intervention by the Union is justified as necessary in order to attain the objectives pursued, within the framework of the competences conferred, the Treaty does not rule out intervention by the Union through regulations. It is not necessary, to that end, to have recourse to the flexibility clause (Article 352 TFEU, ex Article 308 TEC), which may only be used when a means of action, deemed to be necessary, is not provided for in the Treaties. Moreover, the uniform format for residence permits for third-country nationals has been established pursuant to Regulation No 1030/2002 of 13 June 2002.

3.1.1.6. The pre-emptive effect, to the extent of the exercise of Union competence, is not definitive

The Treaty of Lisbon has provided for the possibility of shared competence being given back to the Member States. Article 2(2) TFEU stipulates that the Member States may again exercise their competence to the extent that the Union has decided to cease exercising its competence. According to the declaration in relation to the delimitation of competences, the institutions may decide to repeal a legislative act, ‘in particular better to ensure constant respect for the principles of subsidiarity and proportionality’. The Council may request the Commission, at the initiative of one or more representatives of Member States, in accordance with Article 241 TFEU, to submit proposals for repealing a legislative act. According to the declaration, ‘[t]he Conference welcomes the Commission’s declaration that it will devote particular attention to these requests’. The Union has exercised its shared normative competence, pursuant to ex Article 63(3) and (4) TEC, particularly through the adoption of directives, both on legal immigration and on illegal immigration.

The Treaty of Lisbon expands the Union’s competence.

It may now adopt measures on conditions governing the freedom of movement and of residence in other Member States of third-country nationals residing legally in a Member State (Article 79(2)(b) TFEU), whereas under ex Article 63(4) TEC Community measures could regulate the rights to reside in other Member States and the conditions under which legal migrants could do so. The competence to regulate the freedom of movement of third-country nationals lawfully residing in the Union differs from the competence to regulate travel for a short period (Article 77(2)(c) TFEU, ex Article 62 TEC).

The Union may also adopt legislative acts, in accordance with the ordinary legislative procedure, concerning combating trafficking in persons, in particular women and children.

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(Article 79(2)(d) TFEU), whereas such measures used to be adopted pursuant to framework decisions under the former third pillar.

Finally, the provision of ex Article 63 TEC under which measures on migration issues did not prevent any Member State from maintaining or introducing national provisions which were compatible with the Treaty and with international agreements disappears. Pursuant to the Treaty of Lisbon, the exercise of the shared competence of the Union leads to the loss of competence on the part of the Member States, to the extent covered by the common rules.

3.2. Coordination, complementary and support competence

Article 4(2)(j) TFEU, which provides that the competences shared between the Union and the Member States apply to the area of freedom, security and justice, is not a provision conferring competence. Provisions conferring competence in this sphere fall within Title V of Part 3 of the Treaty on the Functioning of the European Union. That means that this title may include special provisions as compared with Title I of Part 1 of the same treaty, where Article 4(2)(j) TFUE appears. This title relates to the categories and areas of Union competence and its objective is to clarify the division of competences.

Thus, Union competence on migration issues is not a shared competence in all its aspects. According to Article 79(4) TFEU, ‘the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States’.

This is a competence to provide support, to complement, and to coordinate, which has no pre-emptive effect upon the competence of the Member States, since the Union has no normative competence on the criteria and methods of integration of third-country nationals residing legally in the Union (see 4.1.1 below). Thus, the Union has an operational competence, in the sense that its intervention is based more upon a power to act than on a normative product.

The Treaty of Lisbon gives the Union the power to adopt legislative acts to support and complement national action on the integration of third-country nationals residing legally in the Union. These acts are adopted in accordance with the ordinary legislative procedure. However, the Union, placing its migration policy within the context of the pursuit of the ultimate objective of integration, has already adopted such measures and has developed a legal framework based on soft law instruments, constituting an open coordination method. Now, the Union may adopt legislative acts with a view to promoting the integration of third-country nationals residing legally in the Union, but without affecting the normative competence of the Member States.

The operational competence of coordination is also exercised in administrative cooperation. Pursuant to Article 74 TFEU, the Council may adopt measures to

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17 Triantafyllou D., La Constitution de l’Union européenne, Bruylant, 2005, p. 31 ff.
ensure administrative cooperation between the relevant departments of the Member States and between those departments and the Commission. Such measures are adopted following a Commission proposal, after the European Parliament has been consulted (Article 74 TFEU)\(^\text{21}\). They must be justified in terms of the principle of subsidiarity and the principle of proportionality.

In addition, Article 70 TFEU gives the Council the possibility of adopting measures ‘laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States’ authorities, in particular in order to facilitate full application of the principle of mutual recognition’. Such measures are adopted on a proposal from the Commission, with the European Parliament and national Parliaments being informed of the content and results of the evaluation. The adoption of such measures is an example of the duty of sincere cooperation incumbent upon the Member States pursuant to paragraph 1 of Article 4(3) TEU\(^\text{22}\).

### 3.3. External competence

The Treaty of Lisbon confers upon the Union an explicit external competence concerning illegal immigration. According to Article 79(3) TFEU, ‘[t]he Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States’. Prior to the entry into force of the Treaty of Lisbon, the Union had already concluded bilateral readmission agreements on the basis of an implicit external competence\(^\text{23}\).

According to the ERTA case\(^\text{24}\) the Union’s external competence results from its internal competence. Thus, the Union has an external competence for all issues falling within its competence on migration issues internally. The granting of an explicit external competence to conclude readmission agreements is thus of a solely political significance.

Since the Union’s competence in the area of freedom, security and justice is a shared competence, and in the absence of a specific reference in Article 79(3) TFEU, its competence to conclude readmission agreements is also shared. That means that it is not out of the question for readmission agreements to be concluded by the Member States. However, according to Article 216(1) TFEU, the Union may conclude an international agreement where the Treaties so provide. Therefore, the Union may exercise its competence to conclude a readmission agreement independently of its Member States (on the consequences of the exercise of the Union’s competence for State competence, see below, 6.1). The introduction of the provision in Article 79(3) TFEU thus removes doubts regarding the possibility of the Union’s external competence being exercised with regard to readmission agreements. This possibility had already been based on the need to conclude an international agreement in order to attain the objective of combating illegal immigration.

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\(^{21}\) It should be noted that Article 76 TFEU, which provides that measures to ensure administrative cooperation between the Member States may be adopted on the initiative of a quarter of Member States, does not apply to migration, but solely to judicial cooperation in criminal matters and police cooperation.

\(^{22}\) ‘Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties’.


\(^{24}\) ECJ, 31 March 1971, Commission v Council, 22/70, ECR p. 263.
With regard to issues other than the readmission of third-country nationals residing illegally in the Union, the Union may conclude an international agreement, acting alone, when its external competence is exclusive. According to Article 3(2) TFEU, which confirms the case law of the Court of Justice, summarised and clarified in Opinion 1/03 on the conclusion of the new Lugano Convention\(^{25}\), the Union has an exclusive competence to conclude an international agreement ‘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, or in so far as its conclusion may affect common rules or alter their scope’.

Given the shared nature of the Union’s internal competence on migration issues and the reluctance of the Member States to cede their competence to the Union, the conditions for implicit external exclusive competence on the part of the Union are not met. In fact, the Member States only lose their internal competence on migration issues in so far as the application of minimum rules is concerned, and not entirely. In addition, internal harmonisation is not complete. Finally, it is difficult to imagine that a legislative act will confer an exclusive external competence upon the Union. Therefore, the implicit external competence of the Union may only be exercised through the conclusion of joint agreements\(^{26}\).

However, the development of the Union’s competence on migration issues might lead to the exclusivity of its external competence, as is the case for short-stay visas. Moreover, the wording of ex Article 63 TEC, under which measures on migration issues did not prevent any Member State from maintaining or introducing national provisions which were compatible with the Treaty and with international agreements, has disappeared with the Treaty of Lisbon.

It should be noted that the Union has not concluded any joint agreements with third countries specifically on migration issues. This is explained by the notion of the position of migration issues within the Union’s external action (see 2.2 above). The global approach to migration and the link between migration policy and development cooperation policy lead the Union to include questions of cooperation with third countries on migration issues within its other policies.

Thus, the Union’s competence with regard to development cooperation, as a result of the wide-ranging nature of the objective of poverty eradication, covers migration issues. It is significant that the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organised Crime, was concluded by the Union by virtue of its development cooperation competence\(^{27}\).

Cooperation with third countries on migration issues is one aspect of the association or cooperation agreements concluded by the Union and its Member States within the framework of the development cooperation policy or the neighbourhood policy\(^{28}\). The financing instrument for development cooperation\(^{29}\) also includes a section on cooperation on migration issues.

\(^{25}\) ECJ, 7 February 2006, ECR I-1145.
\(^{26}\) Pascouau Y., La politique migratoire de l’Union européenne, LGDJ, 2010, p. 150 ff.
4. THE LIMITS ON ACTION BY THE UNION

In accordance with the principle of conferred powers, the Union is to act within the limits of the competence conferred on it. The powers that are conferred may be increased only by revision of the Treaties in accordance with the ordinary revision procedure. Moreover, the Treaty of Lisbon confirmed the case-law of the Court of Justice, according to which the flexibility clause (Article 352 TFEU, ex Article 308 EC) cannot permit any widening of the Union’s powers. According to the Declaration on Article 352 TFEU, that provision ‘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. In any event, this Article 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’.

[According to] Title V in Part Three of the TFEU, and in particular Article 79 TFEU, defining the tasks and activities of the Union in connection with migration, the Union’s competence may not be exercised beyond the limits specified in that provision. The objective of developing a common immigration policy is to be combined with respect for the competence explicitly reserved for the Member States under the Treaties (4.1). Union action on migration is not limited only by the explicit reservation of State competence. It must comply with the principle of conferred powers and speciality (4.2). The limits on Union action also relate to external activities (4.3) and may be territorial (4.4).

4.1. The explicit reservation of State competence

The Union’s competence in connection with migration does not affect the competence of the Member States in connection with the integration of third-country nationals residing legally in their territories (4.1.1), the determination of volumes of third-country nationals admitted in order to seek work (4.1.2) or the maintenance of law and order and the safeguarding of internal security (4.1.3). The exercise of Union competence must take Member States’ social security interests into account (4.1.4).

4.1.1. Integration

Integration does not figure among the objectives of the common immigration policy listed under Article 79(1) TFEU. This means that integration cannot be the direct and immediate objective of legislative intervention by the Union; the institutions cannot adopt acts relating to the conditions governing integration of third-country nationals residing legally in the Member States. While the objective of integration constitutes the Union’s priority in connection with migration, it is not an objective associated with any legislative powers.

Under Article 79(4) TFEU, any harmonisation of the laws and regulations of the Member States on the integration of third-country nationals residing legally in their territories is excluded. This reserves competence for the State and limits the competence of the Union. The Union has some competence in this connection, but it is a support, a coordination competence (see above).

The measures of encouragement and support, under this provision introduced by the Treaty of Lisbon, will be adopted as legislative measures decided jointly by the European Parliament and the Council (see 3.1.2 above). The legal framework for integration measures already established in accordance with the open method of coordination (OMC),
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through soft law instruments, is institutionalised in the Treaty but this does not change the nature of the Union’s competence.

Encouragement and support for the integration of legal migrants does not figure among the areas covered by the Union’s coordination and support competence (Articles 5 TFEU and 6 TFEU). It is not an area of competence but an aspect of the area of freedom, security and justice, an area of shared competence under Article 4 TFEU, and Article 79(4) TFEU constitutes a lex specialis in this connection. It will be noted however that employment policies and social policies are covered only by the Union’s coordination competence (Article 5 TFEU).

The integration of third-country nationals residing legally in their territories constitutes a competence of the Member States, and the Treaty excludes any transfer of jurisdiction to the Union. Under Article 2(5) TFEU:

‘In certain areas and under the conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

Legally binding acts of the Union adopted on the basis of the provisions of the Treaties relating to these areas shall not entail harmonisation of Member States’ laws or regulations’.

Support competence is thus distinct from shared competence, in that support competence may not entail any transfer of jurisdiction from the Member States. In that sense, competence reserved for the State limits action by the Union.

The Union cannot adopt harmonisation measures, under the flexibility clause, on questions concerning the integration of third-country nationals residing legally in the Member States (see above). One might have thought that, if the integration of third-country nationals is the ultimate objective of Union migration policy, achievement of that objective might justify the adoption of harmonisation measures, even if that is not provided for in the Treaty, under Article 352 TFEU. However, Article 352(3) TFEU provides that ‘measures based on this Article shall not entail harmonisation of Member States’ laws or regulations in cases where the Treaties exclude such harmonisation’.

Thus the Member States retain competence for the integration of legal migrants. This raises the question of Member States’ use of their competence. May the conditions governing integration conflict with the common rules on the conditions of entry and residence and the rights of third-country nationals residing legally in the Member States?

The common rules may refer to national conditions governing integration in the context of derogations from the obligations arising from the common rules. For example, the derogations in favour of national competence provided for in Directive 2003/86 on the right to family reunification include the possibility of verifying whether a child aged over 12 years who arrives independently from the rest of his/her family meets a condition for integration. However, Member States cannot disregard the common rules in the name of such derogations (see below).

4.1.2. Immigration for employment purposes

The Treaty of Lisbon introduces a new provision which constitutes a reservation of State competence. This is Article 79(5) TFEU: ‘This Article shall not affect the right of Member...
States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.'

Economic immigration is a sensitive issue in that it touches on Member States’ objectives and competences in connection with employment and economic policy. The Member States have repeatedly expressed their reservations about the development of Union competence and its impact on policy relating to admission for employment purposes.

Before the Lisbon Treaty entered into force, the Council adopted two Resolutions, relating to limitations on the admission of third-country nationals to the territory of the Member States for employment and for the purposes of pursuing activities as self-employed persons. In accordance with those Resolutions, the Member States adopted a common approach with regard to the conditions to be met by third-country nationals and the value they might add to the economy of the host country. They insisted in particular that the Resolutions do not apply to persons claiming freedom of movement and members of their families, or to third-country nationals admitted in connection with family reunification, or to third-country nationals with rights arising from agreements concluded with third countries.

Thus the reservation of State competence is not absolute and is to be interpreted in conjunction with the specific provisions of the various Union policies.

Under Article 7(5) TFEU, the common immigration policy is not concerned with the volumes of third-country nationals admitted for employment, including self-employment. The competence reserved for the Member States is limited to determining the volumes of admission of third-country nationals coming from third countries, i.e. entering the European Union for the first time.

The Union’s competence, under Article 79(2) TFEU, to define the rights of third-country nationals residing legally in a Member State and the conditions governing freedom of movement and of residence in other Member States covers access to employment or the social security scheme for migrant workers. In that sense, Article 79(2) TFEU constitutes a lex specialis in relation to Article 46 TFEU on freedom of movement for workers. It is significant that Council Directive 2009/50/EC of 25 May 2009, adopted in accordance with points (3)(a) and (4) of the first subparagraph of ex Article 63 EC, concerns the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (EU Blue Card).

The EU Blue Card Directive states that it is to be without prejudice to the right of the Member States to determine the volumes of admission of third-country nationals entering their territory for the purposes of highly qualified employment.

The inclusion of this reservation in the Treaty reflects the Member States’ fears in connection with the increased application of the ordinary legislative procedure, and the qualified majority, in the area of migration.

This is thus an important question that is not within the competence of the Union, which does however cover other questions relating to immigration for the purposes of employment.

34 OJ L 155 of 18 June 2009.
It should be noted that the reservation of State competence pursuant to Article 79(5) TFEU applies only when the Union action in connection with immigration for work is based on Article 79 TFEU, and not when third-country nationals’ access to employment falls within other areas of competence (see 4.2.2 below).

Moreover, the reservation of State competence relates only to the determination of volumes of admissions, and not to access to employment for persons who have already been admitted or who are to be admitted on some other legal basis, such as family reunification. The reservation relates only to third-country nationals coming from a third country, and not those coming from another Member State, even one that is not covered by Union immigration policy (see 4.4 below). Conversely, the reservation of State competence should relate to the admission of third-country nationals who already have employment arrangements or work contracts\(^{35}\).

4.1.3. The maintenance of law and order and the safeguarding of internal security

According to Article 72 TFEU (ex Article 64(1) EC), ‘this Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security’.

It is not a matter of limiting the Union’s legislative competence but, rather, its operational competence\(^{36}\). The adoption of measures to implement acts of the Union falls within the competence of the Member States (see below). The exercise of the Union’s operational competence is accordingly limited to support and coordination of State action.

This reservation of State competence does not exclude all forms of control. The Court of Justice has noted that Member States are required, in accordance with the principle of sincere cooperation (Article 4(3) TEU, ex Article 10 EC), to exercise their competence in connection with the maintenance of public order and internal security so as not to hinder the full effect of the provisions of the Treaties in other areas\(^{37}\).

4.1.4. Social security

The Union’s competence in connection with migration covers measures relating to the social security of workers who are third-country nationals, Article 79(2) TFEU being a lex specialis in relation to Article 48 TFEU on the Union’s competence in the area of social security for workers. However, the exercise of the Union’s competence is limited by the Declaration on Articles 48 and 79 TFEU:

‘The Conference considers that in the event that a draft legislative act based on Article 79(2) would affect important aspects of the social security system of a Member State, including its scope, cost or financial structure, or would affect the financial balance of that system as set out in the second paragraph of Article 48, the interests of that Member State will be duly taken into account’.


\(^{37}\) CJEC, Case C-265/95 Commission v France [1997] ECR I-6959. In that case, France had failed to comply with the rules on free movement of goods.
4.2. **Compliance with the principle of conferral and speciality**

Apart from the State competence reservations enshrined in the Treaty, the exercise of the Union’s competence in connection with migration must not encroach on areas that are not covered by Article 79 TFEU. This question is of particular interest in connection with the adoption of criminal penalties (4.2.1). Moreover, the Union’s competence in connection with migration is exercised only when the principal objective of the action taken is one of the objectives listed in Article 79 TFEU, even if third-country nationals may be affected by the exercise of Union competence on some other legal basis (4.2.2).

4.2.1. **Criminal penalties**

The objective of combating illegal immigration and the trade in human beings has led the Union to consider criminal penalties. For example, Directive 2009/52 of 18 June 2009, adopted in the context of the fight against illegal immigration, provides minimum standards on sanctions and measures against employers of illegally staying third-country nationals. The Union’s competence to establish minimum rules on the definition of criminal offences and sanctions in areas of serious crime, including trafficking in human beings, is covered by the provisions on judicial cooperation in criminal matters (Article 83 TFEU).

However, the Court of Justice has held that the adoption of effective, proportionate and dissuasive penalties by the Member States is essential to the effective application of Union law. Acts of the Union, adopted in accordance with its competence in various areas, including competence in connection with migration, may provide a framework for State competence by requiring the Member States to adopt such penalties and indicating the type of penalty to be adopted. Union intervention may not encroach on the Member States’ competence in criminal matters, in the absence of harmonisation pursuant to Article 83 TFEU.

4.2.2. **The choice of legal basis**

The definition of the rights of legally resident third-country nationals is not determined exclusively by Union migration policy. The specific provisions form the legal basis for action by the Union in connection with the relevant third-country nationals.

Thus, the second paragraph of Article 56 TFEU on the prohibition of restrictions on freedom to provide services provides that ‘the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union’.

In accordance with the rules developed by the Court of Justice in litigation on the legal basis, which establish the principle of speciality, the choice of legal basis depends on the principal objective of the action taken. The Union can exercise its competence under Article 79 TFEU only if the principal objective of the action it takes comprises one of the objectives of immigration policy. If, on the other hand, the objective of the Union action is

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to regulate the trade in services, the provisions on competence in connection with migration do not apply. Thus, acts adopted under Article 56 TFEU which concern legally resident third-country nationals will also apply to Member States which are not affected by the Union’s policy on migration (4.4 below).

Similarly, the international trade in services is covered by the Union’s competence in connection with the common commercial policy. Article 207 TFEU confers exclusive competence on the Union (Article 3(1)(e) TFEU) covering the trade in services, whereas ex Article 133 EC covered only part of this field. The Union’s competence covers not only the conclusion of international agreements but also the adoption of unilateral legislative acts. Thus, the adoption of an act designed to regulate international trade will not be based on Article 79 TFEU, despite the Union’s competence in connection with migration for work. Conversely, the Union’s competence in connection with migration will be exercised in the case of third-country nationals planning to remain and to move freely within the Union for some time.

4.3. The limits on external action by the Union

The Union’s external competence in connection with migration is not an exclusive competence (3.2 above). Thus, except for the conclusion of agreements on readmission, opportunities to exercise that competence at international level are limited, as migration questions are covered by a framework for the global exercise of external competences.

When the Union acts within the framework of a global approach to migration questions, combined with questions on which it has exclusive competence, it cannot disregard the limits of its competence. While the exercise of the Union’s competence in connection with development cooperation covers migration questions without the necessity of invoking competence in connection with migration, the Commission cannot exceed its mandate, as the global approach is horizontal and does not entail any extension of the Union’s competences.

The reservation of State competence in connection with migration limits international action by the Union even in areas in which it has exclusive competence. Thus, an international agreement on services, negotiated by the Commission under the common commercial policy for which the Union has exclusive competence, cannot include provisions concerning an area in which competence is reserved for the Member States (Article 79(5) TFEU) or an area in which harmonisation is excluded (Article 79(4) TFEU).

4.4. The territorial limits

The substantive scope of the Union’s competence in the area of immigration is limited by the exempt position of the United Kingdom, Ireland and Denmark, which covers the whole area of freedom, security and justice. Under Protocols Nos 21 and 22 to the Treaty of Lisbon, these Member States are free to choose whether or not to participate in acts in connection with the Union’s policy on immigration. However, these Member States are not in that position when the Union acts relating to third-country nationals are adopted under other competences (4.2.2 above).

Moreover, as the Union’s competence in connection with migration is a shared competence, the establishment of enhanced cooperation may be considered (Article 20 TEU and Articles 326-334 TFEU). In that case, acts relating to legal and illegal immigration, adopted under the enhanced cooperation, will be binding only on Member States which are parties to the acts in question, and other Member States may participate later.
5. THE OBLIGATIONS OF MEMBER STATES WITHIN THE FRAMEWORK OF THE INTERNAL COMPETENCE OF THE EUROPEAN UNION

Under Article 291(1) TFEU, which enshrines the principle of indirect administration, the competence for implementing acts of the institutions is reserved for the Member States, except in cases where implementing powers may be conferred on the Commission (Article 291(2) to (4) TFEU) and where the Union has operational competence under the Treaties (see above). The adoption of implementing measures by the Member States is an expression not only of the principle of indirect administration but also of the principle of sincere cooperation.

Under the second paragraph of Article 4(3) TFEU (ex Article 10 EC), ‘the Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union’. That provision also requires Member States to ‘refrain from any measure which could jeopardise the attainment of the Union’s objectives’.

Thus, the Member States have an obligation to implement the common rules (5.1) and an obligation to comply with the common rules in the exercise of their own competences (5.2).

5.1. Obligation of implementation

When the Union has exercised its competence by adopting common rules, the Member States have an obligation to take the necessary implementing measures. Implementation may be legislative, in the case of transposition of Directives, or administrative, in the case of applying Regulations. In all cases, the national courts are responsible for judicial implementation, in that they must ensure the effective application of Union law by refusing to apply national law that is contrary to Union law (in accordance with the principle of primacy) and by adapting the national rules of procedure to meet the requirements of effective judicial protection (the principle of effectiveness).

The obligation to transpose Directives may raise particular questions owing to the nature of that act, which leaves to the Member States the choice of form and methods to be employed to achieve the required result (Article 288 TFEU, paragraph 3).

Since, in the case of migration, legal or illegal, Union action does not cover the whole area but is currently limited to the harmonisation of national provisions, the Member States are required to adopt measures to transpose Directives within the framework of their institutional autonomy. This means that the Member States are free to choose the transposing acts but are nevertheless bound to respect the principle of effectiveness. Thus, the Court of Justice has held that the transposition of Directives requires the adoption of legally binding acts41.

The institutional autonomy of the Member States is also apparent from the fact that the obligation of transposition does not affect the division of responsibilities for migration between the State and its local and regional authorities. The obligation of transposition is incumbent on the Member States. The Member States fail to fulfil their obligations if acts are not transposed or are incorrectly transposed, even where the obligation to adopt the necessary measures is a matter for the local and regional authorities. Moreover, under

41 CJEC, 10 March 2005, Case C-531/03 Commission v Germany.
Article 4(2) TEU, the Union is required to respect the national identities of the Member States, ‘inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’.

The Member States are required to adopt measures to transpose Directives within the period prescribed in the Directives. If they are not transposed, or incorrectly transposed, the States have failed to fulfil their obligations, and the Commission may bring proceedings before the Court of Justice (Articles 258-260 TFEU).

Absence of transposition does not prevent individuals from relying on clear, precise and unconditional provisions of Directives in proceedings before the national courts. The Court of Justice held, in proceedings for a preliminary ruling on interpretation of the Return Directive, that when a Member State fails to transpose a Directive within the prescribed period or transposes it incorrectly, the provisions of that Directive which appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise may be relied upon by individuals against that State. In the case in question, the Court considered that Articles 15 and 16 of Directive 2008/115, on detention for the purposes of removal, are unconditional and sufficiently precise not to require any other specific elements to enable Member States to implement them.

It should be noted that the French Conseil d'État was asked by an Administrative Court whether the Return Directive, which was not transposed into French law within the prescribed period, may be relied upon directly by foreign nationals contesting deportation orders. The Conseil d'État, in its Opinion of 21 March 2011, took the view that the provisions in question, on the period prescribed for voluntary departure, were sufficiently precise and unconditional to have direct effect in national law.

In that Opinion, the French Conseil d'État took the view that a Member State may be unable to rely on the derogations provided in a Directive if it has not been transposed. As regards the Return Directive, the concept of ‘flight risk’ enabling the period prescribed for voluntary departure to be reduced or cancelled was to be defined by national legislation on the basis of objective criteria. The Conseil d'État explained that, so long as national law did not contain any such definition, the State could not rely on that risk to justify reduction or cancellation of the period in question.

It should also be noted that individuals who suffer loss or injury as a result of failure to implement common rules may bring an action for damages against the State before the national court, on the conditions established in Francovich.

5.2. **Obligation of compliance**

In so far as the Member States’ jurisdiction is not affected by the exercise of the Union’s competence in connection with migration, they may adopt national measures which go further than the European legislation. National measures must comply with the minimum rules of the framework within which they are adopted (5.2.1), and also with the European provisions on fundamental rights (5.2.2) and with other Union policies (5.2.3).

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42 CJEU, 28 April 2011, Case C-61/11 PPU Hassen El Dridi.
43 EC, avis MM. J. et T., n°345978 et 346612.
The national courts are required, in accordance with the principle of primacy, to refuse to apply any national provision that is contrary to the provisions adopted by the Union, even if the application of the national rule is ordered by the Constitutional Court.\(^{45}\)

### 5.2.1. Respect for the minimum rules

The Member States have a margin of discretion in applying acts on migration adopted for the purpose of harmonising their laws and regulations, especially when that margin is explicitly provided by way of derogation (3.1.1 above). However, the Member States are required to respect the minimum rules and not to act in a manner that could jeopardise the effectiveness of those rules.

When a national court reviewing the legality of a State measure has doubts as to whether the measure complies with the minimum rules, it may or must (depending on the case) refer the matter to the Court of Justice for a preliminary ruling on interpretation. References for a preliminary ruling on migration may be dealt with under the urgent procedure.

In the judgment of 28 April 2011 in *El Dridi* (see above), the Court of Justice interpreted the Return Directive as meaning that it precludes national rules which provide for a prison sentence to be imposed on an illegally staying foreign national on the sole ground that he remains, without valid grounds, on the national territory, contrary to an order to leave that territory within a given period. While the Return Directive allows the Member States to adopt or maintain provisions that are more favourable to illegally staying third-country nationals, it does not allow those States to apply stricter rules in the area covered by the Directive.

It is true that the Member States have criminal jurisdiction to adopt coercive measures to dissuade third-country nationals from staying illegally in their territory. But the exercise of criminal jurisdiction must not jeopardise the achievement of the objectives pursued by a directive and deprive it of its effectiveness.\(^{46}\)

It should also be noted that the Member States are required, in accordance with the principle of sincere cooperation (Article 4(3) TFEU, ex Article 10 EC), not to adopt national measures that are incompatible with the provisions of directives, even before the period for transposing them has expired.\(^{47}\)

### 5.2.2. Respect for fundamental rights

The Member States’ margin of discretion in implementing the European legislation on migration is subject to the requirement to respect fundamental rights. Article 67(1) TFEU provides that ‘the Union shall constitute an area of freedom, security and justice with respect for fundamental rights’.

In *Parliament v Council*\(^{48}\), the Court of Justice held that the exercise of State jurisdiction, within the leeway Member States are given under the Directive on family reunification, is subject to review so far as concerns respect for fundamental rights. Thus, a review by the Court is required in connection with provisions of a Directive which allows the Member

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45 CJEC, Case 106/77 Simmenthal [1978] ECR 629. CJEU (Grand Chamber), judgment of 8 September 2010 in Case C-409/06 Winner Wetten GmbH.
46 Judgment in El Dridi, paragraph 55.
48 Case C-540/03, cited above.
States to apply derogations, since those derogations could require or authorise them to adopt or maintain national laws which do not respect fundamental rights.

The review must take into account the Member States’ competence to adopt measures to maintain law and order and safeguard internal security (Article 72 TFEU). The judicial review is conducted on the basis of the principle of proportionality, with the Court considering whether the national measure is appropriate in view of the objective to be achieved, whether it is necessary, and whether it keeps a balance between the interests.

In its judgment of 28 April 2011 in El Dridi (see above), on the interpretation of the Return Directive, the Court of Justice states that where a Directive allows Member States to adopt implementing measures of various kinds, the choice of the measure that imposes most restrictions on the rights and freedoms of the illegally staying foreigner must comply with the principle of proportionality (paragraph 41).

The review of respect for the principle of proportionality is primarily a matter for the national court in which State acts are contested. The national court may or must, depending on the case, refer a question for preliminary ruling by the Court of Justice, which has jurisdiction to interpret the minimum rules laid down by Directives and, thus, the indirect framework for discretionary action by the Member States.

It should be noted in this connection that internal rules relating to review of the constitutionality of laws or regulations of the Member States which have implications for rights and fundamental freedoms must not affect the right or the obligation of the national court to refer cases for preliminary ruling, since the national provisions on review of constitutionality must be interpreted in accordance with Union law.

5.2.3. Respect for European provisions other than the rules on migration

The Member States have an obligation, in accordance with the principle of sincere cooperation (Article 4(3) TFEU, ex Article 10 EC), not to take measures that may jeopardize the achievement of the Union’s objectives.

In exercising the competences reserved for them, the Member States have an obligation, in accordance with the principle of sincere cooperation, not to undermine the rules and principles of European Union law. The Member States’ margin for intervention in migration matters must not affect the application of more specific provisions relating to the situation of third-country nationals, such as the provisions on European citizenship or freedom of movement.

49 The Court of Justice ruled to this effect in the context of a reference for a preliminary ruling from the French Court of Cassation in a case concerning the rules relating to the priority question of constitutionality. See CJEU (Grand Chamber), judgment of 22 June 2010 in Joined Cases C-188/10 and C-189/10 Aziz Melki and Sélim Abdeli.

50 For example, the Court of Justice has held that Article 20 TFEU on the rights of citizens of the Union precludes a Member State from refusing to grant a work permit to a third-country national, upon whom his minor children, who are European Union citizens, are dependent. The Court held that such a refusal deprives the third-country national’s children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen. See CJEU, judgment of 8 March 2011 in Case C-34/09 Gerardo Ruiz Zambrano.

6. **THE OBLIGATIONS OF MEMBER STATES WITHIN THE FRAMEWORK OF EXTERNAL ACTION BY THE UNION**

The Member States have an obligation to implement international agreements on migration concluded by the European Union (6.1). They also have an obligation to facilitate the Union’s exercise of its competence (6.2).

6.1. **Obligation to implement international agreements**

In accordance with Article 216(2) TFEU, agreements concluded by the Union are binding upon the Member States. Thus, the Union’s international agreements constitute common rules, which must be implemented by the Member States. Failure to implement such agreements constitutes failure to fulfil obligations, which is subject to sanction by the Court of Justice.

The Member States’ competence in connection with migration is affected by the conclusion of readmission agreements by the European Union. The Member States have an obligation, in accordance with the principle of sincere cooperation, to implement these agreements, which supersede prior State agreements.

The Member States’ competence in connection with migration may not impede the implementation of international agreements concluded by the Union, which relate to the free movement of third-country nationals. Thus, the reservation of State competence in connection with immigration for employment purposes (4.1.2 above) cannot preclude the implementation of association agreements which enshrine rights for nationals of the partner country.

It should be noted that association agreements, mixed agreements, are binding on the Member States as a whole, irrespective of the division of competences.

6.2. **Support for international action by the Member States**

In accordance with the principle of sincere cooperation (Article 4(3) TFEU, ex Article 10 EC), the Member States are to facilitate the Union’s task in fulfilling its mission. With respect to the conclusion of readmission agreements, that obligation entails providing a framework for the exercise of the Member States’ competence. It is true that the Member States may conclude bilateral readmission agreements when the Union has not exercised its competence in connection with the partner concerned. However, in the early stages of concerted action, when the Commission obtains a negotiating mandate from the Council, the Member States have an obligation to assist the Commission, in accordance with the principle of sincere cooperation. While the mere existence of a negotiating mandate does not deprive the Member States of their competence, the Court of Justice has confirmed that there is an obligation of close cooperation.

Moreover, in addition to the conclusion of readmission agreements, Member States exercising their shared competence in migration matters at multilateral international level (within the OECD, for example) have an obligation, in accordance with the principle of sincere cooperation, to ensure the unity of the Union’s international representation by presenting a common position. This is not, however, an obligation to achieve a result.

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inasmuch as the Union does not act autonomously when dealing with migration matters at international level.

In short, the exercise of the Member States’ external competence must not undermine the internal common rules. The obligation of compliance in the exercise of internal State competence applies equally to the Member States’ international activities.
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