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**RETHINKING THE METHODS OF DIVIDING AND  
CONTROLLING THE COMPETENCIES OF THE UNION**

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## RETHINKING THE METHODS OF DIVIDING AND CONTROLLING THE COMPETENCIES OF THE UNION

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## A. Introduction

Talking about “who does what in the EU”, at first sight, concerns the system of power sharing between the national and the European level of government.<sup>1</sup> The German Länder initiated the debate with a view to preserving some meaningful freedom of action and political discretion to those democratically elected bodies in the Union who are closest to the citizens. But it also concerns the horizontal division of powers among the institutions, the degree of democratic legitimacy of the decision-making process and, in particular, the extent of qualified majority voting in the Council. What kind of powers may be entrusted to the European institutions and within which limits very much depends both on efficiency of the procedures and the effectiveness of democratic control – be it direct by the European Parliament or indirect controlling the ministers in the Council. Finally, the issue is closely connected to the protection of fundamental rights and freedoms of the citizens who could not consent to the transfer of public authority to institutions which are not strictly bound to respect the fundamental rights and to follow, in framing their policies, the orientations and values expressed by the fundamental rights. Consequently, “rethinking the methods of dividing and controlling the competencies of the Union” must be understood as an exercise which is interdependent with the progress of the institutional debate aiming at more transparency, democratic accountability and efficiency - on the one hand - and with the readiness to give the European Charter of Fundamental Rights binding effect so to be enforced by individuals against any use of European power by which he or she might be affected,<sup>2</sup> on the other.

Talking about the division of powers does not imply that all these powers have always existed, at the national (regional) or the European level. Given that e.g. legislative power for the harmonisation of legislation throughout the European Union didn't exist before the foundation of the European Communities, this perspective would be too narrow. Therefore, the process of integration does indeed entail the progressive creation of new powers as well as the reorganisation of existing powers at both levels of governance, in accordance with new challenges and political aspirations of the citizens. Competencies in the area of the environment, for example, have been created at national and European level well after the Treaty of Rome; European powers to combat international terrorism may well be the next to be extended. Therefore, the question we face is not the division of powers in a static structure, but in an evolving, dynamic multilevel system of governance. The aim of achieving legal certainty by detailed definitions must be balanced by securing the degree of openness and flexibility necessary for the effective functioning of the system. Given the political character of the use of competencies in practice as well as the dynamics of interpretation and necessary limits to legal certainty, any attempt to improve the existing situation would fail, if the work at constitutional texts was not coupled with procedural arrangements.

A third preliminary remark concerns the adequacy of possible procedures for the definition and delimitation of European competencies: a number of political and academic actors have already expressed their support for a new catalogue of competencies<sup>3</sup> or even a new constitution for the European Union comprising a solution for the question of competencies.<sup>4</sup> Though it is laudable to engage in such exercises with a view to designing models how a revised treaty or

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<sup>1</sup> For a detailed analysis of the debate see Mayer, “Die drei Dimensionen der europäischen Kompetenzdebatte”, (2001) 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (forthcoming).

<sup>2</sup> See the general considerations and proposals made by Pernice, “Kompetenzabgrenzung im Europäischen Verfassungsbund”, (2000) *Juristenzeitung*, 866 et seq. (also published in: [www.whi-berlin.de/pernice3.htm](http://www.whi-berlin.de/pernice3.htm)); for other contributions to the subject see the speech of Prime Minister Wolfgang Clement, *Europa gestalten - nicht verwalten*, FCE 10/2000, <http://www.whi-berlin.de/clement.htm>

<sup>3</sup> See the early draft of the Berlin Chancellery of State Franßen-de la Cerda, *Verbesserte Kompetenzabgrenzung zwischen der Europäischen Gemeinschaft und den Mitgliedstaaten*, Skzl EB 4 of 21 January 1999; Fischer/Schley, *Organizing a Federal Structure for Europe. An EU Catalogue of Competencies* (2000).

<sup>4</sup> Economist 28 October 3 November 2000, 21 et seq.; Juppé/Toubon/Gaymard, *Esquisse d'une Constitution Européenne*, presented 28 June 2000 at the Colloque: “Quelle constitution pour quelle Europe” in the Sénat – Palais du Luxembourg; Union pour la Démocratie Française, *Projet pour une Constitution de l'Union européenne* (2000).

constitution could be structured and look like, the final solution to the problems we face is a political one and can only be the result of the political process. This political and “constitutional” character of the exercise should be reflected in the procedure chosen. It should, in the first stage, be organised following the “Convention” model. The proposals and options of the Convention should then be submitted, in a second phase, to an IGC and a final summit for discussion and adoption. A European referendum should be held on the “European Constitutional Treaty” so elaborated, to underline its character of a new European social contract.<sup>5</sup> After it has become definitively clear in Nice that the traditional procedure under article 48 EU is neither efficient nor democratic, it is inevitable to adapt the procedure for “constitution-making” in Europe.

If this exercise is a political one, there is, on the other hand, no reason to re-invent the wheel. Most of the problems which were at the origin of the debate do indeed not concern the attribution of competencies and their limits, but the excessive exercise of given Community which are, in principle, not disputed: the application of the state aid regime, the structural policies and certain measures in the field of environment.<sup>6</sup> My conclusions and recommendations, will therefore try to find some pragmatic improvements of the existing system (D) and are based on a brief oversight of the existing catalogue of competencies in the European Treaties and the constitutions of other federal systems (B) as well as on some remarks on the characteristics of the European multilevel constitutional system which requires solutions different from those found in federal states (C).

## **B. Models for a new order of competencies in the European Union**

Before examining new systems or structures for the division and control of the competencies of the European Union, it is necessary to understand the existing system and the difficulties it creates (I). The comparison with other federal systems allows to build upon the experience of countries around the world without ignoring the fundamental differences between the European system and federal states (II). Existing proposals for a revised European system of competencies will be examined against this background (III).

### *I. The catalogue of competencies in the European Treaties*

The European Treaties includes of a very detailed and differentiated - and therefore complex - catalogue of competencies and means for their control. Without going too much into detail, it seems possible to describe the system by the following five characteristics:

The principle of limited, attributed competence: article 5 EC provides that “the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”. Accordingly, articles 1(2) and (5) EU state that the objectives of the Union shall be achieved “as provided in this Treaty...” and that the institutions “shall exercise their powers under the conditions and for the purposes” provided for by the provisions of the EC Treaty and the Treaty on European Union. Thus, the European institutions have no power unless expressly provided for in the Treaties. This presumption for Member State competence, is underlined by the principle of subsidiarity as defined in article 5(2) EC and specified by the Amsterdam Protocol (no. 30) and Declaration (no. 43) on the Application of the Principles of Subsidiarity and Proportionality.

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<sup>5</sup> See Pernice, “The European Constitution”, Sinclair House Talks Bad Homburg May 2001, (2001) 21 *Human Rights Law Journal* (forthcoming); see also Pernice/Mayer/Wernicke, “Renewing the European Social Contract. The Challenge of Institutional Reform and Enlargement in the Light of Multilevel Constitutionalism”, in: Andenas/Gardener (eds.), *Can Europe Have a Constitution?*, Kings College London, February 2000 (forthcoming).

<sup>6</sup> See in particular Clement, *supra*, note 2HYPERLINK. For an overview on the issues raised by the German Länder see Mayer, *supra*, note 1, at II.

Though there is no systematic distinction, most of the competencies conferred on the European level of government by the Treaties are competencies for legislative action. As opposed to the American approach of "dual federalism", implementation and financing of European policies is largely left for the Member States. Article 175(4) EC says so expressly for the environment and the Amsterdam Declaration on the Application of the Principles of Subsidiarity and Proportionality clearly confirms it. In its *Milchkontor* judgment the Court of Justice has established that the Member States are bound, under article 10 EC, to implement European policies in accordance with their respective national administrative law in an effective, non-discriminatory and loyal way.<sup>8</sup> The implementing powers referred to in article 202, last indent, and article 211, last indent, EC concern either legislative acts specifying Community legislation or, exceptionally, administrative powers of the Commission which need to be exercised at the European level, such as competition and state aids or the administration of the structural funds. These exceptions, however, confirm the rule of national implementation, a rule which is important for the vertical division of powers, for the political coherence of the system and for securing that measures which directly affect the citizens are taken as close to them as possible.

While article 3 EC contains a general list of areas in which the European Community may act, four categories of provisions dealing with legislative competencies can be distinguished in the Treaties:

*Competencies defined by areas*, for the conduct of concrete Community policies, such as customs (articles 26, 27 and 135 EC), agriculture (articles 32 to 38 EC), visas, asylum, immigration etc. (article 61 to 69 EC), transport (articles 70 to 80 EC), competition and state aids (articles 81 to 89 EC), the co-ordination of economic policies (articles 98 to 104), monetary policy (articles 105 to 111 EC), employment (articles 125 to 130 EC), commercial policy (articles 131 to 134 EC), social policy (articles 136 to 148 EC), research (articles 163 to 173 EC), environment (articles 174 to 176 EC) etc. Specific powers for co-ordination and common action are, in addition, conferred to the European Union by the provisions on the common foreign and security policy and on the police and judicial cooperation in criminal matters in the EU Treaty. All these competencies are each of very different reach and intensity, and defined by areas of action, by the indication of specific objectives, by the means of action and by the procedures to be followed.

*Competencies defined by objectives* for the achievement of specific goals of horizontal character and, in particular, of the internal market, such as the general provision of article 94 EC and the specific provisions of article 95 EC for goods, articles 40, 42 and 47 EC for the free circulation and social security of workers, the freedom of establishment, and the freedom to provide services. Even broader is the revision clause of article 308 EC, under which any measure may be taken, in case of the lack of a specific competence, if deemed necessary to meet an objective of the Treaty in the framework of the common market. These provisions are not related to specific policy areas, and measures taken to achieve the objectives defined therein may reach in any other policy area, including those for which the Union has (expressly) no specific power to legislate or to act otherwise. Only where legislative powers e.g. for harmonisation is expressly excluded (e.g. articles 149 to 152 EC on education, culture, public health), such general provisions may not be used.

*Negative competencies*, i.e. provisions which expressly exclude certain kinds of action of the Union in specific areas. The most important clauses of this kind are the provisions just mentioned in the areas of education, culture, public health etc. which exclude any kind of harmonisation of legislation. Article 152(5) EC goes further in securing that the Community action "shall full respect the responsibilities of the Member States for the organisation and delivery of health services and medical care". Article 137(6) EC states that Community competence in social matters "shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs", articles 64(1) and 68(2) EC as well as articles 33 and 35(5) EU make sure that "the exercise of the responsibilities incumbent on Member States with regard to the maintenance of law and order and the safeguarding of internal security" is not affected by European provisions, and under article 135 EC the European measures on customs co-operation "shall not concern the application of national criminal law or the national administration of justice".

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<sup>8</sup> [1983] ECR 2633.

“Abolished” competencies, i.e. prohibitions to act, both for the Member States and for the Union,<sup>9</sup> such as the prohibition to establish customs duties or other barriers to trade between Member States (articles 23, 25, 28 to 31 EC), barriers to the free movement of persons (articles 43 and 49 EC) and capital (article 56 EC) or the prohibition of tax discrimination (articles 90 to 92 EC). The prohibition, under articles 10, 81, 82 and 86 EC to establish or promote restrictions on competition and the prohibition of state aids contrary to the common market may also be added to this category. These provisions do not confer any competence on the European institutions, except the power of the Commission to control the prohibition and to take action in the case of violation, and the powers conferred to the Court of Justice to rule on cases brought to it in relation to such infringements.

A mix of the above-mentioned powers can be observed with the provisions on the economic and social cohesion (articles 158 to 162 EC). The policies of the structural funds are closely linked, in practice, to the application of the rules on state-aids, with the result that the Member States’ freedom of action in their regional policies is heavily restricted.<sup>10</sup>

The decision whether or not the Treaties provide for a European competence in a given case, and to what extent the principle of subsidiarity is respected is trusted in the hands of the institutions. Each institution is bound to respect the limits of competencies conferred on it, and the political practice shows that the cases where such limits have been exceeded are very rare. It is, in particular, the “in-built” control by the ministers in the Council, by which the interest of the Member States to safeguard their respective competencies and preserve their freedom of political action and discretion is secured. However, in practice, governments sometimes tend to use the “European channel” to implement policies which - for political reasons - they are unable to achieve at the national level.<sup>11</sup>

It is up to the Court of Justice to decide cases submitted to it, to examine and judge in any case upon the legality of the European measures and legislation in question. The *tobacco* case, in which it found that the Directive on the prohibition of advertising for tobacco products was ill-founded and, therefore, void, has already become a famous example.<sup>12</sup> An increasing tendency of the Court to find balanced solutions between the objectives of integration and the interest of the Member States to preserve their freedom of action, now expressed by article 6(3) EU and the principle of subsidiarity, can already be found in its opinion on the power of the Community to adhere to the European Convention on Human Rights.<sup>13</sup> Although the question of limits of competencies under the Treaties and the principle of subsidiarity is largely political, the Court could turn into a reliable arbiter between the national and European institutions in such questions.

## II. Comparative analysis: The division of competencies in federal states

Although there is a great variety of ways how competencies are divided and delimited in federal states, it seems to be possible to distinguish broadly three categories or models. As the debate in the European Union basically relates to the legislative competencies and the above-mentioned principle, that implementation and financing of the European policies are a matter for the Member States, shall not be questioned, it is appropriate to focus on how legislative competencies are assigned to the different levels of governance in other federal systems.

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<sup>9</sup> See the category of “compétences abolies“, developed by Simon, *Le système juridique communautaire* (2<sup>nd</sup> ed. 1998), 83 et seq., on the basis of considerations made by Constantinesco, *Compétences et pouvoirs dans les Communautés européennes* (1974), 231 et seq., at 248.

<sup>10</sup> See the remarks made by Clement, *HYPERLINK supra*, note 2.

<sup>11</sup> Kohl, “Europa auf dem Weg zur politischen Union“, in: Konrad Adenauer Stiftung (ed.), *Europa auf dem Weg zur politischen Union. Documentation of a congress of the Konrad Adenauer Foundation*, 1993, 11 et seq., 14 et seq.; cf. also Pernice, *supra*, note 2, at 874.

<sup>12</sup> [2000] ECR I-2247.

<sup>13</sup> [1996] ECR I-1759.

### 1. Special assignment of federal competencies

Most common is a system - comparable to the European approach - of explicit assignment of legislative competencies to the federal level with residuary legislative power on the state or regional level. Thus, whenever there is no responsibility assigned to the federal level, the state level is competent to legislate on the matter. This model is open for exclusive as well as concurrent or other legislative competencies on the federal level, with concurrent competencies understood as legislative powers that the state level may use as long as the federal level has not passed any legislation in a particular policy area. A good example is the German Grundgesetz: it provides for catalogues of exclusive, concurrent and framework legislative competencies assigned to the federal level (articles 71 et seq.), whereas the Länder have residuary legislative power (articles 30 and 70). This model – with minor deviations – can also be found in the constitutions of the United States<sup>14</sup>, Brazil<sup>15</sup>, Australia<sup>16</sup> and Austria<sup>17</sup>.

### 2. Residuary powers of the federal level

In a second model explicit legislative powers are assigned to the state or regional level while the residuary legislative competence remains at the federal level. This model is basically followed by the constitution of Canada<sup>18</sup>. The process of devolution in the United Kingdom<sup>19</sup> seems to follow the same line, although the UK is far from being a federal system.

### 3. Bipolar assignment of competencies

A third model takes its bearings from a bipolar or dual structure of competency assignment: explicit legislative competencies assigned to both the federal and the state level. However, a distinction shall be made between a strict and an open bipolar system. In the strict bipolar system, only exclusive competencies are dealt with. The federal constitution confers exclusive competencies to the different levels of governance and the responsibility for a specific policy belongs either to the states or to the federation. This system can be found in Belgium. In the open bipolar system, the federal constitution not only refers to exclusive competencies on both levels but also to concurrent or parallel legislative powers, and distributes such powers (partly including even powers for the administrative implementation and financing) by very detailed and specific rules (Switzerland<sup>20</sup>, India<sup>21</sup>).

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<sup>14</sup> Legislative competency assignment to the federal level (article I Section 8 Constitution of the United States), residuary competence on state level (Amendment X), exclusive and concurrent (“Dormant Commerce Clause”) competencies (see Brugger, *Einführung in das öffentliche Recht der USA* (1993), at 56 et seq.), supremacy of federal law in case of inconsistency (article VI clause 2 Constitution of the United States).

<sup>15</sup> Catalogue of exclusive legislative competencies assigned to the federal level (article 22 Constitution of the Federative Republic of Brazil), catalogue of concurrent legislative competencies (article 24 Constitution of the Federative Republic of Brazil).

<sup>16</sup> Enumeration of exclusive (article 52 Constitution of Australia) and parallel (article 51 Constitution of Australia) legislative competencies assigned to the federal level, residuary competence on state level (article 107 Constitution of Australia), in case of inconsistency federal law shall prevail state law (article 109 Constitution of Australia).

<sup>17</sup> Catalogue of exclusive legislative competencies assigned to the federal level (articles 10, 11 Federal Constitutional Law of Austria), enumeration of basic/framework legislative competencies assigned to the federal level (article 12 Federal Constitutional Law of Austria), detailed bipolar listing of legislative competencies in educational matters (articles 14, 14a Federal Constitutional Law of Austria), residuary legislative power (article 15 (1) Federal Constitutional Law of Austria) on state level.

<sup>18</sup> Catalogue of exclusive legislative competencies assigned to the state/provincial level (article 92 Constitution Act, 1867), residuary legislative power on federal level, though enumeration “for greater certainty” (article 91 Constitution Act, 1867).

<sup>19</sup> See Bogdanor, “Devolution: The Constitutional Aspects”, in: The University of Cambridge Centre for Public Law (ed.), *Constitutional Reform in the United Kingdom: Practice and Principles* (1998), 9 et seq.; Pahl, “‘Devolution’ und Europa - Die neuen Regelungen zur Mitwirkung der Regionen des Vereinigten Königreichs in EU-Angelegenheiten”, (2000) 23 *Integration*, at 245.

<sup>20</sup> Very detailed catalogue of exclusive, concurrent and supplementary competencies for both the federal and cantonal levels (articles 54 et seq. Federal Constitution of the Swiss Confederation), residuary competence on cantonal level (articles 3, 42

#### 4. Modalities of assignment and control

A general overview also allows two further distinctions to be made with respect to the delimitation of competencies in federal systems:

Attributed powers may be described in terms of specific tasks or may be delimited on the basis of policy areas. Most common among competency catalogues is a mix of both forms. The assignment of general competencies just for the attainment of certain objectives, such as the establishment or functioning of the internal market, however, seems to be reserved to the European Union.

In all analysed systems competency delimitation conflicts are decided by supreme courts or federal constitutional courts<sup>22</sup>. The alternative of a rather political control has been chosen in Belgium, where a special Court of Arbitration (article 142 Constitution of Belgium) decides on competency conflicts between Regions, Communities and the Federal State.<sup>23</sup>

### III. Proposals under discussion in the European debate

A number of draft constitutions or at least proposals for drafting a new catalogue of competencies exist already. One similarly to the bipolar Swiss model provides for the full assignment and distribution of powers between the two levels of government (1), others take over the existing system of assigned competencies, while splitting the Treaties into two parts (2) and two French proposals plead for the special assignment of European competencies by the treaty or by organic laws adopted under the treaty (3). The Economist opts for specially assigned competencies to the Union in the framework of a European Constitution which shall co-exist with the revised Treaties (4) and the German Länder are still searching for a compromise in view of a more systematic order of competencies combined with some procedural safeguards (5).

#### 1. The bipolar or dual system developed by Fischer and Schley

The proposal of *Fischer* and *Schley*<sup>24</sup> merely follows the strict bipolar approach<sup>25</sup>. However, the model goes beyond the dual listing of responsibilities which belong exclusively to the Member States and the European level by introducing the additional distinction between primary and partial competencies on both the national and the supranational level. Primary competencies cover cases in which the powers of the Member States and the European level are normally exercised in a given policy area, whereas the partial competencies state the exceptions to this rule with regard to the other level.

Developing a model for the Treaty-based reorganisation of the division of competencies between the European Union and its Member States, *Fischer* and *Schley* propose the use of the subsidiarity principle of the Treaties with its "necessity" (insufficient) and "effectiveness" (better) clause for the compilation of a "competency test" to determine the distribution of competencies between the European Union and the Member States. The principle of subsidiarity is thereby mutated from a rule on the use of competencies into a rule governing their distribution. For this purpose, they propose a set of criteria for scrutinising and reorganising European responsibilities in a *dual catalogue of competencies*. Applying these criteria, they eventually give a short description of each competence. They suggest, in addition, a new

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Federal Constitution of the Swiss Confederation, 1998).

<sup>21</sup> Catalogues of exclusive state (State List), exclusive federal (Union list), and concurrent legislative competencies (Concurrent list) in the Seventh Schedule of the Constitution of India, federal level has residuary legislative competencies if the relevant matter is not enumerated in the state or concurrent list (article 248 (1) Constitution of India).

<sup>22</sup> See e.g. article 93 (1) no. 3 of the German Grundgesetz or article III Section 2 Constitution of the United States.

<sup>23</sup> For more details see: Alen, *Treatise on Belgian Constitutional Law* (1992), 117 et seq. and at 145 et seq.

<sup>24</sup> Fischer/Schley, *supra*, note 3.

<sup>25</sup> A model which was already proposed by the "Commission on European Structures" in 1994, see Weidenfels (ed.), *Europe '96. Reforming the European Union* (1994), 18 et seq.



procedure for the transfer of competencies in order to make sure that the integration process - despite the precise delimitation of responsibilities - can develop in a dynamic way.

Though the approach looks very attractive and promises both, a high degree of legal certainty and dynamism, it is questionable if it can accommodate with the special features of the European Union. Could a European Treaty define the competencies of the Member States without interfering too much with their constitutional autonomy? If additional competencies could be conferred on the Union under a simplified procedure with a view to more flexibility, another crucial difference between the Union and a federal state, the principle of consent, i.e. the veto on basic constitutional questions, would disappear. As long as the specific features of the EU are to be maintained, it is preferable, therefore, to be content with the assignment and definition of European competencies and its institutions and not to interfere more than necessary with the autonomy of the Member States. This does not exclude, however, a broader use of “negative competencies” mentioned above, by which certain kinds of action are excluded from the scope of European competencies with a view to protecting national freedom of action.

## 2. Simplification by splitting - the EUI and Bertelsmann proposals

The drafts for a of the *EU*<sup>26</sup> and the *Bertelsmann Group for Policy Research*<sup>27</sup> propose a reorganisation of the presentation and form of the Treaties, while largely respecting the present legal situation. It is clear, therefore, that these proposals cannot produce substantial changes to the existing system of competencies in the European Union.

Yet, it is worth mentioning that both the EUI and the Bertelsmann Group for Policy Research propose that the Treaties should be divided into two parts, with a Basic Treaty and a separate Treaty containing more specific regulations. In the Basic Treaty, they restructure the whole primary law in a consistent way and set out the fundamental features of the European Union. The main purpose of this exercise is clarification and simplification. An enormous body of complex rules is reduced to a short, clearly structured text for the benefit of the citizens of the Union. This basic treaty would have the advantage of enhancing legal certainty and respect for the primary law, while endowing the Union with a symbolic and identity-creating document with an effect similar to the Charter of Fundamental Rights. The more readable document might eventually lead to more transparency and acceptance of the European Union.

It is questionable, however, whether the complexity of the “European constitution” would be reduced and legal certainty regarding the division of competencies between the Union and its Member States would be enhanced. To really understand who does what, people and experts would have to read the Basic Treaty *and* the persisting provisions of the European Treaties, establish which of both has prevalence over the other in case of conflicts or open questions, and eventually have to refer to the different provisions to make a specific argument. The exercise would therefore result in more complexity instead of reducing it. To achieve a clearer delimitation of competencies was neither the task nor the purpose of the authors, anyway.

## 3. Flexible mechanisms in a European constitution: the Juppé and UDF proposals

A draft paper by a group of French politicians around *Alain Juppé*<sup>28</sup> seems to be close to the first model of attributed competencies mentioned above (B.II.1). It distinguishes three categories of legislative competencies: exclusive compe-

<sup>26</sup> European University Institute, Robert Schuman Centre for Advanced Studies, *A Basic Treaty for the European Union. A study of the reorganisation of the Treaties. Report submitted on 15 May 2000 to Mr Romano Prodi, President of the European Commission*, [http://europa.eu.int/comm/archives/igc2000/offdoc/repoflo\\_en.pdf](http://europa.eu.int/comm/archives/igc2000/offdoc/repoflo_en.pdf).

<sup>27</sup> Bertelsmann Group for Policy Research at the Center for applied Policy Research, *A Basic Treaty for the European Union. Draft Version for the Reorganisation of the Treaties* (May 2000) <http://www.cap.uni-muenchen.de/download/treaty.pdf>; a synthesis of all the attempts at consolidating the founding Treaties in a single document is given by Schmid, “Konsolidierung und Vereinfachung des europäischen Primärrechts – wissenschaftliche Modelle, aktueller Stand und Perspektiven”, in: v. Bogdandy/Ehlermann, *Konsolidierung und Kohärenz des Primärrechts nach Amsterdam* (1998) *Europarecht*, Beiheft 2.

<sup>28</sup> Juppé/Toubon/Gaymard, *supra*, note 4.

tencies assigned to the European Union level in the Treaties, shared competencies (compétences partagées) enumerated in an organic law - "loi organique", which can be altered more easily than Treaty provisions, which would still require a more formal procedure than ordinary secondary legislation, and residuary legislative powers of the Member States. Within the framework of a wider approach including institutional reforms, it is proposed to introduce a special political control for the exercise of powers conferred on the Union in particular with regard to the principle of subsidiarity, by a new "second chamber" which shall be composed of representatives of national parliaments ("Chambre des Nations"). It takes up, in this respect, an idea of the French Senate, which has apparently been calling for such a Second Chamber for a long time.<sup>29</sup>

The draft-constitution of the UDF<sup>30</sup> is another French proposal based on the model of assigned competencies. It distinguishes between exclusive legislative competencies (compétences fédérales) and shared European competencies (compétences partagées), both to be determined in and exercised according to the conditions laid down in organic laws as well as the principles of subsidiarity and proportionality (Art. 9, 6, 1). The principle of subsidiarity is applied not only to the exercise of existing competencies, but also as a rule governing the assignment of competencies to the Union (Art. 6). A residuary legislative competence rests with the Member States (Art. 7) which they may exercise collectively outside the Treaty framework. The exercise of competencies is subject to the control by the Court of Justice (Art. 19).

Both French proposals seem to rely on a "hierarchy of norms" – an approach by which the flexibility of the assignment and the division of competencies is found in the special procedure designed for such decisions of a constitutional character. The aim does not seem to be more legal certainty or the effective preservation of the freedom of action of the Member States. Though the system would be simpler and more transparent, and both proposals consider, by a "Chamber of nations" or by the Court of Justice, a control for the respect of the limits of competencies including subsidiarity, their main purpose is drafting a constitution as simple as possible, replacing the existing Treaties and setting the Union on a new basis.

#### 4. A British proposal for a European Constitution: the Economist

A different path is taken by the proposal of a European Constitution submitted by The Economist<sup>31</sup>. The European Constitution is proposed to be a basic document that is, like the Basic Treaty of the EU, designed to co-exist with the Treaty of Rome and with the other Treaties of the Union. However, these would be amended substantially. The proposal includes an enumeration of legislative competencies for the European Union in the Constitution (Art. 13 et seq.) or in the Treaties (Art. 1) and residuary competencies for the Member States (Art. 1). It does not distinguish between different types of competencies. Powers can also be returned to Member States, if all Member States agree (Art. 17). The proposal provides for a new chamber of representatives of national parliaments, the "Council of Nations", and charges this body with the task of constitutional oversight (Art. 6). The Council will even have the power to overrule the Court of Justice (Art. 6 and Art. 9) in constitutional matters.

Compared to the ideas Tony Blair expressed in Warsaw last year,<sup>32</sup> this proposal seems to be more courageous in so far as it suggests a European Constitution. It does, however, neither add much to reducing the complexity of the system nor clarify the delimitation of competencies. Tony Blair suggested a political charter of competencies which would serve as a guideline for the institutions in applying the provisions of the Treaties, and - like Juppé and the French Sena-

<sup>29</sup> See Hoeffel, *Rapport d'information fait au nom de la délégation du Sénat pour l'Union européenne sur une deuxième chambre européenne*, No. 381 Sénat session ordinaire de 2000-2001.

<sup>30</sup> Union pour la Démocratie Française, *supra*, note 4.

<sup>31</sup> Economist, *supra*, note 4.

<sup>32</sup> Blair, *Europe's Political Future*, Speech by the Prime Minister to the Polish Stock Exchange, Warsaw, Friday 6 October, <http://www.fco.gov.uk>.

te, and followed insofar by the Danish minister of foreign affairs, Lykketoft - a parliamentary chamber for the political control of subsidiarity and the limits of European competencies.<sup>33</sup>

### 5. The German debate on a catalogue of competencies

After almost two years of discussion in Germany, a first important conclusion seems to be that the original idea of a catalogue of competencies "a la tedesca" is dead. This is not because such a catalogue would transform the Union into a federal state, as was stated recently by Andrew Duff.<sup>34</sup> But it has become clear that the system of the German constitution, including catalogues of exclusive, concurrent and framework competencies, criteria for their exercise and a control by the Constitutional Court did not prevent a continuous process of centralisation eroding the competencies of the Länder. The debate is still going on. While the Länder are close to find a compromise among themselves<sup>35</sup> and the foreign office is making up its mind, the think tank of the Christian democrat party under the guidance of *Wolfgang Schäuble* is preparing a comprehensive paper in which the general approach for the European competencies in the framework of a European Constitutional Treaty will be outlined and proposals for a clearer and more balanced attribution of powers in each policy area of the Union will be made. Finally, a working group of the Social Democrat Party has worked out and published, mid October, some thoughts on a concept for the division of competencies, pointing out that the key question is that of the exercise, not of an excessive attribution of competencies to the Union.<sup>36</sup>

What can be said so far, is that

the German Länder and the Schäuble group will insist on a more systematic and transparent approach. This does not only mean to distinguish more systematically different categories of competencies, such as exclusive, basic/framework and competencies for complementary action. But it also includes the idea to determine different forms and categories of European action: direct regulation, harmonisation, mutual recognition, measures of co-ordination, (financial) support and administrative action;

there is a discussion on a more precise drafting of article 95 EC, namely with a view to conditioning any measure of harmonisation more strictly by the proper functioning of the internal market, the introduction, in addition, of more precise specific powers for harmonisation in technical standards etc. and the abolition of article 308 EC which is considered superfluous at this progressed stage of integration;

serious thought is given to the question, to what extent agriculture policies and certain competencies in other areas such as transport and research can be re-transferred to the Member States, so to secure them more freedom of action;

there is a strong questioning also whether the system and operations of the structural funds: if more than 50% of the national contributions finds its way back to the funding Member State, would it not be safer, more transparent and cheaper to limit financial transactions to the amounts which represent a real transfer? Thought is given to substitute the structural funds on these lines by a „fund of solidarity“;

a more precise drafting of certain provisions of the Treaties is proposed to enhance legal certainty and to give the Court of Justice - or a special Court for Competencies to be created - more ground for a strict legal control;

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<sup>33</sup> Blair, *supra*, note 32; Lykketoft, Speech of 26 August 2001 at the Außenpolitische Gesellschaft, reported in: *Frankfurter Rundschau* No. 198 of August 27, 2001, 2: "Die Suche nach Gegengewichten".

<sup>34</sup> Duff, ELDR Task Force Paper on the Future of Europe, *Towards a Liberal Laeken* (2001), [www.andrewduffmep.org](http://www.andrewduffmep.org), at point 11.7.

<sup>35</sup> At their meeting of 11/12 October 2001 in Goslar they seem to have agreed upon a first paper on a common position.

<sup>36</sup> SPD working group European Integration, paper no. 10 (September 2001) on „Kompetenzausübung, nicht Kompetenzverteilung ist das eigentliche europäische Kompetenzproblem“, <http://www.fes.de/indexipa.html>

a number of procedural safeguards are discussed, such as provisions for an earlier participation of the Member States in the legislative process, the internal control of subsidiarity in the Commission by a “subsidiarity officer”, an independent control of subsidiarity and the respect of the limits of European competencies during the law-making process by an expert committee or a “Parliamentary Subsidiarity Committee”;

it is finally suggested to establish a right for the regions to seize the European Court of Justice in matters of competence and subsidiarity.

A number of the proposals mentioned above need further consideration. To abolish article 308 EC, however, would put at serious risk the dynamic development of the Union and be in nobody’s interest. The revision of the Treaties is too heavy an instrument for creating legal basis in a specific case of need. Touching the rules on the agriculture policies would question a basic deal between Germany and France, but the question is, to what extent it would be in the interest also of France and other Member States to reconsider the pros and cons of the present situation, namely with a view to enlargement. Neither the rules on the economic and social cohesion, nor the structural funds, finally, will be sufficient to solve the social and economic problems eventually linked to the internal market under the conditions of the Economic and Monetary Union. It will be necessary, therefore, to consider new ways of a system of horizontal financial transfer within the framework of a new financial constitution for the European Union.

The German debate, therefore, has left the “catalogue” issue far behind and rather seems to move towards proposals which bring the call for clarification and delimitation in balance with a clear demand for concentration on certain core policies, including new and enhanced supranational powers in areas where the EU so far remained ineffective:

international trade policy and the establishment of a legal framework of the global order,

foreign and security policy, including a common defence and action for the solution of regional conflicts,

a common policy in matters of immigration, visa, refugees and asylum, including the question of a balanced burden sharing

the creation of a real European legal area through enhanced judicial co-operation

combat of organised international crime and terrorism, a matter that has got a new dimension since the events of September 11, 2001.

With these important changes in mind, it is clear that the option of Nice to simplify the Treaties “with a view to making them clearer and better understood without changing their meaning” could not be the guideline for the preparation of IGC 2004. What the post-Nice process is about, will instead be a reorganisation of the Treaties including the assignment of new and the delimitation of old competencies, based on the common values as expressed by the objectives and the Charter of fundamental rights, which, understood as a catalogue of “negative competencies” with regard to the protection of the citizen’s rights<sup>37</sup> and existing social institutions at the national level.<sup>38</sup>

## C. EU-power sharing in the light of multilevel constitutionalism

Evaluating the numerous proposals discussed and considering concrete steps to clarify and, if necessary, complete the European system of competencies in a revised Constitutional Treaty should be based on a common understanding of the very nature of the Union. My view is, that it is not an international organisation the “masters” of which are the Member States and the acts of which reach their citizens because of a validating act of each Member State. I suggest to

<sup>37</sup> In this sense: Ehmke, *Wirtschaft und Verfassung* (1961), at 29 et seq.; Häberle, *Öffentliches Interesse als juristisches Problem* (1970), at 666; Alexy, *Theorie der Grundrechte* (1985), at 223 et seq.; more generally: Mayer, *supra*, note 1, at I.1.b), and applied on the EC: *ibid.*, I.1.d).

<sup>38</sup> Pernice, Editorial: “Europäische Grundrechte-Charta und Abgrenzung der Kompetenzen”, (2001) *EuZW* (forthcoming).

conceptualise it as a multilevel constitutional system, composed of - as the case may be - local, regional, national and European levels of political integration and action, and, thus, a system of (multi-)layered competencies established to meet the needs of the citizens most effectively each at the appropriate level. Let me first give some elements of the theoretical approach on which my considerations are based (1), and draw in a second step some conclusions for the criteria and methods for dividing and controlling the Competencies of the Union (2).

### *I. Elements of Multilevel Constitutionalism*

Multilevel constitutionalism<sup>39</sup> is the legal “pendant” to the political theory of multilevel governance in Europe<sup>40</sup>. To describe what it means in our context, the following five elements are crucial:

In the process of globalisation, states are increasingly unable to meet the challenges and serve effectively the needs of their citizens regarding peace, security, welfare etc. The “postnational constellation” described by J. Habermas<sup>41</sup> requires supra- and international structures serving as complementary instruments to fill this growing lacuna. On the basis of a functional - or as I would call it: “postnational” - concept of constitutionalism<sup>42</sup>, it does not seem necessary to assume that only states can have a constitution. But generally, the term rather means the legal instrument by which the people on a certain territory agree to create institutions vested with public authority, i.e. powers to achieve certain objectives in their common or general interest, and define their respective rights with regard to such institutions and their status as citizens of the organisation, “community” or polity so created.<sup>43</sup>

There are many ways, historically, how constitutions have been made. One, if not the most appropriate and attractive, could be to empower representatives of the groups of people concerned to negotiate a draft that is later submitted to ratification. This is exactly how, on the basis of the integration clauses, conditions and procedures set out in the constitutions of the Member States, the European Treaties have been adopted and developed: as an expression of the common will, as an instrument to pursue certain common goals, the citizens of the Member States - through their respective governments and constitutional processes have agreed to create supranational institutions, entrust them with certain competencies to be exercised according to the procedures laid down in the Treaties, and have defined their own common status as citizens of this Union, their rights and freedoms. The statehood of the Member States and national citizenship are not called into question, but a new constitutional layer establishing a complementary public authority has been added for matters of common interest, drawing its legitimacy from the subjects who are subject to its policies.

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<sup>39</sup> For the concept see: Pernice, “Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and ‘Multilevel Constitutionalism’”, in: Riedel (ed.), *German Reports on Public Law Presented to the XV. International Congress on Comparative Law*, Bristol, 26 July to 1 August 1998 (1998), 40 et seq.; further developed in: Pernice, “Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?”, (1999) 36 *CMLRev.*, 703 et seq.; Pernice/Mayer, “De la constitution composée de l’Europe”, (2000) 36 *RTD eur.*, 623 et seq. at 631 et seq.; cf. also: Schuppert, “Anforderungen an eine Europäische Verfassung”, in: Klingemann/Neidhardt (eds.), *Zur Zukunft der Demokratie. Herausforderungen im Zeitalter der Globalisierung* (2000), 237 et seq. at 256 et seq.; v. Bogdandy, “A Bird’s Eye View on the Science of European Law: Structures, Debates and Development Prospects of Basic Research on the Law of the European Union in a German Perspective”, (2000) 6 *ELJ*, 208 et seq. at 226 et seq.; Bauer, “Europäisierung des Verfassungsrechts”, (2000) *JBl.*, 749 et seq. at 751.

<sup>40</sup> See Marks/Hooghe/Blank, *European Integration and the State*, at 7; Mayer, *Kompetenzüberschreitung und Letztentscheidung* (2000), at 36.

<sup>41</sup> Habermas, “Die postnationale Konstellation und die Zukunft der Demokratie”, in: *ibid.*, *Die postnationale Konstellation. Politische Essays* (1998), 91 et seq.; Zürn, *The State in the Post-National Constellation - Societal Denationalization and Multi-Level Governance*, ARENA Working Papers WP 99/35, [www.arena.uio.no](http://www.arena.uio.no); Schuppert, “Demokratische Legitimation jenseits des Nationalstaates. Einige Bemerkungen zum Legitimationsproblem der Europäischen Union”, in: Heyde/ Schaber (eds.), *Demokratisches Regieren in Europa? Zur Legitimation einer europäischen Rechtsordnung* (2000), 65 et seq. at 76 et seq.: ‘Die postnationale Konstellation oder die EU als dynamisches Mehrebenensystem’.

<sup>42</sup> See Pernice, “Europäisches und nationales Verfassungsrecht”, (2001) 60 *VVDStRL*, 148 et seq. at 155 et seq.

<sup>43</sup> For the application of this concept to the constitutional tradition of the United Kingdom see Thym, “European Constitutional Theory and the Post-Nice Process”, in: Andenas/ Usher (eds.): *The Treaty of Nice, Enlargement and Constitutional Reform* (forthcoming).

This process has strong impacts on the realities of national constitutions, the powers and the functions of the institutions of the Member States and on the national legal systems. Every revision of the European Treaties, which the Court so rightly calls the “constitutional charter of a legal community”,<sup>44</sup> entails an implicit or explicit modification of the national constitutions, it may “destitute” powers at the national level and constitute them at the European level. Although “autonomous” in their origin, both constitutional levels strongly depend on each-other: the European authority could not function without the national institutions and legal systems on which it is based, and the national authorities have to rely on and operate through the European institutions if they want to achieve the results which they on their own, would not be able to reach.

As a result European integration, the citizens of the Member States have adopted multiple identities - local, regional, national, European - which correspond to the various levels of political community they are citizens of. Rules of conflict make sure that, at whatever level decisions are taken, the system produces for each case only one legal solution. In applying European law which prevails over conflicting national law, national authorities act as European agencies, while on the other hand, national authorities are strongly involved in the process of European policy-making, so that the European functions of the national governments and parliaments more and more outweigh their national responsibilities.<sup>45</sup>

To conceptualise the process of European integration as a process of “multilevel constitutionalism”, by which the allocation of powers shared by the national and European levels of government is continuously reorganised and re-shifted, while all public authority - national or European - draws its legitimacy from the same citizens and, therefore, means to rise awareness upon the fact that the European Union is as much our own instrument of political action as are the Member States and their regions, and not a foreign, nameless power. The “European constitution” therefore already exists and it is to be understood as a composed multilevel constitutional system comprising two or more constitutional levels which are closely interwoven, interdependent and connected to each other. It is the multilevel character of this system which allows and the complexity of the system which requires a revision of its structure, procedures and constitutional texts, if possible resulting in a consolidated Constitutional Treaty of the European Union.

## *II. Consequences: Criteria for a revised system of power sharing in the EU*

A first important consequence of this approach is that the discussion on whether or not the post-Nice process shall aim at a European constitution is futile. A constitution, at least in a “postnational” sense, already exists and the question we face is how to improve and simplify it and, maybe, bring it closer to the traditional perception of what formal constitutions. It was Jacques Chirac who clearly gave this perspective in his speech to the German parliament in June 2000.<sup>46</sup> A second consequence would be to realise that reconsidering the competence-order of the Union also means reconsidering the distribution of powers under the national constitutions. A third consequence is that it is the perspective and the interest of the citizen which matters, not the preferences of national administrations and ministers who might find it odd to leave certain powers to the European level, which they may prefer to exercise autonomously. The case law of the Court of Justice shows how heavily national governments rely upon national prerogatives and a restrictive interpretation of the Treaties, namely the provisions on the four freedoms and non-discrimination, contrary to the interests of citizens who invoke these provisions as individual rights. The decisive criterion therefore is what the citizens want to be dealt with at the European level, even if their relative democratic influence and control is minimised. This, again, is by and large a political consideration.

<sup>44</sup> [1991] ECR I-6079 at 6102; and already [1986] ECR 1339 at 1365 et seq.; more recently [1996] ECR I-1759 at 1789.

<sup>45</sup> For the qualification of the national parliaments as European parliaments see: Pernice, “The Role of National Parliaments in the European Union”, in: Melissas/Pernice (eds.), *Perspectives of the Nice Treaty and the Intergovernmental Conference in 2004* (2001), forthcoming.

<sup>46</sup> Chirac, *Notre Europe*, Discours prononcé par Monsieur Jacques Chirac, Président de la République Française, devant le Bundestag”, 27.6.2000, [www.botschaft-frankreich.de](http://www.botschaft-frankreich.de), at 12.

Though there is little doubt about the justification of all the powers the European Union disposes of at present, it is a common view that the Treaties are so complex that nobody really understands who is responsible for what. The multilevel structure of the European political system as such implies a high degree of complexity. This complexity is multiplied by the mere fact that those who take a stake in the policy-making at European level are not only European politicians - elected members of the European Parliament or Commissioners appointed by the Member States - but to a large degree representatives of national institutions. Democracy, however, is based on transparency and on the accountability of those who take decisions. The more the Treaty provisions on competencies are differentiated and detailed out with regard to their objectives, conditions and modalities of their exercise, the more difficult it is to establish clear responsibilities. Simplification means transparency, but contrary to what is suggested in Declaration no. 23 of the Nice summit, simplification implies modification in substance following some logic and system.

## **D. Conclusions and recommendations for the division of powers in the EU**

What is at issue, therefore, is to simplify and clarify the attribution of competencies to the European Union, to concentrate on core responsibilities which have to be assumed at the European level and to enhance the capacities of the system for political monitoring and control of the limits of the competencies assigned to the European Union and of the principle of subsidiarity. Against this background, the following measures are recommended for further consideration:

### *I. Consolidation of the Treaties into one European Constitutional Treaty*

Declaration (no. 42) to the Treaty of Amsterdam stresses the necessity for a consolidation of the Treaties. Contrary to what the three "wise man" have suggested<sup>47</sup> and what the EUI has elaborated in its careful study,<sup>48</sup> this should not lead to another splitting of the European primary law but to one consolidated "Constitutional" Treaty in which people can find the objectives of the Union, the Charter of Fundamental Rights, provisions defining the competencies and policies of the Union, the institutions including the appointment procedures and the procedure(s) for decision-making. Though it is clear that the objectives already give guidelines for the use of the assigned competencies, and fundamental rights, in addition, limit their use in favour of the individual and as a safeguard for social standards and regimes achieved in the Member States, the core of this Constitutional Treaty would have to be a system of competence attributions including the powers of co-ordination and common action provided for, so far, in the second and third pillar of the EU Treaty.

### *II. A general clause on the division of functions and mutual loyalty*

The principle, mentioned above, that policies and legislation in a given area shall be a matter of the Union to the extent that common action or rules applying equally to all the citizens of the Union is deemed necessary, and implementation should be a matter for the Member States and their regions whose administrations are closer to the citizens, know more about the specific conditions on the spot and are therefore able to achieve more adequate and better results, this principle of a functional separation of powers between the two levels of action should be spelled out more clearly in the new Treaty. Article 5(1) EC is not sufficient to this effect. Implementation means the transposition of Community directives by national legislators, but also the administrative execution and control of application of European law. Article 5 EC and, in particular, its paragraph 3 reserve for national authorities a maximum of political discretion, freedom for creativity and autonomy.

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<sup>47</sup> Cf. v. Weizsäcker/Dehaene/Simon, "Die institutionellen Auswirkungen der Erweiterung. Report to the European Commission", 18 October 1999, *FAZ* no. 244, 20 October 1999, 9 et seq.

<sup>48</sup> European University Institute, *supra*, note 26.

This responsibility of national and regional authorities is a major element for the functioning of the Union and a condition for effective government in the multilevel system. It requires *mutual* respect and loyalties, not only discipline of the Member States. Therefore, article 10 EC should be amended by a provision addressed to the institutions of the Union requiring them expressly to have regard and consideration for particular national and regional interests and difficulties. While article 6(3) EU requires the respect of the national identities of the Member States, this provision would underline a specific feature of European identity, which is - in the light of multilevel constitutionalism - based on mutual respect and co-operation of the institutions at two levels of government which are not in a hierarchical order but equal instruments of the citizens in pursuing common goals.

If powers for administrative implementation and execution at the European level are the exception, they should be reduced to a strict minimum and conferred to the Commission by express provisions of the Treaty or secondary law.

### *III. System and categories of European competencies*

A more systematic approach to the attribution of competencies to the Union is needed. Areas and matters of exclusive competence (customs, trade policies, monetary policy) must be distinguished from areas for which competencies are shared between the Union and the Member States (agriculture, transport, environment, social, regional, consumer, health, research, immigration, asylum policies etc.) and areas where the Union just provides the framework for the coordination of national policies or intergovernmental co-operation and no legislative powers (economic and employment, foreign, security and defence policies, home affairs, criminal justice etc.). Simplification would be achieved, if the existing differentiation between the various forms of action, decision-making procedures, voting-modalities in the Council and participation of other institutions could be abolished in favour of one common procedure, which should be co-decision of the Council and the European Parliament after consultation of the relevant committees. Though the catalogue of possible forms of action in article 249 EC (regulation, directive, decision, recommendation) may be completed by framework directives, common strategies, joint actions and common positions, the choice of the appropriate instrument should be left to the political process and the institutions, with due regard to the principles of subsidiarity and proportionality.

It is clear that this exercise would not only imply a new order of competencies, but also major changes in substance. All the complexity of the present Treaty is a result of difficult and long negotiations resulting in detailed exceptions and qualifications, specific conditions and procedures coupled with protocols and declarations annexed to the Treaties. But the compromises negotiated between diplomats, ministers and Heads of State or Government are unreadable and, in part, impracticable - such as the new provisions in article 133(5)-(7) EC amended by the Treaty of Nice -, and in any event did not produce the desired effect of making clear who does what. It is time to reduce the rhetoric of international diplomacy to the very essence of powers attributed to the Union, and to give it insofar the responsibility to meet the expectations of the citizens.

### *IV. Definition of competencies and "negative competence clauses"*

Some of the provisions of the present Treaties need stricter definition, some others a broader scope. While article 133 EC regarding the common commercial policy should clearly state that services including transport are covered by this policy, article 95 EC would need to be redrafted in order to reduce its scope to measures directly preventing restrictions of trade or serious distortions of competition. Likewise, article 308 EC should refer to the internal market and its functioning, and not allow for such schemes as food aid or programmes such as PHARE and TACIS.<sup>49</sup> The Parliamentary Subsidiarity Committee, proposed below, may play a special role in the context of these provisions.

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<sup>49</sup> Crit. also Dashwood, "The Limits of European Community Powers", (1996) 21 *ELRev.*, 113 at 120 et seq. relating to article 100a EC, and at 123 et seq. on article 235 EC.



To secure national room for action in certain areas or matters, related to subjects for which the competence is given to the Union, the already existing practice to include “negative competence clauses” may be extended to other areas. It should be clear, however, that there is no policy area where the need for limited action at the European level can totally be excluded. The negative clauses, therefore, could refer to a revised article 308 EC, to allow such exceptional limited action subject to its specific procedural requirements.

### *V. Procedural safeguards: a Parliamentary Subsidiarity Committee*

What degree of specificity provisions on competencies in the Treaty may have and their interpretation and application in practice will always be a matter of political and hermeneutic discretion. Though it is - and should always be - the task of the European Court of Justice to exercise a final control<sup>50</sup>, those who really have an interest in preserving room for national legislation should have a stake in the decision-making process: the national parliaments. Some way in line with the ideas of a Second Chamber developed by the French Senate, Juppé/Tourbon and Tony Blair, it seems to be appropriate to underline the European function of national parliaments by giving them a consultative role for the respect, by the European institutions, of the principle of subsidiarity and the limit of the European competencies.

This would - and should - however, not be a Second Chamber *stricto sensu*, since the Council in its legislative capacity already functions as the second chamber of the Union. Instead, it could be a second branch - or a special committee<sup>51</sup> - of the Council and might even be present during its deliberations. In full knowledge of the various positions of the ministers, it could be consulted in any case of doubt on questions of subsidiarity and competence before the Council is taking any final decision. Its (reasoned) opinion would not be binding, but well compel the ministers to re-examine their position and give good arguments why they consider to be competent and respectful of subsidiarity in the given case. All the arguments exchanged in this open and public discourse would be submitted to the Court of Justice, if a Member State or another privileged complainant brings an action to the Court.

Such a “Parliamentary Subsidiarity Committee” (PSC) should be composed of at least two representatives of each national parliament, one representing the party or parties supporting the government and one from the opposition. The presence of the opposition would contribute to political neutrality of the Committee and secure some divergence of the Committee’s view from the position of the ministers. It could also include representatives of regional parliaments, in so far as they have autonomous legislative competencies they may wish to preserve.

To enhance the role of national parliaments in this context, the PSC could, in addition, be involved more directly in the decision-making process, where a specific political control is needed because of the vagueness of the competencies entrusted to the Union. This would be the case, in particular, for competencies defined by purpose and not by area, such as articles 95 and 308 EC. In these cases, the Committee could have a veto or a right to ask postponement of the decision to be taken by the Council. It should, furthermore, be the task of the PSC to prepare regular reports on the respect of subsidiarity and the competencies of the Union by the legislation during the previous year.<sup>52</sup>

### *VI. Political guidelines for the use of European competencies*

Given the remaining uncertainties on the question if, in a given area of European competence defined by the Treaty, the Union should act or leave the legislation to the Member States, it seems to be useful to complete the more or less vague attribution in the provisions of the Treaty by a political declaration setting out all necessary differentiation. This proposal could be the “Charter of competencies” proposed by Tony Blair. In the framework of environmental policies, for example, it seems obvious that combating climate change with all its international and internal implications, inclu-

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<sup>50</sup> For the discussion of alternative proposals, including a „Court of Review“ (European Constitutional Group), a „Common Constitutional Court“ (Di Fabio) or a „Constitutional Council“ (Weiler), see Mayer, *supra*, note 1, at I.2.

<sup>51</sup> See for the concept of a parliamentary subsidiarity committee Pernice, [HYPERLINK supra](#), note 2.

<sup>52</sup> For a system of regular reports see already Mayer, *supra*, note 1, at I.2.c.bb).

ding burden sharing between the Member States, should be a matter for the Union. On the other hand, the Member States can well deal with the preservation of the soil or of inland water quality individually. The same would apply to transport, agriculture, health, education and other policies, even to the application of the competition and state aid rules to certain sectors which are, in certain Member States, regarded as matters of public services.

Such political guidelines could be established by either the PSC or by the PSC together with the Council and the European Parliament. Although they would not be mandatory in any respect, concrete measures of the Union could be checked against them and specific arguments would have to be made in the case of deviation from its provisions. The guidelines themselves would be subject to regular revision following the procedure of their enactment, they would be a flexible criterion for monitoring the delimitation of competencies between the European Union and its Member States and not inadequately block the dynamics of European integration.