

King's College London – Summer School

Candidate no.	R						
Module Title:	European Union Law						
Module Code: (e.g. 5AABC123 )							
Essay no: (e.g. 1 or 2)	1						
Essay Title: (may be abbreviated)	Question 5: "The system of competence enshrined in the Treaties after the reform of Lisbon is a welcome and long-awaited clarification. Now the EU cannot overstep the limits of its competences and of the provisions of the Treaty anymore because there are clear rules on the division of competence between the EU and Member States." Discuss.						
Assignment tutor/group:							
Deadline:	08.08.2013						
Date Submitted:	07.08.2013						
Word Count:	3448						

**The word count, which should preferably be calculated electronically, must be stated accurately above.**

For details of how to calculate the word count, please consult the School handbook. No penalty is exacted for work up to 5% above the word limit. Thereafter two marks will normally be deducted for every 5% above the word limit, until 50% is reached. After 50%, three marks will normally be deducted for each additional 5% above the word limit. These regulations are laid down by the Boards of Examiners in the School of Arts & Humanities.

**DECLARATION BY STUDENT**

This assignment is entirely my own work. Quotations from secondary literature are indicated by the use of inverted commas around ALL such quotations AND by reference in the text or notes to the author concerned. ALL primary and secondary literature used in this piece of work is indicated in the bibliography placed at the end, and dependence upon ANY source used is indicated at the appropriate point in the text. I confirm that no sources have been used other than those stated.

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*Student's note: For logical reasons the examiner's report form has been attached at the very end of this document*

5 The Treaty of Lisbon aimed at “a new strategic goal for the Union in order to  
strengthen employment, economic reform and social cohesion as part of a  
knowledge-based economy”. It intended for the European Union, to become more  
and more competitive and to modernise the European social model.<sup>1</sup> The impact of  
the Treaty of Lisbon was granted, it is one of the biggest developments for the  
10 European Union.

The Lisbon Treaty brought several changes to the Union. One of those fundamental  
changes was a modification in the system of competences, which got renewed,  
clarified and enshrined in the Treaties. The new system of competences introduces a  
15 precise classification for the first time in the founding Treaties, and it distinguishes  
between three main types of competence: exclusive competences, shared  
competences and supporting competences.<sup>2</sup> This change shall guarantee that the  
European Union cannot overstep the limits of its competences.

20 Prior to the Lisbon Treaty it was difficult to decide on the limits of competences.  
There were no general categories of competence and every legal act needed a  
precise analysis of the treaties. The Lisbon Treaty makes provision not only for the  
existence and scope of competence of the European Union, but also for whether the  
competence should or should not be exercised.<sup>3</sup>

25 But how much clarification did the Treaty of Lisbon really bring? Are the rules which  
were set up in the Treaty of Lisbon really lucid? In my following essay I will discuss  
these issues and I will dig deeply into the system competences of the European  
Union in order to find answers to those and other questions, which are arising with  
30 the changes brought forward by the Treaty of Lisbon.

The European Union displays a special international organisation with certain  
authorities as well as particular aims and organs to help reach those aims. In order to  
make that organisation work flawlessly it is essential to set up strict rules and  
35 regulations about the powers of each and every organ. It is a necessity to have  
barriers in order to protect other, maybe weaker, organs from abuse of powers.

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<sup>1</sup> Nixon, Frederick and Artis, Mike, *The Economics of the European Union*, 4<sup>th</sup> Edition, 2007, p. 408.

<sup>2</sup> [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/lisbon\\_treaty/ai0020\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm) (02.08.2013)

<sup>3</sup> [http://fds.oup.com/www.oup.com/pdf/13/9780199576999\\_prelim.pdf](http://fds.oup.com/www.oup.com/pdf/13/9780199576999_prelim.pdf) (02.08.2013)

Barriers are also important in order to prevent organisatory problems within the Union itself.

40 I will start my essay by explaining the principle of conferral in its details and will then continue to move on to the system of competences and the three main types of competences between which the Treaty of the Functioning on the European Union distinguishes. Then I will continue with the special competences with which the European Union is provided and give a brief summary on the exercise of those and  
45 the other competences. My subsequent essay will be rounded off by my own personal statement and opinion about the improvement the European Union has experienced by the renewed competence system and an evaluation about how well the attempt to clarify was enacted.

50 First and foremost it has to be declared that the Lisbon Treaty does not remove every argument that claims the statement of the European Union legislative or judicial action being ultra vires. It does, however, make it less likely that problems brought up by a state of ultra vires might arise.<sup>4</sup> Still, at the same time it also brings new challenges, as for instance the flexibility clause which has a wide range of  
55 possibilities to interpret it <sup>5</sup> and for that reason is a highly discussed matter in literature. I will resume to that issue on a later on point in the following essay.

Now to begin with the Principle of Conferral: Article 5 paragraph 2 nominates the principle of conferral and hence provides the main source to look into in order to find  
60 information and details about the system of competences. Article 5 is one of the most central principles of the European Union and states that any organ of the European Union may only act within the competence which was given to it and not exceed that assigned power. This means that no organ is in power of a general competence to act wherever or whenever it pleases. Yet Article 5 is no absolute rule. In order to  
65 accomplish the aims and goals which were manifested in the contracts of the European Union, TEU and TFEU, the organs were appointed with competences which had previously been perceived by the member states themselves.<sup>6</sup>

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<sup>4</sup> Craig, Paul, *The ecjand ultra vires action: A conceptual analysis*, 2011, p 422

<sup>5</sup> compare with: Craig, Paul, *The ecjand ultra vires action: A conceptual analysis*, 2011, p 423

<sup>6</sup> translated from: Borchartdt, *Die rechtlichen Grundlagen der europäischen Union* 4th edition, 2010, p.222

Nonetheless, the organ is not allowed to overstep a competence and the authorisation to enact a competence for an organ of the European Union is extremely strictly bordered by the contracts of the Union.

As a result in order to perform any legal act it is necessary and obligatory for the organs to have an explicit - or at least by means of interpretation implied - legal foundation which also has to be provable. This stands in contrast to the legislative competence of the national states as the national legislator does not need constitutional power to issue a law (apart from such where a change of fundamental rights is proposed, which is an exception in which a constitutional justification is essential in national law as well).<sup>7</sup> The European Union undoubtedly distinguishes itself in one particular issue from any national state as it has no concept of a competence to enlarge its own competences, the institution of a „Kompetenz-Kompetenz“ does not exist.

The principle of conferral does not only work for institutional powers (as mentioned in Article 5 paragraph 1, 2 TEU), but also the repartition of competences between the member states and the European Union is affected by it. The question which organ of the Union is responsible in one or another case is also a part of the principle of conferral.<sup>8</sup> However the principle of conferral only concerns those acts which are mandatory for either the member states or its citizens, because only those acts might endanger the sovereignty of the member states.<sup>9</sup>

The jurisdiction of the compliance of the principle of conferral is subject to supervision of the European Court of Justice.<sup>10</sup>

The principle of conferral includes the duty of the organs to work together and to be loyal towards each other, which means that - as previously stated -, the organs of the European Union are not allowed to legislate a legal act in a range of which the contracts do not give competence and furthermore nor are they allowed to use any other forms of action than the one which is stipulated in the contracts specifically mentioned facts of case.

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<sup>7</sup> translated from: Pechstein/Koenig, *Die europäische Union* 3rd Edition, 2000, p 82

<sup>8</sup> <http://www.cep.eu/index.php?id=68&title=Prinzip+der+begrenzten+Einzelerm%C3%A4chtigung> (23.10.12)

<sup>9</sup> translated from: Borchart, *Die rechtlichen Grundlagen der europäischen Union* 4th Edition, 2010, p 222

<sup>10</sup> translated from: Borchart, *Die rechtlichen Grundlagen der europäischen Union*, 4th Edition, 2010, p 222

The Treaty on the Functioning of the EU distinguishes specifically between three types of competence<sup>11</sup> and draws up a non-exhaustive list of the fields concerned in each case.<sup>12</sup> There is a very strict classification between exclusive and shared  
100 competence made.<sup>13</sup> The system of competences can altogether be summarised as following:

- **Exclusive competences** (legislated in Article 3 of the TFEU): The term exclusive powers refers to certain areas in which the European Union alone is the only appropriate level for taking an action needed to achieve the objectives of the  
105 treaties.<sup>14</sup> Only the European Union is able to legislate and adopt binding acts in these fields. The Member States' role is therefore limited to applying these acts, unless the Union has authorised them to adopt certain acts themselves.<sup>15</sup> Exclusive competence of the Union relates to the following areas: customs union; the establishing of the competition rules necessary for the functioning of the  
110 internal market; monetary policy for the Member States whose currency is the euro; the conservation of marine biological resources under the common fisheries policy; common commercial policy<sup>16</sup>.

- **Shared competences** (legislated in Article 4 of the TFEU): Shared competences refer to specific areas where the best results can be achieved by a collaboration  
115 between the European Union and the Member States.<sup>17</sup> Both, the European Union and the Member States are authorised to adopt obligatory acts in these matters. However, Member States may exercise their competence only in so far as the European Union has not exercised, or has decided not to exercise its own competence.<sup>18</sup>

120 What's more, if the Member State does not suffice to exercise its competence, then the European Union has been granted to have the power to step in (further details about this possibility are enlisted in the category of supporting competences as well). To shared competence belong for instance the following

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<sup>11</sup> translated from: [http://www.wuu.de/imperia/md/content/ifpol/ifpol\\_institut/webmaster/rechtssystemdereu/sose2013\\_dasrechtssystemdereu\\_6.pdf](http://www.wuu.de/imperia/md/content/ifpol/ifpol_institut/webmaster/rechtssystemdereu/sose2013_dasrechtssystemdereu_6.pdf) (02.08.13)

<sup>12</sup> [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/lisbon\\_treaty/ai0020\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm) (02.08.2013)

<sup>13</sup> compare with: Tosiek, *The European Union after the Treaty of Lisbon – Still an Intergovernmental System*

<sup>14</sup> compare with: Hitris, Theo, *European Union Economics*, 5<sup>th</sup> Edition, 2003, p 56

<sup>15</sup> [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/lisbon\\_treaty/ai0020\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm) (02.08.2013)

<sup>16</sup> <http://www.jhubc.it/ecpr-riga/virtualpaperroom/072.pdf> (02.08.2013)

<sup>17</sup> Hitris, Theo. *European Union Economics*, 5<sup>th</sup> Edition, 2003, p 56

<sup>18</sup> [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/lisbon\\_treaty/ai0020\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm) (02.08.2013)

125 fields: internal market; social policy (for the aspects defined in the treaty);  
economic, social and territorial cohesion; agriculture and fisheries (excluding the  
conservation of marine biological resources); environment; consumer protection;  
transport and many more.<sup>19</sup>

- **Supporting competences** (legislated in Article 6 of the TFEU): The European  
130 Union can only intervene to support, coordinate or complement an action of the  
Member States. Consequently, it has no legislative power in these fields and may  
not interfere in the exercise of these competences reserved for the Member  
States.

The stipulation in Article 5 paragraph 2 makes it obvious that the Union shall only act  
within the limits of the competence conferred on it by the Member States. In contraire  
135 it also shows that any competence not conferred to the European Union remains with  
the Member States.

Apart from the three main categories there are some special competences which the  
European Union is allowed to enact. The European Union has special competences  
in following certain fields<sup>20</sup>:

- 140 • The **coordination of economic and employment policies** (Article 5 of the  
TFEU): The European Union is responsible for ensuring the coordination of  
economic and employment policies. It is required to define the broad direction and  
guidelines to be followed by Member States;
- The Common Foreign and Security Policy (**CFSP**)<sup>21</sup> (Article 24 of the Treaty on  
145 EU): The European Union has competence in all fields connected with the  
Common Foreign and Security Policy. It defines and implements this policy via,  
among many others, the President of the European Council and the High  
Representative of the Union for Foreign Affairs and Security Policy, whose roles  
and status have been recognised by the Treaty of Lisbon. However, the European  
150 Union may not adopt legislative acts in this field.

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<sup>19</sup> Tosiek, Piotr, *The European Union after the Treaty of Lisbon – Still an Intergovernmental System*

<sup>20</sup> [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/lisbon\\_treaty/ai0020\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm)  
(02.08.2013)

<sup>21</sup> compare with Tosiek, Piotr, *The European Union after the Treaty of Lisbon – Still an  
Intergovernmental System* and

[http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/lisbon\\_treaty/ai0020\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm)  
(03.08.2013)

In addition, the Court of Justice of the European Union does not have the competence to give judgment in this area. The competence in the area of Common Foreign and Security Policy is defined in Article 11 paragraph 24 TEU. The competence in this realm covers all the areas of foreign policy and all difficulties relating to the security of the European Union, including the progressive framing of a common defence policy that might even lead to a common defence. The implementation of CFSP, so it is aimed, shall not affect the application of the procedures and the extent of the powers of the institutions which are laid down by the treaties for the exercise of the European Union competences defined elsewhere.<sup>22</sup>

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160 Similarly, the implementation of the policies which are listed elsewhere shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the treaties for the exercise of Common Foreign and Security Policy.<sup>23</sup>

- 165 • The “**flexibility clause**” (Article 352 of the TFEU): This very famous and widely discussed clause enables the European Union to act beyond the power of action conferred upon it by the Treaties if the objective pursued so requires<sup>24</sup>.

However, this clause is framed by a strict procedure and by certain restrictions in terms of its application. The main focus here is to act towards a specific aim which shall be achieved. Furthermore, this aim has to be the realisation of one of the main goals of the treaties and the action has to be necessary (given if the Member State is unable to fulfil the aim on its own). A similar concept to Article 352 was already provided in Article 308 of the European Community and was viewed with suspicion by many who were claiming for a more clear determination and for the elimination of the Community competences.<sup>25</sup> The Laeken Declaration for instance expressly asked whether Article 308 of the European Community ought to be reviewed in the light of the challenges of preventing the “creeping expansion of competences” from taking national and regional powers.<sup>26 27</sup>

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<sup>22</sup> Tosiek, Piotr, *The European Union after the Treaty of Lisbon – Still an Intergovernmental System*

<sup>23</sup> Cf. Article 25b and Article 40 TEU, compared with: [http://eur-](http://eur-lex.europa.eu/en/treaties/dat/12007L/htm/C2007306EN.01001001.htm)

[lex.europa.eu/en/treaties/dat/12007L/htm/C2007306EN.01001001.htm](http://eur-lex.europa.eu/en/treaties/dat/12007L/htm/C2007306EN.01001001.htm) (04.08.2013)

<sup>24</sup> compare with: [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/lisbon\\_treaty/ai0020\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm) and [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/treaties\\_singleact\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_singleact_en.htm) (03.08.2013)

<sup>25</sup> compare with: Craig, Paul, *The *ecjand ultra vires* action: A conceptual analysis*, 2011, p 423

<sup>26</sup> Laeken Declaration, European Council, 14-15 Dec 2001, p.22

<sup>27</sup> [http://europa.eu/legislation\\_summaries/glossary/laeken\\_declaration\\_en.htm](http://europa.eu/legislation_summaries/glossary/laeken_declaration_en.htm) (04.08.2013)

180 The now enshrined flexibility clause in Article 352 TFEU can serve as the  
source for competence in almost all areas of European Union law. There has  
been sufficient concern about an over-expansive use of the flexibility clause,  
yet there are numerous reasons for why, at least after the treaty of Lisbon, an  
over-expensive use of the Article 352 TFEU seems highly unlikely: The  
185 requirements in order to be authorized to use Article 352 TFEU are even more  
restrictive than they used to be in Article 308 of the Community. For instance  
there is now a required unanimity to use this power. In an enlarged European  
Union compulsory unanimity for the authorisation makes it extraordinarily  
difficult to enact the Article. Furthermore the consent of the European  
Parliament is required.<sup>28</sup> In the end it also has to be said, that national  
190 parliaments are now, after all the negotiations on Article 308 of the European  
Community, exceedingly alerted to the use of the flexibility clause. Hence,  
rationality and precaution will prevent any form of abuse enacted via Article  
352 TFEU.

The exercise of Union competences is subject to three fundamental principles which  
195 appear in Article 5 of the TEU. The definition of the European Union competences  
greatly facilitates the proper application of all these principles:<sup>29</sup>

- **The principle of conferral:** This principle has already been discussed on an earlier stage in my essay and I will for that reasons not go over the pro and contra arguments and issues of it for a second time.
- 200 • **The principle of proportionality:** the exercise of European Union competences may not go a step further than to what is necessary to achieve the objectives of the Treaties;
- **The principle of subsidiarity:** The Maastricht Treaty enshrined the principle of subsidiarity by asserting that decisions should be “taken as closely as possible to  
205 the citizens” but nevertheless extended the competences of the institutions in several directions.<sup>30</sup> It can, for instance, now be taken as granted that for shared

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<sup>28</sup> compare with: Craig, Paul, *The ecj and ultra vires action: A conceptual analysis*, 2011, p 423

<sup>29</sup> [http://europa.eu/legislation\\_summaries/institutional\\_affairs/treaties/lisbon\\_treaty/ai0020\\_en.htm](http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0020_en.htm)  
(02.08.2013)

<sup>30</sup> Leonard, Dick, *Guide to the European Union*, 8<sup>th</sup> Edition, 2002, p 91



competences the European Union may only intervene if it is capable of acting more effectively than the Member States.

210 Because of the principle of subsidiarity the competences of the Member States shall be treated with consideration. It is additionally the central criteria for all organs and for every legal action between the European Union and any Member State.<sup>31</sup>

215 Taking into account how much the European Union has changed during the last few years already it has to be said, that a clarification of competences was desperately needed in order to keep the Union functioning and the tasks and duties accomplishable.

220 The driving force behind the formation of the European Union, the earliest and most influential of all existing integration schemes, was the political unity of Europe with the aim of realising eternal peace in the Continent.<sup>32</sup> This aim can only be reached if we have a functioning system of competences to prevent any conflicts of competences and thereof following uncertainties to happen.

225 It has to be taken into consideration that in the European Union are national and european levels of government, a fact which makes the search for a system of government complex. I assume that before the Treaty of Lisbon there may have arisen more problems about competence in the legal authorities than now, as before the Treaty of Lisbon the allocation of responsibilities was not as throughout structured as it is now.<sup>33</sup>

230 The question which arises all-time is whose task should it be to take proper policy measures and legal actions.<sup>34</sup> Furthermore, there has to be a balance kept between regulating too much or regulating too little: The question whether there shall be more European Union legislation or less is everlasting<sup>35</sup>.

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<sup>31</sup> translated from: [http://www.wwu.de/imperia/md/content/ifpol/ifpol\\_institut/webmaster/rechtssystemdereu/sose2013\\_dasrechtssystemdereu\\_6.pdf](http://www.wwu.de/imperia/md/content/ifpol/ifpol_institut/webmaster/rechtssystemdereu/sose2013_dasrechtssystemdereu_6.pdf) (02.08.13)

<sup>32</sup> El-Agraa, Ali M, *The European Union – Economics & Politics*, 6<sup>th</sup> Editon, 2001, p.16

<sup>33</sup> compare with: Hitris, Theo. *European Union Economics*<sup>5</sup>, 2003.p 56

<sup>34</sup> Hitris, Theo, *European Union Economics*, 5<sup>th</sup> Edition, 2003, p 225

<sup>35</sup> compare with: Leonard, Dick. *Guide to the European Union*, 8<sup>th</sup> Edition, 2002, p 292.

The methodological change demanded by Lisbon might have an impact on the existence of the case law system, as it is another giant step towards more codification.<sup>36</sup>

235 The new division of competences between the European Union and the Member States will inevitably bring borderline problems between exclusive and shared competence.

For instance ambiguities are to be found regarding the relationship between competition rules (exclusive competence) and internal market (shared  
240 competence).<sup>37</sup> Paul Craig mentions in the Cambridge Law Journal 2012 that the same problems can also arise between shared competences and the category of supporting, co-ordinating or complementary action. As an example for this argument he states the possible intersection of different competences regarding the area of social policy which does not have a clear attribution.<sup>38</sup> The development of  
245 effectiveness is also not without any problems. It might be argued that the sphere of criminal law is basically too important or too different from any other legal subject matter to be included in a newly generated wide ranging European Union competence. On the other hand the counter argument that in several procedural terms the Courts reasoning fell short of justification and therefore such steps in order  
250 to improve a laid out system of competences should be taken may be brought up.<sup>39</sup>

Boundary problems as between the categories and the determination of which category is chosen may however be of real importance since different legal consequences flow from each category.<sup>40</sup> Moreover, inclusion in the category of exclusive competence hinders Member States from taking any kinds of legally  
255 binding action within the area in question, unless there is a specific allowance from the European Union to do so.<sup>41</sup> It is therefore undeniable that there will still be several difficulties and issues to deal with in comprehensive reviews about certain imprecise topics.

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<sup>36</sup> Hatzopolous, *The court's approach to services (2006-2012): From Case Law to Case Load?*, 2013

<sup>37</sup> *Publication Review by Riccardo Sciaudone: Lisbon Treaty: Law, Politics and Treaty Reform*

<sup>38</sup> compare with: Craig, Paul, *Publication Review by Riccardo Sciaudone: The Lisbon Treaty: Law, Politics and Treaty Reform*

<sup>39</sup> compare with: Craig, Paul, *The ecjand ultra vires action: A conceptual analysis*, 2011, p 401

<sup>40</sup> compare with: Craig, Paul, *The ecjand ultra vires action: A conceptual analysis*, 2011, p 424

<sup>41</sup> Article 2 paragraph 1 TFEU

260 Coming to an end it has to be said that it is in any case an improvement to see that  
the Member States have obviously come clean with the decision that their best  
interests are served by partnership and co-operation between them rather than war  
and rivalry.<sup>42</sup>

265 To agree to the arrangements as they are laid out in Lisbon was certainly a step  
towards more legislation than before, but also a step towards a European Union that  
will be ready to take more Member States and go towards a bigger and brighter  
future than before, ready to settle its remaining issues.

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<sup>42</sup> Hitris, Theo, *European Union Economics*, 5<sup>th</sup> Edition, 2003,p 56

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- Craig, Paul, Publication Review by Riccardo Sciaudone: The Lisbon Treaty: Law, Politics and Treaty Reform

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- Tosiek, Piotr, The European Union after the Treaty of Lisbon – Still an Intergouvernmental System

## 295 **Links**

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