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THE DEBATE ON EUROPEAN POWERS AND COMPETENCIES
SEEING TREES BUT NOT THE FOREST?

by Franz C. Mayer[*]

Introduction

The Declaration on the future of the Union annexed to the Treaty of Nice (Declaration No. 23), agreed upon in December 2000, provides for a large debate, until 2004, on fundamental issues related to the constitutional order of the European Union. One of these fundamental issues is the question of how to establish and monitor a more precise delimitation of powers/competencies between the EU and its Member States, which reflects the principle of subsidiarity. The Laeken summit of December 2001 [1] decided to establish a Convention [2] charged with preparing a reform of the foundations of the European Union, and to deal with, inter alia, the competence issue.

The starting point for the following analysis of the issue is the awareness that the competence question is a complex and multi-faceted one, covering a wide range of aspects.[3] The debate on

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[1] SN 300/01, <http://ue.eu.int>.
[2] See *infra*, III.
[3] For further references on the competence issue see Mayer, 'Die drei Dimensionen der europäischen Kompetenzdebatte', 61 *ZaöRV* (2001) 577, on which parts of the following text are built. See also v. Bogdandy/Bast,

European powers and competencies can only be understood if all these dimensions are taken into consideration. In the following study I will first try to explain the legal and political background of the competence debate in the European Union (I.). In the second part, I will turn to the constitutional dimension of the debate (II). The third part is devoted to the work of the Convention (III.).

I. The competencies of the EU: legal and political aspects

The debate on the reach and the limits of European competencies is much older than the Nice Treaty or the Laeken declaration. It became visible in EC primary law at the beginning of the 90s with the introduction of the principle of subsidiarity into the 1992 Maastricht Treaty.[4] With the Maastricht decision of the German Constitutional Court of 1993, it has even become a major issue of constitutional law in Germany.[5] I will first try to provide some clarification concerning the legal concept in the European context (1) before turning to the political dimensions of the debate (2).

1. The legal dimension of the debate

a. Kompetenz – the term and the concept

The first question raised in connection with the debate on European competencies is a semantic one, namely the one about the origin of the term in a European context.[6] Art. 5 para. 2 EC, the provision dealing with subsidiarity introduced by the 1992 Maastricht Treaty, is the principal place [7] in the treaties where the term 'competence' appears:

> "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 so far as the objectives of the proposed

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'Die vertikale Kompetenzordnung der Europäischen Union', *EuGRZ* (2001) 441 ('The European Union's vertical order of competences: The current law and proposals for its reform', 39 *CMLRev.* (2002) 227); Di Fabio, 'Some remarks on the allocation of competences between the European Union and its Member States', 39 *CMLRev.* (2002) 1289; I. Pernice, *Eine neue Kompetenzordnung für die Europäische Union*, WHI Paper 15/02 (2002), <http://www.whi-berlin.de>; Nettesheim, 'Kompetenzen', in A. v. Bogdandy (ed), *Europäisches Verfassungsrecht* (2003), 415.

[4] See v. Borries, 'Das Subsidiaritätsprinzip im Recht der Europäischen Union', *EuR* (1994) 263, at 298.

[5] BVerfGE 89, 155 - *Maastricht*.

[6] See on the language issue de Witte, 'Clarifying the delimitation of powers', in *Europe 2004 – Le Grand Débat* (2001), <http://www.ecsanet.org>; de Búrca and de Witte, 'The Delimitation of Powers Between the EU and ist Member States' in A. Arnull and D. Wincott (ed)*, Accountability and Legitimacy* in the European Union (2002), 201, at 202; see also Mayer, 'The language of the European Constitution – beyond Babel?' in A. Bodnar et al. (eds), *The Emerging Constitutional Law of the European Union - German and Polish Perspectives* (2003).

[7] See also Art. 230 EC.

> action cannot be sufficiently achieved by the Member States and therefore, by reason of the scale of effects of the proposed action, be better achieved by the community".[8]

The odd thing is that the English word that would normally be used in that context is '*powers*', as in Art. 5 para. 1 EC: "The Community shall act within the *powers* conferred upon it [...]".[9] It is true that "competences" is to some extent "Euro-speak".[10] 'Powers' is also the term used in Declaration No. 23 annexed to the Nice Treaty as published in the OJ, whereas the English version of the initial document agreed upon in Nice (SN 533/00) uses the word 'competencies'. 'Competences' is the term used throughout the Convention deliberations.[11]

In a non-legal English context 'competence' is mostly used as a singular word to express a particular kind of expertise.[12] In an EU context it seems to be a hasty translation from German *Kompetenz*, which has come to be part of EU constitutional law vocabulary.[13] One way of dealing with this dichotomy would have been to uphold a clear terminological distinction between 'competencies' and 'powers' and to use them as two distinct concepts of European constitutional law. This has not been attempted. Today, in European law discourse, the terms are more or less used interchangeably.

Confronted with the question of what 'competence' actually means, a German lawyer will first note that in German constitutional thinking *Kompetenz* is generally considered to be an extremely complex concept.[14] It is related to fundamental notions of the state or public authority and the relationship between individual freedom and statal/public power. There is also an entire German debate over the question of how to distinguish tasks of public authorities (*Aufgaben)* from *Kompetenz*.[15] I will not go into the details of the German debate. Neither will I deal with the concept of *Kompetenz-Kompetenz*.[16]

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[8] Emphasis added.
[9] Emphasis added.
[10] See 'Charlemagne. Snoring while a superstate emerges?', *The Economist* 8.5.2003: "powers ('competences', in Euro-speak)".
[11] See CONV 724/03: "Title III: Union competences and actions".
[12] See in that context D. Halberstam, *From Competence to Power: Bureaucracy, Democracy, and The Future of Europe*, Jurist EU Paper 7/2003, <http://www.fd.unl.pt>. Note that this element of expertise is totally absent in the German *Kompetenz* in a *legal* context, though.
[13] See for example P. Craig/G. de Burca (eds), *The evolution of EU law* (1998) 137 et seq., where the term is used.
[14] This complexity can not be dealt with in detail here. See for further reference R. Stettner, *Grundfragen einer Kompetenzlehre* (1983); see also F. C. Mayer, *Kompetenzüberschreitung und Letztentscheidung* (2000) at 21 et seq.
[15] See in that context Stettner, *supra* n. 15, at 35 et seq., who makes this distinction: a) task, b) attribution of the task, c) attribution with public authority, and who wants only b) and c) to be elements of the *Kompetenz* concept, unlike *Horst Ehmke* and others who include task and public authority in the concept of *Kompetenz*.
[16] The main problem with the notion of *Kompetenz-Kompetenz* is its equation with sovereignty, see for example MacCormick, 'Sovereignty Now', 1 ELJ (1995) 259, at 260. The concept can be perpetuated *ad infinitum*: the

One aspect of the German legal concept may be helpful in elucidating the problems arising from its use in an EU context, though: *Kompetenz* enshrines both an element of attribution (authorising, entrusting, enabling) and an element of limitation. The attribution may stem from a constitution, for example.[17] The element of limitation is inherent in any concept of attributed or assigned power. Besides the question of how to define 'competence' in a general, abstract sense, there exists a great variety of possible categories of competence. Frequently used categories in the context of non-unitary systems such as federal states are categories that describe the relationship between different entities:[18] examples of this kind of categories are exclusive competencies (exerted by one entity alone to the exclusion of any other), concurring competencies (competencies may be activated by different entities, but once activated, they are exclusive), parallel competencies (competencies may be activated by different entities, not exclusively).

A distinct way to approach the question of how to establish categories of competence provisions is to distinguish between positive and negative competence provisions:[19] ”If 'A' is true, it follows that there exists a competence” would be a general formula for a positive provision (see Art. 42 EC for an example). ”If 'A' is not true, it follows that there exists no competence” would be a negative competence provision (Art. 5 EC may be read as such a provision).

Another basic distinction can be made between the ‘if’ and the ‘how’ of competencies, between provisions that confer competencies (positive competence provisions) and provisions that specify *how* to use existing competencies (e.g. the provisions on subsidiarity in Art. 5 EC).

b. The system of competencies in the founding treaties

As to the system of competencies as laid down in the European founding treaties, it appears

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competence to decide upon the Kompetenz-Kompetenz would be "Kompetenz-Kompetenz-Kompetenz", M. Zürn, *The State in the Post-National Constellation - Societal Denationalization and Multi-Level Governance*, ARENA Working Papers WP 99/35 (1999), Note 45. ‚Kompetenz-Kompetenz’, generally perceived as a very German concept, goes back to Böhlau, *Kompetenz-Kompetenz?* (1869). See also C. Schmitt, *Verfassungslehre* (1928) at 386 et seq.; M. Usteri, *Theorie des Bundesstaats* (1954) at 96 et seq.; Lerche, ‘"Kompetenz-Kompetenz" und das Maastricht-Urteil des Bundesverfassungsgerichts’, in J. Ipsen et al. (eds), *Festschrift Heymanns Verlag* (1995) 409. See also T. Hartley, *Constitutional Problems of the European Union* (1999), at 152 et seq.; critical Grabitz, ‘Der Verfassungsstaat in der Gemeinschaft’, *DVBl.* (1977) 786, at 790.

17 Note the wording introduced by Art. I-9 para. 2 of the Draft Constitution in CONV 724/03 (26.05.2003), though: ”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.” (emphasis added)

18 See the categories established under Art. 70 et seq. of the German constitution.

19 For the details, see Mayer, *supra* n. 3.

that numerous positive and negative competence provisions tightly circumscribe European public authority. This view is confirmed by the background-study prepared by the Secretariat of the Convention for the Convention.[20] In these treaties, European competencies are not enumerated in a list or catalogue, as known from classical federal constitutions. Instead, they may be found all throughout the treaties. The fundamental principle of the European competence order is the principle of enumerated competencies, laid down in Art. 5 para. 1 EC (conferred powers).[21] According to this principle, the Community [22] may only act within the limits of the competencies conferred upon it by primary law and of the objectives assigned to it therein.

As for categories, Art. 5 para. 2 EC (see *supra*) establishes a distinction between exclusive European competencies and non-exclusive competencies. A further distinction can be made between positive competence provisions (aa.), provisions on how to use competencies (bb.), and negative competence provisions (cc.).

aa. Positive competence provisions

Most competence provisions in the founding treaties are positive ones, i.e. provisions that lay down what the Union/Community may do. These provisions have been modified and amended over the years, they reflect countless political compromises. They therefore appear to be much more differentiated than the typical list of catalogues in federal constitutions [23] such as for example Art. 72 et seq. of the German constitution.[24] Even a rather wide and therefore often criticised [25] provision such as Art. 308 EC - which allows the community to take the appropriate measures, if action by the community should prove necessary to attain (in the course of the operation of the common market) one of the objectives of the Community - does not appear to be an unusual mechanism: It is an almost classical technique to provide this kind of safety-net provision for unforeseen cases, which is often construed as *implied*

[20] CONV 17/02, see also CONV 47/02.
[21] See Art. I-9 CONV 724/03.
[22] I will use Community and Union interchangeably when referring to the provisions of the founding treaties.
[23] In that sense Pernice, 'Kompetenzabgrenzung im europäischen Verfassungsverbund', *JZ* (2000) 866, at 872, emphasizes that the finality-driven structure of the competence provisions is more competence limiting than lists of area fields.
[24] In a recent decision, the German Constitutional Court tried to give Art. 72 more teeth, though: BVerfG Dec. of 24.10.2002, *NJW* (2003) 41 – *Altenpflege*.
[25] See Jarass, 'Die Kompetenzverteilung zwischen der Europäischen Gemeinschaft und den Mitgliedstaaten', 121 *AöR* (1996) 173, at 180.

powers and which can be found, for example, in the US constitution of 1787 with the *‚necessary and proper-clause'* of Art. I Sect. 8.[26]

The harshly criticised internal-market provisions of Art. 94, 95 EC [27] are not that unique either. Functional equivalents may be seen in the *interstate commerce clause* of the US constitution [28] or in Art. 95 para. 2 of the Swiss constitution of 2000 with a federal competence for the establishment of a single Swiss economic area.[29]

Descriptions of the European situation prior to the Convention that suggested that there were no limits whatsoever to European competencies were not accurate. They tended to confound European regulatory competence with the fact that numerous areas of life are affected by European non-discrimination and non-restriction provisions. A European rule of non-discrimination on grounds of nationality in the area of, say, education does not mean that the Community has a competence to positively set rules in the field of education [30]. Maybe it is helpful to rephrase this point as follows: Some competencies such as the competence to regulate access to education using the criteria of nationality simply don't exist any more in the EU; no public power, whether national or European, has this competence - it has vanished. This phenomenon has been called the phenomenon of abolished competencies (*compétences abolies* [31]).

Considering the question of what can be done at the European level, it turns out that the overall volume of European competencies appears to be relatively modest, not least for the following reason: The European level disposes 'only' of regulatory competence. Almost the entire area of norm implementation and norm application through the executive and the judiciary remains at member-state level. This lack of competence is particularly visible when a measure has to be implemented by force:[32] in these cases, the Union is totally dependent on national administrations.[33] The Union does not have 'power', i.e. the *Gewaltmonopol* in the traditional

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[26] See L. Tribe, *American Constitutional Law*. *Volume One*, (3rd ed. 2000) at 798.

[27] According to these provisions, the Community adopts measures whose object is the establishment and functioning of the internal market.

[28] Art. I Sect. 8 para. 3.

[29] "[Der Bund] sorgt für einen einheitlichen schweizerischen Wirtschaftsraum". See also W.-H. Roth, Freier Warenverkehr und staatliche Regelungsgewalt in einem gemeinsamen Markt, 1977. Cf. the German constitution's provision on a federal competence for the 'Law of commerce' in Art. 74 I Nr. 11.

[30] See in that context for example Reich, 'Zum Einfluss des Gemeinschaftsrechts auf die Kompetenzen der deutschen Bundesländer', *EuGRZ* (2001) 1 at 13, confusing European competencies and points of contact between European integration and Länder activities.

[31] D. Simon, *Le système juridique communautaire* (2nd ed. 1998) at 83 et seq., referring to V. Constantinesco, *Compétences et pouvoirs dans les Communautés européennes* (1974) at 231 et seq. and 248.

[32] Dashwood, 'States in the European Union', 23 *ELRev* (1998) 201 at 213.

[33] See the Hoechst case, Cases 46/87 and 227/88, *Hoechst/Commission* [1989] ECR 2859.

sense of legitimate physical force of the public authority, entrusted to the state and to the state alone.

A counterexample can be seen in the US model where competencies of federal or state level authorities are not just rule-making competencies, but 'comprehensive' competencies extending to administrative implementation and enforcement of legislation through a separate federal administration and to the judiciary with a separate federal judiciary.[34]

bb. Provisions on how to use existing competencies

Besides positive competence provisions, the treaties also contain provisions on how to use existing competencies such as the principle of subsidiarity in Art. 5 para. 2 EC (for non-exclusive competencies of the Community) or the principle of proportionality in Art. 5 para. 3 EC.[35] In theory, the instruments and types of Community action could also play a role in this context. Whenever the Community is given a competence to legislate by means of directives, one may expect this to have an additional competence-limiting effect. According to Art. 249 EC, the directive "shall be binding as to the result to be achieved [...] but shall leave to the national authorities the choice of form and methods". It follows that form and methods are not covered by the Community competence. In practice, however, laying down the means of action has not really been helpful in establishing the reach of European competencies: A distinction between directive as framework versus regulation (as fully-fledged regulation) is not that easy to detect. This has to do with the ever-increasing precision of directives. At the same time, the regulation is also used to establish a regulatory framework.[36]

This may change with the renaming of European acts as suggested by the Convention:[37] directives renamed framework laws may indeed become acts setting just a regulatory framework.

cc. Negative competence provisions

Negative competence provisions are numerous in the treaties. In a sense the provision on enumerated powers (Art. 5 EC [38]) and the principle of comity (Art. 10 EC,[39] as far as it also

[34] The US constitution, however, only mentions the US Supreme Court, but see Art. I Sect. 8 para. 9 US constitution.

[35] See Art. I-9 CONV 724/03.

[36] For a detailed account of how the means of action of the Union can be conceptualised, see v. Bogdandy/Bast/Arndt, 'Handlungsformen im Unionsrecht', 62 *ZaöRV* (2002) 77; see also Bast, 'Handlungsformen', in A. v. Bogdandy (ed), *supra* n. 3, at. 479.

applies in favour of the Member States) can already be read as negative competence provisions.[40] There are, in addition, numerous articles where positive competence provisions contain exclusions of area fields.[41] Art. 137 para. 6 EC is a case in point: there, pay, the right of association, the right to strike or the right to impose lock-outs are excluded from the social policy competencies of the EU. Another example is Art. 152 para. 5 EC, according to which the Community shall fully respect the responsibilities of the Member States for the organisation and delivery of health services and medical care and shall not affect national provisions on the donation or medical use of organs and blood.

Additional examples of competence limits at the European level can be found in the EU Treaty dealing with intergovernmental cooperation, for example Art. 17 EU (the EU respects obligations flowing from the NATO-Treaty) and Art. 33 EU (responsibilities of the Member States with regard to the maintenance of law and order and the safeguarding of internal security). Examples in the EC-Treaty are Art. 16 EC (respect of the role of services of general economic interest); Art. 20 EC (responsibilities of the Member States for diplomatic and consular protection); Art. 64 para. 1 EC (responsibility of the Member States with regard to the maintenance of law and order and the safeguarding of internal security); Art. 129 EC (no harmonisation of the laws and regulations of the Member States in the field of employment policy); Art. 135 EC (measures of customs co-operation shall not concern the application of national criminal law or the national administration of justice); Art. 149 para. 1 and 150 para. 4 EC (full respect of the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity; no harmonisation of the Member States' laws and regulations in the field of education); Art. 280 para. 4 EC (the fight against fraud at the European level shall not concern the application of national criminal law or the national administration of justice). The fact that Art. 293 EC provides for agreements between the Member States in some area fields can be read as a negative competence provision for the Community, as the area fields enumerated in Art. 293 are outside Community competence. According to Art. 295 EC, the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership. Art. 296 EC contains competence limitations that are related to the national security interests of the Member States.

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[37] See the Final report of Working Group IX on Simplification CONV 424/02 and Draft Arts. 24-31 CONV 571/03.

[38] See Art. I-9 CONV 724/03.

[39] See Art. I-5 para. 2 CONV 724/03.

[40] If A is true, it follows that there is no competence of the European level: set A = breach of comity, or A = no enumerated competence in the treaties.

[41] Most provisions are now contained in Part III of the Constitution, see CONV 725/03.

Additional limitations of European competencies can be found in most of the Protocols annexed to the Treaties (for an example, see Art. 69 EC).

The Nice Treaty added even more negative competence provisions: Art. 18 para. 3 EC (no European competence regarding provisions on passports, identity cards, residence permits, social security or social protection); Art. 137 para. 2 lit. a) and para. 4 EC (European measures in the realm of social provisions shall not affect the right of the Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof); Art. 157 para. 3 EC (in the field of industrial policy, no Community competence for measures which contain tax provisions or provisions relating to the rights and interests of employed persons).

The provisions excluding employment in the public service and the exercise of official authority (Art. 39 para. 4 and 45 EC) from the fundamental freedoms as well as Art. 46 EC (respect of national provisions providing for special treatment of foreign nationals on grounds of public policy, public security or public health) can also be read as limitations of Community competence.

Lastly, there exists yet another category of negative competence provisions at the European level: the fundamental rights developed by the ECJ (cf. Art. 6 EU), made more visible in the European Charter of Fundamental Rights;[42] to some extent the fundamental freedoms in so far as the Community itself is bound by these freedoms [43] and finally the provision of Art. 6 para. 3 EU, according to which the Union shall respect the national identities of its Member States:[44] National identity, arguably, includes national constitutional identity. With this provision, *Koen Lenaert's* famous sentence that "There simply is no nucleus of sovereignty that the Member States can invoke, as such, against the Community" [45] may have to be reconsidered. Seeing the reference to national identities in Art. 6 EU as limits to European competencies could mean that, depending on the situations in the different Member States, competence relations between European level and Member State could vary considerably from Member State to Member State, with an asymmetric competence order as a result. This is stunning, at first glance, as this kind of multiplicity does not correspond to the traditional idea of homogene-

[42] See Part II of the Constitution, CONV 725/03. See in that context the references in Mayer, 'La Charte européenne des droits fondamentaux et la Constitution européenne', *RTDE* (2003), No. 2, in print; see also v. Bogdandy, 'Grundrechtsgemeinschaft als Integrationsziel', *JZ* (2001) 157, at 158.

[43] Case C-51/93, *Meyhui v Schott* [1994] ECR I-3879; Case C-9/89, *Spain v Council* [1990] ECR I-1383; Case C-114/96, *Kieffer* [1997] ECR I-3629; Case C-284/95, *Safety Hi-Tech v S&T*, [1998] ECR I-4301. See also Art. 157 EC in that context.

[44] See Art. I-5 para. 1 CONV 724/03.

[45] Lenaerts, 'Constitutionalism and the Many Faces of Federalism', 38 *AJCL* (1990) 205, at 220.

ous, symmetrical polities.[46] Asymmetrical competence settings do exist at the Member State level, though.[47] And, because of the principle of respect of national identities, it can fairly be said that this multiplicity is intrinsic to the European system and characteristic of the heterogeneous structure of the Union.

c. The European problem: not a problem of competence order

The conclusion that can be drawn from this *tour d'horizon* is that, from a pre-Convention legal perspective, there is no urgent need for rewriting the European system of competencies from scratch; it is not in urgent need of repair.[48] There are no obvious deficiencies. The limits to European powers are numerous; the overall volume of European competencies is not unsettling.

If there exists a perception of a problem with the European competence order, it appears that, rather than being a problem of the legal architecture of the competence order as such, it is one of transparency, of proper implementation (at Member-State level) and of properly monitoring the application of competencies.

As far as monitoring the implementation of competencies is concerned, the primary mechanism foreseen by the treaties is judicial control, exercised by the ECJ. This control can take the form of different proceedings: The ECJ reviews Community acts under Art. 230 EC, as incidental questions under Art. 241 EC or in the context of a reference under Art. 234 EC.[49]

It has been argued again and again that the ECJ's monitoring of competencies is insufficient.[50] This position is not supported by the case law of the Court. ECJ judge *Colneric* has

[46] See in that context the critique of conventional constitutional thought by J. Tully, *Strange multiplicity. Constitutionalism in an age of diversity* (1995).

[47] See for example Art. 143 et seq. of the 1978 Spanish Constitution. See also the modified Art. 116 and 117 of the 1947 Italian constitution (Atto Senato 4809-B 8.3.2001). For general reference, see the country reports on Australia, Spain, Canada and Germany in R. Agranoff (ed), *Accomodating Diversity: Asymmetry in Federal States* (1999).

[48] This contrasts with some of the findings in the Lamassoure-Report to the EP of January 2002, PE 304.276

[49] See the respective provisions in Part III of the Constitution, CONV 725/03.

[50] See Dänzer-Vanotti, 'Unzulässige Rechtsfortbildung des Europäischen Gerichtshofes', *RIW* (1992) 733; Scholz, 'Europäisches Gemeinschaftsrecht und innerstaatlicher Verfassungsrechtsschutz', in K. H. Friauf and R. Scholz (eds), *Europarecht und Grundgesetz* (1990), at 97 et seq.; P. M. Huber, 'Bundesverfassungsgericht und Europäischer Gerichtshof als Hüter der Gemeinschaftsrechtlichen Kompetenzordnung', 116 *AöR* (1991) 211 at 213, with further references. See also Sir Patrick Neil before the House of Lords Select Committee on the European Communities, Sub-Committee on the 1996 Intergovernmental Conference, HL Paper 88, p. 218 et seq., 253 et seq.

presented a detailed account of the jurisprudence of the Court in the field of competencies, which shows that the Court does take the issue seriously.[51]

The transparency of the competence order is certainly reduced by the fact that the relevant provisions are scattered all over the treaties. Reorganising these provisions into a single, accessible list of competencies without altering the wording of the provisions is not feasible. A 'list' of the treaties' competence provisions would just not be a list any more. Altering the wording entails the risk of affecting the political compromises embodied in these particular provisions. This is not completely impossible, of course, but it should be borne in mind that such a necessarily less detailed list is typical of federal constitutions, and there such a list reflects the fact that a federal state is a different kind of polity than the European Union.

Finally, it should be borne in mind that there is a general problem inherent in competence law that cannot really be solved by merely legal means: There will always remain room for interpretation because of the gap between reality and competence items laid down in legal texts.

d. The competence issue and the underlying approach to European constitutionalism

To relate European integration to the concept of constitution is not a recent idea. The official explanations of the German government annexed to the ECCS-Treaty in 1951 and to the EEC-Treaty in 1957 stated in identical terms that the respective treaty was about creating a 'European entity of constitutional nature' ("ein europäisches Gebilde verfassungsrechtlicher Gattung").[52] But beyond applying the term 'constitution' to the EU/EC, it may fairly be said that the view one takes of the competence issue depends to a large extent on one's basic conception of European constitutionalism and on what substantial theory of European constitutionalism one takes as a starting point. Conceiving European integration in terms of classical federal state mechanisms or in terms of a quasi-federal system will lead to a different view of the competence issue from an approach that looks at European integration from a public-international-law perspective or from a confederal [53] angle.

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[51] Colneric, 'Der Gerichtshof der Europäischen Gemeinschaften als Kompetenzgericht', *EuZW* (2002) 709. See also ECJ, Case C-376/98, *Germany/Commission* (Tobacco directive), [2000] ECR I-8419.

[52] Deutscher Bundestag Drucksachen 2401, 1. Wahlperiode und 3440, 2. Wahlperiode. For the founder's view in general, see Ophüls, 'Zur ideengeschichtlichen Herkunft der Gemeinschaftsverfassung', in E. von Caemmerer et al. (eds), *Probleme des europäischen Rechts. Festschrift für Walter Hallstein zu seinem 65. Geburtstag* (1966), 387-413.

[53] An example of such an approach may be seen in the German Constitutional Court's Maastricht decision, where the Court reserved the right to declare European acts ultra vires, BVerfGE 89, 155 – *Maastricht*.

One approach to European constitutionalism is the concept of multilevel constitutionalism and of a composite constitution of Europe. Multilevel constitutionalism [54] (*Verfassungsverbund* [55]) is the idea of a constitutional pluralism which rests on mainly two assumptions: The first one is that the concept of people related to a state has to be supplemented with a concept of the individual within the Union related to European public authority. The second assumption is that the concept of constitution is neither linked nor limited to the state. According to this reading, a constitution is both foundation and limitation of public authority. There can be no legitimate public authority outside the one created by the constitution.[56] This leads to an understanding of European integration and the European Union in 'non-statal' terms: The core elements of European constitutionalism are, on the one hand, the public authorities that exist both at European and member state level and, on the other hand, the individuals subject to those authorities. The respective frameworks for these national and supranational public authorities can be understood as two distinct, albeit related constitutional levels that are complementary to each other, forming a single, non-hierarchical constitutional system of multilevel constitutionalism. It is this construct as a whole that is 'the' European Constitution, which thus turns out to be a composite constitution, whose component elements and the very compositional basis of which rest on the will of the individuals in Europe.

Looking at the delimitation of competencies from the perspective of multilevel constitutionalism, one cannot help emphasising that the European constitutional order is as a non-hierarchical order without strong enforcement capacity. As for real or supposed deficiencies of the competence order, one will therefore probably rely on political mechanisms to accommodate interests affected by European integration instead of insisting on legal hierarchies or on a last say for the Member States.

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[54] See in that context Pernice, 'Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and Multilevel Constitutionalism', in E. Riedel (ed), *German Reports on Public Law Presented to the XV. International Congress on Comparative Law, Bristol, 26 July to 1 August 1998* (1998), at 40-65; Pernice, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?', *CMLRev.* (1999) 703 et seq.; Pernice and Mayer, 'De la constitution composée de l'Europe', *RTDEur.* (2000) 623; Pernice/Mayer/Wernicke, 'Renewing the European Social contract', *King's College Law Journal* (2001) 61; see also J. Shaw, *Law of the European Union* (3rd ed. 2000), at 179 et seq.; for the level-metaphor, see Mayer, *supra* n. 15, at 36.

[55] Pernice, 'Bestandssicherung der Verfassungen: Verfassungsrechtliche Mechanismen zur Wahrung der Verfassungsordnung', in R. Bieber and P. Widmer (eds), *The European constitutional area* (1995), at 225, 261 et seq., and Pernice, 'Die Dritte Gewalt im europäischen Verfassungsverbund', *EuR* (1996), at 27 et seq.; Pernice, 'Europäisches und nationales Verfassungsrecht', 60 *VVDStRL* (2001) 163; see also A. v. Bogdandy, *Supranationaler Föderalismus als Wirklichkeit und Idee einer neuen Herrschaftsform. Zur Gestalt der Europäischen Union nach Amsterdam* (1999) at 13 et seq.; Wahl, 'Die zweite Phase des öffentlichen Rechts in Deutschland. Die Europäisierung des Öffentlichen Rechts', *Der Staat* (1999), at 495, 500 et seq.

[56] This idea goes back to Adolf Arndt, cf. also Häberle, 'Die Europäische Verfassungsstaatlichkeit', *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* (1995) 298, at 300.

Political mechanisms with an indirect effect on the competence issue can be intrinsic to the institutional design of a polity: The theory of Political Safeguards of Federalism,[57] developed in the context of the US federal system, emphasises the safeguards of state interests by means of structural characteristics of the overarching (federal) level. *Koen Lenaerts* has noted that this approach actually suits the EC/EU constellation even better than the US situation.[58] The Member State interests are built into numerous institutions at the European level, whether it is the Council, or the fact that Commissioners or Justices of the European Court are chosen on a Member State basis.

Thinking of political mechanisms related to the competence issue, one may not only consider the institutional design, but also role and function of institutions: After all, the primary responsibility for the political control of competencies lies with institutions which exercise competencies such as the Council of Ministers and the European Parliament.

As to the legal questions of how the delimitation of competencies is to be monitored and who is to declare European acts *ultra vires* (beyond European competencies), the current answer – the ECJ – is in accordance with the specific non-hierarchical character of the European multi-level system, which seems to be particularly dependent on a dialogue between the different courts rather than on a hierarchical order. Dialogue is what the preliminary reference-procedure of Art. 234 EC is all about today already. Introducing a competence court [59] would be out of keeping with a dialogical approach. An additional forum where the judicial dialogue between the courts could be improved may be useful, though. Such a body could take the form of a Common chamber of the highest European courts, modelled on the French 'Tribunal des Conflits' or the German 'Gemeinsamer Senat der obersten Bundesgerichte'. The US American Certification procedure, enabling federal courts, even the US Supreme Court, to refer questions of state law to state courts, could be a model for a similar European procedure, which would, for example, allow the ECJ to ask national courts what "national identities" of the Member States in the sense of Art. 6 EU [60] means with regard to a given Member State [61].

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[57] Wechsler, 'The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government', 54 *Colum. L. Rev.* (1943), 543; D. Shapiro, *Federalism* (1995), at 116 et seq.; see also US Supreme Court, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

[58] Lenaerts, 'Constitutionalism and the Many Faces of Federalism', 38 *AJCL* (1990) 205, at 222.

[59] Proposals have been made by members of the German Constitutional Court, Judge Siegfried Bross, 'Bundesverfassungsgericht – Europäischer Gerichtshof – Europäischer Gerichtshof für Kompetenzkonflikte', *Verwaltungsarchiv* (2001) 425; see also more recently in 'Überlegungen zum gegenwärtigen Stand des Europäischen Einigungsprozesses', *EuGRZ* (2002) 574 and Judge Udo Di Fabio, 'Ist die Staatswerdung Europas unausweichlich?', *FAZ* 2.2.2001, 8.; U. Everling, 'Quis custodiet custodes ipsos?', *EuZW* (2002) 357, rejecting this kind of proposal; for the debate in the Convention see document CONV 286/02.

[60] See Art. I-5 para. 1 CONV 724/03.

[61] Under the EU Treaty, Art. 6 para. 1 EU is outside the ECJ-jurisdiction (see Art. 46 EU). See Pechstein and Cirkel, 'EuGH-Zuständigkeit für deutsches Verfassungsrecht?', *DÖV* (1997) 365 on the question of which court

is to interpret ‘national identities’.

2. The political dimension of the debate

The issue of competencies is not just a legal issue. Competence questions are questions of power. In order to assess the political dimension of the competence issue, it is helpful to ask who is affected in terms of power and who loses power because of European integration. This brings us to the driving forces of the political debate. My claim is that the German regions, the *Länder*, have been the driving forces in the European debate. The dissatisfaction of some [62] of the *Länder* with the European competence order has become a constant undertone of the German debate on European integration.[63] The threat to refuse the ratification of the Nice Treaty in the summer of 2000 [64] at least partly explains why the competence issue has been put on the agenda of the Declaration annexed to the Treaty. Calls of the *Länder* for an improvement in the delimitation of competencies are far from being a recent phenomenon.[65] The principle of subsidiarity was introduced into the treaty notably at the German *Länder*'s insistence.[66] Their call for a list of competencies, or a catalogue of competencies has been reiterated at regular intervals.[67] It is since the end of the 80s that the *Länder* have been seeking to have a say in the process of European integration. Evidence of this trend is the new Art. 23 of the German constitution,[68] which grants the *Länder* significant room for influencing the German position in European decision-making, the transformation of *Länder* outposts in Brussels into genuine 'embassies' [69] and the initiative to set up a Committee of Regions.

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[62] Note that this goes notably for larger Länder such as Bavaria or Nordrhein-Westfalen, which, with a population of 15-17 million, are larger than most of the EU Member States.

[63] See for example the Minister President of Bavaria E. Stoiber, *Reformen für Europas Zukunft* (27.9.2000) <http://www.bayern.de/Politik/Reden/2000/000927.html> ("tendency towards an omnicompetence of the EU"); the Minister President of Niedersachsen S. Gabriel, *Niedersachsen - Eine starke Region für Europa. Das neue Niedersachsen gestalten* (21.6.2000) <http://www.niedersachsen.de/ scripts/aktinforead.asp? Ministerium=&ID=4479>; the Minister President of Sachsen K. Biedenkopf, *Europa vor dem Gipfel in Nizza - Europäische Perspektiven, Aufgaben und Herausforderungen*, FCE 10/2000, <http://www.whi-berlin.de/Biedenkopf.htm>; the Minister President of Rheinland-Pfalz K. Beck, *Die Regionen brauchen Europa. Europa braucht die Regionen* (21.11.2000) <http://www.stk.rlp.de/010politik/030reden/ rede1100.stm>; the Minister President of Nordrhein-Westphalen W. Clement, *Europa gestalten – nicht verwalten*, FCE 10/2001, <http://www.whi-berlin.de/Clement.htm>.

[64] See Biedenkopf, *supra* n. 63, at point 3.

[65] For the demands by the Länder for the IGC 1996 see Schwarze, 'Kompetenzverteilung in der Europäischen Union und föderales Gleichgewicht', *DVBl.* (1995) 1265.

[66] See v. Borries, *supra* n. 4, at 298.

[67] See Schwarze, *supra* n. 65, at 1265.

[68] The Art. 23 provision dealing specifically with European integration was introduced in December 1992, replacing the old Art. 23 which had served as the legal basis for German reunification. Both Arts. 23 and 24 foresee an act of assent for the transfer of public powers. Art. 23 establishes two sets of limits; on the one hand, it institutes limits concerning the European construct, which for example has to guarantee a standard of fundamental rights protection essentially equal to that guaranteed by the German constitution. On the other hand, Art. 23(1) points to the limits of how European integration can affect Germany, as the principles mentioned in Art. 79(3) are inalienable.

[69] According to § 8 of the Statute on the cooperation between the Federal power and the Länder in European affairs (EuZBLG, BGBl. 1993 I p. 313) the Länder offices have no diplomatic status. To emphasize this seems to increase the importance of these offices, though.

A closer look at the arguments submitted by the *Länder* reveals that their concern is not so much over European competencies encroaching on the Member State level competencies but the perception that for reasons that are somehow related to European integration, less and less policy-making leeway remains at the *Länder* level.[70]

It is true that there is a trend towards reducing the policy-making options of the *Länder*. European integration alone cannot be blamed for this development, though. To a large extent, it is the result of the particular German model of unitary federalism, neatly captured in the term "unitary federal state" (*Konrad Hesse* [71]). This term, coined as early as 1962, after just 13 years of the existence of the Federal Republic, encapsulates the development towards ever-increasing uniformity of legislation and political-administrative structures. According to *Konrad Hesse*, the increasing weight of technical progress, the economic realities and the infrastructure, the general interdependence of economic and social life and the rising number of planning and distribution tasks resulting therefrom – in short: the transformation into a social state under the rule of law - call for uniformity and standardisation.[72]

Thus, with only little policy-making leeway left at the *Länder* level, it appears that any European action that affects the *Länder* in one way or another is perceived as an existential assault on the *Länder*. This does not necessarily have to do with European *ultra vires* acts. If one tries to find evidence for European acts outside the boundaries of European competence that specifically violate *Länder* rights one is faced with some difficulty: Typically enough, the *Länder* statements remain unclear and vague, for example when the *Länder* call for Europe to stick to 'genuine European issues',[73] without specifying what this really means. The *Länder*'s critique [74] of the 'method of open co-ordination' as used by the European Council [75] blurs the distinction between competence in the sense of 'power to set norms' on the one hand and political guidelines and recommendations (see Art. 4 EU) on the other.[76]

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[70] Freistaat Sachsen/Nordrhein-Westfalen: Grundsätze zur Zukunft des Föderalismus in der Europäischen Union: Wahrung der Länderzuständigkeiten im Kompetenzgefüge der EU, 1999, p. 3.

[71] K. Hesse, *Der unitarische Bundesstaat* (1962), in: P. Häberle and A. Hollerbach (eds), *Konrad Hesse. Ausgewählte Schriften* (1984) at 116 et seq.

[72] Hesse, *supra* n. 71, at 116. See in that context Fritz Scharpf's brilliant analysis 'Mehr Freiheit für die Bundesländer. Der deutsche Föderalismus im europäischen Standortwettbewerb', *Frankfurter Allgemeine Zeitung* No. 83, 7.4.2001, at 15.

[73] BR-Drs. 61/00 v. 4.2.2000, No. 2. Equally opaque the conservative position in the Bundestag ("europäische Kernaufgaben", European core tasks), BT-Drs. 14/8489 12.3.2002, p. 2.

[74] Stoiber, *supra* n. 63 and Clement, *supra* n. 63.

[75] See for more details on this method the Conclusions of the Lisbon European Council 23./24.3.2000, SN 100/00, <http://ue.eu.int>, Point 37.

[76] See in that context the discussions in the Convention Working groups VI (CONV 357/02 WG VI 17), IX (CONV 424/02 WG IX 13) and XI (CONV 516/1/03 REV 1 WG XI 9 and CONV 516/1/03 REV 1 COR 1).

One gets closer to understanding the real motivations of the *Länder* when examining ECJ cases involving the *Länder* such as those of the car manufacturer *Volkswagen* in Sachsen [77] and the *Westdeutsche Landesbank*.[78] It is the link that the *Länder* are establishing between services of general economic interest (*Daseinsvorsorge*), competition control and delimitation of competencies [79] that is particularly revealing. Apparently, it is almost all about regional economic policy: apart from structural policy, it seems to be the review of state aids by the Commission, which threatens to eliminate the last remaining policy-making options at the *Länder* level and the respective incentives to investment in the Länder [80] that the *Länder*'s concern is about. This is not really surprising. Regional economic policy is the main tool for attracting investors and therefore the central remaining policy-making instrument with potential for convincing voters. It is the central remaining vote catcher.

The European competence to review state aids is laid down in the Treaty, though (Art. 87 et seq. EC [81]). It is considered to be one of the pillars of the internal market.[82] Removing the control of state aids from the Treaties would be tantamount to removing one of the main goals of the whole integration project; it would open a race to the bottom, which may arguably endanger the whole concept of an internal market. This can not be the aim of the *Länder*, though. To put it very bluntly: They would simply prefer to be rid of some of the state aid control in order to have more policy-making options.

The debate about competencies thus boils down to this: the main concern of the *Länder* is a problem that will not in the least be affected by remodelling the competence order of the European Union, because it is not really a problem of competencies. Calls by the *Länder* for limiting European competencies can be understood as a reaction to a general trend towards ever-decreasing regional freedom of action and policy-making leeway at the *Länder* level, in particular in the area of regional economic policy. The irony is that rewriting the European competencies and introducing a competence catalogue or list as known e.g. from the German constitution (and which, one may add, is not exactly a success story within the German system [83]) are by no means likely to improve the situation of the *Länder*, for the real problem of

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[77] Cases T-132/96 and T-143/96, *Sachsen v Commission* [1999] ECR II-3663; Case C-156/98, *Germany v Commission* [2000] ECR I-6857.

[78] Case C-209/00, *Commission v Germany*, [2002] ECR I-___ (decision of 12.12.2002).

[79] See Nr. 3 of the protocol of the Conference of Minister Presidents (*Ministerpräsidentenkonferenz (MPK)*) of 14.12.2000. See also Gabriel and Clement, *supra* n. 63.

[80] This is very clear in Stoiber, 'Auswirkungen der Entwicklung Europas zur Rechtsgemeinschaft auf die Länder in der Bundesrepublik Deutschland', *Europa-Archiv* (1987) 543, at 547.

[81] See Part III of the Constitution, CONV 725/03.

[82] Lehman, Art. 87 CE Para. 6, in P. Léger (ed), *Commentaire article par article des traités UE et CE* (2000).

[83] See in that context the German Constitutional Court's decision on Art. 72 para. 2, though, *supra* n. 24.

the *Länder* is not just one of defining competencies but largely an intrinsic problem of the German federal system and a structural problem of large federal states participating in regional integration. As modifying the competence order will not help the *Länder*, they will keep insisting on further modifications, much the same way as they insisted on additional measures throughout the 90s even after the introduction of the subsidiarity principle.

The political dimension of the debate about competencies can be rephrased in more general terms: competence debates can arise as problems of asymmetric component units in a composite multilevel political system, with these units fearing that they might lose or feeling that they are losing policy-making capacities when an overarching level gains more and more political relevance. As the Member State level is sufficiently represented at the European level, it is the regional level that is actually losing power, at least in Member States where regions are sufficiently relevant to have something to lose.

II. The constitutional dimension of the competence debate

The competence issue turned out to be much more than an item among others of Declaration No. 23 of the Nice Treaty.[84] It became a major issue of the debate on European integration), high on the agenda of the Convention. This seems to contradict the claim put forward in the preceding section that the European competence debate was first and foremost a *Länder*-level affair. It is easy to see why, amidst threats from the *Länder* not to ratify the Nice treaty, the German government had to insist that the competence issue be included in Declaration No. 23. But it is less easy to understand why the competence issue could become a standard element of most of the contributions to the debate on a European constitution and why the Convention even decided to make it rank as the first substantial issue to be discussed in May 2002.

The answer that there is indeed a major problem with the European competence order does not convince me (see *supra*). I rather believe that the following reading of the way the debate has unfolded is more accurate. As it evolved, the competence issue has become a *chiffre* for a much larger question - the question of what European integration is all about and where it should lead. According to this reading, the innocuous-looking formula 'Who does what?' becomes the question of 'How much integration do we want?'. This is probably the most fundamental question of European integration, hence a genuinely constitutional question. In other

[84] See *supra*.

words: to a large extent, the debate on European competencies is also a debate on the state and the very purpose of European integration.

III. The work of the Convention and the IGC 2004

The Laeken European Council called on the Convention to consider ”how the division of competence can be made more transparent”, ”whether there needs to be any reorganisation of competence” and ”how to ensure that a redefined division of competence” is maintained, ensuring ”that the European dynamic does not come to a halt”. Without entering into the details of the Convention’s work, the way the debate in the Convention unfolded may be summarised as follows:

After initial attempts to get under way a major rewriting of the competence order, most Convention members soon came to realise that the answer to the question of who is to control competencies was at least as important as the wording of competence provisions. Several measures intended to improve not only the competence provisions but the European legal order in general almost suggested themselves: These kinds of measures include streamlining and pruning the language of some of the competence provisions (cf. the incomprehensible wording of Art. 133 EC in the Treaty of Nice version), doing away with the distinction between EU-Treaty and EC-Treaty, introducing treaty provisions on taking into account principles developed by the ECJ such as supremacy and making external competencies and competence categories intrinsic to the treaties more visible.

The debate having shifted to the question of ‘who is to control’, suggestions to take judicial control away from the ECJ were never really taken seriously. New judicial institutions would only have a limited problem-solving capacity. For one thing, it cannot be overemphasised that there exists a court of competence already - the ECJ.[85] Introducing an additional court invested with comprehensive powers would amount to a complete reshuffle of the institutional setting at the European level. As to the proposed *ex ante* control of competencies, they would fail to cover ECJ decisions. Moreover, a court-like institution consisting of an equal number of European judges and national judges would probably be unable to solve or prevent conflicts. In sum: New judicial institutions would not prove effective in resolving all conceivable conflict scenarios. [86]

[85] See the detailed account presented by ECJ judge Colneric, *supra*, n. 51.

[86] Nonetheless one conceivable institution would be an additional forum for judicial dialogue between courts of the different levels, see *supra*, I.1.

As the competence and subsidiarity issues had come to be considered to be primarily of a political nature, the debate ultimately focused on an evaluation of several different concepts of a political control of competencies. Finally, proposals to introduce new political institutions such as a parliamentary subsidiarity committee were disregarded. The Convention suggested introducing some kind of early warning mechanism instead. The following is a more detailed account of the work of the Convention's Working Groups I and V and the Draft Constitution's relevant provisions:

1. Working Group I (Subsidiarity)[87]

The Working Group emphasised that, during the drafting and examination phases of legislative acts, the institutions participating in the legislative process, (the European Parliament, the Council and the Commission) have to take into account and to apply the principle of subsidiarity. In drawing up its legislative proposals, the Commission should take account of reinforced and specific obligations concerning justification with regard to subsidiarity using a "subsidiarity sheet". The Group also proposed that the Commission's annual legislative programme should be discussed by the European Parliament and by the national parliaments.

The Working Group considered the possibility of the appointment, within the Commission, of a "Mr or Mrs Subsidiarity", or of a Vice-President specifically responsible for ensuring his/her institution's compliance with the principle of subsidiarity. It recommended setting up an "early warning system" of a political nature, intended to reinforce the monitoring, by the national parliaments, of the European institution's observance of the principle of subsidiarity. According to this recommendation, the Commission should transmit all proposals of a legislative nature directly and contemporaneously to each individual national parliament, and to the Community legislator. Within six weeks of the date of the transmission of the proposal, and before the legislative procedure proper is initiated, every national parliament would have the chance to give a reasoned opinion as to whether the proposal in question is in accord with the principle of subsidiarity. This reasoned opinion, relating exclusively to the question of compliance with the subsidiarity rules, would be addressed to the Presidents of the European Parliament, of the Council and of the Commission. The consequences of such opinions for the continuation of the legislative process would depend on the number pertinence of the reasoned opinions submitted, ranging from adding further specific subsidiarity-related arguments

[87] Conclusions of Working Group I on the Principle of Subsidiarity (23.09.2002), CONV 286/02.

in justification of the act in question to amending or withdrawing it. A similar mechanism was suggested for the work of the Conciliation Committee (Art. 251 EC).

Finally, the Working Group recommended broadening the possibilities of referral to the Court of Justice for non-compliance with the principle of subsidiarity. According to the Group, it is important to link the possibility of appealing to the Court in case of violation of the principle of subsidiarity with the participation of national parliaments in the early warning system it suggests. The Group therefore proposes that a national parliament that had submitted a reasoned opinion for a case of violation of the principle of subsidiarity should be allowed to refer the matter to the ECJ.

Furthermore, the group proposes that the right to refer a subsidiarity-related matter to the Court of Justice should also be given to the Committee of the Regions.

2. Working Group V (Complementary Competencies)[88]

The Working Group recommended replacing the term ”complementary competence” with a term such as ”supporting measures”. It considered the concept of complementary competencies to be already laid down in the EC-Treaty and to be part of the general system of Union competencies. It therefore devoted considerable time to basic issues of competence. It also suggested introducing a separate title on competence into a future treaty, containing provisions that clearly define the three categories of Union competence and lay down a basic delimitation of competence in every policy area as well as stating the conditions for the exercise of Union competence.

The Working Group spent quite some time on the issue of competence categories. Supporting measures should be defined in the future Treaty on the basis of the following considerations: Supporting measures apply to policy areas where the Member States have not transferred legislative competence to the Union, unless exceptionally and clearly specified in the Treaty Article in question. They allow the Union to assist and supplement national policies where this is in the common interest of the Union and the Member States. According to the Group, supporting measures are conceivable in the fields of employment, education and vocational training, culture, public health, Trans-European networks, industry, research and development.

Exclusive competence and shared competence are policy areas where the Union shall be fully or predominantly responsible. They should be defined in a future treaty in accordance with

[88] Final report of Working Group V on Complementary Competencies (4.11.2002) CONV 375/1/02 REV1.

existing Court of Justice decisions, and the respective areas of exclusive and shared competence should be delimited in accordance with the criteria established by the Court.

As for the conditions for the exercise of Union competence, the Working Group held that a text explicitly stating that any power not conferred upon the Union by the Treaty remains with the Member States should be included in a future Treaty. A chapter on conditions and criteria for the exercise of competence as part of a general title on competence in a future Treaty should contain separate clauses covering the principles of subsidiarity, of proportionality, and of primacy of Community law; the principle of national implementation and execution of European law (with the exception of Commission implementation and execution where explicitly provided for in the Treaties); a clause on the statement of reasons for the adoption of an act - including information necessary to review compliance with requirements emanating from the principles governing the exercise of competence; principles of solidarity and of common interest.

The Group also suggested that Art. 308 EC should be maintained for the sake of providing the necessary flexibility, but unanimity and the assent or other substantial involvement by the European Parliament should be required.

3. The Draft Constitution

The results of the Working Groups where approved by the Convention, they are reflected in the result of the Convention's work.[89] Part I of the Constitution contains a specific title on the Union's competencies (Art. I-9 to I-17), complemented by a protocol on subsidiarity.[90]

It lists and defines the fundamental principles governing the limits and exercise of competencies: the principles of conferral, subsidiarity, proportionality and loyal cooperation. It also lists and describes the different categories of the Union's competencies, stating for each category what the consequences of the Union's exercise of its competencies are for the competencies of the Member States. The key criterion for establishing those categories is the reach of the legislative competence conferred on the Union in relation to that of the Member States, according to whether the competence in question is conferred on the Union alone (exclusive competence) or shared between the Union and the Member States (shared competence), or whether it continues lying with the Member States (areas for supporting, coordinating and complementary European action).

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[89] CONV 724/03, CONV 725/03. See already the draft of Articles 1 to 16 of the Constitutional Treaty CONV 528/03.

[90] See for the draft CONV 579/03. 'Protocol' is a term that does not correspond to the constitutional terminology used eleswhere by the Convention.

- Exclusive competence:[91] this category includes the competence to establish competition rules within the internal market; competence covering the areas of customs union; common commercial policy; monetary policy for the Member States which have adopted the Euro; conservation of marine biological resources under the common fisheries policy. The Union shall also 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.
- Shared competence:[92] 'principal areas' of this category include the internal market; area of freedom, security and justice; agriculture and fisheries; transport; trans-European networks; energy; certain aspects of social policy; economic and social cohesion; environment; common safety concerns in public health matters. This is not an exhaustive list of the areas of shared competence, taking account as it does of the Convention's wish not to establish a fixed catalogue of competencies.[93]
- Areas for supporting action [94] include industry, protection and improvement of human health, education, vocational training, youth and sport, culture, civil protection. Acts of the EU in these fields cannot entail harmonisation of Member States' laws or regulations.

Coordination of the Member States' economic and employment policies [95] and common foreign and security policy [96] are given separate articles in order to reflect the specific nature of the Union's competencies in those areas.

A flexibility clause corresponding to the former Art. 308 EC,[97] is maintained in order to enable the Union to react in unforeseen circumstances. But that flexibility is restricted to the areas already specified in Part III of the Constitution that deals with the policies in detail.[98] The provision requires unanimity in the Council and that the Member States' national parliaments must be informed explicitly whenever the Commission proposes to use the flexibility clause.

All in all, the Draft Constitution submitted by the Convention reflects more or less the *acquis communautaire*, as the detailed competence provisions of the EU and the EC-Treaty are con-

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[91] Art. I-12 CONV 724/03.
[92] Art. I-13 CONV 724/03.
[93] Thus the Union shall have competence to carry out actions in the areas of research, technological development and space in particular to define and implement programmes; in the areas of development cooperation and humanitarian aid, the Union shall have competence to take action and conduct a common policy; however, the exercise of these competences may not result in Member States being prevented from exercising theirs.
[94] Art. I-16 CONV 724/03.
[95] Art. I-14 CONV 724/03.
[96] Art. I-15 CONV 724/03.
[97] Previously Art. 235 ECT.
[98] CONV 725/03.

tained in Part III of the Draft Constitution which has the same legal value as Part I. Still, provisions such as Art. I-9 para. 2 of the Draft Constitution [99] indicate and probably overemphasize a profound sense of distrust that does not correspond with the fact that participating in European integration is not a duty but takes place on a voluntary basis.[100] In that sense, although the text is well more reasonable than some contributions during the Conventions deliberation, there remains a problem with the overall mood that the provisions embody.

Conclusion

It should be kept in mind that the answer to the standard question raised in the competence debate - 'Who does what in Europe?' - can easily be found in the Official Journal. But for substantial accountability, it is the transparency and openness of the decision-making process that are crucial, which is an additional argument for introducing public Council meetings, as suggested by the Convention.[101]

This aspect indicates that the competence issue in the EU is not merely a legal problem in the sense that solutions may be obtained through modifications of competence provisions. It is to a large extent a political issue which has to be addressed with appropriate mechanisms. In non-unitary systems such as EU, the competence issue is an issue that is also about underlying concepts of the relationship between the different levels of public authority involved.

Taking into consideration the nature of the European construct as a constitutionalised multilevel system without strong hierarchies, mechanisms and tools that emphasise political safeguards in order to protect affected interests seem to be best suited to the European situation. This points towards 'soft' procedures - mechanisms aimed at raising sustainable sensitivity on competence issues such as regular reports on the state of the competence order in the EU, debated in the European Parliament and by the national legislatures or the appointment of some kind of Ombudsman who would be collecting complaints related to the competence issue.

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[99] "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." (emphasis added), CONV 724/03.

[100] This is what makes Art. I-59 on voluntary withdrawal from the Union (CONV 724/03) such an absurd provision.

[101] Art. I-49 para. 2 CONV 724/03. The Council and its dysfunction concerning coordination may also have played a role in the perception of a competence problem: in the absence of comprehensive coordination of the work of the different specialised Councils a trend towards ever-increasing activity of each of these councils comes as no surprise. This has to do with the phenomenon that often enough, the members of a specific specialised Council, e.g. the Ministers responsible for the environment, can easily agree on a policy measure that their respective cabinet colleagues at home would reject.

The work of the Convention seems to be inspired by a similar understanding of the issue, as it refrained from major modifications of the existing competence order and from introducing additional institutions, although the sense of distrust that seems to underlie some of the provisions suggested by the Convention does not correspond to the fact that a community of law has to be built on some basic understanding and trust.

For all the work achievements of the Convention, it seems to me that the crux of the competence issue in non-unitary systems consists in ensuring that all those involved in the decision-making process show a consistently high level of sensitivity in matters of competence. In other words: An ongoing debate on competencies in itself is the best means of monitoring the proper exercise of competencies. This can be achieved neither through the wording and re-wording of competence provisions, however detailed, nor by institutional arrangements alone. It is primarily a question of a specific constitutional culture.