

Una regulación adecuada de los derechos fundamentales exigiría llevar a cabo la operación inversa a la que ha tenido lugar por el Tratado de Lisboa. Esto es, los derechos fundamentales deberían regularse exclusivamente en la Carta, y en caso de que se hicieran menciones a los mismos en otras partes o títulos de los Tratados, éstos deberían remitirse a la Carta, y no al contrario, como se deduce de los artículos 51 y 52 de la Carta.

De manera que podríamos concluir que la pretendida certidumbre que se derivaría de los artículos 5 del TUE y 2 a 6 del TFUE se habría convertido más bien en incertidumbre, como resultado del análisis que hemos llevado a cabo. No basta con establecer un modelo teórico para que éste se realice sin más. Así, el modelo teórico que se plasma en el TUE y en el TFUE apenas se corresponde con el sistema de competencias que se deduce del análisis conjunto y sistemático del texto de los Tratados vigentes.

La certidumbre plena, la inexistencia de incertidumbre, no resulta posible en el Derecho. Ni siquiera en el ámbito de las competencias exclusivas es posible la certidumbre plena, ya que, en último extremo, los límites materiales de una competencia siempre entran en contacto con los de otras competencias constituyendo una zona competencial de intersección en que no siempre es fácil dilucidar los límites de unas y otras competencias. Esto es, a medida que nos alejamos del núcleo central de la competencia exclusiva (de la competencia en general), la competencia en cuestión entra necesariamente en contacto con otra competencia o competencias (propias o de los Estados miembros), de manera que será necesario contar con reglas capaces de solucionar los eventuales conflictos que se produzcan.

Pero, es necesario separar las dificultades interpretativas del Derecho como lenguaje, de las dificultades interpretativas derivadas de la complejidad, o de la imprevisión. En el caso que nos ocupa la complejidad del sistema se deriva, fundamentalmente, como hemos señalado en reiteradas ocasiones, de que el modelo teórico de los artículos 5 del TUE y 2 a 6 del TFUE no ha tenido en cuenta las atribuciones de competencias que tienen lugar a lo largo de los textos de dichos Tratados, que traen causa en los Tratados de la Unión y de las Comunidades Europeas, sin operar en estos últimos las reformas que hubieran sido precisas.

Pero, dicho lo anterior, hay que significar que grados altos de incertidumbre deben ser asumidos como un componente más del sistema neofederal de la Unión Europea y no como una deficiencia del mismo.

**KEYWORDS (alphabetical order):** Certainty, Flexibility clause, open clause competences, expansion clause, confinement clause, accordion competences, shared competences, complementary competences, concurrent competences, competences cooperatives, support competences, competences of optional exercise, competences of compulsory exercise, coordination competences, exclusive competences, exclusive competences conditional, unconditional exclusive competences, exclusive competences occurring, discretionary competences, flexible competences, supporting competences, competences rigid, passerelles competences, competences or full, enhanced competences singular, necessary addition, fundamental rights, «extra-constitucionalidad», uncertainty, «infra-constitucionalidad», essential core, specific objectives, general objectives, objectives generic, cross-cutting objectives, national parliaments, common policy, principle of conferral, principle of consistency, competence principle, principle of primacy, principle of subsidiarity, principle of proportionality, principle of supremacy, functionalist principle.

**ABSTRACT:** This paper aims to construct a system of European Union competence on materials scattered and sometimes contradictory providing Treaties of the European Union and on the Functioning of the European Union. Since the TEU in article 5 and the TFEU in articles 2-6 seek, unsuccessfully, to establish the criteria governing competence in the Union.

First this paper addresses the location and interpretation of the principles of competences, conferral, subsidiarity, proportionality, primacy, as well as the principle functionalist, the flexibility clause, the clause of Article 296 TFEU, and the function and classes of policy

objectives of the Union, which is essential to establish a consistent competence model. And from the conclusions drawn in Chapters I and II are discussed in Chapter III, the types of competence under the TEU and the TFEU, conducting a reconstruction of the same. Chapter IV of the work is a synthesis of the conclusions, which then partially included.

To analyze the competences of the Union follows the following scheme: the objectives are discussed attending the policy in question, the nature of competences in accordance with the provisions of Articles 2-6 TFEU, competences and institutions actually attributed and instruments available to the Union to exercise jurisdiction or competences conferred. As a result of this analysis is described competences or competence in question.

The *exclusive competences* have a number of common features (excluding Member States, excluding the subsidiarity principle, etc), but each is a unique scheme: from the monetary policy of the countries that have adopted the euro, which enhanced cooperation is singular that integrates a large number of competences, to conservation of marine biological resources within the Common Fisheries Policy, which is a mere exclusive competence.

The fact that the concept of exclusive competence displayed, in Article 2.1 of the TFEU, is purely relational not illogical, since the analysis of areas of exclusive competence referred to in Article 3 TFEU follows that the contents materials called exclusive competences cannot be guided back than to a type other than the purely relational, given the heterogeneous nature of the same. Indeed, the list contained in Article 3 of the TFEU can identify competences of different nature, as previously anticipated. Thus, it is referred to as enhanced cooperation its unique *monetary policy of the States that have adopted the euro*, which nevertheless leaves virtually unscathed external competence of the Member States in the field that has not transferred TFEU to the Union. As regards the *customs union*, its name is somewhat pretentious, considering that the Union has assumed responsibility in regard to the customs administrations of the Member States. That is the Union has no direct competences, which it is still somewhat surprising. In the field of *competition law* is difficult to apply the concept of exclusive competence, as noted, as this area includes only trade and trade exchanges between Member States, so that the trade or trades that do not affect trade intercommunity is not part of the exclusive competence of the Union: Thus the TFEU implicitly recognizes this matter competence of the Union and of the Member States, which is difficult to reconcile with the concept of exclusive competence over a matter. *Common commercial policy*, including areas of exclusive competence, the best fit in with the concept of exclusive competence, although it is a tangent competition with the customs union, which introduces some shadows in its regulation. Furthermore, the *conservation of marine biological resources* is a competence under the common fisheries policy, which gave rise to a judgment of the ECJ which, although not surprising stop, has not received the deserved singular regulation which undoubtedly has been an oversight by lawmakers. Finally, competences for *conclusion of international agreements*, which brings formulation because, in part, in the jurisprudence of the ECJ, as we have seen above, has received insufficient regulation and poor will be a source of conflict between the Union and the Member States.

So the determination of the position in which the Member States are, in relation to the few areas of exclusive competence, cannot be done only under the provisions of Article 2.1 of the TFEU, but requires an analysis of each of the respective areas of exclusive competence are heterogeneous in nature, to the point that exclusivity should be considered a general relational criteria that must be completed, in each case, with unique relational criteria that are derived from each of these areas of exclusive competence. For example, the exercise of exclusive competence in principle requires no justification, which, however, is an exception to the rules on competition we have finally qualified as self-competence of the Union (Article 101 and sigs.).

Moreover, it is noteworthy the different intensity of the different regulatory exclusive competence. Thus, in some cases the directions on their legal status are virtually nonexistent: as is the case for the conservation of marine biological resources under the common fisheries policy (a mere statement, without further indication, in Article 3 TFEU and without subse-

quent regulation, which carries with it significant challenges to establish their legal status), and the competence to enter into treaties is totally inadequate. In other cases we find very different regulatory intensities: low in the case of the customs union, something higher in cases of common trade policy and competition rules, and extraordinarily detailed in the case of monetary policy. All this is a result of the character of alluvium that has the Union law.

It should also be quoted that the existing treaties, in some cases, have *unique exclusive competences* in areas other than those referred to in Article 3 TFEU and, for example in the context of transport policy in establishing prohibitions and enabled exclusively to the Council to ensure compliance with them (Article 95 TFEU)

So, as we have had opportunity to test the difference between competences characterized as exclusive and non-exclusive, except that we have noted, is especially relevant only with respect to the application or not of the principle of subsidiarity.

But it must also be noted that, in accordance with Article 2.2 of the TFEU, the areas where the Union has excised its competences are reserved to it until decided to cease exercising. So it can happen that the Union drains the material content of a non-exclusive competence, formally and materially, so that it becomes in this way in an *exclusive competence supervening* or a competence fact exclusive. If it is true, that the operation of the principle of subsidiarity can subsequently reduce the contents of such materials supervening exclusive competence, and, moreover, it could come even later, to return to competences in question Member States. These possibilities are impractical in the case of original exclusive competences, except that the Union through the power under Article 2.1 *in fine* TFEU will come to mutate the original Treaties.

The biggest problems of determining competence under the TFEU arise under non-exclusive competences. Those competences, which will apply the principles and procedures of subsidiarity and proportionality, are classified into treaties with non-homogeneous criteria. So, next to the category shared competence, which would supposedly relational other categories would attend to the legal nature of competence from a material perspective, not relational (coordination, support, etc) or simply would not object categorization as the case of the common foreign and security policy.

In my view, the error of the Treaties is to presume to classify in a rigid (Articles 2-6 TFEU) a heterogeneous set of competences, which gave rise to the Treaties of the Union and of the European Communities, before reform Lisbon Treaty, by the fact that the latter far from responding to a theoretical model, composed of pure categories, are the fruit of a long process of European integration: the EU law is a law of alluvium. So it was almost impossible that the competences of the Union are the TEU and TFEU without prior restatement, were consistent with the articles of the Treaties. This deficiency, as we have seen, that is, the mismatch between the intended model categories or types of competences and practice throughout the texts of the Treaties, occurs both within the exclusive competence as part of non-exclusive competences, but the main problems occur in relation to the latter.

In my view, in relation to the non-exclusive competences may use criteria more successful than those contained in Article 2 TFEU, however, may be useful with residual character. The non-exclusive competences may be, first *mandatory or optional*. That is, the Union, in accordance with the Treaties, in some cases, necessarily would have to exercise its competence, the obligation arising from the imperative tense used by the TFEU to confer jurisdiction or regulatory context in which occurs the attribution, or both at once (*obligatory exercise competence*). Or, on the contrary, in other cases, competition is attributed by the TFEU to the Union as a competence that can be exercised or not, what time is deducted from non-mandatory or regulatory context in which the allocation takes place, or both together. This type of categorization that we postulate is characterized, on the other hand, because it allows to build a gradual scale that can be seen in different intensities between mandatory and optional ends.

In a considerable number of precepts is said that the Union (the European Parliament and the Council, the Council or the Commission) «will establish measures», «will take ac-

tion», «will conduct negotiations», «will facilitate access», and many other expressions imperative that in the context of the provision indicates that the Union should exercise competence (*mandatory exercise competence*) prescribed therein. A competence of this nature can be configured, in turn, as a *conditional competence*, or seen as *flexible*, or be *complementary* to the policies of the Member States. It is true that in some instances the Court has discretionary character attributed to such expressions, but it is more than doubtful that that Court has claimed that the decision on the case can be applied generally and, in particular, does not seem that this competence can be moved to the TFEU, given that it should be understood reinforced the principle of conferral. The above conclusion would be reached by the fact that in many instances the TFEU uses «may», which takes place in an context in which there is also no doubt that the Union is given competences that may or may not be actuated (*optional competence*) that, in turn, can be, among other possibilities, as a supplement.

The *competences of compulsory exercise*, in my opinion, represent the advance of the trial by the Treaties of opportunity with that ends the procedure for applying the principle of subsidiarity. So when you identify a mandatory exercise competence may not apply the procedure for applying the principle of subsidiarity: that is, the question whether competence should be exercised by the Union. But in any case must be activated with the proportionality principle that in assessing the intensity of the intervention should, among other things, decide the choice of legal instrument when the Union can choose to regulations, directives and decisions.

By contrast, when the Treaties use the «may» in attributing a competence we will face *facultative competence* which to be exercised must be preceded by the application of the principles of subsidiarity and proportionality.

To some of the facultative competences of the Union is applicable the characterization of shared competence of Article 2.2 of the TFEU. Thus, to the extent that the Union may or may not use its competence given to them by the Treaties, it will be possible to exercise the competence by the Member States. And we say, in some circumstances, because not all discretionary competences under the Treaties on which the Union is likely to be exercised by the Member States by substitution. It will be necessary to analyze each optional competence to conclude if substitution is possible. Here among them any examples of paragraph 3 of Article 64 of the TFEU. This provision states that in accordance with a special legislative procedure the Council «may establish» measures which constitute a step backwards in Union law regarding the liberalization of the movement of capital to or from third countries of them. Competence is optional, «may provide», to the extent that the Union is not obliged to issue a provision of this nature, but the competence is attributed exclusively to the Union, because in the context of competences is excluded, precisely, that States may adopt measures of this unique tenor. So if the EU does not act competences because there is no formulated proposal about it, or does not have opportunity to pass judgment result of the application of the principle of subsidiarity, why are not enabled States to act.

Moreover, *optional competences* could be exceptionally *conditioned*. This is as well as the exercise of an optional competence, in the majority of cases only depends on the outcome of the procedure of subsidiarity, in other cases, unless the exercise of competence firstly (as *prius*) requires compliance with certain requirements.

Finally, the facultative competence can be *compatible*, *complementary* or *incompatible* with the powers of the Member States. The competences-compatible complementary competences would be optional for the Union in a frame of attribution of competences to the Union and the Member States to allow the exercise by the Union of its competences, in addition to support, would be complementary. This would, in general, the scope of competence to support, coordinate or supplement. While facultative competences would be inconsistent with competences of the member States in a flexible framework in which the exercise of competences by the Union would exclude finally the exercise of competences by the Member States.

The competences mandatory or optional, however, indicate the intensity of which may be exercised so that there will also be considered as superimposed on the above categories

the types of *competence rigid or flexible* or, more suitably, one should refer to scale gradual reflecting the degree of flexibility or rigidity of competences mandatory or optional. The extreme example of flexibility is given in which we called *accordion competences* in the context of the common foreign and security policy. An intermediate level of competence should be the accordion and the minimum level of flexibility or rigidity would be where all the quotes for the exercise of competence come default in the exercise o compulsory competence (objectives, content material competences, and type of institutions and procedural rule), so that the operation of the application of the principles of subsidiarity and proportionality was virtually nonexistent (*stiff competence*). The varying intensity with which they use this principles indicates the varying degrees of flexibility of the competence conferred.

After application of the above rules of relational, must take into account the material content of the competences conferred on the Union (in its different modalities, coordination, promotion, supervision, etc) to determine the competence conferred. The material scope of competences tells us what the Union can do and to do it (positively or negatively) creates a negative environment in which the Union cannot exercise competence.

The integration of the material content of a competence, taken into account the above criteria in all cases is the result of an integration operation of previous categories of varying complexity, as is well known and we will not go into here. The question that interests us here is related to the concept of effectiveness, one of the fundamental concepts that served the Union to expand its competence so considerable. This concept was based on the functionalist principle has been displaced by the principle of conferral, so much less effective than that in exceptional cases. But, the fact that the principle has been marginalized functionalist does not mean that one of the reasons persist determining the existence of this concept of effectiveness, such as the content material competence is comprised of several levels of certainty, which, however, can be approached from the principle of conferral. No doubt the substance of competence is constituted by a *central core*, without question, we would call the essential and, from it, you could configure as appropriate, contain eccentric circles of materials may be attracted to the core would call a *necessary complement*. What sets this prevailing conception of today is that when we refer to the essential and necessary complement we do so from the principle of conferral, because both the core and the corollary are attributed content, which only require a legal transaction delimitation of the content, operation can be simple or very complex to the point of having to rely on the principle of connecting to integrate certain content material in a competence.

The history of the implementation of fundamental rights in the European Union law is about as rugged, and it seems that the Lisbon Treaty has ended this dynamic, and it has completed the process of implementing them. So as you know, the Charter was proclaimed rather than incorporated into the Treaties, on the occasion of the Treaty of Nice, and the recognition of the Charter the same legal value as the Treaties of the Union is of such unique characters and so many precautions, threatening its effectiveness.

Giving the EU Charter of Fundamental Rights is introduced into the same one of the essential elements of modern constitutionalism: without fundamental rights no constitution or rule of law. Furthermore, second, the Charter, together with the accession of the Union forced the Rome Convention of 1950, will facilitate the unification of fundamental rights in the whole European Union (to do the domestic laws of the Member States should solve some problems in their legal systems), which is absolutely essential to stop the possible conflict between different systems of protection of fundamental rights that apply to the States of the Union.

In my view, the regulation of fundamental rights in the Treaties has serious problems. We have established that fundamental rights are governed by the Charter, but also regulated in the Treaties and in the same regulation supersedes the regulation contained in the Charter. So, what have certainly been achieved Treaties reiterate, without (or with the ultimate aim of undermining the Charter), which is regulated by the Charter of Fundamental Rights or artificially separate what should be regulated together. Moreover, to be clear that many of the

fundamental rights in the treaties regulating there was a significant depletion of the Charter that can only be explained by a reluctance of Member States to the unification of fundamental rights in the European Union.

Appropriate regulation of fundamental rights would require performing the inverse of that has taken place by the Lisbon Treaty. That is, the fundamental rights should be regulated solely by the Charter, and in case you did mention the same in other parts of the treaties or titles, they should be referred to the Charter, and not vice versa, as is clear from the Articles 51 and 52 of the Charter.

So we can conclude that the supposed certainty that would result from Articles 5 TEU and TFEU 2-6 would become more of uncertainty as a result of the analysis that we have carried out. Not sufficient to establish a theoretical model for it to be done without more. Thus, the theoretical model is reflected in the TEU and the TFEU just match the competence system that follows the joint and systematic analysis of the text of the existing treaties.

The full certainty, the absence of certainty, it is not possible under the law. Even in the field of exclusive competence may complete certainty, because, ultimately, the material limits of competences always come into contact with other competences to be an area of intersection of competences is not always easy to decide some limits and other competences. This is as we move away from the core of the exclusive competence (*general competences*), competences in question necessarily in contact with another competence or competences (own or Member States), so it will be necessary have rules capable of resolving disputes that arise.

But it is necessary to separate the interpretative difficulties of law as language, interpretative difficulties arising from the complexity, or unpredictability. In the present case the complexity of the system is derived, primarily, as we have repeatedly pointed out, that the theoretical model of Article 5 TEU and TFEU 2-6 that have not taken into account the competence of competence occur throughout the texts of those Treaties, because they bring in the treaties of the Union and of the European Communities, without operating in recent reforms have been accurate.

But that said, you have to mean high degrees of uncertainty must be assumed as a component of the neo-Federal system of the European Union and not a deficiency.