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Competences- Reloaded? The Vertical Division of Powers in the EU after
the New European Constitution

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COMPETENCES – RELOADED?

The vertical division of powers in the EU
AFTER THE NEW EUROPEAN CONSTITUTION

Franz C. Mayer *

Introduction

Following the constitutional debate before, during and after the 2002/2003 Convention, one could easily have a sense of *déjà vu*.

More or less similar European debates on lists of competences, subsidiarity, a competence court etc. had taken place before. The vertical division of powers is a recurring issue of European constitutional law.¹

What's wrong with *déjà vu*? There is a movie from 1999 called *The Matrix*,² which depicts a future where machines have gained control over the earth and human beings are kept in

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¹ There exists an abundant amount of literature on the competence issue. See Pescatore, *Distribucion de competencias y de poderes entre los Estados miembros y las Comunidades europens*, *Derecho de la Integracion* (1967) 108; V. Constantinesco, *Compétences et pouvoirs dans les Communautés européennes* (1974); Usher, 'The Scope of Community Competence', *JCMS* (1985) 121; Scharpf, 'Kann es in Europa eine stabile föderale Balance geben?', in R. Wildenmann (ed), *Staatswerdung Europas?* (1991), at 422 et seq.; Dashwood, 'The Limits of European Community Powers', 21 *ELRev.* (1996) 113; Jarass, 'Die Kompetenzverteilung zwischen der Europäischen Gemeinschaft und den Mitgliedstaaten', 121 *AöR* (1996) 173; T. Fischer and N. Schley, *Organizing a Federal Structure for Europe. An EU Catalogue of Competencies* (2000); Pernice, 'Kompetenzabgrenzung im europäischen Verfassungsverbund', *JZ* (2000) 866; F. C. Mayer, 'Die drei Dimensionen der europäischen Kompetenzdebatte', 61 *ZaöRV* (2001) 577; v. Bogdandy/Bast, '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/pernice-kompetenzordnung>>; Nettesheim, 'Kompetenzen', in A. v. Bogdandy (ed), *Europäisches Verfassungsrecht* (2003), at 415 et seq. (English version forthcoming 2004); Bieber, 'Kompetenzen und Institutionen im Rahmen einer EU-Verfassung', in Häberle/Morlok/ Skouris (eds), *Festschrift für D. Th. Tsatsos* (2003), at 31 et seq.; Craig, 'Competence: clarity, conferral, containment and consideration', 29 *ELRev* (2004) 323. For a comparative view see F. C. Mayer, *The Delimitation of Powers – Lessons from the United States for the European Union?* in D. Halberstam and M. P. Maduro (eds), *The Constitutional Challenge in Europe and America: People, Power, and Politics* (forthcoming 2004).

some kind of permanent dream world. In this computer generated virtual reality controlled by the machines, a *déjà vu* that occurs is usually considered “a glitch in the Matrix”.³ Such a *déjà vu* can be understood as some kind of system malfunction, but to the extent that it is generated by the machines, it may also be regarded as a mere feature of the system.

Does the fact that the competence issue keeps recurring indicate that there is a systemic malfunction of the ‘Matrix’ in the EU?

Or is the recurring debate about European powers and competences an in-built feature of European integration?

It seems to me that to some extent, there has been a false debate, insofar as the debate was mainly on how to solve the competence problem. I would argue that the competence issue cannot be ‘resolved’, as the competence issue is in fact a debate on the reach and the purpose of European integration.⁴ I will develop this approach to the competence issue in two steps.

After a brief look at the previous – current – ⁵ system as laid down in the founding treaties and the work of the Convention (I, II), a first level of analysis will try to assess the competence provisions of the new Constitution ⁶ in the light of the pre-Convention debate on European competences (III).

A second level of analysis will try to go beyond a narrow understanding of competence as merely legislative competence (IV). There is some evidence that what frequently comes along as a problem of competences is actually about issues outside the realm of legislation, which raises the question of how the Convention dealt with this type of issues.

I will conclude with the perspective that the competence issue is likely to come back.

² See in that context G. Yeffeth, *Taking the Red Pill. Science, Philosophy and Religion in The Matrix* (2003). The movie had two sequels, *Matrix – Reloaded* (2003) and *Matrix – Revolutions* (2003), which were generally considered less imaginative than the first movie.

³ L. Wachowski and A. Wachowski, *The Matrix. The Shooting Script* (2001) at 74.

⁴ This may be a difference as to competence debates in federal states.

⁵ Since February 2003 and until further notice – as the ratification of the Constitutional Treaty procedure may take at least two years and may even fail – the founding treaties as amended by the Nice Treaty of 2001 are the relevant law.

⁶ Hereinafter CE. For the result of the Convention’s work, see the “Draft Treaty establishing a Constitution for Europe” of July 18, 2003, Convention document CONV 850/03. The Intergovernmental Conference of 2003/2004 established a revised version of the Convention’s text which is IGC document CIG 50/03 (25 November 2003). The political agreement reached on the Constitution is laid down in CIG 81/04 (16 June 2004) and finally CIG 85/04 (18 June 2004), which both refer to CIG 50/03. A consolidated, preliminary text is available as CIG 86/04 (25 June), with two addenda that include the protocols and declarations to the Treaty, an overall package of more than 700 pages. This text was renumbered for the signature in Rome on 29 October 2004 (CIG 87/04). All articles quoted here refer to the final article numbers (CIG 87/04), if the article number of the original draft established by the Convention is different, the original number is also also indicated.

I. Powers and competences in the founding treaties pre-Convention

1. Competences?

The pre-Convention terminology seems to ignore the term 'competence'. Instead, the English word normally used is 'powers', as in Art. 5 para. 1 EC. 'Powers' is also the term used in Declaration No. 23 annexed to the Nice Treaty,⁷ the document that was the starting point for the process that led to the Constitution. "Competences"⁸ has been called "Euro-speak".⁹ In an EU context it seems to be a hasty translation from German *Kompetenz*,¹⁰ which has come to be part of EU constitutional law vocabulary:¹¹ this is indicated by the fact that 'Competences' is the term used throughout the Convention deliberations and in the Constitution.¹²

⁷ As published in the OJ, whereas the English version of the initial document agreed upon in Nice (SN 533/00) uses the word 'competencies'.

⁸ In will use 'competences' (as opposed to *competencies*, see e.g. Working Group V on Complementary Competencies (4.11.2002) CONV 375/1/02 REV1) as the plural of competence, because 'competences' is the word used in the constitutional treaty.

⁹ See 'Charlemagne. Snoring while a superstate emerges?', *The Economist* 8.5.2003, stating "powers ('competences', in Euro-speak)". On the terminology question see also de Búrca and De Witte, 'The Delimitation of Powers Between the EU and its Member States' in A. Arnulf and D. Wincott (eds), *Accountability and Legitimacy in the European Union* (2002), 201, at 202; 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), at 359. In a non-legal English context 'competence' is mostly used as a singular word to express a particular kind of expertise, 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 from the German constitutional law concept of *Kompetenz*.

¹⁰ See for further reference on the German concept R. Stettner, *Grundfragen einer Kompetenzlehre* (1983); see also F. C. Mayer, *Kompetenzüberschreitung und Letztentscheidung* (2000) at 21 et seq. I will not deal with the concept of 'Kompetenz-Kompetenz' here. This 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), at 409 et seq. 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. 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 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.

¹¹ See for example P. Craig and G. de Burca (eds), *The evolution of EU law* (1998) 137 et seq., where the term is used.

¹² See Art. I-11 to I-18 (previously Art. I-9 to I-17): "Title III: Union competences".

However, the term ‘power’ is also used in the Constitution. It appears in the *Thucydides*-quote at the beginning of the Convention’s Draft Constitution¹³ and in the flexibility clause, Art. I-18 para. 1.¹⁴ There is even one provision where both terms ‘powers’ and ‘competences’ are used: “When the Constitution confers on the Union a *competence* shared with the Member States in a specific area, the Union and the Member States shall have the *power* to legislate and adopt legally binding acts in that area” (Art. I-12 para. 2,¹⁵ emphasis added). Art. I-19 para. 2¹⁶ states “Each Institution shall act within the limits of the powers conferred on it in the Constitution”. According to Art. I-30 para. 3,¹⁷ the European Central Bank exercises “powers”. Art. I-32 para. 5¹⁸ refers to the Committee of the Regions’ and the Economic and Social Committee’s “powers”. Art. I-37 para. 2¹⁹ is about “implementing powers” of the Commission. The Preamble of the Charter (Part II of the Constitution) refers to “the powers and tasks of the Union”. Art. II-111,²⁰ which is about the field of application of the Charter, requires that Member States respect “the limits of the powers of the Union as conferred on it in the other Parts of the Constitution”. It also states that “This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution”.

All this might be developed into a conceptual differentiation,²¹ e.g. a distinction between competence and powers in the sense of competence being merely the legislative aspect of powers. But maybe it is just a terminological problem related to translation, as Part III seems to indicate.²²

¹³ Convention document CONV 850/03, “Our Constitution ... is called a democracy because power is in the hands not of a minority but of the greatest number.” This quote was not kept in the final version of the text as agreed upon at the Brussels summit in June 2004, see Intergovernmental Conference document CIG 86/04.

¹⁴ Previously Art. I-17.

¹⁵ Previously Art. I-11.

¹⁶ Previously Art. I-18.

¹⁷ Previously Art. I-29.

¹⁸ Previously Art. I-31.

¹⁹ Previously Art. I-36.

²⁰ Previously Art. II-51.

²¹ v. Bogdandy/Bast/Westphal, *supra* n. 57, at 422, point to this perspective.

²² See Art. III-115 (previously Art. III-1) that refers to “the principle of conferring of powers”, as opposed to Art. I-11 (previously Art. I-9) (competences, principal of conferral). In the convention Draft (CONV 850/03), “powers” is used in Arts. III-6, 8, 9, 17, 65, 80, 83, 235, 270 (misuse of powers), 278, 290, 315, 341. The protocol on National Parliaments uses the term “legislative powers” (para. 5).

2. *The current system: enumerated competences and subsidiarity*

A standard account would probably not bother on the distinction between powers and competences. It would simply state that the core issue behind the different terms is the question of the limits to European activities, in particular to legislative activities

This standard account would first point to the fact that the fundamental principle of the European competence order has always been the principle of enumerated competences (conferred powers), laid down in Art. 5 para. 1 EC,²³ the former Art. 3b EEC-Treaty. According to this principle, the Community ²⁴ may only act **within the limits of the competences conferred upon it by primary law and of the objectives assigned to it therein**. As for categories, academia has been trying to establish all kinds of categories, in part based on categories from domestic federal constitutional thought. These categories include exclusive, concurring, parallel, coordinating or complementary competences.

The problem about all these categories is not so much the definition of a category in general terms, but the attribution of the treaties' competence-provisions to the respective categories. Neither academia nor the case-law of the ECJ have managed to establish a coherent and undisputed system. A case in point is the debate on whether the internal market competence (Art. 95 EC) should be considered as an exclusive competence (as clearly no Member State can establish a European-wide internal market on its own) or not (as the Member States also contribute to establishing the internal market).²⁵ What can be said for sure about categories is that Art. 5 para. 2 EC establishes a distinction between exclusive European competences and non-exclusive competences. Only the latter are subject to the subsidiarity test.²⁶

A standard account of the European competence system will emphasize that there are no lists or catalogues of competence provisions, as known from classical federal constitutions.²⁷ Instead, the competence provisions may be found all over the treaties. Most of these

²³ This principle is now laid down in Art. I-11 para. 1 (previously Art. I-9 para. 1 (CONV 850/03)).

²⁴ I will use Community and Union interchangeably. The concept of Community is given up by the Constitution anyway, with the exception of European Atomic Energy Community, which remains distinct from the Union.

²⁵ See Nettesheim, *supra* n. 1, at 446.

²⁶ See *infra*.

provisions are positive competence provisions, 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 habitual lists or catalogues of competences in federal constitutions.²⁸ This is contested for some of the positive competence provisions, though.²⁹ One of the most criticized positive competence provisions is Art. 308 EC.³⁰ This article 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.³¹ Equally contested are the internal-market provisions of Art. 94, 95 EC³² by virtue of which the Community can adopt measures whose object is the establishment and functioning of the internal market.

There are also numerous clauses in the treaties for which the term negative competence provisions may be coined, i.e. provisions stating that the Union/community may *not* take action. In a sense the provision on enumerated powers (Art. 5 EC³³) and the principle of comity (Art. 10 EC, as far as it also applies in favor of the Member States³⁴) can be read as negative competence provisions.³⁵ In addition, there are numerous articles where positive competence provisions contain explicit exclusions of certain area fields.³⁶ Art. 137 para. 6 EC³⁷ 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 competences of the EU. Another example is Art. 152 para. 5 EC,³⁸ 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. Typically, these provisions prevent the European level from harmonizing national legislation in certain fields.

²⁷ Art. I Sect. 8 of the US constitution, Arts. 73 et seq. of the German constitution.

²⁸ In that sense Pernice, *supra* n. 1, at 872, who emphasizes that the finality-driven structure of the competence provisions is more competence limiting than lists of area fields.

²⁹ See Jarass, *supra* n. 1, at 180.

³⁰ See Art. I-18 (previously Art. I-17). It is an almost classical technique to provide this kind of safety-net provision for unforeseen cases, which is often construed as implied powers and which can be found, for example, in the US constitution the 'necessary and proper-clause' of Art. I Sect. 8. See L. Tribe, *American Constitutional Law. Volume One*, (3rd ed. 2000), at 798.

³¹ Art. 308 EC, the former Art. 235 EEC, was used as a legal basis for European agencies, for example, see Nettesheim, *supra* n. 1, at 466 for further references.

³² See Arts. III-172 and III-173 (previously Arts. III-64 et seq.). A functional equivalent may be seen in the *interstate commerce clause* of the US constitution, Art. I Sect. 8 para. 3.

³³ Art. I-11 para. 1.

³⁴ Art. I-5 para. 2.

³⁵ 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.

³⁶ See Part III of the Draft Constitution, CONV 850/03.

³⁷ Now Art. III-210 para. 6 (previously Art. III-104).

Besides positive competence provisions, the treaties also contain provisions on how to use existing competences such as the principle of subsidiarity in Art. 5 para. 2 EC ³⁹ (for non-exclusive competences of the Community) ⁴⁰ or the principle of proportionality in Art. 5 para. 3 EC.⁴¹

Finally, there is the field of external competences for concluding international treaties. This type of competence has always been a particular category, often enough ignored in the debate. In a series of decisions of which the AETR case is probably the most famous, the ECJ has hammered out those principles implicit in the founding treaties that govern the law of external competences.⁴²

3. Powers and competences pre-Convention: no major legal problem

The debate of the Nineties and the Convention's main concern seem to indicate that there exists a major and urgent problem with regard to the delimitation of competences as set up by the European founding treaties. A close look at the treaties does not confirm this impression of a highly problematic situation. It is true that European competences are not enumerated in a list or catalogue, but scattered all over the treaties, therefore they are not easy to find and read. Still, I would insist that these competence provisions tightly circumscribe European public authority, probably even much better than the lists of competences used in federal constitutions (see *supra*). This view is confirmed by the 2002 background-study prepared by the Secretariat of the Convention for the Convention's deliberations on the issue.⁴³

From a pre-Convention legal perspective, an urgent need for rewriting the European system of competences from scratch is hard to detect. From this perspective, there are no obvious deficiencies. The limits to European powers are numerous; the overall volume of European competences is not unsettling. This, of course, raises the question, why the issue has assumed such importance over the last few years. I will come back to that question later.

³⁸ Now Art. III-278 para. 7 (previously Art. III-179).

³⁹ See Art. I-11 para. 3.

⁴⁰ Arguably, there are different ways to look at the subsidiarity principle. Another reading of Art. 5 para. 2 EC is that it tells when competence no longer exists, it would be an 'if'-provision on competences, not a 'how'-provision.

⁴¹ See Art. I-11 para. 4.

⁴² For a detailed account Nettesheim, *supra* n. 1, at 436.

⁴³ CONV 17/02, see also CONV 47/02. This contrasts with some of the findings in the Lamassoure-Report to the EP of January 2002, PE 304.276

II. The 2002/2003 Convention and the Constitution

1. The Laeken mandate and the Convention

The background of the developments that led up to the Constitution can not be explored in detail here. A detailed account would have to elaborate on the impact of 1989 on European integration, the foreseeable reunification of Europe after the downfall of the Iron Curtain and the need to adapt the founding treaties to an enlarged European Union of 25 and more Member States. It would also have to go back to the 1996 IGC, the Amsterdam summit of 1997, the so-called leftovers of Amsterdam and the minimum compromise reached at the Nice summit in December 2000. Declaration 23 on the future of the EU annexed to the Treaty of Nice tried to maintain the perspective of reforming the treaties in spite of the Nice failure. It was the basis for the Declaration of Laeken of December 2001,⁴⁴ establishing a Convention⁴⁵ and an agenda for the work of the Convention with a view to reforming the treaty foundations of European integration.

The issue of European competences had gained particular prominence at the level of EC primary law at the beginning of the 90s with the introduction of the principle of subsidiarity into the 1992 Maastricht Treaty, which was meant to set limits to community action.⁴⁶ The Maastricht decision of the German Constitutional Court of 1993 claiming jurisdiction over European acts outside the realm of European competences (*Ultra vires*-acts) is evidence of how the issue increasingly became a major issue of constitutional law at Member State level as well.⁴⁷ The delimitation of powers and competences between the EU and its Member States had also been a central part of the more recent political debate on a European constitution that started with Joschka Fischer's *Humboldt*-speech in May 2000.⁴⁸

Consequently, the question of how to establish and monitor a more precise delimitation of powers/competences between the EU and its Member States was put high on the agenda of the Convention. The Laeken European Council of December 2001 called on the Convention to consider, inter alia,⁴⁹ "how the division of competence can be made more transparent",

⁴⁴ See SN 300/01, <<http://ue.eu.int>>.

⁴⁵ <<http://european-convention.eu.int>>.

⁴⁶ See v. Borries, 'Das Subsidiaritätsprinzip im Recht der Europäischen Union', *EuR* (1994) 263, at 298; Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', 94 *Colum. L. Rev.* (1994) 332.

⁴⁷ BVerfGE 89, 155 - *Maastricht*. See also the Danish Maastricht case, Højesteret decision 6.4.1998, *Carlsen et al./Rasmussen*, I 361/1997, *UfR* (1998) 800. For a more recent example of how national courts see the issue see the British Metric martyrs case, *Thoburn v Sunderland City Council*; *Hunt v Hackney London Borough Council*; *Harman and others v Cornwall County Council*; *Collins v Sutton London Borough Council*, CMLR (2002) 1461.

⁴⁸ J. Fischer, *Vom Staatenverbund zur Föderation – Gedanken über die Finalität der europäischen Integration*, FCE-Spezial 2/2000, <<http://www.whi-berlin.de/fischer.htm>>.

⁴⁹ The Laeken declaration contains several dozens of questions.

“whether there needs to be any re-organization 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”.

The Convention concluded its work in June/July 2003 with a Draft Treaty establishing a Constitution for Europe.⁵⁰ The ensuing Intergovernmental Conference required under Art. 48 EU for a modification of the founding treaties agreed on a revised draft in June 2004.⁵¹ Although a considerable number of changes to the Convention Draft were agreed upon, the core of the provisions relating to the competence issue were not re-discussed.⁵²

2. THE DEBATE ON COMPETENCES IN THE CONVENTION

THE 2002/2003 CONVENTION DEVOTED A CONSIDERABLE AMOUNT OF TIME AND ENERGY TO THE COMPETENCE ISSUE. IT WAS AMONG THE FIRST LAEKEN AGENDA ITEMS TO BE DEBATED.

A. THE WAY THE COMPETENCE DEBATE UNFOLDED

THE WAY THE DEBATE IN THE CONVENTION UNFOLDED MAY BE SUMMARIZED AS FOLLOWS: AFTER INITIAL ATTEMPTS TO GET UNDERWAY A MAJOR REWRITING OF THE COMPETENCE ORDER, WITH SOME CONVENTION MEMBERS CALLING FOR FEDERAL-CONSTITUTION-STYLE LISTS OF COMPETENCES, MOST CONVENTION MEMBERS SOON CAME TO REALIZE THAT THE ANSWER TO THE QUESTION OF WHO IS TO CONTROL COMPETENCES WAS AT LEAST AS IMPORTANT AS THE WORDING OF COMPETENCE PROVISIONS.⁵³

THE DEBATE HAVING SHIFTED TO THE QUESTION OF ‘WHO IS TO CONTROL’,

⁵⁰ The result of the Convention’s work, the Draft Treaty establishing a Constitution for Europe (hereinafter, articles cited without further references refer to the Draft Treaty) is the convention document CONV 850/03 (18.7.2003). A certain number of ‘technical’ modifications has been suggested by the legal experts of the IGC secretariat (mainly the Council legal service), see IGC document CIG 4/03. The modifications accepted by the legal experts of the Member States are laid down in CIG 50/03 (25.11.2003). After the failure of the Brussels European Council of 15/16 December 2003 (see CIG 60/03), a political agreement was reached on most of the remaining issues at the level of foreign ministers (see CIG 81/04) and then, at the Brussels European Council on Friday, 18 June 2004, at the level of Heads of state and government (see CIG 85/04).

⁵¹ See CIG 86/04 (25 June 2004) for a consolidated version of the IGC outcome.

⁵² This means for example that the categories of competences that have been introduced or the absence of a new competence court were not disputed. Of course, the debate on qualified majority voting which was a core issue of the IGC cannot totally be detached from the competence issue. I will address this *infra*.

⁵³ See in that context ‘The exercise of European competencies is the real problem, not the allocation of competencies in the treaties. Nine points for the 2004 Intergovernmental Conference’, *Friedrich Ebert Stiftung – International Policy Analysis Unit – Working Group on European Integration – Working Paper No. 10*, September 2001/March 2002, <<http://www.fes.de/indexipa.html>>.

SUGGESTIONS FOR TAKING JUDICIAL CONTROL AWAY FROM THE ECJ BY INTRODUCING SOME KIND OF DISTINCT COMPETENCE COURT WERE NEVER REALLY TAKEN SERIOUSLY. 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 CONCEPTIONS OF A POLITICAL CONTROL OF COMPETENCES, BE IT INSTITUTIONAL OR BY PROCESS. FINALLY, PROPOSALS TO INTRODUCE NEW POLITICAL INSTITUTIONS SUCH AS A PARLIAMENTARY SUBSIDIARITY COMMITTEE⁵⁴ WERE ALSO DISREGARDED. THE CONVENTION SUGGESTED INTRODUCING SOME KIND OF EARLY-WARNING MECHANISM INSTEAD.

B. THE RELEVANT WORKING GROUPS

THE CONVENTION SET UP SPECIAL WORKING GROUPS FOR SOME OF THE ITEMS ON ITS AGENDA, AND IT IS QUITE REVEALING THAT THERE WERE EVEN TWO WORKING GROUPS DEALING WITH COMPETENCE-RELATED QUESTIONS. AS THE CONCLUSIONS OF THE WORKING GROUPS SERVED AS THE BASIS FOR THE TEXT OF THE DRAFT CONSTITUTION, IT IS WORTH HAVING A CLOSER LOOK AT THE WORK OF THE CONVENTION'S RELEVANT WORKING GROUPS I AND V. THE WORKING GROUPS ALSO ILLUSTRATE THE FOCUS OF THE CONVENTION'S DEBATES.

AA. WORKING GROUP I (SUBSIDIARITY)⁵⁵

Working Group I focused on the question of subsidiarity and legislation. It emphasized the responsibilities of the institutions participating in the legislative process (the European Parliament, the Council and the Commission) and recommended that the Commission should take account of reinforced and specific obligations concerning justification with regard to subsidiarity by using a "subsidiarity sheet". The Group also proposed that the Commission's annual legislative program should be discussed by the European Parliament and by the national parliaments. The Working Group contemplated 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 ended up recommending 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.

Finally, the Working Group recommended broadening the basis for referral to the Court of Justice for non-compliance with the principle of subsidiarity. The Group considered it to be important to link the possibility of appealing to the Court in case of violation of the principle of subsidiarity

⁵⁴ See in that context Pernice, *supra* n. 1, at 876; see also Schwarze, 'Kompetenzverteilung in der Europäischen Union und föderales Gleichgewicht', *DVBl.* (1995) 1265, at 1268.

⁵⁵ Conclusions of Working Group I on the Principle of Subsidiarity (23.09.2002), CONV 286/02.

with the participation of national parliaments in the early-warning system it suggested. Hence the proposal 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 proposed that the right to refer a subsidiarity-related matter to the Court of Justice should also be given to the Committee of the Regions.

BB. WORKING GROUP V (COMPLEMENTARY COMPETENCIES)⁵⁶

Unlike Working Group I, which ultimately focused on process, the Working Group 'Complementary competences' devoted considerable time to basic issues of the competence system. It suggested introducing a separate title on competence into a future treaty, containing provisions that clearly define 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 defining competence categories and finally suggested the following definitions: In the future treaty, supporting measures should be understood as measures that 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 were conceivable in the fields of employment, education and vocational training, culture, public health, Trans-European networks, industry, research and development.

The Working Group suggested defining exclusive competence and shared competence in accordance with existing Court of Justice decisions, and to delimit the respective areas of exclusive and shared competences in accordance with the criteria established by the Court. As for the conditions for the exercise of Union competence, the Working Group held the view that a provision 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 for reviewing compliance with requirements emanating from the principles governing the exercise of competence; principles of solidarity and of common interest.

⁵⁶ Final report of Working Group V on Complementary Competencies (4.11.2002) CONV 375/1/02 REV1.

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. Competences in the Draft Treaty establishing a Constitution for Europe

It is mainly the conclusions of the Working Groups that are reflected in the final outcome of the Convention's work.⁵⁷ This also applies to the competence issue, as most of the recommendations of the Working Groups described *supra* found their way into the Draft Constitution.

The approach taken is a twofold one: On the one hand, competence provisions from the founding treaties are more or less maintained in Part III of the Constitution, as Art. I-12 para. 6⁵⁸ states: "The scope of and arrangements for exercising the Union's competences shall be determined by the provisions specific to each area in Part III." Note that all parts of the Constitution have the same legal rank.

On the other hand, Part I of the Constitution introduces a specific title on the Union's competences (Art. I-11 to I-18⁵⁹), complemented by a (new) protocol on subsidiarity.⁶⁰ In contrast to the actual competence provisions in Part III, this title is of a more general nature. It lists and defines the fundamental principles governing the limits and exercise of competences: principles such as the principle of conferral,⁶¹ subsidiarity and proportionality. National parliaments are called upon to ensure compliance with the subsidiarity principle in accordance with the procedure laid down in the subsidiarity protocol (Art. I-11⁶²). Art. I-6⁶³ confirms the principle of primacy⁶⁴ of Union law adopted "in exercising competences

⁵⁷ CONV 850/0357. See already the draft of Articles 1 to 16 of the Constitutional Treaty CONV 528/03. For an assessment of the provisions in the Convention draft, see v. Bogdandy/Bast/Westphal, 'Die vertikale Kompetenzordnung im Entwurf des Verfassungsvertrags', 26 *Integration* (2003) 414; R. Bocklet, *Bericht über die Ergebnisse des EU-Konvents*, Bavarian government memorandum dated 11.9.2003 (on file with the author); Schröder, 'Vertikale Kompetenzverteilung und Subsidiarität im Konventsentwurf für eine europäische Verfassung', *Juristenzeitung* (2004) 8.

⁵⁸ Previously Art. I-11.

⁵⁹ Previously Art. I-9 to I-17.

⁶⁰ See for the draft CONV 579/03. 'Protocol' is a term that does not correspond to the constitutional terminology used elsewhere by the Convention.

⁶¹ See already Art. I-3 para. 5, though: "These objectives shall be pursued by appropriate means, depending on the extent to which the relevant competences are attributed to the Union in the Constitution".

⁶² Previously Art. I-9.

⁶³ Previously Art. I-10.

⁶⁴ The fact that European law prevails over national law in case of conflict may be conceptualised as 'supremacy' or as 'primacy'. Unlike European law textbooks and doctrinal writings, the ECJ has used the term 'supremacy' only once in a judgement so far (ECJ, Case 14/68, *Walt Wilhelm* [1969] 1, para 5). The term appears as a keyword in a 1972 decision (ECJ, Case 93/71, *Leonesio*, [1972] 287) and occasionally in Advocate General Conclusions (in Case C-112/00, *Schmidberger* [2003] ECR 5659, para 5, AG Jacobs played it safe: "...by virtue of the

conferred on it". Art. I-12 et seq. ⁶⁵ lists and describes the different categories of Union competences, stating for each category what the consequences of the Union's exercise of its competences are for the competences of the Member States.

Exclusive competence (Art. I-13 ⁶⁶): this category includes the competence to establish competition rules necessary for the functioning of the internal market and competence covering the areas of monetary policy for the Member States which have adopted the Euro; common commercial policy; customs union; the conservation of marine biological resources under the common fisheries policy. An area frequently ignored in the competence debate is also dealt with in Art. I-13, the area of 'external competences': According to Art. I-13 para. 2, the Union shall also have exclusive competence for the conclusion of international agreements when its conclusion is provided for in a legislative act of the Union, when it is necessary to enable the Union to exercise its competence internally, or when it affects an internal Union act.

***Shared competence* (Art. I-14 ⁶⁷): "principal areas" of this category include the internal market;⁶⁸ the 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 meant to set up as 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 competences.⁶⁹**

***Areas of supporting, coordinating or complimentary action* (Art. I-17 ⁷⁰) include industry, protection and improvement of human health, education, vocational training, youth and sport, culture, civil protection. Art I-17 para.**

primacy or supremacy of Community law, they prevail over any conflicting national law"). 'Primacy' can be found much more frequently in ECJ decisions, albeit often enough the Court just refers to what was said by parties or the national court. For an example of the ECJ clearly using 'precedence' see ECJ, Case C-256/01, *Allonby* [2004] ECR ____ (13 January 2004), para 77. The Constitutional Treaty uses 'primacy' (Art. I-10 DCT). It is hard to say for a non-native speaker to what extent there is a difference between primacy and supremacy, whether this difference is related to British versus American English or whether the term supremacy implies more of a hierarchy or of the German concept of *Geltungsvorrang* as opposed to *Anwendungsvorrang* (European prevailing over national law would also affect the validity (*Geltung*) of national law, not only its applicability (*Anwendung*)).

⁶⁵ Previously Art. I-11 et seq.

⁶⁶ Previously Art. I-12.

⁶⁷ Previously Art. I-13.

⁶⁸ The Commission argued for the internal market to be an exclusive competence. The compromise is that the competence to establish competition rules necessary for the functioning of the internal market is an exclusive competence.

⁶⁹ 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.

⁷⁰ Previously Art. I-16.

3 states that acts of the EU in these fields cannot entail harmonization of Member States' laws or regulations

Coordination of the Member States' economic and employment policies (Art. I-15 ⁷¹) and common foreign and security policy (Art. I-16 ⁷²) are given separate articles in order to reflect the specific nature of the Union's competences in those areas.

With Art. I-18,⁷³ a flexibility clause corresponding to the former Art. 308 EC,⁷⁴ 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. This formula may be narrower than the one used in the old Art. 308 EC ("in the course of the operation of the common market").⁷⁵ The provision requires unanimity in the Council and that the Member States' national parliaments be informed explicitly whenever the Commission proposes to use the flexibility clause.

The subsidiarity protocol mentioned in Art. I-11 replaces the current subsidiarity protocol. It introduces the early-warning system suggested by Working Group I (information of national parliaments, see *supra*). Not only are national parliaments given a role in defending subsidiarity, though, the protocol also states that the Committee of the Regions may bring actions on grounds of infringement of the principle of subsidiarity by a legislative act before the ECJ.⁷⁶ According to the protocol, the Commission shall submit to the European Council, the European Parliament, the Council of Ministers and the national parliaments a report on the application of Art. I-11 each year.

III. A first level of analysis: Assessing the Constitution in the light of the pre-Convention critique

What did the Convention and the IGC actually achieve? A simple answer would be that the Draft Constitution submitted by the Convention, more or

⁷¹ Previously Art. I-14.

⁷² Previously Art. I-15.

⁷³ Previously Art. I-17.

⁷⁴ Previously Art. 235 TEC.

⁷⁵ Most critics interpret Art. I-18 to be wider than Art. 308 EC, though, see Schröder, *supra*, n. 57, at 10.

⁷⁶ Protocol on the application of the principles of subsidiarity and proportionality, para. 7.

less, reflects the *acquis communautaire*, as the detailed competence provisions of the EU and the EC-Treaty are contained in Part III of the Draft Constitution, which has the same legal value as Part I. Then, certain measures intended to improve not only the competence provisions but more generally the European legal order seemed to almost suggest themselves. This includes measures such as streamlining and pruning the language of some of the current 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, reducing the number of legal instruments, taking into account principles developed by the ECJ such as primacy and making external competences and competence categories intrinsic to the treaties more visible.

All this certainly makes European law easier to read. But this could appear to be a rather slim result of 16 months of work of the Convention plus nine months of IGC. Did the Convention manage to address those elements of the pre-Convention critique specifically aiming at competence issues? I will try to answer this by looking at core issues of the competence debate such as enhanced transparency, higher precision, better control and better policy coordination within the Council and between the institutions.

1. Transparency?

The Laeken declaration emphasized the importance of a transparent system of competences easily accessible to Union citizens. Although Art. I-11 to I-18 do make it slightly easier for Union citizens to get some kind of idea of what the EU may and may not do, the competence order under the Constitution is probably still not transparent or easily accessible to the citizens. It may be argued that the areas listed in Art. I-11 et seq. are simply too vast (just think of 'energy') and that Euro-speak such as "economic, social and territorial cohesion" or "trans-European networks" (Art. I-14 para. 2) is difficult to decipher. References to Part III such as "social policy, for aspects defined in Part III" (Art. I-14 para. 2) oblige the reader to turn to Part III in order to find out what aspects of social policy are covered. And is it convincing to classify "internal market" (Art. I-14 para. 2) under shared competence, whereas "industry" falls under the category of supporting, coordinating or complementary action (Art. I-17)?

As regards the structure of the competence title in Part I, it is somewhat confusing to find the two articles on coordination of economic and employment policies and common foreign and security policy (Arts. I-15, 16) between the articles dealing with the more general concepts of exclusive and

shared competence (Arts. I-13, 14) and the article on supporting coordinating and complimentary action (Art. I-17).

More generally speaking, it can be said that the structure of the Constitution as a whole is not particularly transparent.⁷⁷ Part II, the Charter of Fundamental Rights, was drafted in 2000, at a time when a complete overhaul of the treaties was not yet on the agenda. Part I was written at a time when it was not clear yet whether including the Charter into the Constitution would find political support. This explains why Art. I-51⁷⁸ and Art. II-68⁷⁹ both deal with the protection of personal data, the former including a legislative competence in that field, which does not fit into Art. I-11 et seq. or Part III, the latter without any provision on legislation. It turns out that not all competences in the Constitution are covered by Arts. I-13, I-14 and I-17: Art. I-47 para. 4⁸⁰ on the citizens' initiative or Art. III-122⁸¹ on principles and conditions on services of general economic interest or Art. III-123⁸² on rules to prohibit discrimination on grounds of nationality are further examples. Art. III-125⁸³ is a particularly striking example: According to that provision, the Union can take action by means of European laws or framework laws to facilitate the exercise of the right, referred to in Art. I-10,⁸⁴ of every Union citizen to move and reside freely, if the Constitution has not provided the necessary powers elsewhere. Para. 2 states that this can include measures - laid down by a European law or framework law of the Council of Ministers (!) - concerning passports, identity cards, residence permits or any other such document and measures concerning social security or social protection (!). The latter is clearly a legislative competence beyond Art. III-136⁸⁵ (ex Art. 41 EC) and covers activities that Art. 18 para. 3 EC excluded from European competence.

The situation is even less transparent when it comes to protocols. The Union citizen who really wants to know about subsidiarity or about the role national parliaments and the Committee of the Regions play in monitoring European competences will have to turn to the more than 100 protocols annexed to the Constitution⁸⁶ in order to find the two relevant protocols.

Does all this mean that the Convention has delivered a bad text? Certainly not. Its structure simply reflects the complexity of the European competence

⁷⁷ For a more detailed assessment of the structure see F. C. Mayer, 'Verfassungsstruktur und Verfassungskohärenz – Merkmale europäischen Verfassungsrechts?', *Integration* (2003) 398.

⁷⁸ Previously Art. I-50.

⁷⁹ Previously Art. II-8.

⁸⁰ Previously Art. I-46.

⁸¹ Previously Art. III-6.

⁸² Previously Art. III-7.

⁸³ Previously Art. III-9.

⁸⁴ Previously Art. I-8.

⁸⁵ Previously Art. III-21.

order, developed over more than 50 years and embodying many political compromises. A detailed list of competences is not what Arts. I-13, I-14 and I-17 are about. And there definitely are aspects of the Constitution that go beyond a mere reshuffling of the old competence provisions. Probably the most important aspect in that context is that the third pillar issues of justice and home affairs are no longer under a separate regime.

Transparency is a concern that also drives the current efforts to reform the federal system in Germany.⁸⁷ In that context, a large consensus emerged that legislative competences should be clearly separated between federal and state level, in order to have clear responsibilities. It is quite likely that this will lead to the abolishment of the category of 'framework competences' of the German constitution. This is a legislative device where the federal law sets a frame, e.g. in the field of civil service law, and the states fill out this frame. There are some parallels with the EU directive, which will be renamed European framework law. This is somewhat misleading, as the directive is not necessarily about a frame, but first and foremost simply an instrument of multilevel law-making. In spite of this difference between the German *Rahmengesetz* and the European directive, the German debate on clear responsibilities in legislation did not resonate at the European level to the extent that the abolition of the directives was envisaged. But this may well come on the agenda if the modifications introduced by the Constitution should not lead to the results that those who are concerned about ever-increasing European activities are hoping for. Ultimately, instruments of multilevel-lawmaking such as the directives of framework laws may be blamed to be the cause for the lack of transparency. The establishment of an anti-commandeering rule as known in US constitutional law is not likely, though.⁸⁸ 'Commandeering' means the overarching entity in a non-unitary

⁸⁶ For an overview see CIG 8/03.

⁸⁷ Kommission zur Modernisierung der bundesstaatlichen Ordnung, <<http://www.bundesrat.de>>.

⁸⁸ See in that context Halberstam, 'Comparative Federalism and the Issue of Commandeering', in K. Nicolaidis and R. Howse (eds), *The Federal Vision* (2001), at 213.

system issuing binding commands that force the component entities to take regulatory action with respect to private parties. US constitutional jurisprudence prohibits commandeering, whereas the EU permits such action. Prohibiting commandeering in the EU would presuppose a total de-coupling of the European level and the Member State level. That would include the establishment of a genuine EU administration in all Member States. Again, it is for competence reasons that this is not a likely scenario.

2. *A precise and balanced division of competences?*

The Laeken-mandate on transparency was not only about accessibility of the competence order, but also about improving the distinction between what is of European competence and what is not of European competence. In the words of the Nice Declaration 23, the question was “how to establish and monitor a more *precise* delimitation of competences between the European Union and the Member States, reflecting the principle of subsidiarity” (emphasis added).⁸⁹ Note that this meant using subsidiarity as a principle of competence attribution, and not as a principle of exercising competences (Art. 5 EC), implying that there is some kind of competence imbalance between the EU and Member State level.

Here, the work of the Convention has been subjected to criticism,⁹⁰ in particular on the political level. First, a point that is raised in that context is that no competences were ‘given back’ to the Member States; instead new competences have been introduced e.g. for principles and conditions of services of general economic interest (Art. III-122). There is also the fact that Art. 95 (now Art. III-172 ⁹¹) and Art. 308 (now Art. I-18), provisions considered to be extremely imprecise, are still around. The *passerelle* in Art. IV-444 ⁹² which introduces a possibility for the European Council to unanimously decide to switch from unanimity to qualified majority voting in the Council is only a procedural device. Still, some critics fear that this could lead to the extension of European competences beyond the current treaty, e.g. in the field

⁸⁹ The wording was modified later for the OJ version, see *supra*.

⁹⁰ R. Bocklet, *Bericht über die Ergebnisse des EU-Konvents*, Bavarian government memorandum dated 11.9.2003 (on file with the author); see also Schröder, *supra* n. 57.

⁹¹ Previously Art. III-65.

⁹² Previously Art. I-24.

of Union citizenship (Art. III-126 para. 2 ⁹³).⁹⁴ The exclusive Union competence to establish competition rules necessary for the functioning of the internal market under Art. I-13 para. 1 is considered to be unclear as it may also concern internal market aspects. The new category of supporting, coordinating or complementary action established under Art. I-17 is considered unclear, as is also covers areas such as education, where coordinating measures emanating from the EU would meet resistance in some Member States. The extension of cross-cutting so-called clauses of general application (Art. III-115 et seq. ⁹⁵) that deal with issues such as the environment, discrimination or consumer protection is also considered a problem, so is the extension of coordinating powers in Art. I-1, Art. I-12 para. 3 and Art. I-15. Finally, the critics point to the fact that the Union's objectives have been extended (Art. I-3) and now include areas such as 'full employment' or 'solidarity between generations', areas where the Union does not have any competences.

Still, the critics concede that the wording of the relevant provisions is now less centered on objectives: Art. I-3 para. 5 clearly states: "These objectives shall be pursued by appropriate means, depending on the extent to which the relevant competences are attributed to the Union in the Constitution". This has to be read together with Art. I-12 para. 6 which states that „The scope of and arrangements for exercising the Union's competences shall be determined by the provisions specific to each area in Part III“.

Owing to time constraints, the Convention did not debate Part III, which is basically the former EU Treaty and the former EC Treaty, in great detail. This may be part of an explanation for rather unclear competence provisions in Part III of the Convention Draft such as the provision dealing with the

⁹³ Previously Art. III-10.

⁹⁴ P. M. Huber, 'Das institutionelle Gleichgewicht zwischen Rat und Europäischem Parlament in der künftigen Verfassung für Europa', *Europarecht* (2003) 574, at 584. For the related issue of *Kompetenz-Kompetenz* *supra*, n. 10. The critics tend to ignore that autonomous treaty amendment is not that exotic: The UN Charter can be amended by a 2/3 majority, see Art. 108 UN Charter.

⁹⁵ Previously Art. III-1 et seq.

Union's competences to conclude international agreements in the field of the common commercial policy, Art. III-315, which was Art. III-217 until the re-numbering. Art. III-217 para. 5 of the Convention Draft was less clear than Art. 133 para. 6 EC as far as the requirement of mixed agreements in case of lacking internal competence of the Union is concerned. This could have been interpreted as giving up the coherence between internal and external competence of the Union.⁹⁶ Here, the IGC added a provision (Art. III-315 para. 4 lit. b) that clearly states that at least in the field of trade in social, education and health services the Council will still act unanimously.⁹⁷

All things considered, there remain doubts about whether the competence definitions in the Constitution are that much more precise than before. But again, this is not really due to a failure of the Convention. A comparative look at federal systems ⁹⁸ indicates that there are simply limits to what can be achieved by the wording of competence articles. And the overall balance between EU and Member States competences did simply not call for EU competences to be given back to the Member States.

3. A better system of controlling the exercise of competences?

Early on in the Convention's work, a general awareness that the real problem might be the monitoring of the delimitation of competences emerged. In other words: maybe it is less the wording of competence provisions and the precision of subsidiarity clauses as the question of who decides whether there is a problem with competences that matters.⁹⁹

The Convention upheld the primary monitoring mechanism provided for by the treaties: judicial control, exercised by the ECJ. This is a clear statement directed against voices which can still be heard coming out of the Member States who either keep calling for a competence court ¹⁰⁰ or even insist on the national constitutional courts' power to have the ultimate say on

⁹⁶ See Cremona, 'The Draft Constitutional Treaty: External relations and external action', 40 *CMLRev.* (2003) 1347.

⁹⁷ As of CIG 86/04, Art. III-217 para. 4 lit b.

⁹⁸ See Mayer, *supra* n. 1 for further references.

⁹⁹ See in that context Weiler, *The Constitution of Europe* (1999), at 353.

¹⁰⁰ See the Judge rapporteur for European law related cases (!) in the German Constitutional Court Bross, 'Grundrechte und Grundwerte in Europa', *Juristenzeitung* (2003) 429, at 431. Critical former ECJ judge Everling, 'Quis custodiet custodes ipsos?', *EuZW* (2002) 357. For a similar debate in the US on a Court of the Union composed out of the Chief Justices of the

European competences.¹⁰¹ The ECJ shall ensure respect for the law in the interpretation and application of the Constitution (Art. I-29 para. 1 ¹⁰²). It reviews Union acts i.a. under Art. III-365 ¹⁰³ (ex Art. 230 EC), as incidental questions under Art. III-378 ¹⁰⁴ (ex Art. 241 EC) or in the context of a reference under Art. III-369 ¹⁰⁵ (ex Art. 234 EC). It has been argued again and again that the ECJ's monitoring of competences is insufficient.¹⁰⁶ This position is not supported by the more recent case law of the Court. ECJ judge *Colneric* has presented a detailed account of the jurisprudence of the Court in the field of competences, which shows that, today at least, the Court does take the issue seriously.¹⁰⁷

Slight improvements as to standing of individuals under Art. III-365 para. 4 (ex Art. 230 para. 4 EC) have been introduced by the Convention.¹⁰⁸ The idea of new judicial or political institutions such as a Competence Court or a Parliamentary subsidiarity committee were disregarded.¹⁰⁹

Instead, the Constitution relies on procedures. It suggests an early-warning system in which national parliaments will be informed in advance on upcoming EU-acts (see *supra*, Working Group I). Before the European legislative procedure proper is initiated, every national parliament has the chance to give a reasoned opinion, within six weeks of the date of the transmission of the proposal, as to whether the proposal in question is in accordance with the principle of subsidiarity. 1/3 (in specific areas 1/4) of the national parliaments make it

State Supreme Courts see 'Amending the Constitution to Strengthen the States in the Federal System', 36 *State Government* (1963) 10 (pro) and Kurland, 'The Court of the Union or Julius Caesar Revised', 39 *Notre Dame Lawyer* (1963-1964) 636 (contra).

¹⁰¹ See the Chief Justice of the German Constitutional Court Papier in a recent interview, *Der Spiegel*, October 2003. See also the cases referred to *supra*, n. 47.

¹⁰² Previously Art. I-28.

¹⁰³ Previously Art. III-270.

¹⁰⁴ Previously Art. III-285.

¹⁰⁵ Previously Art. III-274.

¹⁰⁶ 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, 218 et seq.; 253 et seq.

¹⁰⁷ 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, which may be seen as a functional equivalent to the US Supreme Court's case law in *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *New York v. United States*, 505 U.S. 144 (1992); *United States v. Lopez*, 115 S.Ct. 1624 (1995); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *Printz v. United States*, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) and *Alden v. Maine*, 119 S.Ct. 2240 (1999).

¹⁰⁸ For the details of these improvements see F. C. Mayer, 'Individualrechtsschutz im Europäischen Verfassungsrecht', *Deutsches Verwaltungsblatt* (2004) 606.

¹⁰⁹ See in that context the proposal of a Constitutional Council by Weiler, 'The European Union Belongs to its Citizens: Three Immodest Proposals', 22 *ELRev.* (1997) 150, at 155.

mandatory for the Commission to review its proposal and if it decides to maintain its proposal to give reasons for its decision. But even unanimity among the national parliaments can not block legislation.

According to the protocol, the ECJ has jurisdiction to hear actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Art. III-365 (ex Art. 230 EC) by Member States, on behalf of their national Parliament, in accordance with their legal order. The Committee of the Regions is also given standing.

At first sight, the idea to include national parliaments in the European legislative process appears reasonable. It is inspired by the insight that it is all about structural safeguards of Member State competences and that ever-increasing European competences are affecting national legislators most, as the governments can compensate losses on the Member State level via the Council.

But there are open questions as to the practicability of the early-warning system.

The current practice is the first element that raises doubts. After all, there already exists an informal early-warning system. In Germany, for example, the *Bundestag* and the *Bundesrat* are informed about upcoming legislation and Commission activities well in advance through reports by the Federal government and the *Länder*. The *Bundesrat* (the second chamber, representing the *Länder*) in particular invokes subsidiarity on a regular basis, without any effect.

Then, the delay of 6 weeks appears rather short, in particular if it is about organizing a quorum of 1/3 of the national parliaments (1/4 in the area of home affairs and justice) in order to put pressure on the Commission. Note that no matter what quorum, the national parliaments can not block legislation. It remains to be seen whether a sufficient infrastructure exists or will be established in order to process the information provided by the Commission in that short time. It will also depend on the role the ECJ attributes to national parliaments' reasoned opinions and the Commission's reaction in subsidiarity legislation.

The Member State action in front of the ECJ on behalf of national parliaments will have to pass a practicability test and raises numerous questions of domestic constitutional law.

Finally, there are also political points. First: in most Member States government and parliamentary majority correspond politically. In this situation, it is hard to imagine that a national parliament (i.e. the parliamentary majority) would take a different position from that of the government. It is likely that the position of a parliament will not so much be informed by subsidiarity concerns as by general political ones, induced by the respective government. Second: for systems where one chamber represents the regional level, the German experience with second chamber majorities that often differ from those of the first chamber indicates

that, again, objections to European initiatives will not only be informed by subsidiarity concerns, but also by domestic policy fights.

It will be up to the ECJ to make sure that the early-warning system will not be abused and that it will not become a major roadblock for European legislation. It will depend on national parliaments whether the Report on the application of Art. I-11 of the Constitution provided for by the Subsidiarity protocol will simply be filed away or whether it will be an occasion to engage into a debate on the state of the Union.

4. The competence problem as a problem of policy coordination?

The responsibility for upholding the European competence order lies with every single institution. Thus, the Council also has a responsibility for respecting the limits of European competences. In the past, the Council has not always lived up to this task.¹¹⁰ This may have to do with an increasing lack of coordination of the Council's activities.¹¹¹ To put it into the words of a government official: If you set up a Council of Ministers for good housekeeping, it would not take long to have a Directive on good housekeeping, an action plan on good housekeeping etc. 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 also 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.

This not only indicates that the Commission monopoly to initiate legislation may not have much of a competence limiting effect. It also points to an almost natural dynamic of institutions to find and to increase their areas of activity.

The reform of the Council has been on the agenda for some time and the number of Council formations has recently been reduced. But the work of the Council still seems to be lacking in coherence. The Convention suggested the introduction of a Legislative Council which was supposed to improve consistency of the Council's work. The Legislative Council was the first thing most governments rejected in the IGC – with the exception of Portugal and Germany. It will therefore probably not find its way into the final version of the treaty.

¹¹⁰ v. Bogdandy/Bast/Westphal, *supra* n. 57, at 417.

¹¹¹ For details of the coordination issue, see F. C. Mayer, 'Nationale Regierungsstrukturen und europäische Integration', *Europäische Grundrechte Zeitschrift* (2002) 111.

This would mean that the Council would not be included in the Constitution's efforts to improve the control of activities at the European level, although the Council's and the European Council's deficiencies are probably at the heart of EU encroachments on Member States' competences.¹¹²

IV. A second level of analysis: Beyond legislative competences - when European integration gets in the way

Up to this point, I have above all been looking at legislative competences. This seems to make perfect sense: The European level possesses almost exclusively regulatory powers. Almost the entire area of norm implementation and norm application through the executive and the judiciary remains at Member State level. There is no EU administration operating in the Member States. This lack of competence is particularly visible when a measure has to be implemented by force:¹¹³ in these cases, the Union is totally dependent on national administrations.¹¹⁴ The Union does not have 'power' ¹¹⁵ - the *Gewaltmonopol* in the traditional sense of legitimate physical force of the public authority, entrusted to the state and to it alone.¹¹⁶ This indicates - among other elements such as the lack of an independent fiscal base - that the EU is not the 'super-state' described by some.

So why is it that there is this persistent complaint about the EU's omnipresent intrusion? At this point, I must come back to the question raised earlier: why is it that the competence issue has gained such momentum?

One answer may be that the focus on legislative competences is too narrow. There is some evidence that what frequently comes along as a problem of competences is actually about issues outside the realm of legislation.

¹¹² See for the reading of the competence issue as a problem of horizontal division of powers see Bogdandy/Bast, *supra* n. 1.

¹¹³ Dashwood, 'States in the European Union', 23 *ELRev* (1998) 201, at 213.

¹¹⁴ See for example the Hoechst case, Cases 46/87 and 227/88, *Hoechst/Commission* [1989] ECR 2859.

¹¹⁵ See Nettesheim, *supra* n. 1, at 442, though, who points to competences in the field of CFSP and JHA.

¹¹⁶ 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.

The Constitution (Art. I-1 para. 1) seems to imply that there are competences on the one hand and activities beyond these competences on the other hand.¹¹⁷ The role of the German *Länder* in the competence debate and their view of European integration may help to understand what this distinction is all about (1). It turns out that the competence issue can come up when, generally speaking, European integration is considered to be intruding. There are a number of examples for this perception, and for each of these examples, the question of the Convention's approach can be raised (2, 3). This leads to the limits of the Convention (4).

1. The German *Länder* and the competence debate: The problem of the third level of public authority in European integration

The German *Länder*, in terms of constitutional theory original states in their own right, some of them with populations of 15-17 million and larger than most EU Member States, stand for all those entities whose losses through European integration are not compensated by a more or less equivalent influence at the European level. Here, it is the example 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,¹¹⁸ it is the regional level that is actually losing power, at least in Member States where regions are important enough to have something to lose.

The threat to refuse the ratification of the Nice Treaty in the summer of 2000,¹¹⁹ is part of the explanation why the competence issue was put on the agenda of Declaration 23 annexed to the Treaty. The German Federal government had to insist on the issue to be put on this agenda in order to be able to respond to the *Länder* demands. But calls by the *Länder* for an improvement in the delimitation of competences are far from being a recent phenomenon.¹²⁰ They have consistently been raising objections to European encroachment on Member State powers.¹²¹ Their call for a list or a catalogue of competences has been reiterated at regular intervals.¹²² The principle of subsidiarity was introduced into the treaty notably at the

¹¹⁷ v. Bogdandy/Bast/Westphal, *supra* n. 57, at 415.

¹¹⁸ This may be related to Herbert Wechsler's theory of political safeguards of federalism, 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, reprinted in H. Wechsler, *Principles, Politics and Fundamental Law* (1961), 49-82. See also *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

¹¹⁹ See Biedenkopf, *infra* n. 121, at point 3.

¹²⁰ For the demands by the *Länder* for the IGC 1996 see Schwarze, 'Kompetenzverteilung in der Europäischen Union und föderales Gleichgewicht', *DVBl.* (1995) 1265.

¹²¹ Note that this goes notably for larger *Länder* such as Bavaria or Nordrhein-Westfalen. 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 Nordrhein-Westfalen W. Clement, *Europa gestalten - nicht verwalten*, FCE 10/2001, <<http://www.whi-berlin.de/Clement.htm>>. See also 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>>.

¹²² See Schwarze, *supra* n. 120, at 1265.

German *Länder's* insistence in 1992.¹²³ It is since the end of the 80s that the *Länder* have been seeking to have a say in the process of European integration.¹²⁴ Evidence of this trend is the new Art. 23 of the German constitution,¹²⁵ 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'¹²⁶ and the initiative to set up a Committee of Regions.

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 relevant *Länder* statements remain unclear and vague, for example when the *Länder* call for Europe to stick to 'genuine European issues'¹²⁷ without specifying what this really means. 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*¹²⁸ and the *Westdeutsche Landesbank*.¹²⁹ It is the link that the *Länder* keep establishing between services of general economic interest (*Daseinsvorsorge*), competition control and delimitation of competences¹³⁰ 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

¹²³ See v. Borries, *supra*, n. 46, at 298.

¹²⁴ Of course, the fact that Germany has become a "unitary federal state" is also part of an explanation for the specific condition of the *Länder* (see Konrad Hesse K. Hesse, *Der unitarische Bundesstaat* (1962), in: P. Häberle and A. Hollerbach (eds), *Konrad Hesse. Ausgewählte Schriften* (1984) at 116 et seq. 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. A constitutional reform of the German federal system is currently being prepared.

¹²⁵ 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.

¹²⁶ 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.

¹²⁷ 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.

¹²⁸ 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.

¹²⁹ Case C-209/00, *Commission v Germany*, [2002] ECR I-11695.

¹³⁰ See Nr. 3 of the protocol of the Conference of Minister Presidents (*Ministerpräsidentenkonferenz* (MPK)) of 14.12.2000. See also Clement, *supra* n. 121.

the *Länder* level and the respective incentives to investment in the *Länder* ¹³¹ that the *Länder*'s concern is about. 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. Nevertheless, it is clear that a European competence to review state aids is laid down in the Treaty (Art. 87 et seq. EC ¹³²).

2. When Europe gets in the way and how the Convention dealt with it: Examples.

The example of the German *Länder* indicates that it may be helpful to leave the narrow legal perspective adopted in Art. I-11 et seq. aside and to simply ask: where does European integration make a difference? What European activities affect Member States? And how did the Convention deal with these activities?

a. Commission activities outside the treaties?

The struggle of some of the *Länder* against European-integration effects points to real or perceived problems arising from the way the European Commission uses its powers. Some of the *Länder* concerns in the German competence debate are about the combination of European control of national state aids and the granting (or often enough not-granting) of financial support from European funds that add to a general perception of European Union power to set agendas and to take policy decisions beyond what is described in the treaties as 'European competences'.¹³³ The example of state aids and structural policy is particularly striking, as there is no doubt that the control of state aids is a task entrusted to the Commission. This may also extend to sensitive cases where funding of infrastructure is considered to be state aid.¹³⁴ There is also no doubt that the Commission has a role in distributing European money. What does not figure in the treaties is the use of state aid control with a view to complementing structural policy. Here, the Commission seems to have its own economic policy agenda. The problem that lurks behind this rather technical example is that the legitimacy of the Commission is not the legitimacy of a 'real' government. When the Commission aspires to be

¹³¹ 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.

¹³² Now Art. III-56 et seq. State aid is considered to be one of the pillars of the internal market, Lehman, Art. 87 CE Para. 6, in P. Léger (ed), *Commentaire article par article des traités UE et CE* (2000). 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.

¹³³ See in that context the case-study by A. Becker, 'Regionale Wirtschaftsförderung unter europäischer Kontrolle: Beihilfenaufsicht und Strukturfonds', *WHI-Paper* 10/01, <<http://www.whi-berlin.de/becker.htm>>

a real government, for example by pursuing an economic policy agenda of her own, this may cause frictions. Other examples in that context are Commission initiatives in the fields of takeovers,¹³⁵ chemicals policy¹³⁶ or the way the Commission insists on the stability criteria of the stability pact.¹³⁷

In this problem area, the Convention did not take much action. There was no in-depth effort to better understand - there was no Working Group on institutions - and then define the role and the power of the Commission. This is not to say that provisions in the Constitution that concern the Commission in general may not also affect the role of the Commission. To say it bluntly: weakening the Commission for example by allowing every Member State to have at least one member on the Commission or by introducing a European President (Art. I-22¹³⁸) as a strong counterpart to the President of the Commission will also make it more difficult for the Commission to develop a policy agenda of its own. It remains to be seen how the institutional order established by the IGC will look like.

b. Policy coordination outside the treaties: the open method of coordination - Soft mechanisms of policy making: the example of OMC – Empowering Executives

Another example of European activities that are difficult to explain in terms of competences is the Open Method of Coordination (OMC). OMC was formally instituted by the European Council in Lisbon in March 2000.¹³⁹ It can be defined as “a mutual feedback process of planning, examination, comparison and adjustment of the policies of Member States, all of this on the basis of common objectives”.¹⁴⁰ Typically, the governments agree upon specific policy goals that are to be achieved within a given timeframe. Then, the Commission is given the task to report periodically on the respective progress in the Member States, based on data submitted by the Member States.

It is difficult to capture OMC in legal terms, as everything happens without constraints and outside the realm of binding rules. This is why OMC also escapes the legal categories of competences, and that is also the problem that comes with OMC. Critics point to the circumventing effect that OMC bears, when OMC is used instead of legislation, but with a

¹³⁴ Santamato and Westerhof, ‘Is funding of infrastructure State aid?’, *EuZW* (2003) 645.

¹³⁵ Proposal for a Takeovers Directive,

¹³⁶ White Paper ‘Strategy for a future Chemicals Policy’, COM(2001) 88 final.

¹³⁷ Case C-27/04, *Commission/Council*, Pending Case.

¹³⁸ Previously Art. I-21.

¹³⁹ 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. This method can be traced back to previous summits, though. But in Lisbon, it was the first time that OMC was officially mentioned and that it was used outside employment policy.

view to attaining harmonization of law. This undermines the function of the Commission as the initiator of legislation, of European Parliament as co-legislator and also of national parliaments as institutions who control the executive.

The Convention debated OMC,¹⁴¹ and the Working Group IX even recommended to give OMC “constitutional status”.¹⁴² The Convention did not follow the Working Group, OMC is not mentioned in the Constitution. This has been heavily criticized as cutting out an important, but in terms of democratic accountability and control also very problematic part of Union activities.¹⁴³ What probably prevented the Convention from formally including OMC in the Constitution was the risk that formalizing this method would even enhance its importance, without being able to assure that the European Parliament would be sufficiently included. *De facto*, OMC is now referred to in Part III in the fields of social policy (Art. III-213¹⁴⁴), research and technological development (Art. III-250¹⁴⁵), public health (Art. III-278¹⁴⁶) and culture (Art. III-280¹⁴⁷).

c. Judicial activism? The role of the ECJ

The jurisdiction of the ECJ is an area that is not directly addressed by the competence provisions of the Constitution. Subsidiarity does not apply to ECJ decisions. ECJ action that completely corresponds to the realm of European legislative action or that concerns conflicts between or within European institutions will generally not be thought of as a problem. On the other hand, European Court decisions with direct and immediate effect in the Member States are often enough perceived as emanations of European competence. Typically, this will lead to problems in cases where ECJ decisions prohibit

¹⁴⁰ Definition suggested by members of Working Group V on Complementary Competencies, see the final report of that group, CONV 375/1/02 REV1), p. 7.

¹⁴¹ 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).

¹⁴² “Constitutional status should be assigned to the open method of coordination, which involves concerted action by the Member States outside the competences attributed to the Union by the treaties”, Final report of Working Group IX on Simplification (29.11.2002), CONV 424/03, p. 7.

¹⁴³ This is the position taken by v. Bogdandy/Bast/Westphal, *supra* n. 57, at 417.

¹⁴⁴ Previously Art. III-107.

¹⁴⁵ Previously Art. III-148.

¹⁴⁶ Previously Art. III-179.

¹⁴⁷ Previously Art. III-181.

Member States from doing something or in cases where ECJ jurisprudence clearly steps outside the wording of the treaties.

Issues of the first type are fairly easy to resolve. In connection with the prohibition by the ECJ of gender-related discrimination in the German military, however, there is this recurrent argument: If the ECJ prohibits discrimination related to gender in the German armed forces, this may be perceived as 'regulating' Member State military, hence the complaints about the ECJ's Dory-decision ¹⁴⁸ pointing to the fact that the EU 'has no competences' in this field. In fact, the decision is simply enforcing European law, which prohibits gender-based discrimination in the work-place.¹⁴⁹ Wherever the treaties establish a prohibition to discriminate on grounds of nationality or gender, or to distort competition, it is not a matter of positive competence, but of what has aptly been captured by the term *compétences abolies*.¹⁵⁰ 'Abolished competences' means that the competence to regulate the military while discriminating against women simply does not exist any more in the EU, neither at the Member State level nor at the European level. The difference between this negative competence and regulatory competence is that the EU cannot establish positive rules. Conflating negative and positive competence ¹⁵¹ ignores the fact that numerous areas of life are affected by European non-discrimination and non-restriction provisions. The Convention did not do much to clarify this issue and did not engage into a debate on what areas should be exempt from ECJ jurisdiction.

As to a second category which may be related to judicial activism: There are numerous examples of the Court stepping outside the narrow wording of the treaties, referring, of course, to general principles and to *effet utile*: *Van Gend en Loos* and *Costa v ENEL*,¹⁵² the

¹⁴⁸ Case C-186/01, *Alexander Dory v Bundesrepublik Deutschland*, [2003] ECR I-2479.

¹⁴⁹ Art. 141 EC and Directive 76/207.

¹⁵⁰ 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.

¹⁵¹ 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.

¹⁵² Case 26/62, *Van Gend en Loos*, [1963] ECR 1 (English special edition); Case 6/64, *Costa/ENEL*, [1964] ECR 585 (English special edition).

jurisprudence on direct effect of directives, the *Francovich* jurisprudence,¹⁵³ the entire fundamental rights jurisprudence, in particular the strand of cases from *ERT* to *Carpenter* ¹⁵⁴ extending the reach of European fundamental rights to the Member State level.

The ERT-jurisprudence ¹⁵⁵ is of particular interest in the present context, as the Draft Constitution seems to take up the issue in Art. II-111.¹⁵⁶ According to the decision in *Elliniki Radiophonia Tiléorassi* of 1991,¹⁵⁷ the Member States have to respect European fundamental rights when national rules fall “within the scope of Community law”.¹⁵⁸ Member States are within the scope of Community law when they implement Community rules, e.g. directives. But ERT went beyond that as there, the ECJ held that Member States are also within the scope of Community law when they invoke treaty provisions such as Art. 45 or 55 EC (*ordre public*) in order to justify national regulation that hinders for example the freedom to provide services. This kind of justification, provided for by EC law, has to be interpreted in the light of European fundamental rights.¹⁵⁹

The Charter of Fundamental rights deals with this issue in Art. 51, now Art. II-111 of the Constitution. Art. II-111 para. 1 states that the provisions of the Charter are addressed to the Member States “only when they are implementing law”. Art. II-111 is one of the few Charter provisions that were modified in the Constitution, apparently because of British pressure. Art. II-111 para. 1 now confirms the respect of the limits of the powers of the Union conferred on it in the other parts of the Constitution. Para. 2 now states that the Charter “does not extend the field of application of Union law beyond the powers of the Union”. The explanations established by the Presidium of the first Convention were also modified, as far

¹⁵³ Cases C-6, 9/90, *Francovich/Italy*, [1991] ECR I-5357

¹⁵⁴ Case C-60/00, *Mary Carpenter/Secretary of State for the Home Department*, [2002] ECR I-6279.

¹⁵⁵ Case C-260/89, *ERT*, [1991] ECR I-2925; Case 60/84 and 61/84, *Cinéthèque*, [1985] ECR 2605 point 26; Case 12/86, *Demirel*, [1987] ECR 3719 point 28; Case 2/92, *Bostock*, [1994] ECR I-955 point 16; Case C-368/95, *Familiapress*, [1997] ECR I-3689. See also Case C-299/95, *Kremzow*, [1997] ECR I-2629 points 14 et seq; AG Van Gerven, Case C-159/90, *SPUC/Grogan*, [1991] ECR I-4685 point 31.

¹⁵⁶ Previously Art. II-51.

¹⁵⁷ Case C-260/89, *ERT*, [1991] ECR I-2925 point 43.

¹⁵⁸ In the French version: “ le champ d’application du droit communautaire”. The Court also says that it can not review Member State measures “which do not fall within the scope of Community law”. In the French version: “ une réglementation nationale qui ne se situe pas dans le cadre du droit communautaire”. Part of the confusion around the ERT-jurisprudence is due to the fact that the English version of ERT uses the same wording where the French (as the German) version use different wordings.

¹⁵⁹ See for a comparison with the American concept of incorporation, Metropoulos, ‘Human Rights, Incorporated: The European Community’s New Line of Business’, 29 *Stanford Journal of International Law* (1992) 131. See also Kühling, ‘Grundrechte’ in A. v. Bogdandy (ed), *Europäisches Verfassungsrecht* (2003), at 583 (606 et seq.). It is true that these cases are not that frequent and that the ECJ always points to the ECHR in the ERT-formula. Thus, these cases could also be read as the Court simply pointing to the obligations that the Member States have under the European Convention of Human Rights, see Thym, ‘Charter of Fundamental

as Art. 51/II-111 is concerned. The Preamble of the Charter (the 'second' preamble in the Constitution) now explicitly refers to these explanations.¹⁶⁰

All this could be read as directed against the ERT-formula: the Member States have to respect European fundamental rights when implementing – and not when invoking exceptions provided for by European law. The expression 'field of application' of Union law, which Art. II-111 para. 2 claims to be equivalent to the powers (!) of the Union, is reminiscent of the key formula in the ERT-case ('champ d'application').

Considering that the Presidium explanations refer to the ERT-cases, it is probably possible to argue that Art. II-111 does not state that Member States are bound by European fundamental rights when they invoke exceptions to the fundamental freedoms provided for by European law.¹⁶¹ It is probably not a coincidence that in 2002, with the *Carpenter* decision, the Court turned to a different wording – avoiding the words 'scope/context of Community law' or 'implementing European law' – to express the concept of ERT. According to *Carpenter*, a Member State "may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures".¹⁶² The ERT-issue is not the subject of this paper, but as a general point, it seems to me that the ERT/*Carpenter* line of cases should be upheld, as it aims at equal application of European law for all Union citizens and as the interpretation of provisions such as Art. 30 EC is, in the end of the day, interpretation of EU law.

For the current context, it should be noted that the way the Convention and the IGC dealt with Art. II-51/II-111 could be read as evidence of the Convention's and the IGC's willingness to curb the Court's activist European fundamental rights approach that extends to the Member States.

3. Is there a pattern?

Can all this be summarized as the Convention shying away from imposing limits on the activities of the Commission and in particular of the Council and the European Council on the one hand, and curbing the activist court on the other hand?

No, because the activities of the Court were totally ignored in the entire field of fundamental freedoms. This can be illustrated by having a closer look at the *Carpenter* decision, a case about the deportation of Mrs. Carpenter, a third country national married to a British citizen. For the Court, the fact that Mr. Carpenter's business required him to travel around in other Member States, providing and receiving services was enough to establish a link with European law. According to the Court, Mr. Carpenter could travel more easily as Ms. Carpenter was looking after his children from his first marriage, so that her deportation would restrict her husband's right to provide and receive services. Although Britain invoked reasons of public interest to justify the deportation, the Court held that the decision to deport Mrs. Carpenter constituted an interference with the exercise by Mr. Carpenter of his European fundamental right to respect for his family life.

Rights: Competititon of Consistency of Human Rights Protection in Europe?', *Finnish Yearbook of International Law* (2000) 19, at note 82.

¹⁶⁰ This point was also debated along the IGC.

¹⁶¹ The German Federal Constitutional Court quoted Art. 51 of the Charter (!) and the ERT-case together, implying that there is no contradiction. See Decision of 22.11.2001 - 2 BvB 1-3/01 (Banning of the NPD-Party), <<http://www.bverfg.de>>.

¹⁶² Case C-60/00, *Mary Carpenter/Secretary of State for the Home Department*, [2002] ECR I-6279. The crossborder element that the ECJ detects in that case is so weak that it raises the question whether it is sufficient to enter into the scope of application of Union law (services) to simply consult a website originating in another Member State.

If you think of Part A of the case as the part where the link between the case and European law is established and Part B of the case as the part which is about the limits imposed by European fundamental rights on Member States (the ERT-issue), the Convention only looked at the Part B question. It did not even consider the Part A problem.

This is surprising, as the reach of the fundamental freedoms – as defined by the Court – may be much more relevant for the perception of European integration intruding than the ERT-scenario.¹⁶³ And considering cases like the *Preussen Elektra*-case,¹⁶⁴ it would simply have been a genuine political task to help the Court to set policy preferences, e.g. in the field of environmental protection.¹⁶⁵

Why did the Convention invest that much time in the competence aspect of fundamental rights and almost no time in the competence aspect of fundamental freedoms? One answer is that most Convention members did not realize the impact of the internal market provisions. It may also be that there was simply not enough time to look at the internal market provisions in detail.

4. *The limits of the Convention and the limits of law*

What is still not clear is why the competence debate, initially triggered by the German *Länder* and pursued by the German Federal government only halfheartedly, was taken up by other Member States such as Great Britain – probably not only out of concern for the own regional level. The answer is that the competence issue has become a cipher for the future of European integration as such: How much Europe do we want? What kind of Europe do we want?

This also applies to the constitutional theory debate: 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 quasi-federal terms 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 confederal¹⁶⁶ angle.

What should be noted, though, is that at least the rhetoric of the Constitution seems to be inspired by sovereignty concerns. Not only was the initial draft of Art I-1, stating that the Union “shall administer certain common competences on a federal basis”,¹⁶⁷ modified into “shall exercise in the Community way the competences [the Member States] confer on it”.¹⁶⁸ Several provisions insist that it is the Member States – and not the Constitution – that confer

¹⁶³ For the link between fundamental freedoms and Art. 95 EC see Weiler, ‘The Constitution of the Common Market Place’, in P. Craig and G. de Burca (eds), *The evolution of EU law* (1999), at 349; see also Th. v. Danwitz, ‘Zur Reichweite der Gemeinschaftskompetenz nach Art. 100a I und III a.F. (Art. 95 I und III EGV n.F.)’, *EuZW* (1999) 622, at 624.

¹⁶⁴ Case C-379/98, *Preussen-Elektra*, [2001] ECR I-2099.

¹⁶⁵ In *Preussen Elektra* the court upheld national legislation that aimed to protect the environment, but the decision is almost incompatible with the previous caselaw of the Court.

¹⁶⁶ An example of such a confederal 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*.

¹⁶⁷ Art. 1 CONV 528/03 (6.2.2003).

¹⁶⁸ Art. I-1 CONV 850/03. See already CONV 724/03 (26.5.2003). Replacing ‘federal’ by ‘community’ appears odd, as the European Communities ceases to exist.

competences on the Union (Art. I-1 para. 1, Art. I-11 para. 2.¹⁶⁹ “competences conferred upon it by the Member States in the Constitution”).¹⁷⁰ This may be read ¹⁷¹ as bringing European law – at least the terminology – closer to the respective provisions of the Member State constitutions, which typically speak of conferral or transfer.¹⁷² Although there are other provisions where it is the constitution that confers competence (Art. I-14 para. 1), some say that emphasizing that the Member States confer competence may threaten the founding principles of European law, direct effect and primacy of European law as principles resting on an interpretation of the European legal order as an autonomous order.¹⁷³ I am not so sure whether the wording of the Constitution is really incompatible with the concept of an autonomous legal order in the sense of the ECJ’s *Van Gend en Loos* and *Costa*-jurisprudence: in these decisions, the Court emphasized the *distinctness* of the legal order (“the EEC Treaty has created its own legal system” ¹⁷⁴), it clearly stated that the powers stem from the Member States (“from the States to the Community”¹⁷⁵).¹⁷⁶ It must also be kept in mind that today, the European legal order is not in the hands of the Member States alone, as Art. 48 EU requires that the Member States *and* EU institutions consent to treaty modifications.¹⁷⁷ And, Art. I-1 of the Constitution states that establishing the Union reflects the will of European citizens. All in all, there is still room to consider the treaty “an independent source of law”.¹⁷⁸ For sure, the European legal order remains an original order, beyond the public international law paradigm, driven by a constitutional paradigm.

¹⁶⁹ See in that context the different conceptions of the relationship between federal power and states of *James Madison* and *Alexander Hamilton* in the *Federalist Papers* of 1787/88: On the one hand, there is the conception of a Union founded by the States, being a closer Union than the one of the Articles of Confederation, but still with a substantive role of the states (Madison in *Federalist* No. 51). On the other hand, there is the emphasis on a distinct and sovereign federal power (Hamilton in *Federalist* No. 78). See also R. Burt, *The Constitution in Conflict* (1992), at 51 et seq. See also the *Virginia/Kentucky-Resolutions* 1798/99 and the *Nullification doctrine* established by *John Calhoun* in the first half of the 19th century, J. C. Calhoun, *A Disquisition on Government and a Discourse on the Constitution and Government of the United States* (1851), at 146.

¹⁷⁰ See CONV 724/03 for the modification of this formula.

¹⁷¹ v. Bogdandy/Bast/Westphal, *supra* n. 57, at 415.

¹⁷² “Hoheitsrechte übertragen” (Art. 23 of the German Constitution); “transferts de compétences” (Art. 88-2 of the French Constitution).

¹⁷³ This concern is elaborated in v. Bogdandy/Bast/Westphal, *supra* n. 57, at 416.

¹⁷⁴ Case 6/64, *Costa/ENEL*, [1964] ECR 585 (English special edition), at point 3.

¹⁷⁵ *Ibid.* Ophüls, ‘Juristische Grundgedanken des Schumanplans’, *NJW* (1951) 289, at 290, relates this to the concept of federalism suggested by Calhoun. On whether Calhoun really meant federalism F. C. Mayer, *Kompetenzüberschreitung und Letztentscheidung* (2000), at 285 et seq.

¹⁷⁶ See also the Federal government’s official introduction to the German EEC Treaty Ratification Statute, referring to a “European construct of constitutional nature”, emphasising that the Community is transnational community with public authority of its own, 2. *Wahlperiode, Bundestags-Drucksache* 3440, *Anlage C*, at 108.

¹⁷⁷ See Nettesheim, *supra* n. 1, at 425.

¹⁷⁸ *Ibid.*

The political question ‘Who does what?’ is not simply about Euro-skepticism. This is why I am not quite convinced that this aspect of the debate can be reduced to the issue of sovereignty,¹⁷⁹ as most politicians at the Member State level understand that sovereignty is increasingly a fluid concept. There is a strand of argument which is less concerned about the EU or EC encroaching upon the national level. This strand is critical of supranational European players such as the Commission, the EP or the ECJ. It has not really a problem with ‘transferring power to Europe’, as long as the governments remain in the driver’s seat. From this perspective, the critical competence questions are the questions of how to organize the decision-making process (institutions, qualified majority voting) and of judicial control.

These were for sure potatoes way too hot for the Convention, as the controversy about the institutional architecture that almost caused a failure of the IGC ¹⁸⁰ indicates. Thus, the narrow understanding of competences that the Convention adopted was probably the only feasible approach: The Convention would probably not have been able to find a consensus on the purpose and the finality of European integration.

Conclusion

The Convention clearly adopted a narrow understanding of competence as legislative competence. Even the limited field of legislation was not fully explored, as Part III of the Constitution, which includes the competence provisions from the former EU- and EC-Treaties, was not debated in depth. This is unfortunate as the ‘real’ competence provisions are laid down in Part III and as a political debate with some serious work on some of the issues of Part III such as the reach of the fundamental freedoms (Art. III-154 ¹⁸¹, currently Art. 30 EC) or of common commercial policy (Art. III-315) would have been helpful. Still, all things considered, the result of the Convention’s work is an improvement compared to the previous situation.

Given the nature of the European construct as a constitutionalized multilevel system without strong hierarchies, it seems to me that mechanisms and tools that emphasize political safeguards in order to protect affected interests are best suited to the European situation. This points to ‘soft’ procedures - mechanisms aimed at raising sustainable sensitivity on competence issues. The work of the Convention seems to have been inspired by a similar understanding of the issue, as it refrained from major modifications of the existing

¹⁷⁹ This is the position taken by v. Bogdandy/Bast/Westphal, *supra* n. 57.

¹⁸⁰ See *supra* n. 51.

¹⁸¹ Previously Art. III-43.

competence order and from introducing additional institutions. Instead, it relied on mechanisms such as the early-warning system and reports, which of course, will have to pass a practicability test.

A broader understanding of the competence issue looks at all kinds of aspects of European integration perceived as intruding at the level of the Member States. Here the EU faces a particular challenge: In non-unitary systems, the competence issue is often enough one about underlying concepts of the relationship between two distinct levels of public authority involved. Because of relevant regional entities in some Member States, the EU has to cope with three levels of public authority. More generally speaking, it seems to me that the crux of the competence issue in non-unitary systems such as the EU consists in ensuring that all those involved in the decision-making process show a consistently high level of sensitivity in matters of competence. This also relates to competences in a large sense.

In other words: The competence debate is not a malfunction of the Matrix. An ongoing debate on European competences and activities is in itself the best means of monitoring the proper exercise of competences. This can neither be achieved through the wording and rewording of competence provisions, however detailed, nor by institutional arrangements alone. It is also a question of a specific constitutional culture.

Finally, the competence issue is also 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, which also implies a broad understanding of competence, the innocuous-looking formula 'Who does what?' becomes the fundamental question of European integration, the question of 'How much integration do we want?'

In other words: to a large extent, the debate on European competences is also a debate on the state and the very purpose of European integration. This is probably the most important question of European integration, hence a genuinely constitutional one. The Convention has not given a comprehensive answer to the fundamental questions of finality, purpose and reach of European integration. Some of the provisions suggested by the Convention indicate that among some, there is a deep sense of distrust towards the Union, which seems to contradict the idea that a *Rechtsgemeinschaft*, a community of law, has to be built on some basic trust. The Convention would probably have fallen apart, had it attempted to answer the fundamental questions of European integration.

Therefore, there will be a sequel. The theater may be an IGC, a Convention, a Member State parliament or a constitutional court court-room: The competence issue will return.