The Division of Competences in the European Constitution

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Federally inspired systems are characterised by a central power endowed with autonomous lawmaking capacity that exists alongside the units comprising that same federal system, which maintain their legislative prerogatives. This transmits the classic definition of federalism as resulting from a combination of the principles of self-rule and shared rule.[1] Whence the so-called vertical division of competences is a key issue in systems of a federal kind.

Among innovative aspects of the Treaty establishing a Constitution for Europe, the Title on Union Competences deserves special mention, for the previous Treaties gave scant attention to the division of competences between the Union and the Member States.

The aim of clarifying and simplifying the vertical division of competences was one of the main purposes of the mandate given to the European Convention. As a result, the latter considered that the European Constitution should contain a Title devoted to the Union's competences, so that citizens could have a clear and concise idea regarding the distribution of competences and understand the different categories of Union competences, as well as the conditions for their use. The European Convention's contributions on Union competences were, in general, received into the text of the new European Constitution.

The concept of division of competences that runs through the text of the European Constitution is ascribed to the idea of dual federalism (see below), as it is imbued with an accentuated stratification of competences between the Union and the Member States. The Union thus only holds those competences conferred it by the Constitution;

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[1] D.J. Elazar (ed.), *Constitutional Design and Power-Sharing in the Post-Modern Epoch*, Lanham, New York, 1991.

the remaining areas of action are considered as pertaining to the competence of the Member States. Additionally, any future changes to the division of competences system will have to be effected by a constitutional revision process.

This article undertakes to study the system of the division of competences that results from the European Constitution. In the first part it frames the evolution of the division of competences in the European integration process. Next, it analyses the main aspects that characterise the Title on 'Union Competences', i.e., the technique of the catalogue of competences, the principle of conferred competences, the competence categories defined by the Constitution, the lists of competences, the flexibility clause, control over application of the subsidiarity principle and respect for the national identity of the Member States.

The Vertical Division of Competences in the Union

The division of competences between the European Union and the Member States is a subject whose consideration can be divided into two fundamental periods over the course of the European integration process: before and after the Maastricht Treaty.

In the period between the founding of the European Communities and the late 1980s, the issue of the division of competences between the Community and the Member States was not a central topic in European integration, whether in political discussion or more especially in its academic treatment.

The Treaty establishing the European Economic Community (TEC) envisaged a system of functional division of competences between the European Community and the Member States. Under the terms of this system, the Treaty set out the purposes of the European Community, as well as the means it enjoyed to achieve the same. The European Community's action was to be situated within limits defined by those two clauses; above all, its legal basis would be grounded on the different Treaty provisions that dealt with policies and other areas of Community action.

Beyond the competences expressly conferred to the Community in the Treaty, article 308 (ex article 235) envisaged that whenever an action was considered necessary to achieve one of the Community's goals, and the Treaty was found to not provide the necessary powers of action, the Council could, by unanimity, take appropriate measures to that end. The authors of the Treaty meant this provision to work as a sort of flexibility clause, enabling the Community to act in areas that lacked an explicit conferral of competences.

Also, during the period in question, when the European Court of Justice (ECJ) was asked to rule on issues concerning the division of competences between the European Community and the Member States, it provided an interpretation tending

to extend Community powers, usually handing down a restrictive understanding of the States' competences regarding action shared with the Community.[2]

The joint effect of the maximalist interpretation of ECJ case law vis-à-vis the division of competences and especially the use and abuse that the Member States, via the Council, make of the flexibility clause established by article 235 of the TEC, generated a feeling of growing uncertainty over the European Community's limits of action.[3] In the mid-1980s, when the question of the division of competences began to be considered more seriously, it was even doubted whether the European Community was still an entity governed by the principle of conferred competences.[4]

Growing awareness of the problem raised by the subject of the division of competences was strengthened by the institutional changes introduced by the Single European Act in 1987. Expansion of the qualified majority vote and the consequent reduction of the Member States' veto right over Community decisions increased the national governments' uncertainty with respect to results of the European Community decision-making process.

In so far as the division of competences between the European Community and the Member States was processed by the functional method, which raised doubts about the effective limits of Community action vis-à-vis the States' prerogatives, the national governments increasingly raised the problem of the division of competences as being a central theme of the so-called 'Community constitutionalism'. In other words, the Treaties on the European Communities should pay more attention to this subject, to better protect the Member States against an approach to the division of competences that favoured centralisation.

It is interesting to note a certain parallelism between this stage of the division of competences in European integration and the experience of the United States. In the American Constitution, the view of federalism as a stratified system for the allocation of competences between the national government and the states had been changing since the First World War, when the federal government made use of the

[2] Case 40/69, *Hauptzollamt Hamburg* v. *Paul G. Bollmann* [1970] E.C.R. 69; case 74/69, *Hauptzollamt Bremen* v. *Waren-Import Krohn & Co* [1970] E.C.R. 451; case 30/71, *Kurt Siemers & Co* v. *Hauptzollamt Bad Reichenhall* [1971] E.C.R. 919; case 18/72, *NV Granaria* v. *Produktschap voor Veevoeder* [1972] E.C.R. 1163; case 159/73, *Hannoversche Zucker AG* v. *Hauptzollamt Hannover* [1974] E.C.R. 121; case 31/74, *Filippo Galli* [1975] E.C.R. 47; joint cases 3, 4, 6/76, *Cornelis Kramer* [1976] E.C.R. 1279; case 5/77, *Carlo Tedeschi* v. *Denkavit Commerciale* [1977] E.C.R. 1577; case 148/78, *Pubblico Ministero* v. *Ratti* [1979] E.C.R. 1629; case 251/78, *Denkavit Futtermittel GmbH* v. *Minister für Ernährung des Landes Nordrhein Westfalen*, [1979] E.C.R. 3369; case 804/79, *Commission* v. *United Kingdom* [1981] E.C.R. 1045; case 222/82, *Apple and Pear Development Council* v. *K.J. Lewis Ltd* [1983] E.C.R. 4083; case 195/84, *Denkavit Futtermittel GmbH* v. *Land Nordrhein Westfalen* [1985] E.C.R. 3181; case 218/85, *CERAFEL* v. *A. Le Campion* [1986] E.C.R. 3513.

[3] This article served as the legal basis for the adoption of about 700 European Community acts.

[4] K. Lenaerts, 'Constitutionalism and the Many Faces of Federalism', *American Journal of Comparative Law* (1990), p. 220.

tax clause to launch a new tax on income. At the end of that conflict the income tax was revealed to be an important funding source for federal power, enabling the latter to launch national programmes in areas such as agriculture and public works, which were nevertheless managed by the states. The concept of co-operative federalism arose from this partnership between states and the national government.[5]

The New Deal and the Second World War strengthened the tendency for increased federal government action and for a change in the traditional view of its competences. But increased intervention by federal power was not accomplished at the expense of the states' competences. On the contrary, there was a certain increase in action by the latter due to new demands deriving from implementation of the welfare state.[6] The balance between the states and the national government changed, although the sharp rise in the federal competences must not be seen as being accompanied by a corresponding reduction of state powers.

The Maastricht Treaty

The Maastricht Treaty was the first act of a constitutional nature that systematically dealt with the problem of the division of competences in the Community system. It might generally be stated that the Maastricht Treaty sought to determine the criteria that govern the division of competences between the Union and the Member States. A new provision was thus created, which contains the fundamental principles in this area, article 5 of the TEC (ex article 3-B).

Article 5 (1) of the TEC affirms the principle of conferral, i.e., the European Community only holds those powers that were granted it by the Member States in the Treaties. The second paragraph goes on to stipulate the principle of subsidiarity, which is to apply in all areas not pertaining to the Community's exclusive powers. The subsidiarity principle establishes a preference for action by the States, limiting Community action to cases in which same added value when compared to the individual action of each country. Finally, the article's last paragraph envisages the principle of proportionality of the Community's action, adjusting the intensity of the means of its action to the intended objectives.[7]

[5] M. Grodzins, *The American System – A New View of Government in the United States* (ed. by D.J. Elazar), Transaction Books, New Brunswick, 1984, p. 41.

[6] D.J. Elazar, *American Federalism. A View from the States*, Harper&Row Publishers, New York, 1984, p. 53.

[7] The principles of subsidiarity and proportionality were given substance by the Edinburgh European Council in December 1992. This Declaration was the subject of an Inter-institutional Agreement in October 1993, signed by the European Parliament, the Council and the Commission. The main aspects of these texts were further incorporated into the Protocol on the Application of the Principles of Subsidiarity and Proportionality, annexed to the Treaty of Amsterdam.

Due to explicit affirmation of the principle of conferred competences in the Treaty, Maastricht had to grant new competences to the European Community. Such competences above all encompassed a set of areas where prior Community action was verified, but where there was no specific legal basis to sustain that same action. In so far as it strengthened the nature of the Community's conferred competences, future action in those domains would need specific legal grounds. For this reason the Maastricht Treaty granted the Community new competences, the so-called complementary competences, in areas as diverse as public health, education, culture, industry, trans-European networks, consumer protection and development co-operation.

The changes introduced by the Maastricht Treaty enabled an entry into a new period with regard to the division of competences between the Union and the Member States. Indeed, after the Maastricht Treaty came into effect the factors that had most contributed to the centralisation of Community competences largely ceased.

On the one hand, there was a clear inversion of approach in the European Court of Justice decisions concerning the division of competences. Over the past decade the Court has shown notable restraint in cases regarding the vertical division of competences,[8] abandoning its traditional view that favoured an extended interpretation of Community competences. Hence the Court of Justice's case law for the period in question took in all consequences of the introduced constitutional changes and as a rule strictly obeyed the principle of conferred competences.[9]

It must on the other hand be considered that in the post-Maastricht era there has been a reduction of the factor that most encouraged the expansion of Community competences in the previous period: recourse to article 308 of the TEC. Indeed, the national governments abandoned the practice of making unrestricted use of the flexibility clause as a legal basis for Community acts not clearly grounded in the Treaty, a practice which frequently occurred in the 1970s and 1980s.

The Union's legislative activity itself was also, and as a result of the subsidiarity principle, the subject of considerable reduction, with the presentation of proposals by the Commission dropping from 71 directives and 290 regulations in 1995 to 48 directives and 193 regulations in the year 2000.[10]

The Maastricht Treaty therefore enabled a cycle characterised by the expansion of Community competences to be closed, not so much due to the originality of the solutions introduced in its text, but rather because the Member States were increas-

[8] G. de Búrca, 'Il ruolo della Corte di Giustizia nel processo di decisione politica nell'UE', in G. Guzzetta (ed.), *Questioni Costituzionali del Governo Europeo*, CEDAM, Padova, 2003, p. 125.

[9] *Opinion 1/94* [1994] E.C.R. I-5267; *Opinion 2/94* [1996] E.C.R. I-1759; Case C-376/98, *Germany* v. *European Parliament and Council of the European Union* [2000] E.C.R. I-8419.

[10] Resolution of the European Parliament on 'The Division of Competences between the European Union and the Member States', 16 May 2002, (based on the report presented by Alain Lamassoure), PE 304.276, p. 14.

ingly concerned about the problem of competence expansion, and the European Court of Justice saw fit to adjust its case law to the provisions introduced by the Maastricht Treaty.[11]

Curiously, the new phase of the division of competences in the Union that began with the Maastricht Treaty presents similarities with the so-called dual federalism that marked the dominant line of thinking in the constitutional literature and case law of the United States between the end of the Civil War and the New Deal. Dual federalism consisted of the affirmation of two types of legislative entities in the federal system – states and federal government – establishing a clear demarcation of the spheres of competence of each one. The main characteristic of this theory lay in the affirmation of the domains deriving from the competence reserved for the states; it was understood that they should be clearly separated from the powers constitutionally granted to federal responsibility, which should in turn be subject to restrictive interpretation by the jurisdictional bodies. The formalism of this concept of dual federalism was also evident in the concern shown toward eventual modifications of the system for the vertical distribution of competences, which could only be achieved by means of constitutional revision.[12]

In the Union, and from a legal standpoint, the Maastricht Treaty irrefutably ended the erosion of conferred competences. During the period that followed the principle of conferred competences attained unprecedented prominence as a justification for Community action.[13]

However, from a political standpoint the problem of the division of competences continued to be raised after the Treaty.[14] There are reasons of a various nature as to why the division of competences remained a central subject of European constitutional discussion. From the start, the Maastricht Treaty itself increased the complexity of the system of the vertical division of competences. As mentioned above, the Maastricht Treaty granted a new set of powers to the European Community, the complementary competences, introducing a third type of Community competences, which were added to its exclusive competences and shared competences.

Beyond the density of the field of competences attributed to the Community, the Maastricht Treaty was politically unable to correspond to the expectations raised when it was adopted. Note that the introduction of the subsidiarity principle was then presented as being a sort of magic wand to resolve the problem of the vertical division of competences. At the time, Member States felt defenceless before the

[11] A. Dashwood, 'The Limits of European Community Powers', *European Law Review* 21 (1996), p. 128.

[12] P.N. Glendening, M.M. Reeves, *Pragmatic Federalism. An Intergovernmental View of American Government*, Palisades Publishers, California, 1984, p. 58.

[13] R. Calvano, *La Corte di Giustizia e la Costituzione Europea*, CEDAM, Padova, 2004, pp. 151-155.

[14] S. Weatherill, 'Better Competence Monitoring', *European Law Review* 30 (2005), p. 25.

centripetal tendencies verified in the division of competences, and transmitted this concern to public opinion. The European Community and particularly the Commission in turn judged that in the subsidiarity principle they had found the solution for the problems concerning competences.[15]

Yet subsidiarity is a concept taken from a context entirely distinct from the constitutional world of the European Community.[16] And besides, the subsidiarity principle was faced with the problem of its own complex implementation. For the subsidiarity principle is a principle of a political nature. This implies that control over its application should derive from analysis of a political nature rather than from a legal evaluation by the European Court of Justice.[17]

The problems inherent to the implementation of subsidiarity and the non-existence of a political control mechanism, on the one hand, and the numerous political actors affected by the Community's action, specifically the different kinds of infra-state bodies whose sphere of intervention is conditioned by Community action, on the other hand, contributed towards keeping the division of competences a central theme of constitutional debate in the Union.

In other words, although the Maastricht Treaty was able to endow the Community with the appropriate legal antidotes to check centripetal tendencies in the division of competences, it was unable definitively to resolve the political anxieties raised by this subject, in large part because it was unable to make the division of competences system understandable for most political actors. For this reason the infra-national structures of certain Member States, such as the German *Lander*, called for a more rigorous delimitation of the division of competences between the Union and the States.

It should be observed that concerns over the division of competences problem basically stem from two types of motives. First, the division of competences between the European Community and the Member States is a complex subject due to the functional technique of conferral envisaged by the European Community Treaty. The Maastricht Treaty, with a view to preventing improper use of the allocation mechanism, nevertheless helped add to the system's very complexity.

Second, the ambiguity of national governments on the Community process itself. For even though the Maastricht Treaty closed a political cycle vis-à-vis the division of competences, the national governments appear to suffer from the same previously evident vices. In other words, their discourse within Community institutions often defends the Union's need to expand its intervention to new fields, due to the intrinsic relationship with the central core of Community competences;

[15] E.J. Edwards, 'Fearing Federalism's Failure: Subsidiarity in the European Union', *American Journal of Comparative Law* 44 (1996), p. 542.

[16] A.G. Toth, 'The Principle of Subsidiarity in the Maastricht Treaty', *Common Market Law Review* 29 (1992), p. 1100.

[17] J.H.H. Weiler, *The Constitution of Europe. 'Do the new clothes have an emperor?' and other essays on European integration*, Cambridge University Press, Cambridge, 1999, p. 322.

yet internally they have encouraged the rise of a discourse holding that the Union increasingly interferes in domestic matters, or have used that interference to free themselves from the responsibilities required of them by the different levels of infra-state power. In any case, one is forced to note a certain sort of political schizophrenia in the behaviour of some national governments.

In this context, it is no surprise that the Declaration on the Future of the Union, annexed to the Treaty of Nice, sought to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity as one of the four main questions for ample and thorough debate on the Union's future that should be prepared by the 2004 inter-governmental conference.

The goal of extensively debating the Union's future led the European Council of Laeken in 2001 to call for a European Convention to be held, inspired by the experience gained by the body that drafted the European Union's Charter of Fundamental Rights.

The Division of Competences in the European Constitution

The division of competences between the Union and the States was the focus of attention during the work of the European Convention, and was debated by the two specific working groups, the so-called Working Group on Complementary Competencies (Group V) and the Working Group on the Subsidiarity Principle (Group I).

As a result, the draft European Constitution submitted to the European Council of Salonika in 2003 gave emphasis to this subject, with the epigraph 'Union Competences' given to Title III of its Part I. The new Title regarding the Union's competences meant to reflect the concern to endow European Constitution with more transparency and rigour vis-à-vis the vertical division of competences. The aim was to provide citizens with a clear and concise idea about the distribution of competences, so that they might understand the different categories of existing competences and also know the conditions governing the exercise of the Union's competences.

Yet the ambitious aims that led to inclusion of this Title did not dispense the Constitution from including in its Part III a detailed record of the Union's different policies and areas of action, which stipulated the specific legal basis for the Union's legislative acts in such matters.

The Treaty establishing a Constitution for Europe, approved by the Intergovernmental Conference in 2004,[18] closely followed the solutions presented by the European Convention regarding the division of competences.

[18] CIG 87/2/04, REV 2.

Catalogue of Union competences

The aspect that most stands out in Title III of the European Constitution is perhaps the adoption of a catalogue of Union competences. As mentioned above, the aim of endowing the Constitution with a separate Title on competences was meant to provide a clear and concise idea of the division of competences. The Convention held that that objective could be attained by drafting a list of the Union's competences. Thus, the provisions of this Title that refer to the different categories of competence also enact the lists of competences conferred to the Union.

The formula of cataloguing powers might at first glance seem the best way to deal with the aim of rigorously and transparently establishing the areas in which the Member States grant competences to the Union. But lists of competences have disadvantages that should be noted. The most significant is the potential effect of crystallising the division of competences between the Union and the Member States.[19] Now the experience of other comparable political entities with regard to the vertical division of competences, the case of the United States, shows that the political process's dynamics are not compatible with a rigid model such as that deriving from lists of competences.

In the European Constitution's case the problem is aggravated by the fact that the lists of competences were formulated for the different categories of powers conferred to the Union. Crystallisation of the division can thus be doubly verified: not only in division between the Union and the Member States, but also in its classification as different types of competences of the Union itself. Therefore the somewhat reductive legal technique followed by the Constitution, which set out to clarify the allocation of competences, may in the future be revealed as too rigid to regulate the division of competences between the Union and the Member States.[20]

Conferred competences

The first precept of the Title on Union Competences, article I-11, establishes the fundamental principles that dominate the subject, stating that the Union is governed by the principle of conferred competences and that the exercise of the Union's competences is governed by the principles of subsidiarity and proportionality.

Even though the drafting of this precept was much inspired by article 5 of the TEC, the phrase added to the definition of the principle of the conferred competences must be noted. The last sentence of article I-11(2) of the Constitution states that the 'competences not conferred upon the Union in the Constitution remain with

[19] S. Weatherill, 'Competence', in B. De Witte (ed.) *Ten Reflections on the Constitutional Treaty for Europe*, European University Institute, San Domenico di Fiesole, 2003, p. 47.

[20] W. Swenden, 'Is the European Union in need of a competence catalogue? Insights from a Constitutional Comparative', *Journal of Common Market Studies* 42 (2004), p. 388.

the Member States'. At first glance this seems to be a tautology, in so far as such assertion clearly derives from the preceding phrase, which states that the Union acts within the limits of the competences the Member States have conferred upon it in the Constitution. In other words, the Union only holds the competences that the States have conferred it; remaining areas pertain to the sovereignty of the latter. This being so, the use of good legal technique in writing the Constitution would have prevented this addition.

The Convention's preparatory work nevertheless reveals a deliberate intention to strengthen the importance for the Member States of the principle of conferred competences, by explicit affirmation in the Constitution text that the competences not conferred upon the Union remain with the States.[21] The aim of such addition would be to reinforce the pretext that favours competence of the Member States.[22]

Given such concerns, it must be concluded that the discussion promoted by the European Convention on the division of competences allowed the same fears that existed when the Maastricht Treaty was being drafted to be brought to light – against the phenomenon of centralising competences – but which inversion of the trend provoked by the latter Treaty should have removed. But it seems that the main European political actors have not yet completely overcome the traumas resulting from those fears.

Categories of Union competences

Article I-12 of the Constitution refers to the categories of Union competences. According to this article there are three kinds of Union competences: competences exclusive to the Union, competences shared with the Member States and supporting measures.

The competences exclusive to the Union are defined as the areas in which only the Union may legislate or adopt legally binding acts. The Member States' legislative activity in these matters is limited to situations in which they are especially empowered to that end by the Union, or when they must implement Union legal acts. The existence of areas pertaining to the Union's exclusive competence was a situation derived from the case law handed down by the European Court of Justice;[23] the very concept of exclusive competence adopted in the Constitution's text was also inspired by the definition previously formulated by that same Court.

The second category of competences envisaged by the Constitution concerns competences shared with the Member States. The sharing of competences between

[21] CONV 375/1/02 REV 1, p. 10.

[22] A. Lopez Castillo, 'Acerca de la Delimitación de Competencias en el Proyecto Constitucional de la UE', *Revista de Derecho Comunitario Europeo*, No. 18 (2004), p. 443.

[23] A. Biondi, 'Le Competenze Normative dell'Unione', in L.S. Rossi (ed.), *Il Progetto di Trattato-Costituzione. Verso una Nuova Architettura dell'Unione Europea*, Giuffrè Editore, Milano, 2004, p. 134.

the Union and the Member States in a given area means that both entities have the power to legislate and adopt legally binding acts in that regard. However, article I-12(2) specifies that the Member States exercise their competence in so far as the Union has not exercised its competence, or has stopped exercising the same. In other words, whenever the Union has legislated in a given area of shared competence with the Member States, its action unleashes an occupation of the field. As a consequence, the Member States are prevented from legislating on those matters. In legal terms a pre-emption of the Member States' competences has occurred, due to the Union's legislative action. In the past, the existence of pre-emption in European Community law was the focus of a certain amount of legal controversy. The Constitution, irrefutably clear, has removed all doubts on the subject.

The third kind of Union competence was the one that caused most concern during the work of the European Convention. It encompasses the category of the Union's so-called complementary competences, which were formally introduced by the Maastricht Treaty. However, the Convention's fears that public opinion would perceive a continual increase in Community powers led to modification of this category's very designation. Thus, and with the explicit aim to reassure citizens, the concept of complementary competences to refer to such powers was abandoned and a formulation that was lighter, though vaguer, was chosen: supporting, co-ordinating or supplementary actions.[24]

This third category of competences, which can be generically designated supporting measures, differs from the two previous kinds due to one elementary feature: the Member States do not formally allocate the respective competences to the Union. From the standpoint of the division of competences, they remain with the States. However, the Member States allow the Union to support, co-ordinate or supplement their own action. As stated in article I-12(5) of the Constitution, the Union's supporting measures do not supersede the States' competences in those areas.

The Union's action with respect to the supporting measures should preferably be governed by adoption of the so-called measures of low legislative intensity, i.e., by means of recommendations, resolutions, orientations and other non-binding measures. However, in cases where the Union is allowed to adopt legally binding measures in these areas, based on the provisions of Part III of the Constitution, such measures shall not entail harmonisation of the Member States' laws or regulations (article I-12(5)).

Lists of Union competences

The Constitution's article I-13 enumerates the areas subject to the Union's exclusive competence, referring to the customs union, establishment of the competition rules necessary for the common market to function, monetary policy for the Member

[24] CONV 209/02, p. 3.

States whose currency is the euro, the conservation of marine biological resources under the common fisheries policy, and the common commercial policy. Section 2 of this precept recognises the parallelism of the Union's international competence with the respective internal competence, according to the *in foro interno, in foro externo* principle.

Article I-14 of the Constitution deals with matters that are subject to shared competence between the Union and the Member States. Note that article I-14(1) intends to confer a residual nature upon this category of competences, asserting that shared competences are considered to be all those not held by the Constitution to be exclusive competences or supporting measures. This provision, along with the second paragraph, seems to introduce a non-restricted nature to the list of shared competences ('applies in the following principal areas'). However, as the Union is an entity governed by the principle of conferral, other competences are not to be considered if they are not explicitly granted by the Constitution. Unless the final reference of article I-14(1) was included in apprehension that the list in the Constitution's text might not be exhaustive, thus clarifying the legal nature of eventual non-enumerated competence.

The Constitution's article I-14(2) enumerates the following areas of shared competence of the Union: internal market; social policy; economic, social and territorial cohesion; agriculture and fisheries; environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; and common safety concerns in public health matters. Article I-14(3) and (4) sets out two other areas of shared competence of the Union – research, technological development and space; and development co-operation and humanitarian aid – which are distinguished from the other shared competences by the fact that their exercise by the Union does not imply pre-emption of the Member States' competence.

In turn, the roll of the so-called supporting measures set out in article I-17 encompasses the following areas: protection and improvement of human health; industry; culture; tourism; education, youth, sport and vocational training; civil protection; administrative co-operation.

Regarding the list of competences in the Constitution mention should also be made of the article on the Common Foreign and Security Policy. It is well known that one of the Constitution's greatest merits was to end of the European Union's so-called architecture in pillars. When the Maastricht Treaty was adopted, the competences the Member States conferred upon the Union regarding common foreign and security policy were placed in a separate pillar. In so far as the Constitution put an end to the Union's distinct pillars, Title III would have to mention the competences concerning foreign and defence policy.

Article I-16 thus envisages that the 'Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence'. However, the broad terms of the conferral of competences realised by this article, which again takes up the

corresponding provisions of the European Union Treaty, do not attenuate the singularities of the Union's action in this area.[25]

In effect, despite formally ending the Union's division into pillars, with regard to the common foreign and security policy the Constitution does not remove the reasons that determined the pillars' creation in Maastricht, i.e., the Member States' willingness to keep this sensitive area of action on a strictly intergovernmental basis. For the Constitution does not extend the so-called Community method to the common foreign and security policy: on the one hand, the main actors of the decision-making process in this area continue to be only the Member States, via the European Council and the Council of Ministers; on the other hand, the absence of the main aspects of the European Community legal system is maintained in this area.

The Union's competence in matters of common foreign and security policy will thus continue to be submitted to a special intergovernmental regime, defined by article I-40. Despite the extent of the competence conferred in this area, the special conditions on its exercise supersede the question of its legal nature. This means that there has been a formal merger of the provisions of the so-called second pillar, though their material incorporation in the Union's legal system has not taken place.[26]

The Union's action is more problematic with regard to the competences enumerated in article I-15: economic policy, employment policy. In both cases, it is noted that the Union adopts measures aiming to ensure *co-ordination* of the respective Member States' policies. This would indicate that these areas should be considered as covered by the supporting measures category.[27] However, one might object that the joint effect of making autonomous from the roll of supporting measures, and the provision of article I-14(1), which states the residual nature of the shared competences, would point to their classification in this latter category.

The Open Method of Co-ordination

Article I-15, on co-ordination of the economic and employment policies, is symptomatic of a certain incongruence in the development of the Union's competences. Indeed, the presiding logic in the Title on Union competences was guided by constitutional regulation of the division of competences. The Constitution used the categories of competences that had previously been identified by case law, and

[25] A. Dashwood, 'The Relationship between the Member States and the European Union/European Community', *Common Market Law Review* 41 (2004), p. 365.

[26] J. Kokkot, A. Ruth, 'The European Convention and its Draft Treaty establishing a Constitution for Europe: appropriate answers to the Laeken questions?', *Common Market Law Review* 40 (2003), p. 1326.

[27] M. Dougan, 'The Convention's Draft Constitutional Treaty: bringing Europe closer to its lawyers?', *European Law Review* 28 (2003), p. 71.

sought to frame the different areas of Union action in the different competence typologies.

But the source of inspiration for the current competence categories and respective lists concerns a period of the hegemony of European Community law. For the developments involving competences integrated, jointly with the principles of primacy and direct effect, the hard core of the so-called constitutionalisation of Community law. This presupposes that the decision-making and the implementation mechanisms were accomplished in strict observance of the system established in the European Community Treaty.

However, with the increasing range of integration, attempts arose to soften the Community procedures in certain areas of the Union's action. This occurred with the co-ordination of economic policy at the time of the Maastricht Treaty, and with employment policy by the Amsterdam Treaty. After the Lisbon European Council, in 2000, reference was made to efforts to streamline the Treaty's constitutional mechanisms by means of the so-called 'open method of co-ordination'.

The open method of co-ordination might forthwith be understood as a reaction to constitutional developments in European Community law, benefiting the mechanisms that allow Member States to collaborate in the sphere of the Union, while remaining free of the constraints derived from the mechanisms for implementing Community rules.[28]

The question was how to frame the line of Community action in preferred instruments of soft law, but simultaneously achieving this in the context of the Union's competences. The European Constitution undertook to compile the Union's competences and proceeded with their classification according to the traditionally admitted categories. During the Convention work the inclusion of a general clause on the open method of co-ordination was weighed.[29] But fear that such a clause might disturb the adopted division of competences system determined that it was not included in the constitutional text. So the Constitution only contains scattered references to situations involving the so-called open method of co-ordination, such as article I-15.

In effect, the aim of streamlining the Union's intervention mechanisms, the ideological pretext of the open method of co-ordination, contrasts with a stratified division of competences system inspired by a model of dual federalism such as that resulting from the European Constitution. It is worthwhile recalling that exercise of the delimitation of competences practised by the Constitution was motivated by the willingness to impose strict limits on enlargement of the Union's competences. Hence the idea of devoting a general clause on the open method of co-ordination would have been more likely if the Constitution had enshrined a view of co-operative federalism.

[28] G. de Búrca, 'The constitutional challenge of new governance in the European Union', *European Law Review* 28 (2003), p. 828.

[29] CONV 375/1/02 REV 1, p. 7.

Flexibility clause

The adoption of a catalogue of Union competences, with a list meant to be exhaustive of the conferred areas of legislative action, runs the risk of introducing a great deal of rigidity in the system of division of competences, preventing the Union from responding to unexpected events or new challenges in the future. For these reasons, the Constitution decided to maintain the flexibility clause from article 308 of the European Community Treaty.

The last provision of the new Title on the Union's competences, article I-18, enshrines the flexibility clause. Despite the fears this clause provoked in the past, after the Maastricht Treaty the European Court of Justice asserted that it could not be used for widening the scope of Union's competences beyond the general framework created by the Treaty, nor serve as a basis for the adoption of provisions whose effect would be, in substance, to amend the Treaty without following the appropriate procedure.[30] The Court also considered that the flexibility clause could not be used as a legal basis to harmonise national laws in areas where the Treaty expressly excludes such harmonisation.[31] Such concern was included by the new version of the flexibility clause.

Regarding procedure, the use of the flexibility clause continues to be accomplished by means of unanimous Council decision, particularly significant in a generalised context of majority vote in the legislative process. It is also envisaged that the European Parliament will be obliged to approve the measures based on article I-18; the national parliaments are called to provide an opinion on whether the adoption of those same measures meets the requirements stemming from the subsidiarity principle.

Control of application of the subsidiarity principle

As mentioned above, one of the biggest problems with the subsidiarity principle as a master criterion for the exercise of community competences lay in the practical difficulties of implementing the concept. In particular, given the principle's essentially political nature, it would be desirable for control of its observance to take on a political approach, and that such should occur before legislative measures were adopted. Control over application of the subsidiarity principle would thus have to be improved a priori, as it only had jurisdictional nature, through the European Court of Justice, and was only realised after the Community legislative measures came into force.

[30] *Opinion 2/94* [1996] E.C.R. I-1763.

[31] Case C-376/98, *Germany* v. *European Parliament and Council of the European Union* [2000] E.C.R. I-8419.

To that end, the European Convention's Working Group on the Subsidiarity Principle submitted a set of recommendations that were basically incorporated into the Constitution's final text.[32]

The fulcrum for the innovations introduced in this regard consists of the creation of an ex ante political control mechanism, defined by the Protocol on the Application of the Principles of Subsidiarity and Proportionality annexed to the Constitution. Under this Protocol an early warning system is established, which allows the national parliaments to participate in controlling subsidiarity, thus associating themselves to the Union's legislative process.

According to this system, the Commission shall forward its draft European legislative acts and its amended drafts to the national parliaments at the same time as to the Union legislator. Any draft European legislative act should include a detailed statement on subsidiarity and containing information on the financial impact of the proposal in question, as well as, in the case of the European framework laws, the respective implications for the rules to be put in place by the Member States.

Under the new system, the national parliaments or any chamber of a national parliament can draw up a reasoned opinion on non-compliance of the proposal in question with the subsidiarity principle, within six weeks counting from the date the Commission proposal was transmitted.

The consequences of the national parliaments' opinions are classified based on respective quantity and substance. When a low number of reasoned opinions is received, the Union legislator should provide better grounds for the measure. If more reasoned opinions are received on the failure to comply with subsidiarity than one third of the votes of the national parliaments, the Commission is obliged to review its proposal and may decide to maintain, modify or withdraw it. In terms of votes, each national parliament shall have two votes, while in the case of bicameral parliamentary system each chamber shall have one vote.

It should further be noted that the Protocol in question envisages strengthening the jurisdictional review of subsidiarity by the European Court of Justice, granting national parliaments the right of standing to bring actions for infringement of this principle. For the Protocol sets out that the national parliaments may, by means of the respective Member States, seek to annul a legislative act, based on infringement of the subsidiarity principle. This provision also enables the Committee of the Regions to file for annulment on the same grounds vis-à-vis European legislative acts that the Constitution provides it should be consulted on.

The early warning system is perhaps the Constitution's most interesting subject with regard to the division of competences,[33] not just because it allows the national parliaments to be associated to the legislative process, which occurs for the first

[32] CONV 286/02.

[33] The need to increase ex ante control over the application of subsidiarity was the subject of much debate in the last decade. Different proposals were presented, ranging from the creation of a second legislative chamber to the establishment of an ad hoc court, see C. Blumann, 'Démocratie

time in the history of European integration, but also because it is able to introduce an ex ante control mechanism for the subsidiarity of legislative acts, while at the same time avoiding the creation of a new body for that purpose, which would end up increasing the complexity of the Union's institutional system.[34]

Member States' national identity

The issue of respect for the Member States' national identity is closely related to debate on the Union's competences.[35] Article 6(3) of the European Union Treaty asserts this principle vis-à-vis the Common Provisions. But the same kind of concerns that led to the inclusion of a new Title in the Constitution, on Union competences, also enhanced the content of the principle concerning respect for the Member States' national identity, which is situated above the problem of division of competences.

In this regard, discussion focused around two main axes of what is held to constitute the Member States' national identity: the fundamental structures and vital functions of the States on the one hand, and the public policies and social values of the States on the other.[36]

Regarding the Member States' fundamental structures, article I-5(1) of the Constitution asserts that respect for national identity is reflected in the States' political and constitutional structures, including regional and local self-government, and also encompasses the essential functions of the States, specifically the guarantee of territorial integrity, maintenance of law and order and the safeguarding of national security.

As for the States' public policies and social values – which include topics such as income distribution policy and systems for taxes, social security, health care, education and culture – the European Convention held that it was not necessary to include reference to these areas in the clause on respect for national identity, because the Member States' responsibility regarding these matters derives from the established system of division of competences itself and from the extent of the so-called supporting measures in the text of the Constitution.[37] So a deeper content with respect to the States' national identity was limited to aspects associ-

et subsidiarité', in G. Cohen-Jonathan, J. Dutheil de La Rochère (eds.), *Constitution européenne, démocratie et droits de l'homme*, Bruylant, Bruxelles, 2003, pp. 145-153.

[34] During the Convention, President Giscard d'Estaing supported the creation of a new Union body, the European Congress, composed by members of national parliaments and the European Parliament. The latter firmly opposed this idea.

[35] H. Bribosia, 'Subsidarité et répartition des compétences entre l'Union et ses États membres dans la Consitution européenne', *Revue du droit de l'Union europénne*, no. 1 (2005), p. 31.

[36] CONV 375/1/02 REV 1, p. 12.

[37] CONV 375/1/02 REV 1, p. 12.

ated to its fundamental political structures and to definition of the respective vital functions.

One last point concerns article I-6 of the Constitution, which stipulates that Union law prevails over the law of the Member States. In the draft Constitution presented by the Convention, the principle of the primacy of Union law was inserted in Title III, on Union competences. This might lead to a mistaken notion that conflicts involving competences between the Union and the Member States would be resolved by application of the primacy of Union law. The modification of the systematic insertion of the primacy principle, placing it in Title I of the Constitution, made clear the existing distinction between conflicts involving norms and those involving competences. Conflicts between national norms and Union law will thus be resolved by application of the primacy principle. Eventual conflicts involving competences between Member States and the Union should be resolved by application of the set of principles and rules resulting from Title III of the Constitution. On this aspect, the modification the intergovernmental conference introduced in the draft submitted by the European Convention was adjusted.

Conclusion

The Title on Union Competences follows the approach adopted since the Treaty of Maastricht concerning the division of competences, with a stronger emphasis on the principle of conferral.

For citizens, the system governing the division of competences between the Union and Member States in the European Constitution will undoubtedly become more understandable and transparent than in the Treaties on the European Communities and the Union. In this sense, the Constitutional Treaty achieves one of the main political goals set out in the Laeken mandate.

The legal technique used to make the division of competences more precise and transparent may nevertheless cause some problems in the future, given that it crystallises the competences conferred to the Union, as well as the legal nature of those competences. Indeed, the concern that public opinion may engage in misperceptions regarding the division of competences led the Convention to adopt an approach on this issue, under the pretext of clarifying Union competences, though it seems unable to embrace the complexity of the different areas of action assigned to the Union. The difficulties arising from the classification in a precise category of certain Union competences, such as competition or internal market, or the inadequacy of the formal competence categories' ability to deal with the open method of co-ordination, may be considered good examples of the reductive approach taken by the Constitution.

The system governing the division of competences in the Constitutional Treaty is inspired by a dual federalism model as was outlined above and which is based on a formalist approach to the division of competences and a rigid separation between Member States' competences and those conferred to the Union. It is worth recalling

that the evolution of the American constitutional system led to rejection of this stratified view of the division of competences and the evolution towards a model of co-operative federalism.

The solution adopted to increase control over application of the principles of subsidiarity and proportionality is one of the Constitution's most interesting developments regarding the division of competences. For it has allowed the Union to combine in a balanced way the establishment of an early warning system on the application of subsidiarity with the purpose of giving the national parliaments a role in European construction, through its association to the Union's legislative power.