

The Impact of the Flexibility Clause Concept on the Exercise of Competences by the European Union

Prepared by:

Abdullah Al-Shdeidi*¹

Supervised by:

Prof. Amal Yazji*²

1- Abdullah Al-Shdeidi, PhD Candidate, Department of International Law, Faculty of Law, University of Damascus. abd.shadidi@damascusuniversity.edu.sy

2- Amal Yazji, Professor, Department of International Law, Faculty of Law, University of Damascus.

Abstract

Article 352 of the Treaty on the Functioning of the European Union, known as the “Flexibility Clause,” is deemed a legal instrument that allows the EU to adopt necessary measures to achieve its objectives when no other legal basis is available in its treaties. To clarify the role of this article, this study addresses its legal nature and conditions of use. It is applied when necessary to achieve a Union objective, provided that the measure falls within the scope of policies defined in the Union treaties, and that these treaties do not provide other powers that can be invoked to implement it. Additionally, the European Council must reach unanimity. The article has gone through two main phases: an initial phase of widening and rise of its role, followed by a phase of decline and diminish of its role.

Keywords: Flexibility Clause – European Union – Competences – Powers – Ambiguity

Introduction

The EU functions on the basis of treaties that define its competences and legal mechanisms for decision-making. Over time, EU institutions have encountered situations requiring legal intervention not clearly outlined in these treaties, hindering the achievement of Union objectives in some cases. To address this legal gap, Article 352 TFEU, the Flexibility Clause, was introduced to empower the EU to extend its legislative scope in cases where no explicit legal basis exists, aiming to serve essential interests of the member states. This clause enables institutions to respond to unforeseen issues not anticipated during treaty drafting, thus enhancing adaptability to emerging challenges.

However, the clause is marked by ambiguity, making it subject to varying interpretations by EU institutions, sometimes to the point of contradiction. This complicates efforts to establish a unified framework for its use. The clause has also faced criticism for its unclear limits and scope of application.

Originally adopted in 1957 under the Treaty of Rome, which established the European Economic Community, it was then known as Article 235. It underwent two major amendments: the first in 1992 under the Maastricht Treaty, where it became Article 308 EC Treaty¹, and the second in 2007 under the Lisbon Treaty, which renumbered it as Article 352 TFEU². Despite these revisions, member states still express concerns. While it plays an important role in enhancing the EU's effectiveness, it still raises legal and political challenges, particularly regarding its compatibility with the principle of democratic legitimacy and the distribution of competences between the EU and member states. There is a fear it could be used to widen Union powers at the expense of national sovereignty of member states. Nonetheless, it remains a crucial tool enabling the Union to evolve and keep pace with changes, especially in light of the challenges of globalization and emerging crises.

Accordingly, the problem of this research is centered on the following:

To what extent does the Flexibility Clause allow the European Union to widen its competences beyond the general framework that defines its competences without breaching the principle of member states' consent and the preservation of their sovereignty?

The following sub-questions emerge from this central problem:

1. What role does the Flexibility Clause play within the EU framework?
2. How have the amendments to the Flexibility Clause affected its mechanism?
3. How has the application of the Flexibility Clause affected the relationship between EU institutions and member states in the context of widening EU competences?

Research Objective

This research aims to provide an in-depth analysis of the legal nature of the Flexibility Clause in order to evaluate this type of legal rule, which is characterized by flexibility. The goal is to demonstrate the consensual nature of such provisions, which cannot always rely on clear constraints as many treaties do, to function effectively.

Significance of the Study

The importance of this study lies in highlighting the role of ambiguity in increasing the effectiveness of legal texts, through the examination of this clause to understand its legal and political dimensions and its impact on the future of the European Union.

Outline of the Research

Section One: The role of the Flexibility Clause as a mechanism to widen the EU's competences

- Subsection 1: The legal nature of the Flexibility Clause
- Subsection 2: Conditions for using the Flexibility Clause

Section Two: The Flexibility Clause From rise to decline

- Subsection 1: The rise phase of the Flexibility Clause

¹ The EC Treaty is available at the following link: <http://data.eu/eli/treaty/ams/sign>

² The Treaty on the Functioning of the European Union (TFEU) is available at the following link: <https://eur-lex.europa.eu>

- Subsection 2: The decline phase of the Flexibility Clause

Section One: The Role of the Flexibility Clause as a Mechanism to widen EU Competences

This section discusses the nature of the role played by the Flexibility Clause in widening the European Union's competences, as an embodiment of the balance between the need to ensure the effective functioning of the Union on the one hand, and the adherence to the principle of conferred powers on the other. In order to achieve a deeper understanding of the impact of this clause on the evolution of the Union's powers, its legal nature will be examined, along with the conditions that must be met to activate it, in an effort to highlight the balance between the requirements of flexibility and the legal constraints governing the work of the Union's institutions.

Subsection 1: The Legal Nature of the Flexibility Clause

The EU acts on the basis of the principle of conferred powers, based on the treaties that precisely define its competences. However, the Flexibility Clause³ stipulated in Article 352 of the Treaty on the Functioning of the European Union (TFEU) is an exception to this principle, allowing the extension of the Union's legislative powers beyond those defined in the treaties. This clause is considered an expansion mechanism that reduces the traditional strict reading of Article 5 TFEU, which sets the framework for competence conferral upon the Union. As a result, the clause provides a legal basis for the Union to adopt legislative measures beyond the strict limits of the explicitly conferred competences, raising questions about its breadth and impact on the distribution of competences within the EU⁴.

The essence of “flexibility” in this context relates to the scope of competences conferred upon the EU, and this flexibility reflects the acknowledgement of the fathers of the Treaties that “the law cannot foresee all”. Pursuant to classical public international law theory, the EU enjoys no “kompetenz – kompetenz”, and is allowed to act only under the principle of the conferred powers.

This means that the EU legislature has no general competence to legislate but is obliged to base each and every legal instrument on one of the articles (legal bases) of the Treaties. However, the powers explicitly attributed to the EU may prove lesser or inadequate for the purpose of attaining one of the objectives enshrined in the Treaties. Therefore, the Flexibility Clause is aimed at confronting precisely this potential discrepancy between the available legal bases and the competence *ratione materiae* of the Union⁵. The inclusion of the Flexibility Clause reflects a recognition of the fact that it would be impossible to have in-advance and accurate prediction of all contingencies that may arise throughout the integration process. It allows the

³ Article I-18 of the Treaty Establishing a Constitution for Europe [2004] OJ C310/01 Referred to what is now Article 352 as the “Flexibility Clause.” This is the term that will be used in this search.

⁴ Butler, Graham, The EU Flexibility Clause Is Dead, Long Live The EU Flexibility Clause, In Bakardjieva Engelbrekt, Antonina and Groussot, Xavier, ed. (2019) ‘The Future of Europe: Political and Legal Integration Beyond Brexit, Oxford,; Hart Publishing, P 64-65.

⁵ Michail Niotis ‘Sarantis, (2018) ‘The Birth of the EMU Integrating the ESM Into the EU Legal Order: ‘Constitutional’ Challenges, Master Working Paper, Maastricht Center for European Law, p 9.

EU to act in areas where EU competences have not been explicitly granted in the Treaties but are necessary to the attainment of the objectives set out in the Treaty. It thus represents a means of adapting to new challenges⁶.

Although the Flexibility Clause is a subsidiary enabling instrument known as “lacuna filling clause”, it does not constitute a basis for granting the EU competence- competence, in that it does not create new objectives or widen the scope of the Union's competences. The essence of the Flexibility Clause is reinforced by two declarations linked to Article 352. Declaration No. 41 defines the objectives to which Article 352(1) refers⁷, namely those set out in Article 3(2), (3) and (5) of the Treaty on European Union⁸, and the Declaration No. 42, based on the settled case law of the CJEU, also emphasizes that Article 352 is an integral part of the institutional system based on the principle of conferral⁹.

The Court of Justice of the European Union (CJEU) stated: “[Article 352] is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty. That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, this article cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose”.¹⁰ Therefore, the Flexibility Clause is seen as “true locus” of expansion of EU law, since the clause defines the outer reach of EU competence¹¹. It is a general power, where other specific powers are not adequate. It has been seen as the idyllic way to integrate beyond what the treaties provide and has been understood as being an effective instrument in order to ensure the EU legal order is not overly rigid, allowing for the process of integration through law to be made more operative.¹²

Subsection 2: Conditions for Using the Flexibility Clause

Article 352 of the TFEU sets out four main substantive conditions that must all be fulfilled for the clause to be invoked:¹³

⁶ Completing European's Economic and Monetary Union, the Commission's Contribution to the Leaders' Agenda, European Commission, the Role of the Flexibility Clause; Article 352. p2.

⁷ Gadkowski, Andrzej (2022): Limitations to the Implied Powers of International Organizations, Adam Mickiewicz University Law Review, Vol 14, No 5, p110-111.

⁸ Di Biagio, Jacopo, (2021) ‘The European Union's Flexibility Clause: an Analysis of its Interpretation, Use and Evolution over time, Luiss Guido Carli University, Faculty of Law, p 51-52.

⁹ Gadkowski, Andrzej, op cit, p 111.

¹⁰ Opinion 2/94, Accession by The Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, CJEU Reports, 1996, Paras 29-30.

¹¹ Engström, Viljam, (2010), How to Tame the Elusive: Lessons from the Revision of the EU Flexibility Clause, International Organizations Law Review, vol.7, no. 2, p 2.

¹² Butler, Graham op, cit, p 65.

¹³ Article 352 (1) TFEU.

1. The action taken by the Union should prove necessary.
2. The action taken falls within the framework of the policies defined in the EU Treaties.
3. The action taken aims to attain one of the objectives set out in the Treaties.
4. The Treaties have not provided the necessary powers that can be invoked to implement the action taken.

In addition, paragraphs 3 and 4 of Article 352 impose procedural limits:

- The clause must not result in **harmonization of laws** in areas where the treaties prohibit it
- **It cannot be used in matters related to the Common Foreign and Security Policy (CFSP)**¹⁴

1. The Taken Action by The Union Should Prove Necessary:

To invoke the Flexibility Clause, the measure taken must be necessary to achieve the objectives of the European Union. This clause may only be used as a supplementary tool, that is, only when no other legal basis exists that grants the required powers to achieve a specific objective. Accordingly, resorting to the powers provided under the Flexibility Clause is prohibited if an appropriate legal basis is available.¹⁵ This condition reflects the subsidiarity nature of Article 352, which consequently entails the necessity to use this clause as gap-filler to the legal gaps if the available legislative powers proved to be inadequate for fully attainment of the aimed objective, provided that it remains within the defined 'purpose boundary'. This approach is based on the integration of Article 352 with other legal provisions, with the aim of strengthening and supplementing the partial legal basis provided by the treaties.¹⁶

To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. This language, and these terms in particular, do not always carry a single fixed meaning across all contexts and are often used figuratively. The same applies to the word "necessary," as it does not have a fixed, inherent meaning but can vary in interpretation depending on the context in which it is used.¹⁷ Given that the necessity criterion largely depends on case-by-case assessment by EU institutions, this grants them broad discretion to justify meeting this condition without clear constraints¹⁸, especially in the absence of a precise definition of the scope and extent of necessity in the text of Article 352.

The Court of Justice of the European Union in its early jurisprudences adopted a relatively flexible interpretation of this condition, as clearly demonstrated in the *Massey-Ferguson* case, where the Court allowed reliance on the Flexibility Clause even in situations where the measure

¹⁴ Ibid, paras (3-4).

¹⁵ Michail Niotis, Sarantis, op,cit, P 15-16.

¹⁶ Di Biagio, Jacopo op, cit, p 30

¹⁷ Engström, Viljam op, cit, p 5.

¹⁸ Di Biagio, Jacopo, op, cit, p 25

was not strictly necessary¹⁹. However, in its later jurisprudences, the Court moved toward a more restrictive interpretation, accepting recourse to the Flexibility Clause only when no other legal basis is available.²⁰

2. The Action Taken Falls Within the Framework of The Policies Defined in The EU Treaties:

Under the European Single Market, this condition required that resorting to the flexibility clause cannot result in exceeding the powers conferred upon the EU by the Treaties. Therefore, the principle of conferral²¹ constitutes the outer limit for applying this clause, preventing its use as a tool to expand the powers of the EU beyond what is explicitly stated in the treaties.²² However, after the amendment of Article 352 by Lisbon Treaty, its scope was no longer limited to the functioning of the Common Market as it was before. It expanded to include the adoption of measures [...] within the framework of the policies defined in the Union treaties. This change led to a significant expansion in the areas covered by this provision.²³

The amendment to the flexibility clause represents a welcome development. since to continue to link this clause to only one aspect of EU law—such as the internal market— would have implied that the EU was confined to a narrow scope that did not reflect the reality of its

¹⁹ Moull, David, (2004), Lessons the EU should Learn from the Formative Years of the US: Challenges to EU Authority in the Areas of Legitimacy and Interpretive Competence and the Implications for the Conceptualization of the EU, Jean Monnet Centre Euro Med Department of Political Studies - University of Catania, P 6.

See Also: Case 8/73, Hauptzollamt Bremerhaven v Massey-Ferguson GmbH. - Reference for a Preliminary Ruling: Bundesfinanzhof - Germany. - Value for Customs Purposes. - EEU Reports, 1973.

In this case, the Court was asked to rule on the authority responsible for Regulation No. 803/68 concerning the valuation of goods for customs purposes. Briefly, the dispute revolved around a 3% discount claimed by Massey Ferguson GmbH for the clearance of 121 tractors from customs. The Hauptzollamt (Main Customs Office) in Bremerhaven, Germany, rejected the discount based on Article 11(2) of Regulation No. 803/68, which required the company to provide proof of a cash price different from the invoice price.

When the Tax Court (the judicial body responsible for tax matters) annulled the previous administrative decisions made by the Hauptzollamt, the latter appealed to the Federal Finance Court (Bundesfinanzhof), which in turn referred a preliminary ruling request to the Court of Justice of the European Union.

The key question was whether Article 235 of the EEC Treaty provided sufficient legal authority to enact Regulation No. 803/68. Massey Ferguson GmbH challenged the validity of the regulation, arguing that the article was meant to serve as a gap-filling provision rather than a standalone legal basis for secondary legislation. They also claimed that a “general formula” such as the Flexibility Clause was not sufficient to justify binding regulations.

The Court examined the requirement of “pursuing objectives” and found it satisfied under Article 3(a) and (b) of the EEC Treaty, since the establishment of a customs union was explicitly listed among the Union’s objectives.

In paragraph 4, the Court delivered the central part of its ruling, stating:

“If it is true that the proper functioning of the customs union justifies a wide interpretation of articles 9, 27, 28, 111 and 113 of the treaty and of the powers which these provisions confer on the institutions to allow them [...], there is no reason why the council could not legitimately consider that recourse to the procedure of article 235 was justified in the interest of legal certainty”.

²⁰ For Example, see: Case 45/86, Commission of the European Communities v Council of the European Communities, Generalized Tariff Preferences - Action for Annulment - Legal Basis - Obligation to State Reasons for Community Measures, CJEU Reports, 1987.

The discussion will go into more detail about practical cases where the necessity requirement applies in the second section of this research.

²¹ The principle of conferral refers to the competences specifically conferred upon the European Union as set out in Article 5 of the Treaty on European Union.

²² Michail Niotis, Sarantis, op, cit, p 22.

²³ Di Biagio, Jacopo, op, cit, p 24.

expanding roles.²⁴ The new wording, which replaced the term "Community" with "Union," contributed to broadening the conceptual framework of the clause. It is no longer limited to the Common Market but now includes the diverse policies the European Union seeks to pursue. While the concept of the Common Market previously covered most of the tasks of the European Economic Community, the current European Union holds broader responsibilities that go beyond the economic dimension²⁵, especially with the expansion towards new fields of European integration²⁶. This broader scope is seen as a natural reflection of the Union's growth and evolving objectives, making reference to the policies defined in the treaties more aligned with these transformations over time²⁷.

3. The Action Taken Aims to Attain One of The Objectives Set Out in The Treaties

Strictly linked to the "necessary", there is the expression: "attain one of the objectives set out in the Treaties"²⁸. This term plays a key role in defining the conceptual criteria of the flexibility clause. However, it remains vague in both wording and scope. The Union treaties do not clearly define the objectives they aim to attain. Their opening provisions refer to similar concepts such as "tasks" and "activities" without clarifying the relationship between them. The question remains about the relationship between the general objectives and the specific objectives in each sectoral policy area²⁹, given the dynamic nature of the EU's objectives, which are characterized by being an open structure that is subject to continuous expansion.³⁰

Examining the objectives of the treaty is essential for determining the scope of the European Union's competences. These objectives can serve as a source of competence based on Article 3(6) of the Treaty on European Union, which states that "the Union shall pursue its objectives by appropriate means commensurate with the competences conferred upon it by the Treaties." Moreover, since achieving any objective requires a legal basis to justify turning it into an actual competence, the absence of such a legal basis linked to a specific Union objective allows for recourse to the flexibility clause, in accordance with the conditions set out in Article 352 of the Treaty on the Functioning of the European Union.³¹

The interpretation of the term "objectives" raises a challenge related to its potential conflict between the attainment of these objectives and the principle of conferring competence, which is based on granting and clearly defining powers. However, the current wording allows objectives to serve as a basis for deriving competence. This opens the door to exceeding the limits of conferred powers. As a result, a broad interpretation of the concept of objectives may contribute to expanding the scope of legislative powers, which raises questions about the

²⁴ Butler, Graham, op, cit, p 75.

²⁵ Engström, Viljam , op, cit, p 12.

²⁶ Di Biagio, Jacopo, op, cit, p 26.

²⁷ Engström, Viljam , op, cit, p 12.

²⁸ Di Biagio, Jacopo, op, cit, p 26.

²⁹ Schütze, Robert, (2003): Organized Change towards an 'Ever Closer Union': Article 308 EC and the Limits to the Community's Legislative Competence, in Eeckhout, Tridimas (eds.), Yearbook of European Union Law, vol. 22, Oxford University Press, p 84-85.

³⁰ Butler, Graham, op, cit, p 84.

³¹ Serena Rossi, Lucia, Does the Lisbon Treaty Provide a Clear Separation of Competences Between EU and Member State, in Biondi Andrea, Eeckhout Piet and Ripley Stefanie (2012), EU after Lisbon, Oxford University Press, New York, P 90.

strength of the conferral system, even when Article 352 is applied strictly. Moreover, Identifying the intended objectives is a relatively complex process. While some objectives are explicitly stated in Article 3 of the Treaty on European Union and Articles 2–6 of the Treaty on the Functioning of the European Union, others may be implied or inferred from the Union's foundational values. This leads to a fundamental question: Should the concept of objectives be limited to those explicitly stated in the treaties, or should it be interpreted in a broader context that reflects the logical and reasonable path followed by the European Union?³²

In this context, a question has been raised about whether the objectives stated in the preambles of the Union treaties form an integral part of the treaties, and whether they can be used as a legal basis when applying the flexibility clause. When attempting to define the scope of residual powers based on the criterion of the objectives to be attained, a logical problem arises in the attempts to set limits to this clause using a criterion that lacks clarity and precise definition. In other words, these limits are determined based on an unstable and changeable criterion. As a result, assessment becomes case-specific. But this approach fails to establish a consistent or objective criterion. For example, if the objective of fostering close relations among states is interpreted too broadly, then nearly any policy implementation will naturally lead to the attainment of this objective, this would turn the flexibility clause into a tool that grants the Union the power to define its own competences³³. Consequently, it becomes difficult to identify any activity that does not fall within the objectives of the treaty.³⁴

4. The Treaties Have Not Provided the Necessary Powers That Can Be Invoked to Implement the Action Taken:

The requirement that "the Treaties have not provided the necessary powers" means that the flexibility clause may only be invoked when the treaties fail to offer sufficient legal bases to fully attain the intended objectives.³⁵ This clause also raises an important question: When can the treaties be considered insufficient in providing such powers? Or how can a legal gap be identified within the treaty framework? Answering this abstract question remains a significant challenge due to the varying interpretations of the lack of necessary powers criterion, which makes determining the gap a complex and multidimensional process³⁶.

The wording of this clause is indeed confusing, and this confusion has been one of the main sources of conceptual difficulties associated with the flexibility clause.³⁷

The wording of the phrase "the Treaties have not provided the necessary powers" suggests that the clause is inclusive in nature. It is commonly interpreted in two ways:³⁸

³² Di Biagio, Jacopo, op, cit, p 26.

³³ Schütze, Robert, op, cit, p 86

³⁴ Hodun, Milosz, (2014), *Doctrine of Implied Powers as A Judicial Tool to Build Federal Polities- Comparative Study on the Doctrine of Implied Powers in the European Union and the United States of America*, PhD Dissertation, School Of Law, Reykjavik University, p 202.

³⁵ Di Biagio, Jacopo, op, cit, p 27

³⁶ Ibid, p 58-89.

³⁷ Schütze, Robert, op, cit, p 102.

³⁸ Ibid, p 27.

The first is that the treaties lack an explicit material competence, requiring recourse to the clause to develop a new political sphere not provided for in the existing framework - i.e., missing entirely.

The second is that a competence already exists, but the treaties do not provide the tools to fully utilize it to effectively attain the Union's objectives.

The difference between these two understandings is fundamental, not only defining a different scope and limits, but also affecting the nature of the clause.

In the first scenario, the clause is used exclusively and flexibly, and since it has the potential to develop new material competencies, some scholars prefer to describe it as a comprehensive or inclusive understanding, where any subject can be included within its scope provided the substantive condition is met.

In the second scenario, the clause performs a complementary function, as it is used to strengthen the implementation of existing legislation where legal gaps hinder it. It is not a question of creating a new political sphere, but of extending the reach of an existing one. In this context, according to the interpretation of the European Court of Justice, a distinction can be made between a flexible or a strictly complementary character of the clause.³⁹

The controversial and ambiguous nature of the flexibility clause can arguably be attributed to the use of vague terminology in its wording, as it is written in a way that leaves room for different interpretations. The choice of words such as necessary, objective, and appropriate contributed to this ambiguity, as their meanings are difficult to define with precision.

This ambiguity was not just a linguistic issue, but also posed deeper challenges to the understanding and implementation of the clause. Unclear wording can lead to a wide range of interpretations, resulting in complex legal and political issues. The multiplicity of interpretations could open the door to an unforeseen expansion of the Union's powers at the expense of the sovereignty of member states, making it necessary to regulate this clause to avoid its exploitation in ways not agreed upon in advance.

Section Two: The Flexibility Clause from Rise to Decline:

For several decades, the flexibility clause has been a mechanism for expanding powers and competences, allowing the EU to bypass certain institutional constraints to meet emerging challenges. However, the flexibility clause has undergone transformations that have limited the scope of its use, reflecting political and legal changes within the Union. This section aims to examine the trajectory of the flexibility clause, from being a tool to promote European integration to a phase of decline and limiting its use, highlighting the factors that contributed to this shift.

³⁹ Ibid, p 28.

Subsection 1: The Rise Phase of The Flexibility Clause

Due to the exceptional nature of the flexibility clause, there was initially some uncertainty about how it should be handled or managed. There was a phase before its application became more prominent, during which it was thought that it would remain a mere text on paper⁴⁰. However, later readings revealed a long-standing willingness among member states to act unanimously within the Council to assert a wide range of EU legislative competence⁴¹. Prior to the 1970s, recourse to the clause was extremely rare, but by the late 1960s the Commission began to explore circumstances in which the clause could be relied upon with caution. Notably, it was invoked in 1968 to address a matter relating to customs union and free movement of goods⁴², due to the potential inadequacy of the explicit legal bases contained in the treaties at the time. The clause was also used as a basis for regulating trade in agricultural products before the enlargement of the European Union⁴³.

The political impetus for the use of the flexibility clause became stronger in the later period. The 1972 Paris Conference was an important stepping stone towards greater reliance on the clause, enabling its potential to be further exploited. At that time, member states expressed their desire to maximize the use of all treaty provisions, including the flexibility clause. As a result, practices tended to adopt an expansive interpretation of the clause when it was first introduced. This resulted in a marked increase in EU legislation that used the clause as its legal basis, going beyond the traditional framework of competences conferred by the treaties.⁴⁴ The expanded interpretation was immediately adopted in the famous *Massey-Ferguson* case, making it a milestone in the expansion of the use of the flexibility clause⁴⁵. However, the risk is that this case could open the door to the inclusion of almost any matter within the scope of application of the clause, which raises the fundamental issue of potentially undermining judicial oversight of the transformation of EU competences.⁴⁶

The use of the flexibility clause peaked during the 1970s and 1980s, as member states enjoyed a great deal of freedom in interpreting the flexibility clause, which was represented by Article 235 of the EEC Treaty at the time. This clause provided ample opportunities for the Union to actively engage in regional and environmental policies, despite the lack of coverage of these areas in the Treaties at the time. This expansionist approach continued with Article 308 of the amended EC Treaty, which maintained its corrective role against the traditional interpretation of the principle of conferral set forth in Article 5 of the Treaty on European Union (Maastricht Treaty, 1992).⁴⁷

⁴⁰ Butler, Graham, P 66.

⁴¹ Weatherill, Stephen, (2004), Competence Creep and Competence Control, Yearbook of European Law, Vol 23, Issue 1, P 6.

⁴² Regulation (EEC) No 803/68 of the Council of 27 June 1968 on the Valuation of Goods for Customs Purposes [1968] OJ L148/6.

⁴³ Butler, Graham, op, cit, p 67.

⁴⁴ Ibid, p 67-68.

⁴⁵ Di Biagio, Jacopo, op, cit, p 68.

⁴⁶ Butler, Graham, op, cit, p 68.

⁴⁷ Konstantinides, Theodore, (2012), Drawing the line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause, Yearbook of European Law, Vol. 31, No. 1, p 228.

This clause was subsequently used as the basis for the adoption of legal acts by the EU, which were considered as enforceable regulations due to their general effect and direct application, giving the Union new powers not previously conferred to it, and enabling the EU to legislate in new policy areas in which it did not have explicit legislative competence. The use of this clause has expanded considerably, allowing the Union to intervene in somewhat unexpected areas, and by the early 2000s it was noted that this clause had served as the legal basis for over 700 EU legislative acts⁴⁸.

Many of the policies in the current treaties that have clear legal underpinnings originated from this clause before they later acquired independent legal texts. Intellectual property (IP) law in the EU, a vast field in its own right, is one example that has its origins in this clause. Trademark law was the first aspect of IP that saw the application of Article 352 of the Treaty on the Functioning of the European Union (TFEU) before it later acquired an independent legal basis under current Article 118 of the same treaty⁴⁹. In addition, EU agencies have been established based on this article⁵⁰. The same article was also used to conclude international agreements during its rise⁵¹. Although the legal bases of the Union's treaties have expanded in number and content, the flexibility clause has continued to be heavily relied upon⁵². The evolving application of this clause made it an influential legal basis for EU legislation, but this trend did not last long⁵³.

Subsection 2: The Decline Phase of the Flexibility Clause

The flexibility clause is characterized by the evolving position of legislative and judicial actors in the EU over the years, especially since the interpretation of the law changes over time and is inherently subject to modification. This clause has largely compensated for the incomplete nature of the EU's conferred competences, but its wide use has raised questions as to whether it amounts to a competence – competence principle, i.e. granting the EU the power to acquire new competences implicitly. Thus, it has come to be seen as a way to circumvent formal treaty amendment⁵⁴.

While the period between 1972 and 1973 saw the rise of this clause, 1986 and 1987 marked the beginning of its decline. The Maastricht Treaty and Opinion 2/94 accelerated this decline, and two main reasons can be identified for its declining role:

⁴⁸ Butler, Graham, op, cit, p, p 69.

⁴⁹ Case c-270/12 :Council Regulation (EC) No 40/94 of 20 December 1993 on the Community Trade Mark [1993] OJ L11/1

⁵⁰ Case c-270/12: Opinion of Mr. Advocate General Jääskinen Delivered on 12 September 2013., para 27, p 9. For three examples see: Council Regulation 3245/81/EEC of 26 October 1981 Setting up a European Agency for Co-operation [1981] OJ L328/1; Council Regulation (EC) No 2965/94 of 28 November 1994 Setting up a Translation Centre for Bodies of the European Union [1994] OJ L314/1; Council Regulation (EC) No 168/2007 of 15 February 2007 Establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1.

⁵¹ For example, Council Decision of 3 March 1975 Concluding the Convention for the Prevention of Marine Pollution from Land-Based Sources (75/437/EEC) [1975] OJ L194/5; Council Decision of 25 July 1977 Concluding the Convention for the Protection of the Mediterranean Sea against Pollution and the Protocol for the Prevention of the Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft (77/585/EEC) [1977] OJ L240/1

⁵² Michail Niotis, Sarantis, op, cit, p 10.

⁵³ Butler, Graham , op, cit, p 70.

⁵⁴ Ibid, p 70.

First: The Maastricht Treaty expanded the legal bases of treaties and imposed judicial restrictions. When the Single European Act (SEA) was enacted, new policy areas were included and the scope of Qualified Majority Voting (QMV) was expanded, reinforcing its role as a salient feature⁵⁵.

Second, the progressive application of the subsidiarity principle contributed to reducing the need for this clause, as it came to be seen as unnecessary in some areas of EU legislation, and Opinion 2/94, based on the *Generalized Tariff Preferences* ruling, attempted to limit the external scope of this clause, which affected its role in the European legal framework⁵⁶.

The question of the use of this clause in the context of the SEA was raised in the *Generalized Tariff Preferences* case, where the Court emphasized that “*The choice of the legal basis for a measure may not depend simply on an institution's conviction as to the objective pursued but must be based on objective factors which are amenable to judicial review*”⁵⁷. In an important twist in this case, the Court ruled that “*the very wording of article [352] that its use as the legal basis for a measure is justified only where no other provision of the treaty gives the community institutions the necessary power to adopt the measure in question*”⁵⁸. Accordingly, the EU legislature may not resort to this provision without clear justification. Since then, it has been necessary to use the legal bases identified and available in advance for the adoption of any legal act, and this clause can only be invoked when necessary⁵⁹.

This ruling was quickly confirmed in the Court's subsequent jurisprudence, in particular the paragraph stating that “*the clause use as the legal basis for a measure is justified only where no other provision of the treaty gives the necessary power to adopt the measure in question*”⁶⁰. The result reached in the *Generalized Tariffs* case clearly reflects the warnings in the Advocate General's opinion in *Massey Ferguson* case, which stated that: “*It would certainly be against the spirit of the system created by the Treaty if the Commission or the Council were to consider it necessary to act on the basis of Article [352 of TFEU] in a case where other provisions of the Treaty already clearly provide suitable powers of action.*”⁶¹

⁵⁵ Ibid, p 70-71.

⁵⁶ Ibid, p 71.-72.

⁵⁷ Case-45/86, Commission of the European Communities v Council of the European Communities. *Generalized Tariff Preferences - Action for annulment - Legal Basis - Obligation to State Reasons for Community Measures*, CJEU Reports 1987, Para 11.

⁵⁸ Ibid, Para 13.

⁵⁹ Butler, Graham, op, cit, p 71.

⁶⁰ For Examples See: Case c-350/92, Kingdom of Spain v Council of the European Union. *Action for Annulment - Council Regulation (EEC) N° 1768/92 of 18 June 1992 Concerning the Creation of a Supplementary Protection Certificate for Medicinal Products*, CJEU Reports 1995, Para 26; Case C-271/94 European Parliament v Council of the European Union. *Council Decision 94/445/EC - Edicom - Telematic Networks - Legal Basis*, CJEU Reports 1995, Para 13; Case C-84/94 United Kingdom of Great Britain and Northern Ireland v Council of the European Union. *Council Directive 93/104/EC concerning certain aspects of the Organization of Working Time - Action for Annulment*, CJEU Reports 1996, Para 48. Case C-436/03, European Parliament v Council of the European Union. *Action for Annulment - Regulation (EC) No 1435/2003 - European Cooperative Society (SCE) - Choice of Legal Basis - Article 95 EC - Article 308 EC*, CJEU Reports 2006, para 36.

⁶¹ Case 8-73, Opinion of Mr Advocate General Trabucchi Delivered on 27 June 1973. *Hauptzollamt Bremerhaven v Massey-Ferguson GmbH. Reference for a Preliminary Ruling: Bundesfinanzhof – Germany*. CJEU Reports 1973.

The 1997 Treaty of Amsterdam made no substantive changes to the clause, but it did include some aspects of social policy, providing a new legal basis for legislation previously adopted under it. The Amsterdam Treaty also resulted in the 2001 Laeken Declaration, in which heads of government meeting in the European Council expressed their reservations about how the clause would be used by member states through the EU legislative process, and specifically raised concerns about “encroachment upon the exclusive areas of competence of the Member States”⁶².

There was a consensus in the Laeken Declaration that flexibility should not be based on a lack of transparency or ambiguity regarding the distribution of the Union's competences. It was also agreed that the flexibility clause must not imply that the Union determines its own competences. This clause has caused concern and controversy in many Member States, particularly due to fears of undermining the principle of conferred powers. As a result, most Member States agreed that the conditions for its use should be clarified and tightened⁶³.

Following the revision of the Lisbon Treaty, the new clause (Article 352 of the Treaty on the Functioning of the European Union) was extended to “policies defined in the Treaties”. Since the Lisbon Treaty included explicitly regulated new policies, institutions were prevented from using this clause in those areas. The flexibility clause was further restricted, becoming subject to a special legislative procedure, obliging the Council to take its decisions unanimously after obtaining the approval of the European Parliament. In addition, the Commission is now required to inform national parliaments of proposals based on the flexibility clause, in line with the general oversight of the principles of subsidiarity and proportionality⁶⁴. The Lisbon revision introduced substantial changes to the text of the clause compared to its previous versions in Article 235 of the EEC Treaty and Article 308 of the EC Treaty⁶⁵. Although the Lisbon revision has broadened the scope of application of the clause, it has at the same time limited the possibilities for its use⁶⁶.

Although the scope of use of the flexibility clause has expanded to include issues outside the internal market, the actual use of the clause has declined. Nowadays, the use of the clause has become more complex and the Council's recourse to it has become rare, and there are several reasons for this trend:

- Treaty reforms, whereby the legal bases stipulated in treaties have been strengthened, reducing the need for open provisioning⁶⁷.

⁶² European Council, ‘Presidency Conclusions: European Council Meeting in Laeken, 14 – 15 December 2001, SN 300/1/01 REV 1, 22.

⁶³ Attributable to Unnamed Member States, ‘The European Convention: The Secretariat: Report from Chairman of Working Group V “Complementary Competencies” to Members of the Convention. Subject: Final Report of Working Group V (CONV 375/1/02 REV 1), p 14.

⁶⁴ Serena Rossi, Lucia, op, cit, p 104.

⁶⁵ Di Biagio, Jacopo, op, cit, p 45.

⁶⁶ Serena Rossi, Lucia, op, cit, p 103..

⁶⁷ Fanni, Teinila, (2019) , The problematic Legal Basis: Analysis of the Flexibility Clause as a Legal Basis for the Proposed European Monetary Fund, PhD dissertation, University Of Turku, Faculty Of Law, p 32.

- The increasing number of conferred competences in the treaties has led to stricter requirements and restrictions on the use of the flexibility clause. The requirement of the European Parliament's approval has affected the application of the clause, whereas previously the Commission was only required to consult the European Parliament, and the obligation to notify national parliaments has led to dependency checks when using the clause, making the legislative procedure more complicated due to the exceptional character of the clause⁶⁸. For these reasons, the use of the flexibility clause has become extremely rare, with only three or four times a year, indicating a decline in its effectiveness and involving regulations and decisions of limited relevance⁶⁹.

Conclusion

The flexibility clause is a key legal instrument that allows the European Union to adapt to unforeseen developments and address challenges that may hinder the attainment of its objectives, and contributes to the expansion of the EU's competences in a way that allows it to take measures beyond the scope of its conferred competences, when this is necessary to achieve its common objectives.

This clause reflects the need for legislative flexibility within a complex and constantly evolving legal system, especially in a dynamic international environment that requires quick responses and effective measures. However, it remains a double-edged sword, as it gives the EU the ability to quickly adapt to unforeseen developments, but at the same time it requires strict oversight to prevent any abuse that may affect the sovereignty of member states or lead to an unjustified expansion of the Union's competencies outside the agreed framework.

Therefore, finding a delicate balance between legal flexibility and respect for democratic principles is necessary to ensure that the Union continues to function effectively, in line with the aspirations of member states, without weakening the powers of states or reducing their role in decision-making. Despite the conditions placed on the use of the clause, there are still concerns that it could be exploited to enhance the influence of EU institutions in ways that may lack democratic transparency, especially since the article does not clearly define the objective conditions for its use, which could lead to disputes between member states and EU institutions over the legitimacy of expanding competences. As the EU evolves, the future of the flexibility clause remains a subject of debate, given its varied uses throughout history, as well as new challenges arising from rapid global changes that require quick and effective responses. Maintaining this balance between legal flexibility, adherence to the limits of the principle of competences and respect for the sovereignty of member states is crucial to ensuring the effectiveness of the Union without compromising the principles on which it is based.

⁶⁸ Ibid, p 33.

⁶⁹ Ibid, p 33.

Recommendations

- It may be useful to introduce some amendments to the flexibility clause to define more precise criteria for its use, so that the circumstances under which the flexibility clause can be invoked are clearly defined, and a more specific legal framework that clarifies the cases in which its use is allowed, which will help reduce ambiguity and avoid any misuse or unjustified expansion of powers. Clarify the objectives that can be attained through it, and define the concept of necessity or urgency in this context.
- A more detailed list of guidelines by the Court on how to use this clause would be useful, possibly including a specification of the areas in which the clause can be used, which would help minimize differences in interpretation by the EU institutions.
- Establishing a specific time limit for any measure taken under the flexibility clause is both practical and consistent with the principle of state sovereignty, and a means of limiting the increasing influence of some EU institutions at the expense of the interests of state parties to the Union.

LIST OF REFERENCES:

- Gadkowski, Andrzej (2022)• Limitations to the Implied Powers of International Organizations, Adam Mickiewicz University Law Review, Vol 14. No 5.
- Di Biagio, Jacopo, (2021)• The European Union's Flexibility Clause : an Analysis of its Interpretation, Use and Evolution over time, Luiss Guido Carli University, Faculty of Law.
- Fanni, Teinila, (2019), The problematic Legal Basis: Analysis of the Flexibility Clause as a Legal Basis for the Proposed European Monetary Fund, PhD dissertation, University Of Turku, Faculty Of Law.
- Butler, Graham, The EU Flexibility Clause Is Dead, Long Live the EU Flexibility Clause, In Bakardjieva Engelbrekt, Antonina and Groussot, Xavier, ed. (2019)• The Future of Europe: Political and Legal Integration Beyond Brexit, Oxford, Hart Publishing.
- Michail Niotis ,Sarantis, (2018), The Birth of the EMF Integrating the ESM Into the EU Legal Order: 'Constitutional' Challenges, Master Working Paper, Maastricht Center for European Law.
- Hodun, Milosz, (2014), Doctrine of Implied Powers as A Judicial Tool to Build Federal Politics- Comparative Study on the Doctrine of Implied Powers in the European Union and the United States of America, PhD Dissertation, School Of Law, Reykjavik University.
- Konstadinides , Theodore, (2012), Drawing the line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause, Yearbook of European Law, Vol. 31, No. 1.
- Serena Rossi, Lucia, Does the Lisbon Treaty Provide a Clear Separation of Competences Between EU and Member State, in Biondi Andrea, Eeckhout Piet and Ripley Stefanie (2012)• EU after Lisbon, Oxford University Press, New York.

- Engström, Viljam, (2010), How to Tame the Elusive: Lessons from the Revision of the EU Flexibility Clause, *International Organizations Law Review*, vol.7, no. 2.
- Moull, David, (2004)‘ Lesson the EU should Learn from the Formative Years of the US : Challenges to EU Authority in the Areas of Legitimacy and Interpretive Competence and the Implications for the Conceptualization of the EU, Jean Monnet Centre Euro Med Department of Political Studies - University of Catania.
- Weatherill, Stephen, (2004)‘ Competence Creep and Competence Control, *Yearbook of European Law*, Vol 23, Issue 1.
- Schütze, Robert, (2003)‘ Organized Change towards an 'Ever Closer Union': Article 308 EC and the Limits to the Community's Legislative Competence, in Eeckhout, Tridimas (eds.), *Yearbook of European Union Law*, vol. 22, Oxford University press.

DECISIONS, DECLARATIONS AND OTHER DOCUMENTS:

- Council Regulation (EC) No 168/2007 of 15 February 2007 Establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1. <https://eur-lex.europa.eu>
- the Treaty Establishing a Constitution for Europe [2004] OJ C310/01. <https://eur-lex.europa.eu>
- Council Regulation (EC) No 2965/94 of 28 November 1994 Setting up a Translation Centre for Bodies of the European Union [1994] OJ L314/1. <https://eur-lex.europa.eu>
- Council Regulation (EC) No 40/94 of 20 December 1993 on the Community Trade Mark [1993] OJ L11/1. <https://eur-lex.europa.eu>
- Council Regulation 3245/81/EEC of 26 October 1981 Setting up a European Agency for Co-operation [1981] OJ L328/1. <https://eur-lex.europa.eu>
- 77/585 EEC: Council Decision of 25 July 1977 Concluding the Convention for the Protection of the Mediterranean Sea against Pollution and the Protocol for the Prevention of the Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft. <http://data.europa.eu/eli/dec/1977/585/oj>
- 75/437 EEC: Council Decision of 3 March 1975 Concluding the Convention for the Prevention of Marine Pollution from Land-Based Sources. <http://data.europa.eu/eli/dec/1975/437/oj>
- Regulation (EEC) No 803/68 of the Council of 27 June 1968 on the Valuation of Goods for Customs Purposes. <http://data.europa.eu/eli/reg/1968/803/oj>
- Completing European’s Economic and Monetary Union, the Commission’s Contribution to the Leaders’ Agenda, European Commission, the Role of the Flexibility Clause; Article 352. <https://commission.europa.eu>
- European Council, ‘Presidency Conclusions: European Council Meeting in Laeken, 14 – 15 December 2001, SN 300/1/01 REV 1, 22. <https://www.consilium.europa.eu>
- The European Convention: The Secretariat: Report from Chairman of Working Group V “Complementary Competencies” to Members of the Convention. Subject: Final Report of Working Group V (CONV 375/1/02 REV 1). <https://register.consilium.europa.eu>

TREATIES:

- Treaty on the Functioning of the European Union. <https://eur-lex.europa.eu>

- Treaty on the European Community (EC): <http://data.eu/eli/treaty/ams/sign>

CASES:

- Case c-270/12: Opinion of Mr Advocate General Jääskinen Delivered on 12 September 2013. Case c-270/12. <https://eur-lex.europa.eu>
- Case C-436/03, European Parliament v Council of the European Union. Action for Annulment - Regulation (EC) No 1435/2003 - European Cooperative Society (SCE) - Choice of Legal Basis - Article 95 EC - Article 308 EC, CJEU Reports 2006. <https://eur-lex.europa.eu>
- Case C-84/94 United Kingdom of Great Britain and Northern Ireland v Council of the European Union. Council Directive 93/104/EC concerning certain aspects of the Organization of Working Time - Action for Annulment, CJEU Reports 1996. <https://eur-lex.europa.eu>
- Opinion 2/94, Accession by The Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, CJEU Reports, 1996. <https://eur-lex.europa.eu>
- Case C-271/94 European Parliament v Council of the European Union. Council Decision 94/445/EC - Edicom - Telematic Networks - Legal Basis, CJEU Reports 1995. <https://eur-lex.europa.eu>
- Case c-350/92, Kingdom of Spain v Council of the European Union. Action for Annulment - Council Regulation (EEC) N° 1768/92 of 18 June 1992 Concerning the Creation of a Supplementary Protection Certificate for Medicinal Products, CJEU Reports 1995. <https://eur-lex.europa.eu>
- Case 45/86, Commission of the European Communities v Council of the European Communities, Generalized Tariff Preferences - Action for Annulment - Legal Basis - Obligation to State Reasons for Community Measures, CJEU Reports, 1987. <https://eur-lex.europa.eu>
- Case 45/86, Generalized Tariff Preferences - Action for annulment - Legal Basis - Obligation to State Reasons for Community Measures, CJEU Reports 1987. <https://eur-lex.europa.eu>
- Case-45/86, Commission of the European Communities v Council of the European Communities, Generalized Tariff Preferences - Action for annulment - Legal Basis - Obligation to State Reasons for Community Measures, CJEU Reports 1987. <https://eur-lex.europa.eu>
- Case 8-73, Opinion of Mr Advocate General Trabucchi Delivered on 27 June 1973. Hauptzollamt Bremerhaven v Massey-Ferguson GmbH. Reference for a Preliminary Ruling: Bundesfinanzhof – Germany. CJEU Reports 1973. <https://eur-lex.europa.eu>
- Case 8/73, Hauptzollamt Bremerhaven v Massey-Ferguson GmbH. - Reference for a Preliminary Ruling: Bundesfinanzhof - Germany. - Value for Customs Purposes. -, EJEU Reports, 1973. <https://eur-lex.europa.eu>