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The division of competences in
the EU
– a legal matter or political
choice?

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Abbreviations

COSAC	Conference of Community and European Affairs Committees of Parliaments of the European Union
EC	European Community
ECJ	European Court of Justice
EU	European Union
IGC	Intergovernmental Conference
OJ	Official Journal
QMV	Qualified Majority Voting
TEC	Treaty establishing the European Community
TEU	Treaty on European Union

Executive summary

This piece of work is focused on the use of the principle of subsidiarity in the legislative process of the European Union, taking as the starting point the work of the European Convention on the Future of Europe and the Intergovernmental Conference (IGC) 2003-2004. It treats issues related to the division of competences in the EU, which the European Convention confronted in its work between March 2002 and June 2003 and, furthermore, included in its proposal for a Constitutional Treaty. Moreover, it gives an overview of the process of negotiations of the IGC in 2003-2004, to which the Convention's proposed Constitutional Treaty was made subject.

The European Union is moving into a new era in 2004, enlarging its outer borders and its population, bringing in ten new Member States, at the same time deepening its structure, laying down the basis for the European cooperation in a new Constitutional Treaty. The EU of 2004 is a quite different construction than its original counterpart in 1957.

In recent years, the EU has faced a wide range of challenges including the paradox of: on the one hand, the citizens' growing expectations on their political leaders and, on the other hand, the citizens' increasing distrust in the European institutions and politics. The EU needed to become at the same time more democratic, more transparent and more efficient to regain the confidence of its citizens. The citizens needed to see clearer who can be held responsible for the decisions made. The division of competences in the European structure and its safeguard mechanisms therefore needed to be clarified.

Having opened the way to enlargement, the European Council in Nice in March 2000 called for a deep and wide debate about the future of the European Union. This debate should involve all parties concerned: the political, economic and academic circles as well as the Civil Society, alongside representatives of national parliaments and governments. Following on from Nice, the European Council in Laeken in December 2001 clearly stated that the Union needed to become more democratic, more transparent and more efficient. It set out a series of questions regarding: how the division of powers in the EU could be made more transparent; the conclusion as to whether there needed to be a reorganisation of competence;

and how to ensure that a redefined division of competence would not lead to a creeping expansion of the Union or to intrusion in the exclusive areas of competence of the Member States, while at the same time ensuring that the European dynamic would not come to a halt. These questions are also the basic questions asked in this thesis.

The purpose of this work is, primarily, to analyse the innovations of the proposed Constitutional Treaty and to make a first, preliminary assessment of their level of correlation with the goals set out in the conclusions of the European Councils in Nice and in Laeken. Additionally, the text examines to what degree the issue of division of competences can at all be subject to legal principles and judicial control, in relation to the political choices of which it is the consequence.

Currently, the first paragraph of Article 5 of the Treaty establishing the European Community (TEC) provides that “[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”. This principle of conferred powers indicates that all Community action must be founded upon a legal basis laid down in the Treaty.

First and foremost, the legal basis determines the distribution of competences between the Union and Member State levels by transferring a competence to the European Community from the Member States. Where the Community is not empowered to act, the right to action comes within the residuary competence of the Member States.

Moreover, the legal basis determines, together with the principle of subsidiarity and the principle of proportionality, the way in which the Community exercises its competence. The legislative competences conferred on the Community can currently be divided into three types of competences: exclusive, shared and complementary competences.

The principle of subsidiarity was introduced into the TEC by the Maastricht Treaty as a mechanism to regulate the execution of the European Community’s non-exclusive powers. The principle of subsidiarity is still one of many “unresolved” legal issues of the Maastricht Treaty that has not completely produced the results expected from it. Nevertheless, the

principle of subsidiarity is one of the key denominators in relation to the questions of division of competences and its delimitation at EU level.

As a legal concept, subsidiarity is used as an ex-post control of the legality of Community legal acts. Whereas the division of competences in the area of shared competences mainly has been defined on the basis of case law, there has been little case law on the subsidiarity principle as such.

The European Convention proposed to reinforce the principle of subsidiarity, both as a fundamental principle, as laid down in the Constitutional Treaty, and through strengthened political and judicial control. A main innovation of the Constitutional Treaty is the introduction of the national parliaments as democratic check instances in the control of the application of the subsidiarity principle. The increased importance of pre-legislative consultation is an additional advance for the control of the application of the subsidiarity principle.

The dynamic character of the principle of subsidiarity, and its application to the division of competences in the EU, must not and will not change with the adoption of a new Constitutional Treaty. European integration and the actions it requires represent a process which will always include a certain degree of political considerations and which cannot entirely be regulated with legal instruments. However, the responsibility of Heads of State and Government when agreeing on a new Constitutional Treaty is to build in a maximum of democratic safeguards in the European legislative system and to be as open and clear as possible about their political choices, which are in the end inevitable if you want to achieve common goals in a construction like the EU.

1 Introduction

1.1 The democratic challenge

In 2004, the European Union is moving into a new era, moving its outer borders through the biggest enlargement ever in the Union's history. At the same time, the European Union is intensifying, deepening its structure through the unique task of the Intergovernmental Conference laying down the fundamentals of the EU and consolidating its dispersed Treaty texts into one new Constitutional Treaty, which was prepared in 2002 and 2003 by a European Convention. The European Union at the end of 2004 will be a quite different organism than its original counterpart in 1957.

Today's European Union was created gradually over a period of almost fifty years. What was from the beginning purely economic and technical cooperation has, in the last ten years evolved into a wide-ranging, political and legal construction. Cooperation has been established in areas such as environment, transport, social policy, employment and research; even on issues like immigration, police cooperation and justice and home affairs. Even traditionally national policies like foreign and security policy have been made subject to Community coordination.

The European Union's democratic legitimacy has been gradually strengthened in a legislative order which is still to be defined as *sui generis* and comparable with no legal order of a national state, nor that of a federation. Through this development, the most fundamental objective of the Union has, so far, been achieved – maintaining peace. Europe has been at peace ever since the founding of the basis of the European Community.

In recent years, however, the EU has faced a wide range of challenges which have demanded both a widening and a deepening of its structure. The Union is experiencing the effects of expansion, just having brought in ten new Member States potentially bringing in even more. This evolution takes place in a fast changing, globalised world, in which Europe has a leading role to play. At the same time, internally, the Union faces the paradox of: on one hand, the citizens' growing expectations on their political leaders and,

on the other hand, the citizens' increasing distrust in institutions and politics.¹

The European Union needs to become at the same time more democratic, more transparent and more efficient to regain its citizens' confidence. The growing gap between the citizens and the institutions governing Europe must be reduced. One important task is therefore to clarify who can be held responsible for the decisions made and to make clearer the division of competences between the Union and the Member States. The citizens need to know at what level what responsibilities are taken.

A series of questions, asked in the Declaration of Laeken on the future of the European Union, treats the division of competences and the issue of how to make it clearer and more transparent.² These questions were essential for the European Convention, working in 2002 and 2003 to prepare a draft for a future Constitutional Treaty, and for the IGC convened to negotiate and approve the proposed Constitutional Treaty³.

¹ Since 1973, the European Commission has been monitoring the evolution of public opinion in the Member States in so called Eurobarometer surveys, helping the preparation of texts, decision-making and the evaluation of its work. These surveys and studies address major topics concerning European citizenship. These surveys have, for example, shown in recent years a growing mistrust among the European citizens in the institutions governing Europe. See for example European Commission Eurobarometer – Public Opinion in the European Union, Report Number 55, Release: October 2001, Fieldwork: April-May 2001

² See SN 273/01, Laeken Declaration – The Future of the European Union, European Council, 15 December 2001

³ The European Council which met in Laeken, Belgium, on 14-15 December 2001 convened the European Convention on the Future of Europe. The European Convention was asked to draw up proposals on three subjects: how to bring citizens closer to the European decision-making and the European institutions; how to organise politics and the European political area in an enlarged Union; and how to develop the Union into a stabilising factor and a model in the new world order. The European Convention assembled the first time on 28 February 2002. The Convention's proceedings led to the drawing up of a draft Treaty establishing a Constitution for Europe, which was presented to the European Council meeting in Thessalonica on 20 June 2003. An Intergovernmental Conference was convened on 4 October 2003 to negotiate and approve the proposed Constitutional Treaty. Just after the finalisation of the work on this thesis, the IGC came to an end when Heads of State and Government reached agreement on the proposed Constitutional Treaty at the European Council in Brussels on 18 June 2004. The Draft Constitutional Treaty referred to in the thesis (CONV 850/03, OJ C 169, 18.7.2003) has been modified to a certain extent and published in a provisional consolidated version in the documents CIG 86/04, CIG 86/04 ADD1 and CIG 86/04 ADD 2. Heads of State and Government will sign the Constitutional Treaty on 29 October 2004 starting a ratification process of two years.

1.2 The basic questions

The questions formulated in the Laeken Declaration concern, among other issues, the division of competences and how this can be made more transparent by making the distinction between the three different types of competences clearer: the exclusive competence of the Union, the competence of the Member States and the competence shared between the Union and the Member States. At what level is competence exercised in the most efficient way and, how is the principle of subsidiarity to be applied?⁴

An additional series of questions should determine whether a reorganisation of competences is needed, having citizens' expectations as a starting point. What responsibilities would a reorganisation place on the level of the Union? And what tasks could better be left to the Member States?⁵

In 2002-2003, these and other questions of fundamental character to the European Union were made subject to the debate of the assembly forming the European Convention on the Future of Europe, composed of the main parties involved in the debate on the future of the Union. It was the task of the European Convention to consider the key issues arising in view of the Union's future development, among those the matter of competence and its delimitation, and present to the Heads of State and Government a proposal for a future Constitutional Treaty.

The issue of competence, its distribution between the European Union and the Member States, the way the matter was treated by the European Convention and the result of the Convention's work as well as the discussions of the IGC in 2003 and 2004 are focal points in this thesis. The text treats the current legal framework, the debate on the question of competence and the proposals of the Convention, before being approved as the new Constitutional Treaty of the European Union by the European Council in June 2004.

The purpose of this work is, primarily, to analyse the innovations of the proposed Constitutional Treaty and to make a first, preliminary assessment

⁴ Questions posed in the Laeken Declaration – The Future of the European Union, European Council, 15 December 2001, SN 273/01, annexed to the Presidency Conclusions of the European Council Meeting in Laeken 14 and 15 December 2001, SN 300/1/01 REV1, p. 21-22.

of the effectiveness of these proposals in achieving the goals set out in the conclusions of the European Councils in Nice 2000 and in Laeken 2004.⁶ To do so, it is important to clarify what the consequences of the new provisions will be in relation to the control of the EU's legal activities and to public trust in European decision-making.

Additionally, this thesis sets out to examine the effect of legal principles and judicial control, compared with the impact of political choice, on the matter of distribution of competences.

1.3 Method and disposition

Following the work of the Convention from its beginning in March 2002 until it presented its final proposals in July 2003 and the negotiations in the IGC from October 2003 until June 2004, I have studied the way in which the division of competences is regulated by the current Treaties, by case law and by general principles. I have outlined the problems related to the division of competences and presented an overview of how the Convention treated these problems in its work.

Furthermore, I have analysed these problems and future challenges on the basis of the proposals of the Convention as well as contributions from the EU institutions and academics to the process of drawing up a new Constitutional Treaty. The discussions of and texts produced by the Convention and, above all, its final proposals to the IGC on a Constitutional Treaty are the primary sources used in this work.

After the introduction (Chapter 1), which describes the main democratic challenge of the EU and the basic questions of this thesis, Chapter 2 explains the background of the work of the European Convention and the IGC. Chapters 3 and 4 are the main substantial chapters. Whereas Chapter 3 contains a comparison between the current system of division of competences between the EU and its Member States, Chapter 4 treats the control mechanisms of the current situation in comparison with the

⁵ *Ibid.*, p. 22.

⁶ Presidency conclusions: European Council Meeting in Laeken, 14 and 15 December 2001; SN 300/1/01 REV 1; Treaty of Nice amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts, Declaration 23, OJ C 80, 10.3.2001, p. 85-86.

Convention's proposals. The two chapters include an analysis of the Convention's proposals from the perspectives of the European Commission, the European Parliament, and from an academic viewpoint.

Chapter 5 gives a short presentation of the IGC process in 2003 and 2004. Chapter 6 provides an analysis in response to the questions set out in the introduction and in the light of the examination of the Convention proposals in Chapters 3 and 4. The conclusions are presented in Chapter 7.

1.4 Delimitation

The democratic challenges faced by the EU and the points raised in the Laeken Declaration not only relate to the question of what *actions* the Union can take according to its competence, but also the question of what *instruments* it could and should use. The amendments to the Treaties have gradually contributed to the increased number of instruments accessible to the Union and made it very difficult to get a clear overview of the legal system. Subsequently, the European secondary legislation tends to be more and more advanced and complex. The issue of how to clarify the division of competences easily leads to the question whether the different instruments would also need to be better defined and potentially reduced.

In addition, the distribution of tasks and powers between the various EU institutions (the horizontal allocation of powers) reflects the vertical allocation of powers and is therefore of relevance for the division of competences between the Union and the Member States.

In conclusion, to give a complete picture of the issue of division of competences in the EU, three different aspects would have to be dealt with: the division of competences between the Union and the Member States (the vertical division of competences), the roles of the EU institutions as a reflection of the share of powers between the European and national levels (the horizontal division of competences) and additionally, the mechanisms established to control the application of the principle of subsidiarity regulating the division of competences.

However, for reasons of limitation of aim and scope, I have restricted my work to the question regarding the vertical division of competences and how to control compliance with the basic principles guiding this division. The

text treats the distribution of powers between, on the one hand, the EU institutions and, on the other hand, the Member States without entering into the discussion about the roles of the various EU institutions.

The work does neither include any judgement of the extent of the Union competences, as this would be of a more political character, nor of the attribution of policies to certain categories of competence. In this regard, it is essentially limited to principle questions of a more legal character about the definition, division and delimitation of competences.

2 Background

2.1 Problems

In order to assure legitimacy and preserve the democratic values of the European Union, it is of great importance that the definition of the Union's competences is clear to the citizens. It was stated at the Nice and Laeken Summits that it is difficult for the European citizens to understand the delimitation of EU powers and that a simplification would be needed.⁷

The Nice and Laeken Councils requested that the division of competence between the European Union and the Member States be examined in order to define in what areas the Union should take less action and in which it should take more.⁸ The need for clarification of the division between the exclusive, the shared and the complementary competence areas was pointed out.

2.2 Nice

Having opened the way to enlargement, the European Council in Nice called for a deep and wide debate about the future of the European Union.⁹ This debate should involve all parties concerned: the political, economic and academic circles, as well as civil society along representatives of national parliaments and governments. Not only EU Member States should give their opinion, but also the candidate countries and accession states were associated to the process. The following questions were identified as essential to the process:

- how to establish and ensure a more precise delimitation of powers between the EU and the Member States, reflecting the principle of subsidiarity;
- the status of the Charter of Fundamental Rights of the European Union;

⁷ Presidency conclusions: European Council Meeting in Laeken, 14 and 15 December 2001; SN 300/1/01 REV 1; p. 21-23; Treaty of Nice amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts, Declaration 23, OJ C 80, 10.3.2001, p. 85-86.

⁸ *Ibid.*

⁹ The Treaty of Nice, Declaration 23, OJ C 80, 10.3.2001, p. 85, point 3.

- a simplification of the Treaties in order to make them clearer and more understandable;
- the role of national parliaments in the European architecture.

Since Nice, it was agreed that the preparatory work for the IGC 2004 should be taken forward by the establishment of a Convention of a similar concept to that formed to develop the proposals for the EU Charter of Fundamental Rights.¹⁰

2.3 Proposals “à traité constant” – the European Commission’s governance initiative

According to the European Commission, political leaders throughout Europe are facing the paradox of, on one hand, European citizens expecting them to find solutions to the major problems confronting our societies and, on the other hand, the increasing distrust of or indifference vis-à-vis the political institutions.¹¹ The Commission notes that people expect the European Union to be a central actor in the growing globalisation for economic and human development and to respond to everything from environmental challenges to financial needs and concerns over unemployment, food safety and crime.¹²

Having considered the above problem, the President of the then incoming Commission identified in early 2000, as one of its four priorities, the reform of European governance. Political developments since then have highlighted the fact that the Union faces a double challenge: to meet the need for urgent action to adapt governance under the current Treaties but also to cope with the need for a broader debate on the future of the European Union, including fundamental changes of the current Treaties. This later debate took off with the European Council in Nice.¹³

The urgent need for reform of European governance resulted in a Commission White Paper, which was published in July 2001 and which sets

¹⁰ The Treaty of Nice, Declaration 23, OJ C 80, 10.3.2001, p. 85, point 3. See further title 2.5.

¹¹ COM(2001) 428 final, European Governance, A White Paper, OJ C 287, 12.10.2001.

¹² *Ibid.*

¹³ The Treaty of Nice, Declaration 23, OJ C 80.10.3.2001, p. 85-86.

out a number of proposals for changes based on five underlying principles: openness, participation, accountability, effectiveness and coherence.¹⁴

The Commission's White Paper states that the problem of lack of confidence in political deliveries in Europe is particularly acute at the level of the European Union due to a poorly understood and complex system. It proposes opening up the policy- and decision-making processes to get citizens and organisations representing the citizens, as well as democratically elected bodies at national and sub-national levels, better involved in shaping and implementing EU policy and legislation.¹⁵ Moreover, the White Paper highlights the complexity of European legislation and points out the need for extensive simplification of the Union's legislative framework.

The Commission was not mandated to propose Treaty changes within the framework of its governance initiative. The White Paper was an opportunity, however, to stress the importance of and need for renewal of the Community method by abandoning the top-down perspective to the benefit of an enforced bottom-up approach and by complementing legislation with alternative measures.¹⁶ In connection with the formulation of the White Paper on Governance, a more in-depth study of a range of consequences of Community legislation was also initiated.¹⁷

2.4 Laeken

Following on from Nice and the European governance debate, the Laeken declaration clearly stated that the Union needed to become more democratic, more transparent and more efficient.¹⁸ Under the title *A better division and definition of competence in the European Union* it sets out a series of questions regarding:

¹⁴ COM(2001) 428, European Governance, A White Paper, OJ C 287, 12.10.2001, p. 7.

¹⁵ *Ibid.*, p. 1-2.

¹⁶ *Ibid.*, p. 2, 19.

¹⁷ See e.g. the Communication on Impact Assessment, COM(2002) 276 final, 5.6.2002, and the Communication on European Governance: Better Lawmaking, COM(2002) 275 final, 5.6.2002. The importance of pre-legislative consultation is stressed in both, as a means to enhance the understanding of the necessity, aim and extent of Community action.

¹⁸ The European Council in Laeken took place in December 2001, more than a year after the European Council in Nice (March 2000). It took up the debate on the future of the EU, which was initiated at Nice. See SN 273/01 The Future of the European Union, Laeken Declaration, Chapter II "Challenges and Reforms in a Renewed Union".

- 1) How the division of powers can be made more transparent;
- 2) The determination, taking citizens' expectations as a guide, whether there needs to be any reorganisation of competence; and
- 3) How to ensure that a redefined division of competence does not lead to a creeping expansion of the Union or to encroachment upon the exclusive areas of competence of the Member States and their regions while at the same time ensuring that the European dynamic does not come to a halt.

These questions can be further developed in a number of more specific questions to address when treating the matter of division and definition of competences. To achieve a more transparent system the distinction between the different types of competence – the exclusive competence of the Union, the competence of the Member States and the shared competence of the Union and the Member States – needs to be made clearer. Should it also, subsequently, be made clear that any powers not assigned by the Treaties to the Union fall within the exclusive sphere of competence of the Member States? And how is the principle of subsidiarity to be applied?

Bearing in mind the citizens' decreasing confidence in the Union, the question also needs to be addressed what missions should be designated to the Union and, vice versa, what tasks could better be left to the Member States? What changes needed to be made to the Treaties in order to clarify or modify the distribution of competences in various policy areas? How, for example, should a more coherent common foreign policy and defence policy be developed? And how could cooperation in the field of social inclusion, the environment, health and food safety be intensified?

Then again, should the day-to-day administration and implementation of the Union's policy not be left to the Member States and, where their constitutions so provide, to the regions? Should they not be provided with clearer guarantees that their spheres of competence would not be affected?

In parallel with the clarification of the division of competence, a certain flexibility needs to be kept to ensure the dynamics of the European construction. In the future as well, the Union must be able to react to new challenges and developments and to explore new policy areas. Should the Articles 95 and 308 of the Treaty be reviewed for this purpose in the light of the "acquis jurisprudentiel"?

All the questions, rather pointing at the need to defend State prerogatives from interference by the EU than the support and supplement from one level to the other, could also be translated into the question of how to best take forward the mutually beneficially relationship between the Union and the Member States.¹⁹ This leads us to one of the more fundamental questions: at what level is competence exercised in the most efficient way?

At the end, the Laeken Declaration conveyed the decision of the European Council to convene a Convention composed of the main parties involved in the debate on the future of the Union in order to prepare for the IGC 2004 as broadly and as openly as possible.²⁰

2.5 The European Convention

Why a convention? A simple answer would be that the traditional European system for Treaty changes, based on Intergovernmental Conferences, was no longer effective and that a new concept had to be established to replace the old system – or at least widen the perspective of the old system. Something had to be done about the complex constitutional framework caused by treaties changing treaties, which had in their turn been changed by other treaties.

What is a convention? According to Ana Palacio²¹, a Convention is a revolution in the international public law, a revolution next to the international treaties and international institutions. In a region where the entire concept of borders has changed and in a context where the actors have changed, the institutions have to be adapted to the new circumstances. Under those circumstances a new path must be determined in order to deal with the important questions. The Laeken Declaration pointed out that path and established the composition that would form the Convention on the Future of Europe.²²

¹⁹ Weatherill, Stephen, *Competence*, Convention Document CONV 703/03. See further about the views of Weatherill below in Chapter 3.3.3.

²⁰ SN 273/01 The Future of the European Union, Laeken Declaration, Chapter III “Convening of a Convention on the Future of Europe”.

²¹ Ana Palacio was the Spanish Government representative in the Convention Presidium.

²² Ana Palacio’s explanation while chairing the Convention’s Contact Group (Civil Society) for regions and local authorities, meeting with representatives of local and

In order “to pave the way for the next Intergovernmental Conference as broadly and openly as possible”²³ the Convention was conferred with the task of treating key issues related to the Union’s future development.

The Convention was composed of 15 national government representatives (one from each Member State), 30 members of national parliaments (two from each Member State), 16 members of the European Parliament and two Commission representatives. The countries that at the time were accession states and candidate countries were represented in the same way as the Member States (one government representative and two national parliament members), with the right to take part in the proceedings without, however, being able to prevent any consensus emerging among the Member States.²⁴

The Presidium of the Convention was composed of the Convention Chairman and Vice-Chairmen and nine members drawn from the Convention (the representatives of all the national governments holding the Council Presidency during the Convention, two national parliament representatives, two European Parliament representatives and two Commission representatives).

The European Council appointed Mr. Valérie Giscard d’Estaing as Chairman of the Convention and Mr. Giuliano Amato and Mr. Jean-Luc Dehaene as Vice-Chairmen.

The Convention as a model was first used, in the European Union context, when the EU Charter of Fundamental Rights was drawn up, in parallel with the Intergovernmental Conference in 2000. Mr. António Vitorino²⁵ has stated in a speech at the Humboldt University in Berlin that the Convention model as such is valid only if it is part of a constitutional framework incorporating the various European sources of legitimacy, both at national and European level. In his opinion, this was the added value of the Convention that outlined the Charter of Fundamental Rights. Its members agreed on having a political discussion on a project of shared values and did

regional authorities in Brussels on 10 June 2002. See CONV 120/02 Contact groups (Civil Society), 19 June 2002 (21.06), p. 12-15.

²³ SN 273/01 The Future of the European Union, Laeken Declaration, Chapter III.

²⁴ *Ibid.*

²⁵ European Commissioner for justice and home affairs. António Vitorino was one of the Commission’s two representatives in the Convention.

not use the Convention as a basis to legitimate individual interests, which is usually the case in an Intergovernmental Conference.²⁶

As a method, the “first” Convention must be described as quite successful regardless its substantial result. To make the “second” Convention a successful means of conducting the debate on the future of Europe, António Vitorino saw three essential procedural conditions: independence, clear-cut discussion and decision-making arrangements, the quadripartite structure²⁷

Despite initial hesitation among some national Leaders to the use of a “constitutional Convention”, fearing national competences being bypassed by the pure discussions of the Convention, and of the Chair of the first Convention, who did not believe in transferring the method to a different context, several advantages were envisaged with the Convention method.²⁸

If completed in a Convention, the debate preparing the IGC 2004 would be signified by transparency and participation with access for all citizens through the Internet to the documents produced. The issues addressed would not only be national interests but matters of trans-national importance, which could also be represented by other than national government representatives since the composition would be much larger than in an IGC. The debate would not only be a debate among Member State governments, but also include representatives of national parliaments, the European Parliament, the European Commission and observers from the Committee of the Regions, the Economic and Social Committee, social partners and the Ombudsman. In addition, members of the Civil Society and representatives from regional and local government could be heard in special thematic hearings. Moreover, the Convention would be open not only to current EU Member States, but also to the acceding states and candidate countries.²⁹

The mandate of the Convention was limited by Article 48 TEU requiring an Intergovernmental Conference to be convened to amend the Treaties, and

²⁶ *The Convention as a model for European constitutionalisation*, speech given by Commissioner António Vitorino at the Walter Hallstein Institute for European Constitutional Law at the Humboldt University in Berlin, 14 June 2001.

²⁷ *Ibid.*

²⁸ See e.g. the views of Roman Herzog, Chair of the Convention on the EU Charter of Fundamental Rights, in Frankenberger, K-D, *Ist Europa reif für eine Verfassung*, Frankfurter Allgemeine Zeitung, 14 May 2001.

²⁹ See Kämpf, A., *Auch Methode prägt Ergebnisse – Mit einem Konvent zur Reform der Europäischen Union*, in *Der Vertrag von Nizza aus föderalistischer Sicht*, p. 77-82.

any decision taken by the Convention on a future Constitution was therefore be excluded. Given that the IGC 2004 was already planned, the work of the Convention could serve as a preparation on broad basis.

The main procedure related question was most likely whether the consensus method would be sufficiently effective. One could claim that a proof of the success of the consensus method should have been an efficient IGC 2004 without major issues yet to negotiate, which has not been the case. However, the method for Treaty changes based only on Intergovernmental Conferences had, in any event, proved to no longer be sufficiently effective and new elements had to be brought into the process and tried. To avoid further distrust in the EU decision-making processes, efforts had to be made to open up the process to the large public and stimulate a broader debate.

3 The division of competences between the EU and its Member States

3.1 The current situation

The current system for the allocation of competence between the European Union and the Member States can be described as follows.

The first paragraph of Article 5 TEC provides that “[t]he Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”. This principle of conferred powers indicates that all Community action must be founded upon a legal basis laid down in the Treaty.³⁰

Primarily, the legal basis determines the division of competences between Union and Member State level by transferring a competence to the European Community from the Member States. Where the Community is not empowered to act, the right to action comes within the residuary competence of the Member States. Additionally, the legal basis determines, together with the principle of subsidiarity and the principle of proportionality, the way in which the Community exercises its competence.

The first paragraph of Article 5 TEC makes a distinction between Community powers depending on their legal basis, and competences which appear necessary in order to obtain the objectives assigned to the Community by the Treaty. In the original Treaties, legislative competence was generally conferred upon the Community on the basis of the objectives to be attained and the means for doing so.³¹ Successive revisions of the Treaties have replaced this method in certain areas with the result that the Union’s legislative competence is defined both in terms of its objectives and subjects in certain areas.

³⁰ See, for example, Lenaerts, K. and Van Nuffel, P., *Constitutional Law of the European Union*, Sweet & Maxwell, 1999, p. 88.

³¹ Treaty on the European Community, OJ C 325, 24.12.2002 (Consolidated version), Article 2-3.

The legislative competences conferred on the Community can currently be divided into three types: exclusive, shared and complementary competences.

3.1.1 Exclusive competence

In a number of areas, the Union alone may adopt legislative rules. Any intervention of the Member States is in principle excluded, irrespective of whether or not the Community itself has acted. The areas in which the Community has exclusive competence are currently not defined in the Treaties. These have been determined through Court practice. For example, in Opinion 1/75 the European Court of Justice recognised the exclusive nature of the common commercial policy covered by Article 133 TEC.³²

It is not clear which areas should be regarded as falling within the exclusive jurisdiction of the Community.³³ The Commission has indicated that the following areas fall within the exclusive jurisdiction of the Community: the removal of barriers to the free movement of goods, persons, services and capital, the common commercial policy, the general rules on competition, the common organisation of agricultural markets, the conservation of fisheries resources, and the essential elements of transport policy.³⁴ The Commission has made clear, however, that “*The demarcation of this block of exclusive powers will have to change as European integration progresses*”.³⁵

The European Parliament would add to this list: association treaties, monetary policy where the euro area is concerned, the running of the common foreign and defence policy, the legal basis of the common area of freedom and security and the funding of the Union budget.³⁶

The ECJ has taken the view that whenever the Treaty gives the Community a power to enact binding measures, and the Community exercises that

³² Opinion 1/75, [1975] ECR 1355.

³³ See Emiliou, Nicholas, *Subsidiarity: Panacea or Fig Leaf?* in Legal Issues of the Maastricht Treaty, edited by O’Keeffe, D., Twomey, P., p. 74f.

³⁴ The principle of subsidiarity, Communication of the Commission to the Council and the European Parliament, COM Doc SEC(92) 1990, 27 October 1992, p. 7.

³⁵ The principle of subsidiarity, Communication of the Commission to the Council and the European Parliament, COM Doc SEC(92) 1990, 27 October 1992, p. 8.

³⁶ In its Resolution on the division of competences between the European Union and the Member States P5_TA(2002)0247, adopted on 16 May 2002, based on the Lamassoure Report (Constitutional Affairs Committee) FINAL A5-0133/2002, paras. 23-24.

power by adopting legislation or entering into an international agreement, that area is regarded as falling within the exclusive competence of the Union.³⁷

3.1.2 Shared competence

Most Treaty provisions allow Member States to act with a view to attaining the objectives of the Treaty. The Union and the Member States have *shared* or *concurrent* competence in these areas. The Member States may legislate until such time and insofar as the Community has legislated in a given area. The power of the Member States ceases to exist once the Community actually exercises its own competence – the pre-emptive effect of Community law.³⁸

The principle of pre-emption has been established through the practice of the ECJ rather than in the Treaties. The doctrine of pre-emption is closely linked to the principle of the primacy of Community Law over national law, which was developed early in the ECJ practice in the *Costa v. Enel* Case.³⁹ The ECJ confirmed, moreover, in the *ERTA* Case from 1970 the principle that Member States must refrain from taking action in a field in which the Community has already legislated.⁴⁰

Lacking a competence catalogue or a similar constitutional framework for the distribution of powers to each level of the Union, which is common in federal structures, the extent of the Union's legislative action in the areas of shared competence is governed mainly by the principle of subsidiarity and that of proportionality.

3.1.2.1 The development of the principle of subsidiarity

The distribution of competences between the various levels of a federal structure is normally determined by certain fundamental principles, one of which is that of subsidiarity.⁴¹ This principle, which can be interpreted in a

³⁷ See ECJ Case 22/70 *Commission v. Council (ERTA)*, [1971] ECR 263, p. 275.

³⁸ *Ibid.*

³⁹ ECJ Case 6/64, *Costa v. Enel*, [1964] ECR 585.

⁴⁰ ECJ Case 22/70 *Commission v. Council*, [1970] ECR 263, p. 275.

⁴¹ See Nergelius, Joakim, *Amsterdamfördraget och EU:s institutionella maktbalans*, Norstedts Juridik, 1998, p. 125ff. See also Zetterquist, Ola, *A Europe of the Member States*

number of different ways, depending on its legal or political context, generally relates to the level at which, in a structure with several levels of decision-making, a decision is best taken to be the most effective.

As regards the European Union, the principle of subsidiarity was introduced into the EC Treaty by the Maastricht Treaty as a mechanism to regulate the execution of the European Community's non-exclusive powers.⁴² As such, the principle would apply only to Community or first pillar issues.⁴³ However, the Treaty on European Union (TEU), covering both second and third pillar provisions, points out in its Article 2 that the "*objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 5 of the Treaty establishing the European Community*".⁴⁴

Subsidiarity appeared on the political agenda of the EU in the 1990's, in reaction to the EU's progressive acquisition of powers and due to arising fear that the exercise of EU competences would increasingly interfere with issues of national or sub-national competence.

The legal character of the principle, which was first introduced through political agreement on its application, was enforced when the principles of subsidiarity and proportionality were integrated in a special protocol, annexed to the EC Treaty by the Treaty of Amsterdam (the Amsterdam Protocol).⁴⁵ The protocol was an attempt to provide greater clarity in

or of the Citizens, Two philosophical perspectives on sovereignty and rights in the European Community, 2002, p. 198f.

⁴² Treaty on European Union, OJ C 191, 29.7.1992, introducing an explicit reference to subsidiarity in Article 3b (currently Article 5 TEC) "*The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.*" A first reference to the principle, however not explicit, was made in the provisions on environment in the Single European Act, OJ L 169, 29.6.1987.

⁴³ The term *Community* is therefore used predominantly (instead of the term *Union*) in relation to division of competences. However, once ratified, the new Constitutional Treaty will remove the pillar structure and the Union will have legal personality.

⁴⁴ Article 2, para. 2, Treaty on European Union, consolidated version OJ C 325, 24.12.2002

⁴⁵ The criteria for applying the principle of subsidiarity were originally set forth by the European Council held at Edinburgh on 11-12 December 1992, Conclusions of the

relation to the application of the principle of subsidiarity and to ensure compliance with this principle.⁴⁶

Currently, the principle of subsidiarity is set out in Article 5 TEC. Moreover, it is stated in the Preamble and in Article 1 TEU that “*decisions are taken [...] as closely as possible to the citizen*”. The principle of subsidiarity should be a guarantee for this concept of proximity. However, this particular provision in the EU Treaty, formulated more like a political objective, can still not have any direct legal effect in Community law.

3.1.2.2 The interpretation and application of the principle of subsidiarity

The principle of subsidiarity is one of many “unresolved” legal issues of the Maastricht Treaty which has not completely produced the expected results.⁴⁷ Nevertheless, the principle of subsidiarity is of key importance in relation to the question of division of competences.

Subsidiarity can be interpreted in various ways and, subsequently, used for various purposes. According to Article 5 TEC, the purpose of the principle of subsidiarity in the EU context is to determine whether decisions should be taken at Union or at national level. The question at what level decisions are taken within the Member States is a matter for national law to regulate, in which Community law cannot interfere. Subsidiarity is presented as a policy assignment with a related “test” to apply – that of comparative effectiveness: Is it better for the action to be taken by the European Union or by the Member States?

Presidency, European Council in Edinburgh, 11-12 December, 1992, SN 456/92, p. 4 and Annex 1, and later in the protocol which was annexed to the EC Treaty by the Treaty of Amsterdam, Protocol (No. 7) on the application of the principles of subsidiarity and proportionality, OJ C 340, 10.11.1997.

⁴⁶ The protocol built on an Inter-institutional agreement from 1993 on procedures for implementing the principle of subsidiarity.

⁴⁷ Toth, A. G., *A Legal Analysis of Subsidiarity* in Legal Issues of the Maastricht Treaty, edited by O’Keeffe, D., Twomey, P., p. 37; See also Convention Document CONV 47/02, *Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored*, Note from Convention Presidium to the Convention, 15 May 2002, p. 16.

Another interpretation of subsidiarity is that of political and democratic character. This follows from the more general interpretation of Article 1 TEU mentioned above.⁴⁸

According to Article 5 TEC, the principle of subsidiarity applies only in areas which do not fall under the Community's exclusive competence. This provision states that there is a legal area in which the Community is exclusively competent to take action. Consequently, the areas of application of the principle of subsidiarity, the areas of shared competence, are being defined negatively as the areas which fall outside the Community's exclusive competence.

The Amsterdam Protocol lays down guidelines for the Commission when applying the principle of subsidiarity. To justify a measure, the Commission must demonstrate that the objectives of the proposed measure cannot be sufficiently achieved by Member State action within the framework of their national constitutional system. Furthermore, the Commission is required to append to legislative proposals a statement demonstrating compliance with the principle of subsidiarity.⁴⁹

Finally, the Protocol requires the Commission to engage in wide-ranging pre-legislative consultation and to limit the burden which would fall on the various levels of governance in case of adoption of the proposal.⁵⁰

The principle of subsidiarity entered into the Community legal order as a legal concept with the entering into force of the TEU. As such, subsidiarity is used as a concept for the ex-post control of the legality of Community legal acts. There has been some debate as to whether the principle of subsidiarity can really be used as the basis of a legal argument to challenge the validity of individual legal acts adopted by the EU institutions.⁵¹ The ECJ and the Court of First Instance are asked ex post, to make a determination of whether the subsidiarity principle has been applied correctly during the legislative process and whether relevant procedures

⁴⁸ See Chapter 3.1.2.1.

⁴⁹ Protocol (No. 7) on the application of the principles of subsidiarity and proportionality, OJ C 340, 10.11.1997, point 4 and 9.

⁵⁰ *Ibid.*, point 9.

⁵¹ See for example *Proportionality and Subsidiarity as General Principles of Law*, de Búrca, G., in *General Principles of European Community Law*, edited by Bernitz, U. and Nergelius, J, p. 103.

have been followed. There has, however, been very little case law on the principle itself.⁵²

3.1.2.3 The challenge of determining competence allocation

A major challenge of the application of the principle of subsidiarity is that neither the EC Treaty nor any other of the current Treaties makes any explicit distinction between exclusive and non-exclusive competences, and those areas and matters which fall within each category. Such a distinction, which is well known in federal constitutions, has instead been introduced in the European legal framework through the case law of the ECJ and in various policy documents produced by the European Institutions.⁵³

On the one hand, this model has created a very flexible system with the possibilities of gradually adjusting the system to the aim of achieving, in the best possible way, European integration. The negative definition in the EC Treaty of the principle of subsidiarity was mainly a formal recognition of a legal situation existing since a long time and an attempt to adjust the Treaties to it.

On the other hand, the disadvantage of this system is the risk of lack of legal certainty by occasionally overridden compliance with the subsidiarity principle due to the fact that the application of the principle requires a political assessment by the Institutions on a case-by-case basis.⁵⁴ One result of this is considered to be the occurrence of Community intervention in areas where the objectives of the intended action could have been sufficiently attained by the Member States.⁵⁵

From a legal aspect, the principle of subsidiarity can be seen as a way to regulate the division of competence between the Union and the Member

⁵² See Case T-29/92 *SPO and others v. Commission* [1995] II-289, ECJ Case C-415/93 *Union Royale Belge des Sociétés de Football association and others v. Bosman and others* [1995] ECR I-4921, ECJ Case C-233/94, *Germany v. European Parliament* [1997] ECR I-2405, ECJ Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453.

⁵³ See e.g. Art. 72 of the German Basic Law, Grundgesetz der Bundesrepublik Deutschland vom 23. Mai 1949 (BGBl. S. 1), zuletzt geändert durch Gesetz vom 26. Juli 2002 (BGBl. I S. 2863); Art. 1 of the American Constitution. United States Code Annotated, Constitution of the United States Annotated, West Publishing Co., 1987

⁵⁴ Convention document CONV 47/02, p. 16.

⁵⁵ The Directive of 29 March 1999 relating to the keeping of wild animals in zoos, OJ L 94, 9.4.1999, p. 24ff, is one example.

States in the areas where they have shared competences.⁵⁶ Given the fact that the distinction between exclusive and non-exclusive competence areas so far remains unregulated, it is nevertheless uncertain whether the principle can yet serve as that regulator.

The considerable political importance, which the principle has gained, could be explained by the need for it, in response to growing concerns of European citizens' over the centralisation of powers to the EU Institutions. The critics in some Member States relate to fears that the current system may lead to a situation where the Community gradually claims larger areas of competence, where Member States lose powers to the EU and, in the long run, the powers are brought further and further away from the citizens.⁵⁷

This is the reason why the Convention got the task, not only to clarify the status of the principle of subsidiarity, but also to explore the failure to comply it. What has to be taken into consideration though, is that the value of the principle is not necessarily connected to the need for a solution to the democratic deficit of the EU. The protection of the prerogatives of the national, regional or local levels does not automatically make the EU more democratic.⁵⁸

“ 1. The question arises of whether clarifications and more detailed criteria should be introduced for the application of the principles of subsidiarity and proportionality, and whether the means to ensure compliance with those principles should be strengthened in particular with regard to the Institutions taking part in the legislative procedure, namely the European Parliament, the council and the Commission. 2. Regarding the introduction of more detailed criteria, the question is whether or not the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Amsterdam Treaty, is sufficient.”⁵⁹

⁵⁶ Palacio González, J., *The Principle of Subsidiarity*, CMLR 1995, p. 355-370.

⁵⁷ See e.g. Hjelm-Wallén, L. and Hallengren, L., *Fyrapunktsprogram inför EU:s framtidsmöte, Lena Hjelm-Wallén avslöjar regeringens fyrapunktsprogram inför EU:s framtidsmöte: "Vi vill ha enhetliga asyllagar i EU"*, Dagens Nyheter Debatt, 28 Februari 2002. Lena Hjelm-Wallén was the representative of the Swedish Government in the European Convention and Lena Hallengren her alternate.

⁵⁸ Nergelius, J., *Amsterdamfördraget och EU:s institutionella maktbalans*, p. 108.

⁵⁹ Convention document CONV 47/02, p. 16.

The relationship between the competences of the Union and those of the Member States in the areas of shared competences has gradually changed. The idea that shared competences would only be another word for competences which have not yet become exclusive is not really applicable anymore. One used to talk about a diminishing scope of the pre-emptive effect of Community Law already after the Maastricht Treaty. In the last ten years concerns have emerged among Member States leading to decision to devise methods for exerting control over European decision-making.⁶⁰

Successive Treaty revision has expanded Community competences but new competences have often been carefully defined. The competence at EU level in, for example, the fields of health, consumer protection and culture, has been defined as supplementary to that of Member States.⁶¹

Moreover, Treaty provisions generally provide only for minimum harmonisation.⁶² Scope for flexibility is provided in the mechanism of enhanced co-operation invented at Amsterdam and adjusted at Nice as well as through the open method of co-ordination.

Finally, the judicial control has become more prominent than in the past. In its *Tobacco Advertising* judgement, the Court of Justice itself insisted on the seriousness with which the limits of the Community's attributed competence must be taken.⁶³

Despite the existence of these forms of "constitutional safeguards", the growing need for a more systematic overall basis for determining competence allocation had to be taken into account by the Convention and the IGC.⁶⁴

⁶⁰ Weatherill, S., *Beyond Preemption? Shared Competence and Constitutional Change in the European Community* in Legal Issues of the Maastricht Treaty, edited by O'Keeffe, D., Twomey, P., p. 31 and *Competence* in CONV 703/03, p. 49f.

⁶¹ Articles 151, 152 and 153 TEC.

⁶² See examples, Articles 137, 153 and 176 TEC, governing competence to legislate in the fields of social policy, consumer protection and environmental protection, which stipulate that national measures that are stricter than the agreed Community standard are permitted provided they are compatible with the Treaty.

⁶³ ECJ Case C-376/98 *Germany v. Council and Parliament* [2000] ECR I-8419.

⁶⁴ See further Chapter 3.2.

3.1.3 Complementary competence

In certain areas the Union confines itself to supplementing or supporting the action of the Member States, or to adopting measures of encouragement or coordination.⁶⁵ The right to adopt legislative acts in these areas remains a competence of the Member States. This category includes economic policy, employment, education, vocational training, culture, trans-European networks, industry, economic and social cohesion, research and development, development cooperation and defence.

3.1.4 Member States' competence

This type of competence refers to areas in which the Treaties expressly exclude Union competence, or recognise the competence of Member States, or areas not referred to in the Treaty and therefore not within the remits of the Union still being the competence of Member States.

3.1.5 The main problems of the current system

The main problem of the current system is its lack of clarity, very much related to the lack of precision of certain provisions. Article 308 has served extensively, and without any real overview, as a way to extend Union competences.⁶⁶ The executive-dominated expansion of Union activity, without continuous endorsement of the legislative body and with insufficient mechanisms for control to ensure compliance with the principle of subsidiarity, has led to a situation of legal uncertainty. The Union's difficulty to comply with the principles of subsidiarity and proportionality has simultaneously been a failure to comply with citizens' expectations.

Alain Lamassoure⁶⁷ has described the system as a “*complex interweaving [...] of objectives, substantive competences and functional competences, arising from the existence of four treaties and two different entities, the*

⁶⁵ By some seen as part of the shared competences. See European Parliament Resolution on the division of competences between the European Union and the Member States P5_TA(2002)0247, adopted on 16 May 2002, based on the Lamassoure Report (Constitutional Affairs Committee) FINAL A5-0133/2002, para. 21.

⁶⁶ The Council has had to act by unanimity to make Article 308 the specific choice of legal basis, and has done so over 700 times. The choice to use Article 308 as legal basis has been challenged several times, see e.g. ECJ Case C-377/98 *Netherlands v. Parliament and Council* [2001] ECR I-7079.

⁶⁷ French Member of the European Parliament 1999-2004

*Union and the Community, from the proliferation of legislative instruments with differing and sometimes questionable legal scope, and from the absence of a real hierarchy of acts”.*⁶⁸

3.2 The proposals of the European Convention

Historically, the question of division of competences between the Union and the Member States has primarily been subject to a political debate and not so much of legal consideration. Successive reforms of the Treaties to accompany the development of the Community have resulted in a system lacking clarity and which is difficult for citizens to understand. The existence of provisions granting the Community “functional” powers to meet its objectives has allowed for adjustments of the Union’s powers in response to emerging challenges. The system has, moreover, been extended by allocation of competence by subject in areas where the need for greater precision has occurred.

The challenge of the Convention was on the one hand, while bringing more clarity into the system, to achieve a more precise delimitation and, on the other hand, to meet the need for a certain degree of flexibility.

To begin with, many members of the Convention argued that the principle of allocated powers, according to which the Community cannot act in areas in which no power has been conferred on it by Member States and which is implicit in the current Treaty, should be made explicit.⁶⁹ This principle has been explicitly stated in the new Constitutional Treaty in Article I-1 and in the second paragraph of Article I-9, which lays down the principles governing the limits and use of the Union competences: the principle of conferral, the principle of subsidiarity and the principle of proportionality.⁷⁰ Besides, it was proposed and agreed to write out in the same paragraph that competences not conferred upon the Union in the Constitution remain with the Member States although the idea to list the cases of explicit exclusion

68 Resolution on the division of competences between the European Union and the Member States P5_TA(2002)0247, adopted on 16 May 2002, based on the Lamassoure Report (Constitutional Affairs Committee) FINAL A5-0133/2002, A.

69 Specifically in the Convention discussions during its plenary session on 15 and 16 April 2003, CONV 40/02 and recommended in the Final report of Working Group V “Complementary Competences” CONV 375/1/02 REV 1, p. 10.

70 CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003.

from Union competences or the areas covered by the legislative competence of the Member States has not been retained.

Moreover, and most essentially, it was suggested and discussed at length to change the architecture of the Treaties radically, abandoning the current method of functional allocation and replacing it with a system exclusively delimiting subjects, by drawing up a “catalogue” of powers.⁷¹ The Members of the Convention examined in particular to what extent such a catalogue would really mean a more precise division of competences between the Union and the Member States. They also debated the risks and problems of drawing up such a catalogue with regard to adaptation of Union competences and the development of the European Union.

Following the guiding principle of greater transparency and a higher level of clarity, Convention Working Group V “Complementary Competences” recommended that the future Constitutional Treaty should have a separate title on competences, including in particular:

- 1) Provisions granting a basic division of competences in each policy area;
- 2) Definition of the three categories of Union competences;
- 3) Conditions for the exercise of Union competence.⁷²

Finally, the avenue chosen by the Convention was rather close to these recommendations and can possibly be described as something in between the restrictive solution of a competence catalogue and a more flexible choice allowing for successive adaptation. The new Constitutional Treaty defines in a list of articles the different categories of competences and refers to these the areas of policies to which the type of competence should be applied.

3.2.1 Areas of exclusive competence

First and foremost, the characteristic of matters coming within the exclusive competence of the Union is that Member States may only act in such fields if authorised by the Union. In order to clarify to the general public to which

⁷¹ As suggested by Erwin Teuffel, German Member of the Convention, and others during the debates of the Convention plenary session on 15-16 April 2003, CONV 40/02.

⁷² The Final report of Working Group V “Complementary Competences” CONV 375/1/02 REV 1, p. 2ff.

of the tasks and responsibilities of the Union, currently described in Article 3 and 4 TEC, this applies, the Convention had to make sure that policies that fully or primarily fall under the competence of the Union would be described in a way that made this distribution of responsibility clear.

Secondly, classification of an area as exclusive competence must be based on purely legal considerations due to its far-reaching legal consequences. The criteria for classification should remain unchanged. Only matters where it is essential that the Member States do not act themselves should be classified as exclusive competence. Nevertheless, exclusive and shared competences respectively would have to be defined and the areas falling within this category determined in accordance with existing jurisprudence of the Court of Justice.⁷³

The Convention chose to propose in its Article I-12 on the Union's exclusive competence that

“1. The Union shall have exclusive competence to establish competition rules within the internal market, and in the following areas:

- monetary policy, for which the Member States which have adopted the euro,*
- common commercial policy,*
- customs union*
- the conservation of marine biological resources under the common fisheries policy.”*

and that

“2. The Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable the Union to exercise its competence internally, or affects an internal Union act.”⁷⁴

3.2.2 Areas of shared competence

According to what the Convention proposed in Article I-13, the Union shall share competence with the Member States in areas, which do not fall under the Union's exclusive competence or which do not relate to the areas of

⁷³ See e.g. ECJ Case 22/70 *Commission v. Council (ERTA)*, [1971] ECR 263. See further Chapter 3.1.1 and 3.1.2.

⁷⁴ CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003.

supporting, coordinating, or complementary action.⁷⁵ Most of the areas of the current Treaty fall into this category. The scope of competence varies, however, depending on the area in question.

The Convention has chosen to include in Article I-13 Paragraph 2, although it is not to be considered as a catalogue of competences, a list of principal areas in which the Union and the Member States should share competences.⁷⁶ The list enumerates the main areas of shared competence but is not exhaustive since the provision needs to maintain a certain level of flexibility in order to potentially respond to developments of the Union.⁷⁷

In the third and fourth paragraphs of the same article, the pre-emptive effect of the Union's action has been limited in the areas of research, technological development and space (Paragraph 3) and those of development cooperation and humanitarian aid (Paragraph 4). The Convention has proposed that the Union's competence to take action in those areas may not result in Member States being prevented from exercising theirs.

3.2.3 Areas of supporting, coordinating and complementary action

The term *complementary competence* was criticised by the Convention's Working Group on Complementary Competencies for not being an adequate description of the Union's power to support the action of Member States in certain areas.⁷⁸ Consequently, the term has been changed and proposed to be instead *areas of supporting, coordinating or complementary action*.

The areas for supporting, coordinating or complementary action at European level are, according to the proposed Article I-16 Paragraph 2: industry; protection and improvement of human health, education, vocation training, youth and sport; culture; and civil protection.

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Internal market, area of freedom, security and justice, agriculture and fisheries, excluding the conservation of marine biological resources, transport and trans-European networks, energy, social policy, for aspects defined in Part Three of the Constitution, economic and social cohesion, environment, consumer protection and common safety concerns in public health matters.

⁷⁸ CONV 375/1/02, Final report of Working Group V, p.1-2.

Finally, in its third paragraph, the article states that legally binding acts adopted by the Union in those areas may not entail harmonisation of Member States' laws or regulations.

3.2.4 Separate categories

Two separate provisions relate further to two specific areas of competence.

3.2.4.1 The coordination of economic and employment policies

The coordination of economic, employment and social policies has been proposed to be dealt with in a specific provision, Article I-14, stating that the Union shall adopt measures to ensure coordination of economic and employment policies of the Member States, that specific provisions shall apply to the Member States which have adopted the euro and that the Union may adopt initiatives to ensure coordination of Member States' social policies.⁷⁹

3.2.4.2 The common foreign and security policy

Whereas the current third pillar, the area of freedom, security and justice, has been integrated among the shared competences, the content of the current second pillar, the common foreign and security policy, has been treated in a separate provision. The proposed Article I-15 states that the Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions related to the Union's security.⁸⁰ Moreover, it says that Member States shall support the Union's common foreign and security policy and refrain from action contrary to the Union's interests.

3.2.5 Flexibility clause

To provide the necessary flexibility in the future, the content of the current Article 308 TEC, which allows for action under certain circumstances despite the lack of Treaty based powers, is proposed to be preserved. The proposed corresponding Article I-17 will have a wider scope than Article

⁷⁹ CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003.

⁸⁰ CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003.

308 TEC though, given that the pillar structure has been removed and that the Union is proposed to have legal personality. Whereas Article 308 refers to the framework of the internal market, Article I-17 refers to the entire framework of policies defined in Part III of the Constitutional Treaty – the part treating the policies and functioning of the Union.⁸¹

In return, the adoption procedure with unanimity in the Council has been preserved and additional criteria have been introduced. To allow monitoring of compliance with the principle of subsidiarity by Member States' national parliaments, the article requires the Commission's responsibility for drawing the national parliaments' attention to proposals based on this article.⁸² In addition, it clarifies that the article cannot serve as a basis for widening the scope of Union powers saying that provisions adopted on the basis of the article may not entail harmonisation of Member States' laws or regulations in cases where the Constitutional Treaty excludes such harmonisation.

3.2.6 Guiding principles

To guide the application of the provisions defining the various fields of competences, the draft Constitutional Treaty codifies a number of principles existing under European law.

3.2.6.1 The principle of conferral

The principle of conferral, requiring the EU to act only within the limits of the competences conferred upon it by Member States, has a vital significance. This can be seen by its inclusion as a constituent part of the definition of the EU in the proposed Article I-1, paragraph 1.⁸³ In addition, the proposed Article I-9, which codifies fundamental principles, points out

⁸¹ *Ibid.*

⁸² *Ibid.*, Article 9, para. 3.

⁸³ “Reflecting the will of the citizens and States of Europe to build a common future, this Constitution establishes the European Union, on which the Member States confer competences to attain objectives they have in common. The Union shall coordinate the policies by which the Member States aim to achieve these objectives, and shall exercise in the Community way the competences they confer on it.” Article I-1, para. 1, CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003.

in its second paragraph that competences not conferred on the EU remain with the Member States.⁸⁴

3.2.6.2 The principle of subsidiarity

The principle of subsidiarity sets the limits to the use of EU competences in areas that do not fall within the EU's exclusive competences. The basis for this principle so far, mainly through the ECJ case law and quite briefly in Article 5 TEC as pointed out before, is proposed to be reinforced in Article I-9, paragraph 3 and in the annexed Protocol on the application of the principles of subsidiarity and proportionality and the Protocol on the role of national parliaments in the European Union. Article I-9(3) requires the EU to *“act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.”*⁸⁵

3.2.6.3 The principle of proportionality

The principle of proportionality limits the content and form of the Union action so that it does not exceed what is necessary to achieve the Union's objectives.⁸⁶

3.3 Different perspectives on the division of competence

3.3.1 The European Commission

The European Commission contributed to the work of the Convention through its two representatives on the Convention, Commissioner Antonio Vitorino and former Commissioner Michel Barnier, and through written

⁸⁴ “2. Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States. Article I-9, para. 2, CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.07.2003.

⁸⁵ Article I-9, para. 3, CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003. See also Chapter 3.1.2.1 and 3.1.2.2.

input. In its Communication of 22 May 2002, reflecting on the Union's core tasks and on the constitutional framework needed to take the Union forward, the Commission pointed out three fundamental questions: how to consolidate the Union's model of economic and social development; how to build up an EU-wide area of freedom, security and justice; and how to ensure the effectiveness of Europe's external policy.⁸⁷ To achieve the objectives expressed in these questions, the need for clarification of the way in which the Union exercises and implements its powers was also pointed out.

The Commission has also responded to the Convention's final proposals, given its official opinion to the IGC in a communication on the proposed Constitutional Treaty and attended the IGC through its Convention representatives.⁸⁸

In addition, a working document was presented in December 2002 which was prepared by a group of experts coordinated by the Director General Francois Lamoureux, at the request of European President Prodi in agreement with Commissioners Barnier and Vitorino. This working document, a feasibility study or the so called *Penelope document*, does not commit the European Commission. Nevertheless, it offers an overview of the content of the proposals prepared until December 2002 based on work of the European University Institute of Florence and contains some proposals from the Commission.⁸⁹

The problem, as seen by the Commission, is that European rules in certain cases appear to neglect national practices and do not take into account the distribution of powers which certain Member States have introduced internally. The Commission has pointed at a number of shortcomings in the way the Union operates: lack of clarity, stemming from the complexity of procedures; lack of accountability; lack of proximity, stemming from the

⁸⁶ Article I-9, para. 4 and the Protocol on the application of the principles of subsidiarity and proportionality, CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C169, 18.07.2003.

⁸⁷ COM(2002) 247 final, 22.5.2002, Communication from the Commission: A Project for the European Union, p. 5.

⁸⁸ COM(2003) 548 final, 17.9.2003, Communication from the Commission: A Constitution for the Union, Opinion of the Commission, pursuant to Article 48 of the Treaty on European Union, on the Conference of representatives of the Member States' governments convened to revise the Treaties.

fact that the principle of subsidiarity is not always respected; and lack of effectiveness, causing a situation where the actions of the Union are not always in line with the expectations of its citizens.⁹⁰

To attain the objectives: clarity, accountability, proximity and effectiveness, the Commission made a number of requirements and proposals.⁹¹ Firstly, the Commission considers useful for the future Treaty to clearly set out the principles which serve as a framework for the Union's actions: the principle of attribution of powers, the principles of subsidiarity and proportionality and the primacy of Union law over national law.

Secondly, according to the Commission, the unique form of political integration which the Union constitutes would not gain from a list of the powers exercised by the Union. Such a codified catalogue would limit the Union's capacity for action and would only bring limited clarification with regard to the distribution of shared and complementary powers.

Thirdly, the Commission would like to see realised a rationalisation of the use of the various forms of Union actions as this would safeguard the exercise of national powers.

Fourthly, while keeping Article 308, to maintain a certain margin of flexibility, the Commission proposes to review the common objectives and, if possible, to make the powers to act needed to attain the objectives explicit, in order to better mark out what should remain very limited use of this provision.

Fifthly and finally, the Commission has eagerly expressed the need for simplification of the adoption and implementation of the Union's decisions, including an extension of co-decision to new areas and a distinction between the law and what is more properly a matter for implementation rules. (See further 4.1.)

⁸⁹ Working document 04.12.2002, Feasibility Study: Contribution to a preliminary draft, Constitution of the European Union.

⁹⁰ COM(2002) 247 final, 22.5.2002, Communication from the Commission: A Project for the European Union, p. 20.

⁹¹ COM(2002) 247 final, 22.5.2002, Communication from the Commission: A Project for the European Union, p. 19-22.

Can the Commission be satisfied with what was achieved in the end product of the Convention's work and the discussions in the IGC?

The fundamental principles of conferral, subsidiarity and proportionality have been clearly set out by the Convention in the proposed Article I-9 and the principle that Union law shall have primacy over national law is laid down in Article I-10.

Moreover, the Convention proposed to define better the different categories of competence and to list the areas of exclusive Union competence, despite the warning of the Commission for a catalogue of this kind. At the same time, however, the Convention has proposed to list the areas of complementary competence in (areas of supporting, coordinating or complementary action) to set the limits for the areas of shared competences which are defined in the draft Constitution but not exhaustively enumerated. This structure is not entirely corresponding to the proposals made by the Commission.

As outlined in 3.2.6, the Convention has chosen to keep the flexibility allowed for by the current Article 308.

Next to this, the Convention has paid attention to the requests on rationalisation of forms of action and simplification of the Union's instruments and procedures. (See further in 4.1.)

Despite the above, there were at some instances tensions between the Commission and the Convention throughout the work of the Convention.⁹² In its response to the Convention's proposals, the Commission has expressed its satisfaction of the fundamentally changed structure of the Union, giving legal personality to the Union and eliminating the pillar structure; the introduction of a large number of reforms improving the way the Union works, including the way in which competences are assigned to the Union; and the strengthening of the Union's means of action, in

⁹² See e.g. article in *La Libre Belgique*, 10 July 2003, p. 16, "*Convention: un projet à approfondir*", J. Durieux (Director-General, European Commission), according to which the Commission considered that the Convention had failed to attain its fundamental objectives set out in the Laeken declaration: to attribute to the Union more coherent and effective economic and social governance; to make the Union a strong actor externally; and to bring the European citizens closer to the integration process, leaving the IGC with the responsibility of restoring the weaknesses of the incomplete product of the Convention

particular the extension of the Community method to the entire area of freedom, security and justice.⁹³ The Commission asked the IGC not to disturb the balance built in the Convention's proposals but focus on improving, clarifying and finalising the draft Constitutional Treaty.

The Commission points at a need for more EU competence only in one area – the sphere of economic governance. The Commission believes that those Member States whose currency is the euro should be allowed to coordinate their economic policies more closely via Union procedures.⁹⁴

Furthermore, the Commission considers that the IGC should ensure that the provisions of Part III of the future Constitutional Treaty are consistent with the approach taken by the Convention in its classification of competences in Part I. The Convention decided to move certain areas of competence from one category to the other. In the Commission's view, the texts of Part III on these particular policies should also be adapted accordingly.⁹⁵

3.3.2 The European Parliament

The European Parliament has treated the proposals of the Convention and given its official views to the IGC through several resolutions and also by its representative to the IGC.⁹⁶ In its resolution on the division of competences between the European Union and the Member States, the European Parliament has given its views specifically on the matter of

⁹³ COM(2003) 548 final, 17.9.2003, Communication from the Commission: A Constitution for the Union, Opinion of the Commission, pursuant to Article 48 of the Treaty on European Union, on the Conference of representatives of the Member States' governments convened to revise the Treaties, p. 2-3.

⁹⁴ *Ibid.*, p. 5.

⁹⁵ *Ibid.*, p. 13.

⁹⁶ See European Parliament Resolution on the draft Treaty establishing a Constitution for Europe and the European Parliament's opinion on the convening of the Intergovernmental Conference (IGC) P5_TA(2003)0407, adopted on 24 September 2003, based on the Gil-Robles/Tatsos Report (Constitutional Affairs Committee) A5-0299/2003; European Parliament Resolution on the progress report on the Intergovernmental Conference P5_TA(2003)0549, adopted on 4 December 2003; European Parliament resolution on the outcome of the Intergovernmental Conference P5_TA-PROV(2003)0593, adopted on 18 December 2003; European Parliament resolution on the programme of the Irish Presidency-in-office of the Council and the European Constitution P5_TA-PROV(2004)0052, adopted on 29 January 2004.

division of competences.⁹⁷ The following chapter is based mainly on the considerations in this resolution.

The Parliament has underlined the problem of confusion of objectives, substantive competences and functional competences in the current division of competences. This arises from the existence of four Treaties; the existence of two different entities, the Union and the Community; the necessity for the institutions created for a small Community to adapt to successive enlargements and increasing political functions; the excess of legislative instruments with differing legal scope; and the absence of a hierarchy of norms.⁹⁸

In the views of the European Parliament, the principles of subsidiarity and proportionality have not managed to clarify the respective roles of the Union and the Member States. Public opinion polls and debates also reveal a gap between citizens' expectations of the Union and the actual performance of the Union. The Parliament blames the paralysis of the institutions on intergovernmental procedures and unanimous decision-making, resulting in competences theoretically conferred on the Union being retained by the Member States. Even in the cases of shared competences, the intensity of the Union action is determined by the Member States through their involvement in the decision-making procedure via the Council.⁹⁹

The Parliament has offered a number of recommendations, demanding an update of the division of competences on the basis of the principles of subsidiarity and proportionality, a clearer assignment of political responsibility, a Constitution for the Union addressed to all its citizens, a consolidation of the democratic legitimacy, a better balance between the economic and political integration, and a clearer distinction between the general objectives of the Union and its competences.¹⁰⁰

⁹⁷ European Parliament Resolution on the division of competences between the European Union and the Member States P5_TA(2002)0247, adopted on 16 May 2002, based on the Lamassoure Report (Constitutional Affairs Committee) FINAL A5-0133/2002.

⁹⁸ *Ibid.*, A-B.

⁹⁹ European Parliament Resolution on the division of competences between the European Union and the Member States P5_TA(2002)0247, C-H.

¹⁰⁰ *Ibid.*, paras. 1-9.

The Parliament considers essential that a future European Constitution should define better the legislative, executive and judicial functions of the Union.¹⁰¹ Whereas hundreds of directives and thousands of regulations have been adopted since the creation of the EEC in Rome in 1957, the legislative function of the Union (the Council's legislative role) is only mentioned in passing in Article 207(3) TEC and case law illuminates the issue to a very limited extent.¹⁰²

Moreover, the Parliament considers that an effective hierarchy of acts should be implemented and proposes that a distinction should be drawn between three types of competence: the competence exercised by the States, the competences allocated to the Union and shared competences. The Union should retain some flexibility in the ways in which it acts, according to the degree of need for Community intervention.¹⁰³

In the areas covered by the Union's own competences, the Member States must not intervene except at the express invitation of the Union.¹⁰⁴ The Union's powers should remain limited: customs policy, external economic relations, the internal market (including the four freedoms and financial services), competition policy, structural and cohesion policies, association agreements, monetary policy in countries which have the euro, the running of the common foreign and defence policy, the legal basis of the area of freedom and security and the funding of the Union budget.¹⁰⁵

Competences shared between the Union and the Member States cover three types of areas: those in which the Union lays down general rules, those in which it intervenes only in a complementary or a supplementary fashion and

¹⁰¹ *Ibid.*, para. 11.

¹⁰² See ECJ, Case 188/80 *France, Italy and United Kingdom v Commission*, Rec. 1982, p. 2545; ECJ, Case 226/87 *Commission v Greece*, Rec. 1988 p. 3611. The ECJ has taken the view that the competition directives, provided for by Article 86(3) and falling within the competence of the Commission, should be classified in the general category of directives covered by the present Article 249 TEC, in other words that the Commission itself had an autonomous legislative power.

¹⁰³ European Parliament Resolution on the division of competences between the European Union and the Member States P5_TA(2002)0247, para. 19.

¹⁰⁴ *Ibid.*, para. 22. Compare with the provisions in Article 71 of the German Basic Law, Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949 (BGBl. S. 1), zuletzt geändert durch Gesetz vom 26. Juli 2002 (BGBl. I S. 2863), and Article 150 in the Spanish Constitution, Constitución Española – Aprobada por las Cortes en Sesiones Plenarias del Congreso de los Diputados y del Senado celebradas el 31 de Octubre de 1978.

¹⁰⁵ European Parliament Resolution on the division of competences between the European Union and the Member States P5_TA(2002)0247, paras. 23-24.

those in which it coordinates national policies. The Parliament considers that where the competences are shared the Union should lay down general rules on subjects falling into two categories: those which constitute policies complementing or flanking the single area and those relating to the implementation of foreign policy and of defence and security policy, as regards the transnational dimension.¹⁰⁶

Moreover, the Parliament considers that in these areas Community legislation is justified only where European interests are at stake and that Member States must retain the capacity to legislate where the Union has not yet exercised its prerogatives.¹⁰⁷ In other areas, such as education, culture and health, it should be made clear that action by the Union may only complement that of the Member States. It should also be clarified that the Union has powers to coordinate policies being essentially the responsibility of Member States, such as economic and employment policies.¹⁰⁸

Finally, the Parliament takes the view that the principles of subsidiarity and proportionality must be strengthened and enhanced, that the division of powers should be subject to regular review¹⁰⁹ and that the exercise by the Union of its competences should no longer be obstructed by the lack of power of initiative, the unanimous decision-making, the ratification by Member States and lack of parliamentary participation or judicial review.¹¹⁰

Several of the most fundamental, more general problems addressed by the Parliament have also been addressed in the Convention's proposals. The different Treaties have been consolidated in one basic, Constitutional Treaty. The European Union has been designated a legal personality. A

¹⁰⁶ *Ibid.*, para. 26.

¹⁰⁷ European Parliament Resolution on the division of competences between the European Union and the Member States P5_TA(2002)0247, para. 28. Compare with Article 70 para. 1 of the German Basic Law, Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949 (BGBl. S. 1), zuletzt geändert durch Gesetz vom 26. Juli 2002 (BGBl. I S. 2863), and Article 149 para. 3 in the Spanish Constitution, Constitución Española – Aprobada por las Cortes en Sesiones Plenarias del Congreso de los Diputados y del Senado celebradas el 31 de Octubre de 1978.

¹⁰⁸ European Parliament Resolution on the division of competences between the European Union and the Member States P5_TA(2002)0247, paras. 29-30.

¹⁰⁹ Recent federal constitutions have proved capable of the needed flexibility despite a rigid division of powers established on the basis of needs at a specific time. The American Constitution has, for example, showed capacity for adaptation over two centuries. Compare also with the German Basic Law (*Grundgesetz für die Bundesrepublik Deutschland*) Article 72.

Constitutional Treaty for the Union, including the EU Charter of fundamental rights, is being addressed to the citizens. And the legal instruments have been subject to simplification.¹¹¹

Furthermore, the fundamental principles of conferral, subsidiarity and proportionality have been clarified and enforced. The unanimous decision-making process criticised by the Parliament has been radically reduced and the lack of democratic legitimacy restored by the introduction of co-decision between the Parliament and the Council in a large number of areas.¹¹²

The Convention has also introduced a more rigid distribution of competences into categories, while making explicit, as required by the Parliament, the principles which currently exist only in unwritten form. Where the Union has exclusive competence to legislate and adopt legally binding acts, the Member States can do so themselves only if empowered by the Union or for the implementation of acts adopted by the Union.¹¹³ Moreover, the Member States are required to exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence.¹¹⁴

The Convention's proposals differ from the European Parliament Resolution when it comes to the specific areas placed under the various categories of competence. The Parliament's somewhat controversial wish to give the Union exclusive competence for the drawing up and running of common foreign and security policy, for the legal basis of the area of freedom, security and justice, and for the Union budget has not been agreed by the Convention. The issue of common foreign and defence policy has been one of the more controversial questions in the Convention, since it was impossible until the end of the Convention's work to overcome some fundamental differences of viewpoints between different Member States. The solution proposed was to give the Union "*competence to define and implement a common foreign and security policy, including the progressive framing of a common defence policy*" and to introduce a provision

¹¹⁰ European Parliament Resolution on the division of competences between the European Union and the Member States P5_TA(2002)0247, para. 34.

¹¹¹ See Chapter 3.2.

¹¹² See Chapter 3.2.

¹¹³ CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003, Article 11, para. 1.

¹¹⁴ *Ibid.*, Article 11, para. 2.

regarding enhanced cooperation, allowing for Member States, which wish to further the objectives of the Union and to reinforce its integration process, to use its institutions within the framework of the Union's non-exclusive competences, among those common foreign and security policy.¹¹⁵

3.3.3 From an academic point of view

Several attempts to consolidate the current Treaties and to draw up a basic Treaty or a Constitution have been made, leading to the strongly intensified constitutional debate which set off with the Declaration on the future of the Union included in the final acts of the Intergovernmental Conference at Nice in 2000.¹¹⁶ Already the IGC in Nice, and the new Treaty which emerged from it, marked a shift of power within the Community's institutional architecture and a new stage in the process of European integration and the permanent evolution of its constitution.

As concluded after Nice by Xenophon A. Yataganas¹¹⁷, “[...]what appeared to be a purely functional agenda (to prepare the Union for enlargement), the real topic of the discussions was in fact the balance of power in Europe.”¹¹⁸ According to Yataganas, behind the matter of the composition of the Commission and Parliament, behind weighting of votes and closer cooperation, what no one wanted to ask at the stage of Nice, were the fundamental questions: Where does power lie in the European Union and who exercises it? Or rather, where should power lie and who should exercise it? The real issue at stake behind the parity of votes in the Council was the balance of power between Germany and France. The struggle over equal representation on the Commission covered the balance between the

¹¹⁵ CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003, Article 11, para. 4 and Article 43.

¹¹⁶ For its part, the European Parliament has tried several times to establish a "Draft Constitution for the European Union", aiming at the creation of a federal entity: Spinelli "Draft of a Constitution of the European Union" (1984), Official Journal 19 March 1984, C77, p.33 and Bulletin of the European Communities, 1984, n°2, pp.8-26; Colombo Report (1990), doc. A3-165/90, OJEC 17 September 1990, C231, p.91; Oreja/Herman Report (1994), Resolution of 10 February 1994, Official Journal 28 February 1994, C61, p.155 (the draft Constitution which is annexed to the Resolution has not been formally approved by the European Parliament).

¹¹⁷ Legal Advisor in the Legal Service of the European Commission. Fellow, Weatherhead Center for International Affairs and the Center for European Studies at Harvard University.

¹¹⁸ In the conclusions of his Jean Monnet Working Paper 1/01, *The Treaty of Nice, The Sharing of Power and the Institutional Balance in the European Union – A Continental Perspective*. (The views expressed in the working paper are the personal views of

smaller and larger members of the EU. The extension of the qualified majority voting represented a screen for the relationship between the governmental and supranational tendencies in the EU, and the closer cooperation had to do with the possibility of having a leading group in the future EU.¹¹⁹ What was at stake was the division of competences between the Union and its Member States. The details for exercising such competences had to be subject to a constitutional debate and little was obtained at Nice to avoid complexity, reduce the democratic deficit or increase the legitimacy of the EU.

Although admitting that negotiations to give the Union a constitutional dimension appeared likely to take place and underlining that a simplification of the Treaties spelling out the principle of subsidiarity and involving national parliaments in this process would represent considerable improvements on the current situation, Yataganas would in 2001 agree with J. H. H. Weiler¹²⁰ who has argued that the Treaties, and in particular their application and interpretation by the ECJ, already form a Constitution.¹²¹

Many of the efforts to consolidate the Treaties are characterised by long texts filled with technical considerations associated with restructuring operations but with little added value in terms of legibility and legal certainty. Therefore, when the European Commission in 2000 entrusted the Robert Schuman Centre at the European University Institute in Florence with a feasibility study on “reorganising the treaties”, the group at the Robert Schuman Centre suggested, rather than retaining the entire mass of material in the texts of the primary law, that the best option would be to extract the essential features and present the selected provisions in a so called *Basic Treaty*.¹²² The main objective of that operation was to clarify a

Xenophon A. Yataganas and do not represent the official views of the European Commission.)

¹¹⁹ In the conclusions of his Jean Monnet Working Paper 1/01, *The Treaty of Nice, The Sharing of Power and the Institutional Balance in the European Union – A Continental Perspective*.

¹²⁰ Manley Hudson Professor of Law and Jean Monnet Chair at Harvard University. Co-director of the Academy of European Law at the European University Institute, Florence.

¹²¹ Weiler, J. H. H., *Federalism and Constitutionalism: Europe's Sonderweg*, Jean Monnet Working Paper 10/00, Chapter I. Introduction: Europe's Fateful Choice.

¹²² European University Institute, Robert Schuman Centre for Advanced Studies, *A Basic Treaty for the European Union, A study of the Treaties*, Report submitted on 15 May 2000 to Romano Prodi, President of the European Commission. The group at the Robert Schuman Centre was coordinated by Yves Mény and Claus-Dieter Ehlermann. The group members were Grainne de Burca, Alan Dashwood, Renaud Dehousse, Bruno de Witte,

body of complex rules for the benefit of the citizens of the Union and to enhance legal certainty without therefore departing from the present legal position.

The Basic Treaty suggested by the Robert Schuman Centre group consists of eight titles bringing together in total 95 clauses provisions from the TEC and TEU. The first three titles contain the provisions relating to the foundations of the Union, the fundamental rights and citizenship. Title four of this Basic Treaty sets out the specific objectives and activities of each of the Union's three pillars, along with some general principles governing relations between the Union and its Member States, such as subsidiarity, proportionality etc. The proposal differs substantially from the Convention's proposals in the sense that the division of competences has not been significantly enforced or clarified by any basic provisions and the group chose not to include Article 308. The approach taken has the advantage of eliminating the potentially confusing hybrid nature of the current TEU but apart from that it leaves a number of issues still to be resolved, in particular concerning the allocation of competences.

An interesting and rather critical approach is that taken by Stephen Weatherill¹²³ in his comments on the Convention's work.¹²⁴ One of the basic questions asked in the Laeken Declaration is that of how to ensure that a redefined division of competence does not lead to a creeping expansion of EU competence, while at the same time ensuring that the European dynamic does not come to a halt. Weatherill considers both concerns important but has the impression that the first aspect of the question is of greater importance on the Laeken priority list, which makes him express his concern that the process of clarifying the division of competence and of reorganising competence should not be seen simply as a matter of defending state prerogatives from interference by the EU but rather of the question of how EU supports and supplements the Member States and vice versa. The issue at stake should be how best to take forward the mutually beneficially relationship.¹²⁵

Luis Diez-Picazo, Jean-Victor Louis, Francis Snyder, Antonio Tizzano, Armin von Bogdandy and Jacques Ziller.

¹²³ Professor at the Faculty of Law, University of Oxford.

¹²⁴ Weatherill, S., *Competence*, Convention Document CONV 703/03.

¹²⁵ Weatherill, S., *Competence*, Convention Document CONV 703/03, p. 45.

His proposals are guided by three basic perspectives on the law and practice governing the question of the scope of the European Union's competence: the assumption that attempts to impose a rigid division between Union and State competences are likely to prove damaging; the belief that attempts to provide a division between these competences which is completely predictable *ex ante* are likely to prove damaging; and the view that inadequate respect for existing devices designed to balance the allocation of these competences will deepen the perceived problem rather than contribute to resolving it.

Weatherill considers ill-advised to try to construct a "hard list" of competences reserved to the Member States and/or a "hard list" of Union competences. He points out, moreover, that the principle of subsidiarity has been widely presented as a much more aggressive protection of State power than its text should actually allow currently, whereas Weatherill himself believes the EU should be more positively presented as "*an arena through which States can better fulfil responsibilities to citizens*" and that the EU is not taking away power from the Member States but "*improving their capacity to deliver effective governance*".¹²⁶ This way of thinking demands a formula for allocating competence which is based on the ability to deliver the most efficient decisions taking into account all affected interests.

Weatherill admits, however, that although one may not accept the value of a hard list of EC/EU competences, it is important to develop some clearer basis for understanding and explaining the scope of Community/Union competence.

Competence has become a largely political, not constitutional, matter and many of the perceived problems are related to the days when unanimous voting was the norm in the Council. Many of the problems have also been addressed since the Qualified Majority Voting became more widely applicable in the Council but with a regime of QMV instead of unanimity, even more so with the proposals of the Convention to introduce QMV in a number of various policy areas, the importance of defining the limits of Community competence increases. The rise of QMV has generated a concern among Member States to formulate methods for exerting control over the European decision-making and apart from the methods developed

¹²⁶ Weatherill, S., *Competence*, Convention Document CONV 703/03, p. 48.

so far. Nice marked the starting point for a more systematic overall consideration for determining competence allocation.

Weatherill has suggested keeping the provision laying down the principle of conferral and adding, although an explicit statement should not be necessary, a provision ensuring that competences that are not conferred on the Union belong with the Member States, which is in line with the proposals of the Convention.¹²⁷

The nature of the competence conferred on the Union is a crucial question. Few competences are exclusive to the Union and Weatherill has proposed not to list these areas, neither exhaustively nor illustratively. Nevertheless, he has, like several others, stressed the importance of setting out the objectives of the Union in one provision and then defining its competences in another, not confusing the two.¹²⁸

In order to keep the necessary flexibility in the system, Weatherill could accept preserving a provision that fulfils a role similar to that currently filled by Article 308 TEC despite the fact that it would confer significant power on the executives of the Member States to advance the reach of the Union while undermining the proper constitutional controls associated with formal Treaty revision. The precondition would be the elaboration of a special system of constitutional safeguards. In addition to unanimity in the Council, Weatherill suggests involving parliamentary approval and that the formula be supplemented by a new form of institutional supervision.¹²⁹

Finally, Weatherill considers that the inclusion of the principle of subsidiarity in a future Treaty should be regarded as *“a nod to the general idea of the need to pay attention to locating the best level for effective governance for Europe but it should not be invested with any undeserved weight as a sector-specific answer to ‘whose does what’ questions”*.¹³⁰ He believes a lengthy formula on subsidiarity is ill-advised in so far as it is likely to constitute a false promise to provide a predictable basis for deciding in advance who does what. He suggests keeping a provision in line with the current Article 5(2), relying on the institutional settings for

¹²⁷ *Ibid.*, p. 51-52.

¹²⁸ Weatherill, S., *Competence*, Convention Document CONV 703/03, p. 53.

¹²⁹ *Ibid.*, p. 59-61. See further below, Chapter 5.3.

¹³⁰ *Ibid.*, p. 61.

controlling its application. The Convention has indeed chosen to further develop the conditions for application of the principle of subsidiarity laid down in a separate protocol on the application of the principles of subsidiarity and proportionality, annexed to the draft Constitution, and conferred the task to ensure compliance with the principle on national parliaments.¹³¹

¹³¹ CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003, Article 9(3). See further below, Chapter 5.2.

4 Control mechanisms

4.1 The current situation

The principle of subsidiarity constitutes a filter between the Union's competence and the possibility of exercising that competence. The principle of subsidiarity is a dynamic concept which allows the Union's action to be expanded when the circumstances require so and to be restricted when it is no longer justified.¹³² In exercising the powers conferred upon it, each institution has to ensure that the principle of subsidiarity is complied with.¹³³

There are currently two types of checks to ensure compliance with the principle of subsidiarity: political and judicial control. The question whether the Treaties do or do not confer competence on the Union to act in a specific case and to what extent the principle of subsidiarity is complied with, depends to a large extent on the institutions participating in the decision-making process. Each institution should act in accordance with the powers allocated to it. The governments of Member States, national parliaments and public opinion should also exercise such control on the positions adopted by their government representatives in the Council. The Commission has showed willingness to withdraw certain initiatives after consulting interested parties¹³⁴ and to make new proposals adapting existing legislation.¹³⁵ This indicates that the Commission interprets subsidiarity also as the political principle whereby public intervention is weighed against private interest.

The judicial control is exercised by appeal to the European Court of Justice or national courts. The control exercised by the Court of Justice is wide-ranging in the case of the TEC, limited under Title VI of the TEU, and non-

¹³² Protocol (No. 7) on the application of the principles of subsidiarity and proportionality, OJ C 340, 10.11.1997, point 3.

¹³³ *Ibid.*, point 1.

¹³⁴ Bulletin of the European Communities, no. 12 1992, I.23.

¹³⁵ See the Commission's answer of 15 February 1995 to written question No. E-370/95 by Peter Crampton, OJ C 175, 10.07.1995, p. 38 and the list of proposals which have been withdrawn OJ C 344, 22.12.1995, p. 2 and OJ C2, 4.1.1997, p. 2.

existent under Title V of the TEU. Judicial review of the validity of Community acts extends to compliance with the principle of subsidiarity¹³⁶

The principle of subsidiarity as such has, so far, not really been subject to judicial control. It has been questioned whether the principle can at all be controlled in judicial forms. The ECJ can control if Community norms being established are motivated with regard to the principle of subsidiarity and carry out a marginal review of the judgement of practical and political circumstances made by the institutions when considering Community action. This is the only judicial control that has been exercised so far.¹³⁷

Some consider that the principle of subsidiarity, as a mechanism to regulate the implementation of the Union's non-exclusive powers, has not produced the expected results. Since the application of the principle involves political assessment by the institutions on a case-by-case basis, political considerations may sometimes have prevented compliance with the principle.

This might also be the reason why several members of the Convention have considered that the best guarantee for appropriate division of competences between the Union and Member States and ensuring compliance with the principle of subsidiarity would be to establish a more effective monitoring mechanism. There will always be conflicts of competence as there is no "complete" system for distributing powers. Increased monitoring to ensure compliance with the delimitation of powers is therefore essential.¹³⁸

4.2 The proposals of the European Convention

While taking on the challenge to clarify the division of competences between the Union and Member States and to make it more precise, the

¹³⁶ Protocol (No. 7) on the application of the principles of subsidiarity and proportionality Official Journal C340/105, 10.11.1997, point 13, "Compliance with the principle of subsidiarity shall be reviewed in accordance with the rules laid down by the Treaty." For the controversy about this question, see Toth, "Is Subsidiarity Justiciable?" (1994) 19 European Law Review, p. 268-285. Lenaerts, K. and Van Nuffel, P., *Constitutional Law of the European Union*, Sweet & Maxwell, 1999, p. 105.

¹³⁷ See e.g. ECJ Case C-233/94 *Germany v. the European Parliament and the Council*, [1997] ECR I-2405, p. I-2451-2453, paras. 22-29 and ECJ Case C-84/94 *United Kingdom v. Council* [1996] ECR I-5755, p. I-5816-5817, paras. 80-81.

Convention considered that the best guarantee to ensure compliance with that division would be to establish an effective monitoring mechanism. The main questions the Convention had to examine was whether more detailed criteria should be introduced for the application of the principle of subsidiarity and whether monitoring, political and/or judicial, of compliance with the delimitation of competence and the subsidiarity principle should be strengthened, and if so how.¹³⁹

The Convention has proposed, in line with the conclusions of the Convention Working Group on the Principle of Subsidiarity, to enforce the application and monitoring of the principle of subsidiarity on three lines:

- reinforcing the application of the principle of subsidiarity by the institutions participating in the legislative process;
- setting up an “early warning system” of political nature;
- broadening the possibility of referral to the Court of Justice for non-compliance with the principle of subsidiarity.¹⁴⁰

4.2.1 Reinforcing the application of the principle of subsidiarity in the legislative process

In the drafting phase of a legislative act, responsibility for compliance with subsidiarity stays with the Commission. It is for the Commission to consult, before proposing legislative acts, the players who may be affected directly or indirectly by the legislative act. The Convention has proposed to reinforce the reference in the Protocol on the Application of the Principles of Subsidiarity and Proportionality to the obligation for the Commission to consult with concerned actors before proposing legislative acts.¹⁴¹ The Commission is required to take into account not only the effect of its acts at national level, but also the regional and local dimension of the action envisaged.

¹³⁸ Convention document CONV 47/02, 15 May 2002, *Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored*, p. 16-18.

¹³⁹ *Ibid.*

¹⁴⁰ Convention documents CONV 286/02, 23 September 2002, Conclusions of Working Group I on the Principle of Subsidiarity; CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003, Protocol on the Application of the Principles of Subsidiarity and Proportionality.

In addition, the obligation for the Commission to justify the relevance of its proposals is preserved in the Convention's draft.¹⁴² The new Protocol includes the obligation for the Commission to attach to its proposals for legislation a "subsidiarity sheet" to justify its proposals with regard to the principles of subsidiarity and proportionality.¹⁴³ Any legislative proposal should contain this detailed statement making it possible to assess compliance with the principles of subsidiarity and proportionality. This statement should also contain an assessment of the proposal's financial impact and of its implications for the rules to be put in place by Member States.

4.2.2 "Early warning system" – reinforced *ex ante* political monitoring

The main innovation in the Convention's proposals for reinforced control system is the creation of a new *ex ante* political monitoring mechanism as an "early warning system", allowing national parliaments to participate directly in monitoring compliance with the principle of subsidiarity. For the first time in the history of the European construction, it involves national parliaments in the European legislative process. The Convention's proposal means that the Commission shall send all legislative proposals, including the subsidiarity statement, directly to the national parliaments of the Member States at the same time as to the Union legislator.¹⁴⁴ The current Protocol on national parliaments entrusts this task to the national governments.¹⁴⁵ Even legislative resolutions of the European Parliament and

¹⁴¹ CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003, Protocol on the Application of the Principles of Subsidiarity and Proportionality, point 2.

¹⁴² Compare with point 9 in Protocol (No. 7) on the application of the principles of subsidiarity and proportionality annexed to the EC Treaty by the Treaty of Amsterdam, OJ C 340, 10.11.1997.

¹⁴³ CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003, Protocol on the Application of the Principles of Subsidiarity and Proportionality, point 4.

¹⁴⁴ CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003, Protocol on the Application of the Principles of Subsidiarity and Proportionality, point 3; Protocol on the Role of National Parliaments in the European Union, point 2.

¹⁴⁵ Compare with point 2 in Protocol on the role of national parliaments in the European Union annexed to the EC Treaty by the Treaty of Amsterdam, OJ C 340, 10.11.1997.

positions of the Council of Ministers should be sent, upon adoption, to the national parliaments.¹⁴⁶

Within six weeks from the date of a proposal being submitted, any national parliament or any chamber of a national parliament may address to the Presidents of the European Parliament, the Council of Ministers and the Commission a reasoned opinion stating why it considers that the proposal in question does not comply with the principle of subsidiarity.¹⁴⁷ The consequence of such an opinion is, if it represents at least one third of all the votes allocated to the Member States' national parliaments and their chambers, that the Commission shall review its proposal and after the review decide to maintain, amend or withdraw its proposal.¹⁴⁸

By giving the national parliaments of Member States with unicameral parliamentary systems two votes and each of the chambers of a bicameral parliamentary system one vote, this system would place all national parliaments on an equal footing. It would encourage the national parliaments to examine the Commission's legislative proposals with regard to the principle of subsidiarity and ensure that the concerns that they might be led to express further to the examination would be taken more fully into account by the Union legislator.

4.2.3 Reinforced *ex post* judicial review

To take account of the primarily political nature of monitoring subsidiarity, it was important for the Convention to link the already existing possibility of appealing to the Court of Justice against violation of the principle of subsidiarity with the use by national parliaments of the early warning system proposed.¹⁴⁹ Recourse to judicial proceedings should in any case occur only in limited and exceptional cases, when the political phase has

¹⁴⁶ CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003, Protocol on the Application of the Principles of Subsidiarity and Proportionality, point 3; Protocol on the Role of National Parliaments in the European Union, point 2.

¹⁴⁷ CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003, Protocol on the Role of National Parliaments in the European Union, points 3-4; Protocol on the Application of the Principles of Subsidiarity and Proportionality, point 6.

¹⁴⁸ CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003, Protocol on the Application of the Principles of Subsidiarity and Proportionality, point 6.

¹⁴⁹ Convention document CONV 286/02, Conclusions of Working Group 1 on the Principle of Subsidiarity, 23 September 2002, p. 7.

been exhausted without any satisfactory solution being found by the national parliaments involved. The Convention has therefore proposed to extend the jurisdiction of the ECJ to hear actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought currently in accordance with Article 230 TEC by Member States, to include actions notified by Member States in accordance with their legal order on behalf of their national parliament or a chamber of it.¹⁵⁰

In addition, in accordance with the same Article, the Committee of the Regions may also bring such actions as regards legislative acts for the adoption of which the Constitution provides that it be consulted.¹⁵¹ The Advocate-General of the ECJ has commented this new right of the Committee of the Regions as a remarkable innovation in the Union's judicial system.¹⁵²

4.3 Different perspectives on the control mechanisms

4.3.1 The European Commission

The Commission has taken the view that specific control procedures must be introduced to ensure compliance with the principles of subsidiarity and proportionality.¹⁵³ The Commission has suggested to examine ways to prevent that transposal and implementation of European rules by national administrations generate an excess of national regulations and, moreover, to introduce external control of a constitutional nature to check compliance with the principles of subsidiarity and proportionality.¹⁵⁴ The first suggestion relates to the problem, experienced by the Commission, that European rules sometimes generate national rules which are excessive and

¹⁵⁰ CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003, Protocol on the Application of the Principles of Subsidiarity and Proportionality, point 7. See also Article III-270 of the proposed Constitutional Treaty.

¹⁵¹ *Ibid.*

¹⁵² Speaking at a conference organised by the CoR at the Bundesrat in Berlin on 27 May 2004, Francis Jacobs, Advocate-General of the ECJ, commented although stressing that he was speaking in a personal capacity that this right "seems to be the only case in which a body other than the Member States and the three political institutions have a right of action before the Court which is not limited to the defence of their own prerogatives." Press Release CdR/04/CP49.en.

¹⁵³ COM(2002) 247 final, 22.5.2002, Communication from the Commission: A Project for the European Union, p. 23.

¹⁵⁴ *Ibid.*, p. 24.

which are seen as incomprehensible or even rejected by the public. The later proposal is related to the obligation for the European institutions to respect the principle of subsidiarity and to the need for proper control mechanisms to ensure compliance with this obligation.

Some favour a political control, others a juridical control. The Commission believes that both approaches need to be examined.¹⁵⁵ According to the Commission, the existing examination of the Court of Justice should be duly taken into account but the arrangements for the *ex post* control reviewed and broadened.

To inform the decision-making process without weakening it, the Commission would advocate the introduction of an external control of subsidiarity and proportionality at the end of the legislative process before the instrument comes into force. The control would have to be quick not to slow up the decision-making process. In case of such an external control, the *ex post* procedure would have to be adapted.

4.3.2 The European Parliament

Whereas the Commission has considered an external control as a good way to control compliance with the principle of subsidiarity, the European Parliament has been more focused on the role of the European Court of Justice. Currently, the Court's role is to ensure the interpretation and application of the Treaty.¹⁵⁶

The Court has showed concerns about including the principle of subsidiarity in the criteria applied in its judgments.¹⁵⁷ Defending the most Community oriented interpretation, the Court has played a key role in the creation of the single market. Now that this has been achieved, the European Parliament believes that the Union needs a real Constitutional Court.¹⁵⁸ As such the

¹⁵⁵ COM(2002) 247 final, 22.5.2002, Communication from the Commission: A Project for the European Union, p. 24.

¹⁵⁶ Article 220 TEC. The judicial review of Community acts is covered by Articles 230 onwards.

¹⁵⁷ See e.g. ECJ Case C-74/99 *Imperial Tobacco and others* [2000] ECR I-8599; ECJ Case C-377/98 *Netherlands v. Parliament and Council* [2001] ECR I-7079.

¹⁵⁸ See European Parliament Resolution on the division of competences between the European Union and the Member States P5_TA(2002)0247, adopted on 16 May 2002, based on the Lamassoure Report (Constitutional Affairs Committee) FINAL A5-0133/2002, paras. 41-43.

Court would be specifically responsible for ruling in competence disputes involving the Union or one of its institutions. Furthermore, in accordance with the procedures in for example the French Constitutional Court, matters could in that case be referred to the Court *a priori*.

The Parliament has acknowledged the difficulty to define the right procedure.¹⁵⁹ In 1990, the Parliament proposed that within 20 days of final adoption of a legislative act, the Council, Commission, Parliament or a Member State could ask the Court to verify whether the legislation exceeded the limits of Community competence, considering the principles of subsidiarity and proportionality.¹⁶⁰ However, with that type of procedure, after the 2004 enlargement the Union would risk that every piece of Community legislation would be challenged by one or another Member State.

The solutions foreseen by the Parliament to the problem of finding the right procedure have been reflected to a certain extent in the proposals of the Convention. The Parliament envisaged to put a time limit – one month following final adoption of a legislative act – to the possibility of bringing an action before the Court, solely on the grounds of subsidiarity and proportionality.¹⁶¹ Moreover, the sole grounds admissible would be a conflict of powers relating to non-compliance with the principles of subsidiarity and proportionality and this referral procedure would not preclude the same legislation being subject to subsequent review under the ordinary law, on the basis of other provisions of the Treaty or a future Constitution.¹⁶² The idea of conferring a certain responsibility to national parliaments, however, did not appear in the European Parliament's proposals.

4.3.3 From an academic point of view

Despite claiming that the causes, nature and gravity of the problem of competence is misinterpreted in the current debate, Stephen Weatherill

¹⁵⁹ See point 8.2 in the Explanatory Statement to the Lamassoure Report on the division of competences between the European Union and the Member States, FINAL A5-0133/2002, 24 April 2002.

¹⁶⁰ *Ibid.* See also, the European Parliament Resolution of 12 July 1990 on the principle of subsidiarity, OJ C 231.17.9.1990, p. 163.

¹⁶¹ See point 8.2 in the Explanatory Statement to the Lamassoure Report on the division of competences between the European Union and the Member States, FINAL A5-0133/2002, 24 April 2002.

¹⁶² *Ibid.*

would accept the need for a new form of institutional control, applying both to general challenges to the competence of the Union to adopt particular acts, to the application of the subsidiarity principle and to supervision of the successor to Article 308 (draft Article I-17 proposed by the Convention).¹⁶³ He draws attention in particular to two points. Firstly, he claims that the problem is not as important as it is sometimes said to be. Secondly, he underlines the risk that the costs of an over-elaborate new system might exceed any benefits.¹⁶⁴ This is why he tends to advocate modest, minimalist solutions.

Weatherill is a supporter of proposals which improve the possibilities for early-warning systems. He wants to cure the poor participation of national and sub-national parliaments in discussions about legislative proposals at European level. He would argue for a wider dissemination of legislative proposals by the Commission to national and sub-national parliaments but, more significantly, for the need for a better incentive for those later to examine proposals and to react to constitutional arrangements that would reduce their involvement in the pre-legislative debate.¹⁶⁵ Consequently, he argues for a solution in line with the proposal of the Convention with the possibility for national parliaments and the Committee of the Regions to raise a “red flag” if they find something in a legislative proposal that they consider questionable from the perspective of the principle of attributed competence or the principle of subsidiarity.¹⁶⁶

Weatherill is in favour, furthermore, of upholding the current system for *ex post* control. He believes that the control of matters of competence by a judicial or a non-judicial body which is separate from the European Court would harm the prestige of the ECJ and be too costly to the credibility of the whole system.¹⁶⁷

He opposes the idea of special generous standing rules introduced in favour of sub-national units, as these will have been allowed involvement under his

¹⁶³ Weatherill, S., *Competence*, Convention Document CONV 703/03, p. 62.

¹⁶⁴ *Ibid.*, p. 63.

¹⁶⁵ *Ibid.*, p. 62-63.

¹⁶⁶ Weatherill, S., *Competence*, Convention Document CONV 703/03, p. 64. Note that Weatherill proposes to give the same right to the Economic and Social Committee and to sub-national “parliaments” whereas the Convention proposal is limited to national parliaments (both chambers in the case of bi-cameral systems) and to the Committee of the Regions.

¹⁶⁷ *Ibid.*, p. 65.

proposed *ex ante* procedure and that, according to him, should be enough to secure their voice in the debate and to allow them standing under the normal approach taken under Article 230 TEC.¹⁶⁸

The system envisaged by Weatherill is designed to avoid high costs and delays in the legislative process and to guarantee much of the existing machinery, while also maintaining the subsidiarity review as a political process of dialogue, with judicial intervention confined to *ex post* review. It corresponds, to a large extent, to the system proposed by the Convention. The system should increase transparency but is vulnerable due to the risk of causing such a vast volume of drafts and documents that the truly controversial minority of proposals may be lost.¹⁶⁹

¹⁶⁸ *Ibid.* Compare with the proposal of the Convention to give national parliaments and the Committee of the Regions a special right to bring actions as regards legislative acts before the Court of Justice, CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003, Protocol on the Application of the Principles of Subsidiarity and Proportionality, point 7.

¹⁶⁹ Weatherill, S., *Competence*, Convention Document CONV 703/03, p. 65.

5 The Intergovernmental Conference 2003-2004

5.1 The mission of the IGC

The sixth Intergovernmental Conference of the EU, which started in October 2003, was the first to be preceded by a Convention. The EU adopted a new Treaty at the European Council in Nice in December 2000 to amend the Amsterdam Treaty.¹⁷⁰ Introducing a few important changes regarding the composition of the Commission, the seats of the European Parliament, the weighting of the votes in the Council and the extension of majority voting, the Nice Treaty still failed to lay the foundations for an enlarged EU – the main reason why a new IGC was called for by the EU leaders.

The declared aims of the Treaty changes to be decided at the sixth IGC are:

- bringing the EU closer to its citizens;
- strengthening the EU's democratic character;
- facilitating the EU's capacity to make decisions, especially after its enlargement;
- enhancing the EU's ability to act as a coherent and unified force in the international system;
- effectively deal with the challenges globalisation and interdependence create.

5.2 The IGC under the Italian EU Presidency

After having agreed at the Thessaloniki European Council on 20 June 2003 that the text of the draft Constitutional Treaty was a good basis for starting the IGC, the Heads of State and Government asked the Italian Presidency to convene the IGC in October 2003.¹⁷¹ The Italian Presidency launched the IGC in Rome on 4 October 2003. The conference should complete its work and agree on the draft Constitution as soon as possible and in time for it to

¹⁷⁰ Treaty of Nice amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts, OJ C 80, 10.3.2001.

¹⁷¹ Presidency Conclusions, Thessaloniki European Council 19 and 20 June 2003, 11638/03, p. 2, point 5.

become known to the European citizens before the next elections to the European Parliament taking place in June 2004. The leaders also decided that the new Constitution should be signed by the Member States of the enlarged Union as soon as possible after 1 May 2004.¹⁷²

The IGC is conducted by the Heads of State or Government, assisted by the members of the General Affairs and External Relations Council. A representative of the Commission participates in the conference and the Parliament is closely associated and involved in the work of the conference. The ten new Member States have participated fully from the start of the IGC, on equal basis with the old Member States. Bulgaria, Rumania and Turkey take part in the conference as observers.

After the work of the Convention, some contentious issues remained to be resolved in the IGC. The main questions involve the issue of the real balance of power in the EU and its reflection on the roles of the EU institutions: the weighting of the votes in the Council of Ministers; the number of Commissioners; and the distribution of seats in the European Parliament.

Additionally, the IGC negotiations have treated a whole range of other issues, including the extension of qualified majority voting and the right to veto; the distribution of budgetary powers; and the question whether to include a reference to Christianity in the future Constitutional Treaty.

After the breakdown of the IGC at the European Council in Brussels on 12-13 December 2003, not many could envisage the future of an enforced, powerful, and effective European Union – finally unified by a European Constitution.¹⁷³

5.3 The IGC under the Irish EU Presidency

When the Heads of State and Government met for the Spring Council in Brussels on 25-26 March 2004, taking up the negotiations in the IGC, they had to tackle considerable difficulties and the preconditions for reaching agreement on a Constitutional Treaty seemed even poorer than in

¹⁷² *Ibid.*

December. They were surrounded by instability and insecurity with significant threats to a secure and prosperous Europe, as a result of recent acts of terrorism but also of financial difficulties growing over time and leading to unemployment and social exclusion. In addition, they were just in front of one of the Union's biggest challenges ever – bringing in ten new Member States through the enlargement on 1 May 2004.

However, the political climate around them in Europe had changed. The Irish EU Presidency, representing a conciliatory approach, and a new government in Spain, more open to negotiations, had increased the chances of compromises substantially. Under these circumstances the Heads of State and Government managed to commit themselves to reaching agreement on the Constitutional Treaty no later than the June European Council 2004.¹⁷⁴

After the European Council in March 2004, the Irish EU Presidency set out a tight agenda with a meeting of Foreign Ministers on 17-18 May 2004 and aiming at final agreement at the European Council in Brussels on 17-18 June 2004. Senior officials from all Member States came together in Dublin on 4 May. Further to the meeting on 4 May, the Irish Presidency has pulled together the provisions of the draft Constitutional Treaty on which a broad consensus emerged on 4 May.¹⁷⁵ In addition, the Presidency has presented a document with issues still in need for progress in view of the European Council on 17-18 June 2004, which also represents the deadline of the IGC to conclude its negotiations.¹⁷⁶

These issues continue to include: the future composition of the Commission; the formations of the Council of Ministers, the scope of qualified majority voting and the voting system in the Council. These and other points were discussed by the Foreign Ministers on 17-18 May 2004 and during extra ministerial IGC sessions on 24 May and on 14 June 2004, trying to pave the way as successfully as possible for compromise to be reached at the European Council in June 2004.¹⁷⁷

¹⁷³ Presidency Conclusions, Brussels European Council 12 and 13 December 2003, 5381/04, p. 1 point 2.

¹⁷⁴ Presidency Conclusions, Brussels European Council 25 and 26 March 2004, 9048/04, p. 1, point 4.

¹⁷⁵ Document CIG 76/04.

¹⁷⁶ Document CIG 75/04.

5.4 Concluding the IGC?

Noting the difficulties of reaching agreement on the Constitutional Treaty proposed by the Convention and negotiated in the sixth IGC, one has to recognise both the achievements and the dilemmas of the European Union.

Over the last years, the Union has taken a considerable step not only into a substantially enlarged construction, but also towards a deepened and unified structure. This is proof of a fundamental political will across the continent to strive towards further European integration. Legally, this means that the fundamentals for the European cooperation will inevitably be subject to changes. More safeguard mechanisms to prevent misuse of competences; to guarantee effective decision-making, accountability and transparency; and to ensure legal certainty will need to be built in the system.

Still, regardless of how carefully the legal principles are laid down in constitutional structures and how well democratic safeguards are integrated in the decision-making processes, the division of competences in the Union will always to a certain extent be decided by political compromise. A political compromise between 25 Member States, which do not necessarily share the same history and in which cultural, social and legal traditions are different, offering at the same time the valuable strength and the complex vulnerability of the *sui generis* construction of the European Union.

What will the development of the last few years, of the last months, mean in terms of distribution of powers in the Union? The European institutions are growing stronger, gaining new competences. What will that mean to the national governments? In what position will that leave them vis-à-vis the European institutions?

The answers lie in the negotiations of the latest and any future Intergovernmental Conferences. We will have some answers after the adoption of the new Constitutional Treaty but the effect in practice will be visible only at a later stage.¹⁷⁸

¹⁷⁷ Note that the IGC had not yet been concluded when the main content of this thesis was being finalised.

¹⁷⁸ The IGC came to an end, after the finalisation of this thesis, when Heads of State and Government reached agreement on the proposed Constitutional Treaty at the European Council in Brussels on 18 June 2004. The document which now constitutes the new Constitutional Treaty has been modified to a certain extent, compared with the

6 Analysis

6.1 Subsidiarity – a legal principle?

At a conference on the legal principles of European Community Law, organised in Malmö in August 1999 by the Swedish Network for European Legal Studies and the Faculty of Law, University of Lund, the principle of proportionality was a natural choice for discussion, whereas it was questioned whether the Treaty provisions regarding subsidiarity could at all be said to articulate a principle.¹⁷⁹ Graínne de Búrca wrote after the conference that one could *“argue over whether the subsidiarity concept should even be called a legal principle, given that its existence in EC and EU law is primarily governed by a fairly detailed set of Treaty provisions, rather than expressing a more general kind of legal guideline or norm”*.¹⁸⁰ Then again, she suggests that the introduction of subsidiarity in 1993 by the Maastricht Treaty was intended to signify a change in EU’s political and legal culture and that the more general expression of subsidiarity in the provisions of the TEU, as a broader value, forms the basis for the argument that subsidiarity is a general principle designed to guide decision-making at all levels within the EU.¹⁸¹

Five years later, the principle of subsidiarity is being expressively recognised in the new Constitutional Treaty, as a fundamental principle for the division of competences to be applied at all levels of decision-making within the EU, including the central, regional and local levels in Member States. Article I-9 point 3 in the proposed Constitutional Treaty states:

Convention’s proposals, and published in a provisional consolidated version.¹⁷⁸ The references to the document presented by the Convention as the proposed Constitutional Treaty are, however, still maintained in this thesis and the content of the particular provisions referred to generally stays the same. The Dutch EU Presidency takes over the final editing of the text. Heads of State and Government will sign the Constitutional Treaty on 29 October 2004, after which the ratification process of two years will start, including the organisation of referendums in a number of Member States. The main challenge now is to raise public awareness and interest concerning the new Constitutional Treaty before putting the Constitutional Treaty to the European people.

¹⁷⁹ See ex. *Institutional Principles: A Special Category of General Principles of Law*, de Witte, B., in *General Principles of European Community Law*, edited by Bernitz, U. and Nergelius, J, p. 148-149.

¹⁸⁰ *Proportionality and Subsidiarity as General Principles of Law*, de Búrca, G., in *General Principles of European Community Law*, edited by Bernitz, U. and Nergelius, J, p. 103.

¹⁸¹ *Ibid.*

“Under the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The Union Institutions shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Constitution. National Parliaments shall ensure compliance with the principle in accordance with the procedure set out in the Protocol.”

The question whether this provision will help bringing clarity to the division of competences in the EU and the question whether the new protocol annexed to the Treaty can effectively help guiding the application of the principle of subsidiarity remain to be answered. The problem as Neil MacCormick¹⁸² has once expressed it, is partly an issue of clarity and partly an issue of division of competences:

“I belong to the school of thought that maintains that the existing treaties set out a reasonably clear distribution of powers – or rather, that the treaties contain provisions relating to the distribution of powers that demarcate the powers of the member states, the powers of the Union institutions and the shared powers. However, [...] those provisions are not very clearly written, but are written in different styles and are scattered in odd ways throughout the treaties. At the minimum, we need the treaties to be restructured and rewritten to transform them into one treaty that could be read by an intelligent person in a reasonably discursive way and that would leave that person knowing and understanding who does what in the European Union and, roughly, why. At the moment, one almost needs a PhD to be able to answer those questions. That is an unsatisfactory state of affairs that is bound to increase people’s sense that there is a democratic deficit, and to give rise to worries about subsidiarity.

We need a treaty that makes the distribution of powers clearer and that is capable of dovetailing with member states’ constitutional arrangements.

That would allow us to be reasonably clear about who in each member state does what in relation to European legislation and policy implementation [...].”¹⁸³

6.2 The effects of the new Constitutional Treaty

Are the new Treaty provisions sufficient to respond to the problem of clarity and the problem of division of competences?

6.2.1 The process

Primarily, already the process itself, including the work of the Convention and the negotiations in the IGC 2003 and 2004, has led to a growing importance of subsidiarity in policy and legal debate. This process has allowed for open debate and dialogue. This can potentially be an effective counterbalance to a trend towards competences being increasingly executed at higher level.

The importance of the methodology, role and work of the European Convention should be underlined. For the first time in the Union’s history, Treaty changes have been prepared through broad and public discussions among representatives of national Governments and Parliaments, the European Parliament and the European Commission, with observers from the Committee of the Regions and social partners; and through consultation with civil society and representative associations.

6.2.2 Specific change

Secondly, the proposed Constitutional Treaty has brought in substantial change concerning the principle of subsidiarity:

News 1: The new Constitutional Treaty brings in new recognition of the role of national parliaments as democratic check instances in the control of the application of the subsidiarity principle. This can be claimed to be an

¹⁸² Scottish Member of the European Parliament 1999-2004

¹⁸³ Parliamentary question, S1W-18620, The Scottish Parliament, para 55 in *Report on the Governance of the European Union and the Future of Europe: What Role for Scotland?*, European Committee of the Scottish Parliament, 9th Report 2001, para 68.

important development both from an efficiency point of view and from a political aspect.

News 2: Moreover, the increased significance of pre-legislative consultation can be seen as an additional means for verification of the application of the subsidiarity principle.¹⁸⁴

Still, the new responsibility at Member State level, whether of national or sub-national institutions, gives reason to a whole series of questions regarding time frame and coordination which indirectly will have effect on the legal certainty of the law-making process.

It will be the responsibility of each national parliament to consult with regional parliaments with legislative powers where appropriate and to ensure coordination nationally. With the aim of adding democratic accountability and legal certainty to the legislative procedures of the EU, the additional control instances of national parliaments may however also further complicate the decision-making process. Being the original representatives of the European peoples, the national parliaments can be expected to express in the first place the national interests and not necessarily take into account the common European good.

In light of this, it is most likely an advantage that the national parliaments have not been given any right *ex ante* to completely block the European legislative process. The autonomy of the European legislator is maintained. The Commission is requested to give reasons for its decision to maintain, amend or withdraw its proposal after the review required by the reasoned opinions of one third of the votes allocated to the Member States' national parliaments and their chambers.¹⁸⁵

Then again, the ECJ will have jurisdiction to hear actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought *ex post* in accordance with draft Article III-270 by Member States, or notified

¹⁸⁴ About the responsibility of the Commission to consult widely before proposing legislative acts, see Article I-46 point 3 in the Draft Constitutional Treaty and point 2 in the Protocol on the Application of the Principles of Subsidiarity and Proportionality, CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003.

¹⁸⁵ CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003, Protocol on the Application of the Principles of Subsidiarity and

by them in accordance with their legal order on behalf of their national parliament or a chamber of it.¹⁸⁶ This system will require a closer coordination between national parliaments to be efficient and practical solutions, such as reinforcing COSAC or creating a permanent secretariat of national parliaments, may have to be foreseen.¹⁸⁷

An additional question concerns the possibilities to connect the sub-national level to the legislative process, if necessary. The internal organisation and the division of competences within each Member State are matters to be decided by the Member States alone. Nevertheless, given the increasing role that regional and local authorities play in the implementation of Union policies, it has been claimed in the debate on the future of the EU that these authorities may help preventing an increasing distance between the EU and its citizens when the competences of the EU expand.¹⁸⁸

At European level, the solutions will lie in the role of the Committee of the Regions, the interregional cooperation, the work of the permanent national representations to the EU and of regional representations in Brussels. At national level, coordination of actions of territorial authorities will be required either via Members of the national parliaments, via national Members of the European Parliament or passing through the national Governments.

The Committee of the Regions has been provided with the right to bring actions before the ECJ as regards legislative acts for the adoption of which

Proportionality, point 6, paras. 3-4, in certain cases of a Commission proposal one quarter of the votes.

¹⁸⁶ CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003, Article III-270 and the Protocol on the Application of the Principles of Subsidiarity and Proportionality, point 7.

¹⁸⁷ See Report on developments in European Union procedures and practices relevant to parliamentary scrutiny, prepared by the COSAC Secretariat and presented to: XXXI Conference of Community and European Affairs Committees of Parliaments of the European Union, 19-20 May 2004, Dublin, p. 42.

¹⁸⁸ See European Parliament Resolution on the division of competences between the European Union and the Member States, P5_TA(2002)0247, adopted on 16 May 2002, based on the Lamassoure Report (Constitutional Affairs Committee) FINAL A5-0133/2002, paras. 38-40; European Parliament resolution on the role of regional and local authorities in European integration, P5_TA(2003)0009, adopted on 14 January 2003, based on the Napolitano Report (Constitutional Affairs Committee) FINAL A5-0427/2002, paras. 1-2.

the Constitution provides that it be consulted.¹⁸⁹ Its heterogeneity and the great variety of regional structures it represents may, however, make it difficult to use this new right.

6.2.3 General change

Thirdly, the draft Constitutional Treaty entails more general changes with a potential impact on the application of the subsidiarity principle.

The principle of subsidiarity is applied only to shared competences. With the new Constitutional Treaty, the pillar structure is abandoned and the second and third pillars are communitarised.¹⁹⁰ This means that the number of areas in which the competences will have to be shared can be extended with areas, in which traditionally no Community powers could exist. Will this automatically mean an extension of the application of the principle of subsidiarity? No, not substantially, since the TEU already requires compliance with the principle of subsidiarity for all actions assigned to achievement of the Union's goals.¹⁹¹

6.2.4 Political choice

Fourthly and finally, European integration is and the EU as such is a dynamic process. It is not stable, not closed. This will not change with the adoption and ratification of a new Constitutional Treaty. In this process, discussions about the division of competences are at the same time discussions about the political choices of Member States' governments. These will always to some extent include political considerations, which cannot only be regulated by judicial tools or any other legal means.

The competence of competences, which ultimately sets the framework for the EU competences, still is a competence of Member States. The Union cannot act without powers being conferred upon it by Member States. The first article of the new Constitutional Treaty states: *“Reflecting the will of the citizens and States of Europe to build a common future, this Constitution*

¹⁸⁹ CONV 850/03 Draft Treaty establishing a Constitution for Europe, OJ C 169, 18.7.2003, Protocol on the Application of the Principles of Subsidiarity and Proportionality, point 7, para. 2. See also Chapter 4.2.3.

¹⁹⁰ In the case of the third pillar, those parts which have not already been communitarised.

¹⁹¹ See TEU Article 2 second paragraph.

establishes the European Union, on which the Member States confer competences to attain objectives they have in common.”

If the objective is to create a strong, integrated European Union, a certain leading role must be taken at European level and certain powers therefore need to be allocated to the Union. There is a political choice between: on the one hand, using the means of Community legislation because there is a common wish to reach common goals and, on the other hand, remaining with various national legislation at the same time allowing for the objectives to be differentiated.

So far, subsidiarity has been used rather as an argument for preventing execution of powers than as a way to integrate Europe. It has to be recognised that the Union sometimes suffers from a too weak leadership, due to the many mechanisms of checks and balances within the institutional triangle and due to the strong and sometimes diversified forces of Member States' governments.

The reflection of the vertical division of powers on the horizontal share of tasks between the EU institutions is largely equally, or even more, difficult to manage than the issue of division of competences between national and EU level. This matter has been at heart of the work of the Convention and the IGC because it represents a crucial aspect of the balance of powers. It is, nevertheless as previously mentioned, not substantially treated in this thesis. The issue of horizontal division of powers represents to a large extent a political rather than legal debate.¹⁹²

To obtain a sound balance and suitable degree of legislative activity at the various levels, the principles of subsidiarity and proportionality are probably still the most appropriate mechanisms to use as legal guiding principles. There is little alternative for that purpose.

However, making the system more transparent, clear and comprehensive is a responsibility of political character. It is the responsibility of politicians for reaching out to the citizens with the explanations of their political choices, of the common goals agreed and the functioning of the mechanisms to reach these goals. A legal principle, such as the principle of subsidiarity,

¹⁹² See Chapter 1.4.

can possibly act as a warrant for decisions to be taken as closely as possible to the citizens but it can never replace the responsibility of decision-makers at whatever governmental level to clarify their stances to the people.

7 Conclusions

To conclude, it can be recognised that the work of the Convention and the IGC 2004 has introduced in the constitutional structure of the European Union a number of possibilities to reinforce the mechanisms for control of the Union's execution of its powers. The draft Constitutional Treaty acknowledges the role of the principle of subsidiarity as fundamental and clarifies that it should be applied to all levels of government in the Union.

However, the real division of competences between Union and Member State levels is in the end a matter of political choice. It is the choice of setting up common goals for the EU and creating and using the means to achieve them. It is the choice of abandoning certain powers at national level because one believes that transferring these powers to European level is the right way to accomplish effectively the political objectives which are good not only for one or a few Member States but for the whole Union. It is the choice of working together towards European integration.

In the light of this, one could assume that the principle of subsidiarity is a valuable tool primarily for those countries that want to retain competences at national level and move more slowly with regard to European integration. Then again, there has once been agreement among all the Union's Member States to use subsidiarity as the principle and mechanism to regulate the level of Union legislation. The goal should therefore be to make subsidiarity as effective as possible, both as a principle to indicate as objectively as possible at a pre-legislative stage the need for Community action, and as a mechanism for control, which should be as democratic and transparent as possible, of the application of the principle.

In this regard, the draft Constitutional Treaty is an achievement both concerning the principle of subsidiarity specifically and more generally considering the review and simplification of the Union's Treaty structure. It is important to obtain clarity in the constitutional structure, not necessarily to make all citizens read the Treaty but to guarantee legal certainty as largely as possible.

Ratified in its current form, the Constitutional Treaty will offer great opportunities to extend and develop the principle of subsidiarity by

involving national parliaments, sub-national parliaments and national governments more closely in the European legislative process.

However, if this opportunity is to be taken, actions of all levels of government in the EU will be required and efforts necessary to make subsidiarity part of the fundamental culture of both policy and legislative processes of all the EU institutions. The principle will need to be mainstreamed not only as a theoretical principle but also as practical behaviour, and officials who need to apply the principle may need to be guided in order make the principle become more effective.

Not only the EU institutions but also the national instances may need to investigate in techniques to engage in domestic and EU debate with regard to subsidiarity. Subsidiarity will need to be operationalised within the respective Member State's constitutional and political practices. At the same time, the standards used to rationalise the concept must be flexible enough to allow preservation of the dynamic quality of subsidiarity as a legal mechanism.

Finally, although as has already been stated, the aim of the principle of subsidiarity is not primarily to enhance accountability and democratic legitimacy, the procedures used when applying the principle could be selected on the grounds that these reinforce the democratic dimensions of the principle. In this regard, the procedures developed to give effect to the innovations in the new Constitutional Treaty and Protocol provisions could be supported by principles, such as those set out in the European Commission White Paper on European Governance: openness, participation, accountability, effectiveness and coherence.¹⁹³

¹⁹³ COM(2001) 428 final, European Governance, A White Paper, OJ C 287, 12.10.2001.

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¹⁹⁴ Under the Jean Monnet Project, www.jeanmonnetprogram.org, the European Commission supports university initiatives aimed at creating teaching activities in European integration. The Jean Monnet Program pages include the Jean Monnet Working Papers, www.jeanmonnetprogram.org/papers/index.html

¹⁹⁵ Under the Jean Monnet Project, www.jeanmonnetprogram.org, the European Commission supports university initiatives aimed at creating teaching activities in European integration, in particular in Law, Economics, Political Science and History. The Jean Monnet Program pages include the Jean Monnet Working Papers, www.jeanmonnetprogram.org/papers/index.html

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