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Visions on the reform of competences in the European Convention

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I. Introduction

The reform of competences constitutes one of the core issues in the debate on a future European constitution that is currently being debated by the European Convention. The starting point for such reform is certainly not the simplest: on the one hand, the particular complexity in the current system and texture of the European Treaties and, on the other hand, the extraordinary vigilance that Member States devote to a question of such political explosiveness as the assignment of responsibilities in the European Union. Innumerable contributions with proposals for a clearer and more transparent delimitation of powers, in particular by the Union's institutions, academics and interest groups, have accompanied and accompany the reform process. Similarly, discussions within the Convention and, above all, the draft articles of the constitutional Treaty issued by the Presidium,[1] have resulted in a huge number of written and oral reactions by members of the Convention.[2] Further discussion has also followed the recently published draft constitution,[3] which is based on draft articles from the Praesidium and (partly) the amendments received as well as the debates in plenary. This contribution seeks to provide a snapshot of the debate and aims to examine the order of competences proposed in the draft constitution which might form the basis of discussion in the 2004 Intergovernmental conference. It is thereby not intended to pursue an Article by Article-analysis of the draft, but rather to examine the solutions offered within the different constitutional levels in the system of competences: (i) the 'foundations of the system', namely the principles underlying the attribution and control of competences, (ii) the delimitation of competences chosen in the draft and (iii) the exercise of competences, including in particular the Union's legal instruments and their impact on competences. For each of these levels, potential elements of 'constitutionalization' or, conversely, elements which might constitute a further step away from integration will be highlighted. In short, this paper aims to discover whether the Presidium's draft represents 'visions' or rather mere 'political outlooks' on the reform of competences in the European Convention.

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[1] With respect to the Union's competences and instruments, see in particular CONV 528/03, Draft of Articles 1 to 16 of the Constitutional Treaty, 6 February 2003 and CONV 571/03, Draft of Articles 24 to 33 of the Constitutional Treaty, 26 February 2003, in addition see CONV579/03, CONV 602/03, CONV 614/03, CONV 648/03, CONV 649/03, CONV 650/03, CONV 685/03, CONV 691/03, CONV 723/03.

[2] See CONV 574/1/03, Reactions to draft Articles 1 to 16 of the Constitutional Treaty – Analysis, 26 February 2003.

[3] CONV 724/03, Draft Constitution, Volume I - Revised Text of Part One, 26 May 2003, CONV 725/03, Draft Constitution, Volume II - Draft text of Parts Two, Three and Four, 27 May 2003; for the latest version see CONV 797/1/03, Text of Part I and II of the Constitution, 12 June 2003.

II. Principles relating to the attribution and control of competences

The source for the attribution of competences

The first question that has raised some debate within the Convention, concerns the attribution of competences. Several members of the Convention have alleged that 'a Constitutional Treaty should clearly indicate that the competences were conferred on the Union by the Member States and not by the Constitution'.[4] At first glance, this might seem to constitute a rather theoretical concern. The nature of the Union, as well as the way that the Constitution will be 'concluded', namely as a Constitutional Treaty, should leave no doubt that its content also emanates from the will of the Member States.[5] Yet, at the same time, this claim addresses a fundamental issue of the constitutional debate: the demarcation line between an international organization, albeit with the specific sui-generis features of the European Union and a design closer to the concept of a 'state' with a constitution that is more detached from the influence of the Member States as 'masters of the Treaties' or respectively 'masters of the constitution'. This question also relates to a re-organization of the amendment procedures of the Treaty and the discussion whether constitutional aspects of the Treaties should become subject to 'lighter' amendment procedures, such as qualified or reinforced qualified majority voting. Some proposals on the reform of the Treaties envisaged such a step, even specifically with respect to the assignment of competences. The Bourlanges Report on the typology of legal acts and the hierarchy of norms in the EU[6], for example, contains the assumption that the present distribution of competences constitutes 'a result of pragmatic, political compromises [rather] than a genuine attempt to allocate responsibilities on a rational basis'. It therefore opts for revising the procedure for determining the Unions competences by giving institutional status to a body, such as the Convention on the Future of Europe. The power for revising constitutional provisions, including in particular the assignment of competences, shall partially or totally devolve to such body, as 'an authority which is less keen on safeguarding the prerogatives of each of the Member States and more determined to base the division of competencies on the principle of subsidiarity, i.e. on common sense'.[7] The Bourlanges Report, thus, seeks to

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See CONV 624/03, Summary report on the additional plenary session of 5 March 2003 relating to Art 8 and 9 of the draft constitution. Apparently as a reaction to this claim, Articles I-1 and I-9 of the new draft constitution clarify that the competences contained in this constitution are conferred upon the Union by the Member States.

[5] In this regard, it is interesting to note that the terminology used in the draft articles, namely 'constitutional treaty' has in the revised text been changed into 'Draft Constitution'.

[6] Report on the typology of acts and the hierarchy of legislation in the European Union, A5-0425/2002, 17.12.2002 (hereinafter the Bourlanges Report).

[7] Bourlanges Report, Explanatory Statement, Chapter B/A. As suggested in Recital 5 of the report, for any revision of the constitutional part of the Treaty, 'it should be stipulated that the European Council must approve the draft amendments [...] drawn up by a Convention constituted along the lines of the

challenge the monopoly held by the national governments to enact constitutional provisions. Robert Badinter[8], an alternate representative of the French Parliament in the Convention, took a similar approach in his draft constitution. According to his proposal, amendment of the constitution should generally be conducted by reinforced qualified majority voting of the Council and two-thirds majority of the Members of Parliament. Moreover, the distribution of competences should be laid down in an *Annexe* of the Constitution and constitute an organic law. The revision of such an annex would be subject to qualified majority voting by the Council and three-fifths majority in the European Parliament.[9]

With a view to these proposals, it might be similarly decisive how the relationship between the different parts of the draft constitution will be designed. Part I of that draft contains the constitutional foundations, Part II the charter of fundamental rights, Part III the provisions on the different policy fields, including the specifications for each legal basis, and Part IV the draft general and final provisions. If differentiated amendment procedures, in particular in the sense of a 'lighter' amendment procedure for Part III were to apply, this would entail significant changes with regard to the allocation of competences due to many references between Part I and Part III of the constitution. Part I determines the categories of competences, the principles governing the limits and exercise of competences and indicates, in principle, also the areas covered by each category of competences. The category of shared competences, however, is designed as a residual category. If a new legal basis is introduced in Part III which is not explicitly allocated to the fields of either exclusive or complementary competences, it automatically forms part of the residual area of shared competence.[10] The amendment procedure applying to Part II of the Constitutional Treaty would thus automatically constitute the procedure for the allocation of *shared* competences. Such a change would represent a significant step towards constitutionalization when moving away from (now) Art. 48 TEU entailing ratification by the Member States each time a legal basis is introduced or amended. However, given the degree of negotiation already for the allocation of individual fields of competences, approval for such a proposal in the intergovernmental conference does not seem likely. Within the European Convention, whether amendment procedures other than Art 48 TEU should apply, and be only for limited

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current Convention on the Future of Europe; should the European Council wish to amend the draft text put to it, the proposed changes would have to be submitted to the Convention'.

[8] CONV 317/02, Contribution from M. Robert Badinter, alternate member of the Convention – 'A European Constitution', 30 September 2002 (hereinafter: Badinter Draft).

[9] See Badinter Draft, Articles 18 and 81.

[10] See CONV 797/1/03, Article I-13.

amendments, has been subject to discussion.[11] However it seems that the 'conservative approach' has prevailed and Article IV-6 on the procedure for the amendment of the constitution[12] in Part IV still follows the principles of Art. 48 TEU, applicable for all parts of the constitution. Eventually, the European Council may decide to convene a preparatory Convention composed of representatives of national parliaments, the member states, the Heads of State and Governments, the European Parliament and the Commission.[13] However, in summary, the draft constitution makes clear that the competences are conferred upon the Union by the member states, that in principle the same amendment procedure applies for all parts of the constitution and that it remains in the hands of the member states whether or not a Convention comes into play in individual cases.

The principle of supremacy and the control of competences

Another constitutional aspect under discussion is the formulation of the principle of supremacy as contained in Article I-10 para. 1 of the Presidium's draft constitution.[14] By only looking at the 'ultimate aspect' of the supremacy debate, one of the most controversial issues of European law comes to the fore, namely who is the 'final arbiter of constitutionality' in Europe in cases where an act of secondary law conflicts with fundamental provisions of national constitutions. In particular the German Constitutional Court caused considerable waves, when it made clear, in its famous *Maastricht decision*[15], that it would scrutinize any Community action, including the judgements of the European Court of Justice (ECJ), as to their compliance with the Community's competence provisions (*ultra vires* control) and the basic constitutional rights. The developments since the Maastricht decision, respectively the *Alcan Case*[16] and the *banana dispute*[17] have shown that the *Bundesverfassungsgericht* has restricted its claims for a seemingly extensive control of fundamental rights and competences

[11] See CONV 647/03, Part Three: General and final provisions, 2 April 2003, Article F and comments to Article F.
[12] See CONV 725/03, Part IV on the general and final provisions; also compare CONV 728/03, Article IV-6, where it is proposed to provide for a streamlined amendment option (Council acting unanimously, after consultation of the European Parliament, without ratification by national Parliaments) for certain provisions of Part Three which do not affect the objectives, values or competences of the Union, instead of introducing different amendment procedures for different parts of the constitution.
[13] This proposal is based on a suggestion from the Working Group on National Parliaments which 'welcomed the significant benefits gained from involving national parliaments, the European Parliament and governments in the previous and the current Conventions and considered that the method of a Convention should be formalised in a Constitutional Treaty with regard to the preparation of future Treaty changes' (CONV 353/02, Final report of Working Group IV on the role of national parliaments, 22 October 2002).
[14] CONV 797/1/03, Article I-10.
[15] Cases 2 BvR 2134/92 and 2159/92, *Brunner versus The European Union Treaty*, 12 October 1993, CMLRev 1994, 251ff.
[16] Case 2 BvR 1210/98, *Alcan*, 17 February 2000, (2000) EuZW 445, available at www.bundesverfassungsgericht.de.
[17] Case 2 BvL 1/97, 7 June 2000, English translation available at www.bundesverfassungsgericht.de.

and has introduced stringent preconditions for the exercise of its jurisdiction, at least in respect of fundamental rights.[18] However, recent discussions, in particular relating to Article 53 of the European Charter of Fundamental Rights[19] have also demonstrated that there is still not sufficient clarity on the ultimate consequences of supremacy. Some academics have sought to provide a legal foundation for the 'claims' of the German (and other) Constitutional Court(s) which would seem particularly important in the light of the ongoing reform process, not least in order to clarify the basic characteristics and the constitutional foundation of a future Union.[20] Erich Vranes[21], provides a thorough analysis of the academic debate on supremacy and highlights different approaches of how to solve the constitutional conflict between the ECJ and the German *Bundesverfassungsgericht*. Stefan Griller points out that 'it necessarily ensues from the fact that the EU still is not a State that one cannot deny that Member States and their supreme courts retain a residual competence to control acts of secondary law that are manifestly ultra vires or seriously fall below the EU standard of fundamental rights protection'. If one denied the existence of this - very reduced - national review authority, the ECJ would possess *Kompetenz-Kompetenz* which would be irreconcilable with the fact that the EU still is not a State.[22] A similar view, albeit based on a different footing, is to resolve the 'forensic, constitutional' conflict 'by relying on EU law and public international law as both strata contain closely convergent principles for the resolution of this fundamental tension'.[23] According to the necessity principle under public international law which may arguably be interpreted as being recognized under EU law via Art 6 and 7 TEU, a

[18] In the bananas decision, the *Bundesverfassungsgericht* stipulated that any claim of an infringement by secondary EC law of the fundamental rights guaranteed in the *Grundgesetz* (the German Constitution) must 'state in detail that the protection required unconditionally by the Basic Law is not *generally* assured in the *respective* case'. This not only requires 'a comparison of the protection of fundamental rights at national and Community level [...]', but moreover, the referring judges would have been required to submit 'detailed statements concerning a negative evolution of the standard of fundamental rights' within the Community. For a detailed discussion of the constitutional conflict between the ECJ and the German *Bundesverfassungsgericht*, and an analysis of the bananas decision, refer to Erich Vranes, 'European Human Rights Protection and the Contested Relationship of the ECJ and National Courts - Convergent Solutions under International, European and National Law?', in F. Breuss, S. Griller and E. Vranes (eds.), *The Banana Dispute. An Economic and Legal Analysis*, Vienna / New York (Springer) 2003, 185-245

[19] Vranes, *Banana Dispute*, 238, Stefan Griller, Primacy of Community Law: A Hidden Agenda of the Charter of Fundamental Rights, in D Melissas and I Pernice., *Perspectives of the Nice Treaty and the Intergovernmental Conference* in 2004, Baden-Baden 2002, 47 ff., *Liisberg, J.B.* (2001), *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law or just an inkblot?*, Harvard Jean Monnet Working Paper 4/2001, Cambridge, MA 2001, and Ingolf Pernice, *The Charter of Fundamental Rights in the Constitution of the European Union***,** www.whi-berlin.de/pernice-fundamental-rights.htm, WHI-paper, 14/02, 25ff.

[20] For the following paragraph, see also the analysis in Vranes, *Banana Dispute*, 225ff.

[21] Vranes, *Banana Dispute*.

[22] Stefan Griller*, Grundrechtsschutz in der EU und in Österreich. Gutachten zum 12. Österreichischen Juristentag, in Verhandlungen des Zwölften Österreichischen Juristentages*, Band I/2, 7ff, Wien 1994, 49 ff, 54, 55; also compare the survey in Griller, Maislinger and Reindl, *Fundamentale Rechtsgrundlagen einer EG-Mitgliedschaft. Verfassungsfragen der Übernahme von EG-Recht in den bisherigen Mitgliedstaaten in vergleichender Sicht*, Vienna 1991.

[23] Vranes, *Banana Dispute,* p.227; Ingolf Pernice, *Commentary on Article 23*, in *Dreier, H.* (1998), Grundgesetz-Kommentar, Vol. 2, Tübingen 1998, 325 (hereinafter: Pernice, *Commentary on Art 23*).

State that is a contracting party to an international treaty can justify itself for not complying with its contractual obligations, if compliance is in conflict with fundamental legitimate interests.[24] Certainly, the conditions for invoking the concept of necessity should reflect that it only applies in extreme situations. Nevertheless, such concept would have the merit of covering both general violations, and also serious and evident breaches of fundamental constitutional law in single cases.

There is nothing in the draft constitution that might challenge the *Bundesverfassungsgericht's* approach, nor is there any clarification of the conflict between ECJ and national courts. In fact, the wording of Article I-10 of the Presidium's draft does not even take up the ECJ's findings already in *Simmenthal.*[25] To some extent, and probably relying upon the fact that it relates to exceptional situations, unlikely to occur very often, it is understandable that a question of such political delicacy remains 'untouched'. On the other hand, this lack of clarity will naturally continue creating reservations by Member States against the concept of supremacy as developed by the ECJ. Remaining at the status quo means that it would in principle be up to the ECJ to decide whether a given act is covered by competences conferred on the Union. In extreme cases, however, as ultimate arbiters, national courts would be called upon to judge on evident errors or serious infringements of national competences - albeit following principles of general public international law, the respective national supreme court would only be admitted to quash a Union's act after a reconciliation procedure has taken place.[26] Thereby, it may be subject to discussion, which would constitute the most appropriate forum for such conciliation efforts in the EU context: a

[24] As another (third) alternative approach, Erich Vranes quotes Schmid who relies on the public international law 'evidence theory', concerning the classical international law problem under which circumstances a State may invoke fundamental internal law as a ground for justifying non-compliance with an international Treaty (C.U. Schmid, *From Pont d'Avignon to Ponte Vecchio: The Resolution of Constitutional Conflicts between the European Union and the Member States through Principles of Public International Law*, Yearbook of European Law, Oxford 1998, 415).

[25] Article I-10 para 1 of CONV 797/1/03 provides that the Constitution, and law adopted by the Union's Institutions in exercising competences conferred on it, shall have primacy over the law of the Member States; In case C-106/77, the ECJ states that 'in accordance with the principle of the precedence of Community law, the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but -- in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States -- also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community' provisions (Case 106/77, Simmenthal, ECR 1978/629, at marginal note 17).

[26] Vranes, *Banana Dispute*, 225ff., referring to C.U. Schmid*, Ein enttäuschender Rückzug. Anmerkungen zum Bananenbeschluss des BVerfG*, NVwZ 2001, 249and Pernice, *Commentary on Art 23*, marginal notes 29 and 31.

constitutional council as suggested by Weiler and Haltern or the European Council as argued by Pernice.[27]

II. The delimitation of competences

Having considered the 'foundations of the constitution', the next level in the system of competences which shall be examined is the structure chosen in the draft for the delimitation of competences.

The categories of competences

In principle, the categories defined in the Presidium's draft correspond to the distinction developed by academics and jurisprudence as well as the approach followed in the Convention's working group[28]. There are, however, some slight differences which do not contribute to enhancing clarity and simplicity in the Constitution. Besides the 'classical categories' of *exclusive competences*, *shared competences* and *areas of supporting, coordinating or complementary action*,[29] the draft provides for separate categories in the fields of common foreign and security policy, the co-ordination of economic and employment policies of the Member States, as well as several extra categories within the area of shared competences.[30] Neither through the systematic of the draft itself, nor through the explanatory note does it become clear, why these separate categories are necessary however.[31]

The general structure of the draft provides that the respective competences shall be exercised in accordance with the provisions specific to each area set out in Part III of the

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[27] Vranes, *Banana Dispute*, 227; Weiler and Haltern, *The Autonomy of the Community Legal Order Through the Looking Glass*, Harvard Journal of International Law 1996, 411, 447; Pernice, *Commentary on Art 23*, marginal notes 29 and 31.

[28] Compare, for example, de Witte, *Clarifying the delimitation of powers*, http://europa.eu.int/comm/dg10/university/post_nice/index_fr.html; Lenaerts and Desomer, Bricks for a Constitutional Treaty of the European Union: values, objectives and means, (2002) 27 *E.L.Review*; Bogdandy and Bast, The European Union's vertical order of competences: The current law and proposals for its reform, (2002) 39, *Common Market Law Review* 236; Ingolf Pernice, *Eine neue Kompetenzordnung für die Europäische Union,* www.whi-berlin.de/pernice-kompetenzordnung.htm; CONV 375/1/02, REV 1, *Final report of working group complementary competencies*, 4 November 2002; *Report on the division of competences between the European Union and the Member States - Committee on Constitutional Affairs*, *A5-0133/2002* (Lamassoure-report).

[29] This category has usually been referred to as 'complementary competences', especially by academics; it was renamed several times during debates in the Convention. According to Article I-16 in CONV 797/1/03, its current title should reflect more accurately the fact that the legislative competence in these fields remains with the Member States.

[30] See CONV 797/1/03, Articles I-11, I-13 para 3 and para 4, I-14 and I-15.

[31] See also Ingolf Pernice, *Verfassung der Europäischen Union, Bemerkungen zu den Artikel-Entwürfen des Konventspräsidiums*, available at http://www.whi-berlin.de, WHI-Paper 3/03.

Constitution.[32] The attribution of a policy area to a certain category therefore establishes a legal framework. Further specifications, such as the detailed definition of the legal basis, its scope and the instruments for the exercise of the respective competence, follow in the third part.[33]

If, therefore, the reason for separating Common Foreign and Security Policy were its specific features, as is suggested,[34] there would be opportunity enough in Part III of the Constitution to regulate its specificity. This, however, provides no reason, why Common Foreign and Security Policy should not form part of the category of shared competences with adaptations in Part III, taking account of its distinctive character. The same is true for economic and employment policies which might be considered as belonging to the areas of supporting, coordinating or complementary action.[35] If these fields continue to constitute separate categories, they will also in the future always be dealt with as 'separate animals'.

Yet, in particular with respect to Common Foreign and Security Policy, the draft constitution conveys an impression of anticipating a political decision rather than being concerned about a clear and transparent delimitation of powers. Article I-39 of the draft constitution laying down specific provisions for implementing the CFSP explicitly excludes legislative acts in the field of the Common Foreign and Security Policy[36]; CFSP thus remains the business of the executive, with the European Parliament, in principle, only a supporting actor in this field. Together with the clear message of establishing a separate category for CFSP, it seems that in an apparently 'unified' Constitution, the pillar system, at least with respect to the second pillar, re-enters through the backdoor. Even though this might probably describe the most realistic scenario from a political point of view, such clear statement in favour of intergovernmentalism seems rather disappointing as a starting pointing for the intergovernmental conference. This even more so, if one follows Kelsen in considering that the degree of centralization, in particular in the field of external relations, distinguishes a federal state from an international confederation of states.[37]

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[32] CONV 797/1/03, Article I-11 para 6.
[33] See CONV 724/03, Article I-11 para 6 and the commentary to this Article, which explicitly states that these specifications include not only the competences, but also the respective legal instruments and procedures.
[34] CONV 528/03, Explanatory note on Article 10, CONV 724/03, commentary on Article I-11 para 4.
[35] See for example CONV 47/02 or De Witte, *Delimitation of Powers*: 'The EC competences in the field of economic policy and employment policy (the latter added in Amsterdam) are phrased a bit differently; there, the emphasis is on co-ordinating member state activities rather than supporting their activities. But both support and co-ordination can be ranged under the heading 'complementary powers'. What distinguishes these areas of EC policy, is that the power to adopt binding laws is basically left in the hands of the member states (or their regions). This is sometimes made explicit in the text of the EC Treaty.'
[36] CONV 797/1/03, Article I-39 para 7.
[37] Hans Kelsen, *General Theory of Law and State*, Cambridge (Massachusetts), 1949, p.316ff.

Yet, the tendency of favouring intergovernmental mechanisms within the Union's external action is actually confirmed by the articles on external policies in Part III of the constitution[38]. A new provision on the principles and objectives underlying the Union's external action foresees that the European Council's role of identifying the strategic interests and objectives of the Union and its binding decisions issued for this purpose may relate to foreign policy 'and to other areas of the external action of the Union'.[39] This provision could signify that the institutions of the Communities will be subordinated to the decisions of the European Council in this field and would entail the 'intergovernmentalism' of the entire field of external policies, including its supranational elements, such as the Common Commercial Policy.[40]

If this nonetheless constituted a political decision, it should not result in compounding two different approaches in the draft. As Valéry Giscard d'Estaing pointed out in the plenary session on Articles 1-16,[41], the Convention has chosen an approach based on competence categories and not on policy fields. Consequently, the draft should adhere to three clearly defined categories and deal with Common Foreign and Security Policy in a separate Article, possibly only if this should prove necessary for political reasons.

The definition of the competence categories and their impact on the system of competences

Also the definitions of the competence categories and their significance within the Union's system of competences have caused some debate and, following the draft constitution, will continue to do so. One essential feature of the Union's system is that it may be described as a mechanism of co-operative division of powers.[42] It is distinguished by strongly interwoven competences, frequently involving different actors on different levels – Union, Member State and/or the regional level – for one and the same policy matter. The category of competences where this mechanism becomes most strongly apparent are *shared* competences. In this category, both Member States and Union are entitled to legislate, although Member States may does so only if and to the extent that the Union has not already exercised its competences. Therefore, the initial proposal in the Presidium's draft constitution to assign the

[38]CONV 725/03, Part III, Title V, The external action of the Union.
[39] CONV 725/03, Article III-189, para 1.
[40] See Stefan Griller, External Relations, in: B. de Witte (ed.),*Ten Reflections on the Constitutional Treaty for Europe*, Florence 2003, 133-157, p.136ff on the relation between what is now Union law and EC law: 'A binding decision of the European Council might prejudice all other external activities of the Union, the latter appearing somewhat subordinated to the overall guiding capacity of the European Council. If the respective powers of the European Council follow the decision making procedures of the CFSP, such a mechanism would entail, to the extent that the latter would remain intergovernmental in nature, the "intergovernmentalisation" of external policies in general, including what currently comes under the first pillar. In essence, this would not enhance, but rather deteriorate the capacity of the Union to take efficient action in the field of external relations.'
[41] See the introductory remarks of Valéry Giscard d'Estaing in the verbatim reports of the plenary session of 6 February 2003, accessible at http://www.europarl.eu.int/europe2004/textes/verbatim_030206.htm.

four freedoms of movement and competition rules as areas of *exclusive* competence[43] would have constituted a significant shift away from this system of co-operation, given that in the category of exclusive competences *by definition any* action of Member States is excluded, unless explicitly admitted by the Union.[44] This proposal has been mitigated in the draft constitution in that 'only' competition rules shall be assigned to the category of exclusive competences.[45] The four freedoms are now enshrined in Title I of Part I on the definitions and objectives of the Union, where it is stipulated that they shall be guaranteed within and by the Union in accordance with the provisions of the constitution.[46] Their inclusion at the beginning of Part I would make the legal and political importance of the four freedoms more visible and underline more prominently that they are, above all, fundamental freedoms, namely directly applicable guarantees. According to the new approach in the draft constitution, 'this is much more appropriate than the restriction of the Member States' legislative powers through their inclusion among exclusive competences'.[47] . Finally, it has clarified that legislative action implementing the fundamental freedoms would be covered by the concept of the internal market, as part of shared competences. Thus it has been acknowledged that the inclusion of the four freedoms in the category of exclusive competences would not constitute an improvement, or even a clarification in the constitution. This understanding has, unfortunately, not encroached on the external dimension with respect to the Common Commercial Policy, as will be set out below, nor on competition rules, where Member States might not be entitled anymore to adopt, for example, domestic rules on cartels without explicit approval by the Union.

One essential element of shared competences that has thereby apparently been neglected in the Convention's debates is that Member States' legislation is, in any case, pre-empted as soon as and to the extent that the Union exercises competences in the respective fields.[48] The exercise of such competences is subject to scrutiny under the principle of subsidiarity. As soon as an act of secondary law in the field of shared competences ceases to exist, the competence of the Member States in this particular field revives. Inherent in the category of shared competences is, thus, an element of flexibility and dynamics - admittedly one that could still be improved.[49] These dynamics, however, cannot be preserved within the category

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[42] See, for example, Bogdandy and Bast, *Vertical order of competencies*, p.240.
[43] CONV 528/03, Art 11 para 1. At the time, it was foreseen that the internal market, which by definition embraces the four freedoms, should be allocated to the category of shared competencies, which constituted a source of utmost confusion in this proposal.
[44] For further details on the definition of the competence categories, please see the references in fn.
[45] CONV 797/1/03, Article I-12, para. 1; in the latest draft version, the formulation has been watered down even further in that 'the Union shall have exclusive competence to establish the competition rules *necessary for the functioning of the internal market'* (Emphasis by me).
[46] CONV 797/1/03, Article I-4, para. 1.
[47] CONV 724/03, Comments to Article I-4.
[48] CONV 797/1/03, Art I-11 para 2.
[49] See below: the flexibility of the system.

of exclusive competences where *by definition* any action of Member States is excluded. It seems preferable therefore to reduce the category of exclusive competences to the most essential, namely the limited fields of (i) external trade in goods, (ii) monetary policy with regard to members of the EMU, (iii) urgent actions to interrupt or reduce economic relations with third countries and, finally the areas of implicit external competences as foreseen in Article I-12 para 2 of the Presidium's draft.[50]

The external dimension

This leads directly to another, rather precarious proposal in the draft constitution, namely to extend exclusivity to *all* fields of the common commercial policy (now Article 133), including the fields of trade in services and commercial aspects of intellectual property law[51]. This idea constitutes, in a sense, the external component of the proposal to extend exclusivity to the four freedoms of movement. The extension of exclusivity to all fields of the Common Commercial Policy would, however, lead to a similar result. It would, on the one hand, virtually abolish the Member States' competence to conclude international commercial agreements, except those which do not relate to goods, services or IP - which does not leave too much of a choice. Indirectly, of course, it would similarly restrict Member States' internal competences, as it is relatively easy to detect an international dimension in basically all internal legislation concerning services or IP. Therefore, although the proposal to extend exclusivity to the four freedoms has been dropped from the draft constitution, a similar effect might arise from the external dimension. As Stefan Griller has put it, 'This idea is likely to reactivate all reservations against a more or less tacit expansion of exclusive EU competences to services and intellectual property rights.'[52] It is doubtful whether Member States would accept such an extensive restriction of their economic freedom, in particular the freedom to act in the international arena which constitutes an essential element of their position as states. Notably, following the proposals in the current version of the draft, the Convention would strengthen the 'economic federation' to an almost unbearable extent, whilst the political dimension of external relations would remain firmly in the hand of the Member States.

[50] See Griller, *External Relations*, p.155.
[51] See CONV 528/03, Comments to Article 11 and CONV 797/1/03, Article I-12 para 1.
[52] Griller, *External relations*, p.138, on the proposal to bring the entire Common Commercial Policy under exclusive competence: 'The point of such concerns is that as a result of expanding the CCP in this manner, Member States would no longer be competent to regulate services and intellectual property rights with regard to nationals of third countries.'

The flexibility of the system

One aspect which, as already indicated above, merits further and more thorough consideration is the importance of dynamics and flexibility in the framework of the present system of competence categories. A very recent study by Fritz Breuss and Markus Eller analyses the current system of competences and the Presidium's draft from an economist's perspective.[53] It surveys the theoretical and empirical research on the efficient assignment of policy tasks to different levels of government from an economic point of view and applies the results to the delimitation of competences in the EU. In the context of flexibility, I shall highlight two main results of the study. It is submitted that the actual delimitation of EU competences differs in certain fields remarkably from the normative recommendations established by the empirical (economic) review.[54] Nor do the authors expect that the necessary changes of the actual European distribution scheme will find affirmation in the Intergovernmental Conference. As a solution, it is recommended to put an emphasis on 'procedural mechanisms', taking into consideration that 'codified procedural aspects decide permanently future assignment and re-allocation attempts'. The competence-distribution-process should therefore contain 'enough flexibility in order to react to changing general conditions'.[55] Elements of flexibility are thereby proposed for all (constitutional) levels of the competence-assignment scheme, encompassing the amendment procedure of the Treaty with respect to the competence allocation, a well-elaborated design of Article 308 in a Union of 25, the establishment of sunset legislation and more stringent procedural standards of subsidiarity in case that a shift of competences to the Union level is intended. All these aspects merit, in the authors' view, a much stronger consideration in the final Convention-debate. Within the category of shared competences, for example, the dynamics of the system should most suitably come into operation, as Member States may principally exercise their competence, if and to the extent that the Union has not acted. Yet, as Bogdandy and Bast have pointed out[56], in practice action by Member States is blocked by existing secondary legislation and, at present, the Treaties do not contain obligations for regularly revising or restructuring secondary law in light of the subsidiarity principle. In addition, the abolition of a legislative act without a validity period principally requires the same legislative

[53] Fritz Breuss and Markus Eller, *Efficiency and Federalism in the European Union - the optimal assignment of policy tasks to different levels of government*, IEF-Working paper No. 50, May 2003, available at http://fgr.wu-wien.ac.at/institut/ef/pulibreu.html.

[54] It is submitted that 'monetary policy, transport and environment seem to correspond more or less to the normative advice, while remarkable discrepancies arise in the fields of agriculture and defence. Discrepancies to a lesser extent can be detected in the areas of social policy, employment, industry, energy and education. However, a fine-tuning of the compared categories is undeniable in order to cope with different functions of policy responsibility, with additional institutional and non-government layers, or with disaggregated policy functions' (Breuss and Eller, *Optimal assignment of policy tasks*, p.37).

[55] Breuss and Eller, *Optimal assignment of policy tasks*, p.38.

[56] Bogdandy and Bast, *Vertical order of competencies*, 246ff.

procedure as the original act. According to Bogdandy and Bast, this problem has become particularly virulent in the agricultural sector, where attempts at renationalization or changes of the market organization failed due to agreement in the decision-making process. One possible solution, in their view, would be to relax the conditions under which a legislative act under a concurrent (shared) competence can be abolished and to apply less strict majority rules for the abolition than for the adoption of the legislative act. Similar considerations have been taken by Working Group V of the Convention with regard to legislation adopted under the flexibility clause in the future Constitution[57]. It is in the light of this concern, it seems, that the definition of shared competences in the draft constitution has been slightly amended.[58] It stipulates that 'the Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence'. In fact, this amendment implies a clear statement for an enhanced flexibility in the area of shared competences, yet it remains open whether it would imply any changes in the case of 'blocking secondary legislation'. Most probably, it will be a matter of interpretation to determine in which way and, in particular, under which procedure the Union can 'decide to cease exercising' a competence.

As another aspect of enhancing the co-operative characteristics of the competence order, the new design and the substantive requirements of the subsidiarity principle, the *ex ante* political involvement of national parliaments should constitute a useful step in strengthening the consciousness for and, thus, the day-to day application of subsidiarity.[59] Therefore, it is doubtful whether the Presidium's approach of avoiding excessive detail in the draft protocol on the application of subsidiarity and proportionality will prove helpful. On the contrary, given the vital importance of this principle in particular for the dynamics of the system within the category of shared competences, substantive guidelines going beyond the current Amsterdam protocol would be desirable.

III The exercise of competences

The last constitutional layer to be addressed may 'only' be concerned with the *exercise* of competences, but it nevertheless has strong implications for the delimitation of competences both horizontally, between the institutions of the Union, and vertically, between the Union and the Member States. There are, in particular, two aspects of Title V of the constitution on the

[57] CONV 375/1/02, p.16.
[58] CONV 797/1/03, Article I-11, para 2.
[59] Compare CONV 724/03, *Draft protocols on the application of the principles of subsidiarity and proportionality* and *the role of national parliaments in the European Union*, annexed to Part I of the constitution; see also CONV 579/03 of 27 February 2003; for a different view see Anna Vergés Bausili, *Rethinking the methods of dividing and exercising powers in the EU: Reforming subsidiarity and national parliaments*, Jean Monnet Working Paper 9/02, accessible at http://www.jeanmonnetprogram.org/papers/02/020901.html.

Union's legal instruments[60] that merit attention when considering the system of competences: (i) the conjunction of competences and instruments of the Union and (ii) the new system of delegation and implementation.

The conjunction of competences and instruments of the Union

The first aspect relates to the question, 'To what extent the Union's legal instruments will play a role in determining the scope of competences. Article I-11 para 6 of the draft constitution stipulates that 'the scope of and the arrangements for exercising the Union's competences shall be determined by the provisions specific to each area in Part Three of the Constitution'. The reference to Part III thereby covers not only competences, but also the forms and instruments of action provided for in those provisions.[61] In addition, Article I-37 para 1 specifies that, unless the constitution contains a specific stipulation, 'the institutions shall decide [...] the type of act to be adopted in each case, in accordance with the principle of proportionality'. It is not yet clear, whether Part III of the constitution will contain further specifications with respect to the Union's instruments than is currently the case and therefore whether it is intended to move further away from the 'principle of a free choice of instruments' as is currently the practice in the EC-Treaty.[62] It should simply be highlighted in this regard that the specification of applicable instruments and procedures in each policy area, or respectively, in each legal basis would strongly influence the system of competences. One prominent example, as mentioned before, is the general exclusion of legislative acts in the Common Foreign and Security Policy. But even in a less political context, the explicit exclusion or stipulation of instruments, for example either *laws* or *framework* laws, with respect to a specific legal basis, may be decisive for the involvement or preclusion of Member States' activities in these fields. Similarly, it would have a significant impact on the Union's flexibility in shaping policy areas according to requirements in individual cases.

The new system of delegation and implementation

The second aspect relates to the innovations in the Presidium's draft on the Union's means of action for the performance of its tasks. In the face of 'constitutionalization', one concern of the Convention's working group on simplification was a clearer division of powers, in particular the legislative and executive powers in the Union. Against this background, the proposals of the Group included a significant reduction of legal instruments, the introduction

[60] CONV 797/1/03, Articles I-32ff.
[61] CONV 724/03, Comments to Article I-11 para 6.
[62] Compare Craig and de Búrca, *EU Law, Text Cases and Materials*, 2002, S.537; Thomas Oppermann, Europarecht, 2. Auflage, 1999, Rz.517; Streinz, *Europarecht,* 5. Auflage, Rz 436; Bogdandy, Bast and Arndt, *Handlungsformen im Unionsrecht - Empirische Analysen und dogmatische Strukturen in einem vermeintlichen Dschungel*, ZaöRV Sonderdruck aus Band 62 Nr.1-2, 2002.

of a *legislative act* adopted on the basis of a *legislative procedure*, a clear *hierarchy of norms*, and - of particular interest with respect to the delimitation of competences – a new kind of act which should help reduce the level of detail in the Union's legislation: the *delegated regulations*.[63]

According to Article I-35 of the draft constitution, 'European laws and/or framework laws may delegate to the Commission the power to enact delegated regulations in order to supplement or amend certain non-essential elements of legislative acts'[64]. The objectives, content, scope and duration of the delegation are to be explicitly defined in the respective legislative acts. Likewise, the conditions of application to which the delegation is subject, are explicitly determined. Therefore, in the framework of delegated acts, the Commission acts as exclusive 'implementor' of Union legislation subject, however, to control by the legislator who may by way of various control mechanisms decide upon the legal fate of the Commission's delegated act: Council and/or European Parliament may revoke the delegation or subject its entry into force upon their approval.

In addition to delegated regulations, the draft constitution also foresees implementing acts in accordance with current Art 202 TEC: 'Where uniform conditions for the implementation of binding acts are needed, those acts may confer implementing powers on the Commission or, in specific cases duly justified 'and in the cases provided for in Article I-39'[65], on the Council'.[66] The *implementing* powers of the Commission are, similar to those for delegated acts, subject to institutional constraints in the shape of committees, composed of Member States representatives under the so-called comitology procedures. Following the current comitology system, in case of a conflict of interests between Commission and committee - and depending on the applicable procedure - the Council has a final say.[67] Also in the case of *implementing* measures, the Commission is therefore subject to control - in this case by the Member States' representatives and, ultimately by the Council. The Comitology procedures, thus, reflect the Member States' concerns to have the last word in relation to sensitive issues of implementation. The European Parliament, in turn, only has limited influence. Lastly, in conformity with the current system, the implementation of the Union's legally binding acts generally lies in the competence of the Member States.

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[63] CONV 424/02, Final report of Working Group IX on Simplification, 29 November 2002.
[64] CONV 797/1/03, Article I-35.
[65] This refers to the provisions for implementing common foreign and security policy.
[66] CONV 797/1/03, Article I-36 para 2. As stated in Article I-36 para 3, in the future, the rules and general principles for the mechanisms for control over implementing acts shall be laid down by law. The proposal by several members of the Convention to amend the current Comitology procedure will therefore be a matter for secondary legislation.
[67] 1999/468/EC: Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184/23, 17 October 1999, as amended in OJ L 269/45.

With a view to this structure, the question arises whether, on the one hand, the draft contributes to a *clearer delimitation of competences* between Union and Member States and, on the other hand, whether it achieves a clearer *separation of powers* with regard to the functions of the institutions. The introduction of delegated regulations in addition to implementing measures vests the legislator with the option of deciding whether a legislative act requires delegation or implementation. Consequently, the legislator also determines which institutions (either exclusively the Commission, or Commission and Member States plus Council under the comitology procedures or Commission under control of the legislator or finally only the Member States) shall be involved in the implementation of a certain act. Notably, there are, at least for the time being, no substantive guidelines for differentiating delegated and implementing acts in the draft. It is merely emphasised that a delegation may not cover the essential elements of an area, thus, that it shall not form part of a legislative act.[68] Both delegated and implementing regulations therefore constitute executive acts with no clear dividing line, but important differences with respect to the institutional consequences. One gets the impression that the draft steps forward in the direction of a stronger separation of powers by strengthening the Commission's role as *the* 'executive' of the Union and furthering the involvement of the European Parliament. At the same time, however, it did not dare to go as far as barring Member States and Council from any influence in the implementation of Union law. How these two concepts can be reconciled without rendering the horizontal division of competences completely arbitrary, is not obvious. No doubt, this constitutes a decisive issue with respect to the inter-institutional balance in the future Union. In the interest of clarity, it therefore seems unavoidable to decide in favour of one of the solutions: either a step towards federalism with a clearer separation of powers under the system of delegated acts or retaining the current comitology procedure adapted to the requirements of a Union of twenty-five.

IV. Summary

Having finished the journey through the different constitutional levels in the system of competences, the following concluding remarks seem appropriate:

(i) First, regarding the foundations of competences, namely the constitutional structure of distribution and control of competences, the draft as it stands will most probably not entail substantive constitutional changes.

(ii) With respect to the second level, the competence-categories and their definition, there seem to be two controversial developments: on the one hand, a stronger

[68] CONV 797/1/03, Article I-35 para 1.

emphasis of the Union's exclusive competences, thus a move towards integration and centralization, even putting at risk the flexibility and dynamics of the system and, on the other hand, a remarkably strong tendency towards intergovernmentalism in the field of Common Foreign and Security Policy.

(iii) Finally, with respect to the exercise of competences, the draft even attempts to merge these two controversial developments in one and the same concept. Even though this might demonstrate compromise and diplomacy at its highest level, it will not prove helpful in deciding in which direction the future constitution intends to move.

In the light of these conclusions, the question of whether the draft constitutional treaty represents ‘visions’ or ‘political outlooks’ remains open – unless, of course, one considers it possible that the Convention will realize its visions within the boundaries of political compromise.