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# The EU's Powers of External Relations

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The question of the European Union's powers of external relations and in particular its treaty-making powers has, over the years, roused a most lively debate over the extension and exercise of Community competencies. Originally, the European Community, on the basis of the principle of conferred powers, had very limited competencies in this field, and was soon forced to expand them – also by judicial means – so as not to deprive Treaty provisions of the effectiveness which the European Court of Justice (ECJ) has always tried to safeguard and to allow the Community to play an international role proportional to its economic weight. Hence the Court's abundant case law on the division of external competencies between the Community and member states. Having developed over more than three decades, this case law is not linear – at times it is tortuous, at times ambiguous and incongruous – nevertheless, it provides a useful point of departure for a general analysis of the sharing of powers between the Union and its member states.

This issue is central to the ongoing debate on the future of the European Union (EU), as it constitutes one of the points on which the ongoing Convention on the Future of the Union has been called upon to put forward proposals to achieve a better and clearer definition of the Union's competencies and their exercise, in respect of the principle of

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subsidiarity.[1] This article does not intend to offer a systematic reconstruction of the division of powers in the field of external relations. Rather it will briefly go over the main lines of its evolution, taking into account the Court's judicial practice and the successive revisions of the Treaties, hoping that this may be of some use for the broad debate currently under way. It will, in particular, attempt to arrive at some general considerations in the conviction that, in a system like that of the European Union, a margin of flexibility could be more useful for integration than any strict definition and division of powers. Moreover, given the widespread criticism of Community "interventionism", considered – not without reason – excessive by many, the Union's international role seems to be one of the few sectors in which further strengthening and development is being called for.[2]

The article will look first at the external relations powers of the European Community, and then move on to the innovations brought in with the establishment of the European Union and its pillar structure and, finally, draw some overall conclusions. A brief section will deal with the important novelties introduced into external relations by the Treaty of Nice.

## The European Community

### Express attribution of external competencies

In accordance with the general rule by which "the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein" (Art. 5.1 of the TEC), it was long maintained that Community institutions had the power to enter into agreements with third countries only in those matters in which that power was expressly set down in the Treaty. In the beginning, this was the case only in connection with the common commercial policy (Art. 113, now Art. 133) and association agreements (Art. 238, now Art. 310). Progressively, the

[1] This is the mandate given to the Convention by the Nice and Laeken European Councils (Declaration no. 23 on the Future of the Union, annexed to the Treaty of Nice and the Laeken Declaration of 15 December 2001).

[2] "There is widespread acknowledgement amongst Europe's citizens of the potential benefits to be gained when the European Union acts collectively at the global stage. At the same time, there is criticism that the Union's international impact currently falls short of what might reasonably be expected given its economic weight, its high degree of internal integration and the resources collectively at its disposal", writes the Presidium of the European Convention in a note of 3 July 2002 on the EU's External Action (CONV 161/02, p. 2).

Community's need to affirm itself on the international scene led it to extend its express sphere of external competencies through successive revisions of the Treaty, which introduced Community treaty-making powers in relation to a number of matters (monetary policy, Art. 111; environmental policy, Art. 174; technological research and development, Art. 170; development cooperation, Art. 181). Furthermore, other provisions provide for a more general competence of the Community to "cooperate" and "foster cooperation" with third countries, without specifying whether that cooperation may constitute the object of agreements (culture, Art. 151; public health, Art. 152; trans-European networks, Art. 155.3). In many cases, the introduction into the Treaty of a legal basis was preceded by recourse to Art. 235 (now 308), which allowed the Community to endow itself with the necessary power of action as required.[3]

## Implied external competencies

This is the field in which the Court of Justice's case law has been most innovative. In fact, the Court has repeatedly been called upon to judge the extent and nature, whether exclusive or not, of the Community's treaty-making powers. There are two aspects to the matter. First, from the point of view of material extension of treaty-making powers, the Court has stated that the Community (the ERTA case of 1971[4]), in virtue of its legal personality pursuant to Art. 210 TEC (today 281), has the potential capacity to act internationally in all matters related to the tasks and objectives of the Treaty; however, the concrete power to exercise that potential capacity derives from previous exercise by the Community of the corresponding internal power, through the adoption of binding internal acts.

This is the so-called principle of parallelism between internal and external competencies, by which the inability to take on external obligations would jeopardise the effectiveness of internal competencies, in that the member states, by undertaking international obligations, would maintain their power to affect Community rules and to alter their scope. It must be kept in mind that the Court, in its more recent Opinion 1/94 relative to the WTO

[3] Art. 308, along with other provisions of the TEC which allow for the activation of residual competencies (Art. 94 and 95) are at the centre of the debate on the sharing of powers: the need to maintain them is advocated by those who consider flexibility in this field positive (see European Convention, Note on the Plenary Meeting, Brussels, 15 and 16 April 2002, CONV 40/02, p. 6)

[4] Judgement 31 March 1971, Commission vs Council (European Road Transport Agreement- ERTA), case 22/70, European Court Reports (ECR) 1971, pp. 263 et seq.

agreements,[5] seems to have interpreted the ERTA judgment in a restrictive manner, specifying that the mechanism described is only active if there has been complete harmonisation in the matter domestically.[6]

Second, another criterion for the implied extension of the Community's external competencies was set down in Opinion 1/76,[7] by which the Community can enter into an international agreement, even if the internal competence has still not been exercised, as long as the agreement is required for exercise of that internal competency. In the interpretation of Opinion 1/94, which seems quite strict on this point as well, this is the case if the internal competence cannot be exercised independently of the conclusion of the agreement; in other words, if the two competencies, internal discipline of the matter and the conclusion of the international agreement, have to be exercised together to maintain their effectiveness.

## The exclusive and concurrent nature of the Community's external competencies

Reference should be made to the case law of the Court of Justice in this matter as well.[8] It states that the only external competencies that are exclusive by nature are those related to the common commercial policy pursuant to Art. 113 (now 133; see, further ahead, the changes introduced by the Nice Treaty) and the policy on fishing and management of marine biological resources pursuant to Art. 102 of the 1972 Act of Accession. In those matters, Community powers preclude, unless otherwise authorised, action on the part of the member states, even if the Community abstains from exercising its own powers. On the other hand, according to the Court, exclusive by exercise are all those external competencies that derive, in

[5] See the critical assessment by P. Pescatore, "Opinion 1/94 on 'conclusion' of the WTO Agreement: is there an escape from a programmed disaster?", Common Market Law Review, vol. 36, no. 2, 1999, p. 387-405; and the decidedly more positive one by A. Dashwood, "The limits of European Community powers", European Law Review, vol. 21, no. 2, 1996, p. 113-28.

[6] Opinion 1/94 of 15 November 1994 in ECR, 1994, p. I-5267. In that opinion, at points 96 and 102-3, the Court emphasises that, at least as concerns the regimes for access to an independent business and for intellectual property rights, the ERTA mechanism only works when the Community has achieved a complete harmonisation of the subject. As concerns transport, the Court upholds the formulation it used in the 1971 judgement: "common rules". It must be pointed out, however, that on that occasion the Court's argumentation was conditioned by the fact that it felt that the existence of an exclusive Community competence had to be verified.

[7] Opinion 1/76 of 26 April 1977 in ECR 1977, p. 741.

[8] Useful clarifications of this point are provided by the Court of Justice in Opinion 2/91 of 19 March 1993 in ECR, 1993, p. I-1061.

compliance with the ERTA doctrine, from the exercise of an internal competence: one consequence of the principle of parallelism, which makes it possible to extend the Community's field of external action implicitly, is that the latter takes on an exclusive competence. On the other hand, the principle of the primacy of Community law over the internal law of the member states rules out that the latter may legislate (and take on international obligations) in contrast with Community law in a matter which is the object of binding Community rules. Before the Community can exercise its internal competence, the member states maintain their normative power, both on the internal and external plane – which is however of a purely transitory nature – until such time as the Community takes action by definitely "occupying the field" (the so-called Community pre-emption mechanism).

The external competencies assigned to the Community by the successive revisions of the EC Treaty are generally formulated so as to highlight the intended concurrency with those of the member states: for example, point 2 of Art. 181 (formerly 130Y) relating to development cooperation safeguards the power of the member states to negotiate in international fora and to enter into international agreements. At the same time, Art. 111.5 concerning monetary and currency matters is formulated quite differently. It states that the possible exercise of external competencies by the member states must not prejudice the Community's powers. The first example (development cooperation) seems to presume the primary competence of the member states with the subsidiary competence of the Community, while in the second (monetary policy) the presumption is in favour of the Community and the states can only act when Community powers are not jeopardised. This explanation seems intuitive: Art. 111.5 leaves the member states limited external competence in one sector, monetary policy, which constitutes, at least for those adhering to the monetary union, an exclusive Community power.

The Court has had the opportunity to clarify what consequences should be drawn from the way in which the attribution of external relations powers is formulated with respect to such matters as development cooperation: it has spoken clearly of *complementary* powers.[9] This means that the

[9] See, for example, the Judgement of 3 December 1996, Portugal vs Council, case C-268/94, in ECR, 1996, p. I-6177 et seq., regarding the legal basis of Art. 130Y (now 181) TEC on development cooperation. On complementary powers, see the contribution of Henning Christophersen to the Convention (*Mandate of the Working Group on Complementary Competencies*, CONV 75/02 of 31 May 2002) in which he points out that "complementary competence covers areas in which intervention by the Community is limited to supplementing, supporting or coordinating the action of the Member States" and that it is not possible to transform a complementary power into an exclusive one through its exercise; the last observation is correct only within the limits described in the text.

Community's action in those sectors is hypothetical and subordinated to an assessment of its opportuneness and the scope of the objectives pursued. It follows in this case, that there are three options for the division of powers: the Community may enter into agreements by itself, the member states may enter into agreements separately or collectively, and the Community and the member states may enter into agreements jointly, in the form of a mixed agreement. But it must be pointed out that in these cases "mixity" is not mandatory, in that the Community has full – albeit not exclusive – power.

Furthermore, with respect to these matters, the mechanism set down in the ERTA judgement is still in force, as confirmed by the member states themselves in the Declaration on Articles 111, 174 and 181 annexed to the Maastricht Treaty.[10] Thus, once the Community has exercised the power in question on the domestic plane or through the international agreement, the member states lose their power to enter into agreements that would affect common rules or alter their scope, as set down in the ERTA judgement; and this even though the relative Community competence is in principle only complementary. Nevertheless, all of this is considerably mitigated if read together with the interpretation of the ERTA judgement handed down by the Court in Opinion 1/94, by which there has to be complete harmonisation in the sector before the pre-emption mechanism can be activated: harmonisation is clearly excluded in the matters in question (environment and development cooperation). Basically, it is extremely unlikely that the theory of implied powers, in the more restrictive interpretation given by the ECJ, can be applied to the power in question, altering its complementary and purely subsidiary nature. The Declaration mentioned nevertheless establishes that the member states cannot take on international obligations that contrast with preceding agreements entered into by the Community in the exercise of a complementary power.

The case of monetary policy is radically different: pursuant to Art. 111.5, the powers of the member states are totally complementary to those of the Community. In that sector, any agreements entered into by the member states are admissible, but only if they are not detrimental to the principal power attributed to the Community. It should be pointed out that this provision is not meant merely to prevent differences between international obligations taken on by the member states and Community acts or agreements. It demands more from member states: they are asked not to jeopardise the Community's "competence", above and beyond the

[10] "The Conference considers that the provisions of Article 111(5), Article 174(4), second subparagraph, and Article 181 do not affect the principles resulting from the judgement handed down by the Court of Justice in the AETR/ERTA case".

"Community agreements as regards Economic and Monetary Union". This is probably intended to allow the member states to enter into agreements only on marginal aspects and in full respect of Community law.[11]

## Mixed agreements

As is known, the widespread practice of mixed agreements calls for an agreement to be stipulated jointly by the Community and its member states, on the one hand, and a third party, on the other. This leads to the conclusion that the Community and its member states present themselves as a single joint party in which each concurs in the formation of the agreement as concerns its respective competencies. In light of the foregoing, therefore, a mixed agreement, that is when the member states participate in the stipulation of the agreement, is necessary only when part of the agreement is totally outside of the Community's competence (when, to use Court terminology, the competence in relation to an agreement is shared), either because the matter is totally outside of the scope of the Treaty or because the internal competence exists but has not been exercised and the conclusion of the agreement is not required for exercise of the internal competence in the sense mentioned above. Only in these cases, in which the Community cannot enter into the overall agreement alone, must the member states participate.

## The Nice Treaty

The Treaty of Nice made two important revisions that affect the Community's external relations powers: the changes made to Art. 133 as concerns common commercial policy, and the introduction of a new title, made up solely of Art. 181A, relating to economic, financial and technical cooperation with third countries.[12]

The first is important with respect to the division of powers for a number of reasons: primarily, the main aim of the revision was to overcome the

[11] On the external relations of Economic and Monetary Union, see R. Basso, "Sulle relazioni esterne della Comunità europea in materie riguardanti l'unione economica e monetaria", Rivista di Diritto Internazionale, vol. LXXXIV, no. 1, 2001, p. 110 et seq.

[12] For an overall evaluation of the Treaty of Nice, see A. Hatje, "Die institutionelle Reform der Europäischen Union - der Vertrag von Nizza auf dem Prüfstand", EuropaRecht, vol. 36, no. 2, 2001, p. 143 et seq.; J.-M. Favret, "Le Traité de Nice du 26 février 2001: vers un affaiblissement irréversible de la capacité d'action de l'Union européenne?", *Revue* Trimestrielle de Droit Européen, vol. 37, no. 2, 2001, p. 271 et seq.; P. Van Nuffel, "Le Traité de Nice. Un commentaire", Revue du Droit de l'Union européenne, no. 2, 2001, p. 329 et seq.

problem generated by Opinion 1/94 concerning the Community's participation in the WTO after the Marrakesh agreements extended the scope of the GATT to sectors such as trade in services and the commercial aspects of intellectual property rights. Since the revisions made in Amsterdam were considered insufficient,[13] the member states felt the need to change the provision further to extend Community competencies in the sectors mentioned. The result is an extremely complex provision which tries, on the one hand, to take into consideration the Court's case law and the requirements of the Community's international trade relations and, on the other, to be prudent and account for the interests of the member states.

In the end, the member states have maintained their control over the exercise of these powers, considering that, should the corresponding internal power (related to particular aspects of the sectors considered, that is services and intellectual property) not be exercised by the Community (in this case, as in the preceding point, the Community does not have the external power), agreements would have to be negotiated and concluded unanimously by the Council (Art. 133.5.2). The same holds true if the agreement is horizontal in nature: if it deals with different matters of which some require unanimity, then the whole agreement is subject to the rule of unanimity. It is hardly necessary to point to the provision's redundancy when it calls for unanimity for those matters that already require unanimity domestically pursuant to the general rule on the conclusion of Community agreements (Art. 300.2.1), which reflects some member states' preoccupation that they may be giving up sectors of irrenounceable national interest. Art. 133.5, as modified at Nice, is important also because for the first time it breaks the consolidated principle of the exclusiveness of Community competencies in commercial policy: ".This paragraph shall not affect the right of the member States to maintain and conclude agreements with third countries and international organisations insofar as such agreements comply with Community law and other relevant international agreements". It must therefore be concluded that the Community continues to have exclusive competence for trade in goods and other limited sectors indicated by the Court (the fight against trade in counterfeit goods, trade in services that do not involve the movement of persons) and that it has concurrent competence for the other aspects of intellectual property and trade in services.

From a different point of view, the new point 6 of Art. 133 is interesting

[13] See J.H.J. Bourgeois, "External relations powers of the European Community", *Fordham International Law Journal*, vol. 22, Symposium, 1999, p. 172; A. Dashwood, "External relations provisions of the Amsterdam Treaty", *Common Market Law Review*, vol. 35, no.5, 1998, p. 1019.

because it introduces the practice of mixed agreements into the Treaty for the first time: it states that in matters that are not of internal Community competence (the list mentions trade in cultural and audiovisual, educational, social and health services – but is it final?) agreements can only be reached jointly by the Community and its member states.

The second change, the new Art. 181 A, introduces a new legal basis for reaching agreements with third countries that are not developing countries, giving the Community broad powers in external relations that are expressly defined as complementary to those of the member states.

## CFSP and police and judicial cooperation in criminal matters

### Extension of treaty-making powers

The Union's treaty-making power in the framework of the second and third pillars of the European Union is set down in Art. 24 TEU, introduced in Amsterdam and subsequently modified in Nice, and in Art. 38 TEU, which extends its application to the third pillar. According to Art. 24, the Union may stipulate "When it is necessary to conclude an agreement with one or more States or international organisations in implementation of this Title...". The extension of the power is therefore boundless, in that it embraces all aspects of foreign policy (see Art. 11.1 TEU). This could have significant repercussions on the principles that traditionally inform the division of powers between the Community and the member states; they will be described in the following paragraph and the conclusions. The third pillar, on the other hand, is more restricted in that its objectives and instruments are more clearly delimitable, as set down in Art. 29 TEU.

### Division of competencies between the Union and the member states

No demarcation line can be drawn between the competencies of the Union and those of the member states in the second and third pillars[14] – not even one surrounded by grey areas as in the Community pillar. Nor can the criteria that govern the exercise of Union competencies in this sector be defined clearly.

Moreover, as concerns CFSP and police and judicial cooperation in criminal matters, member states maintain constant control over the exercise

[14] See no. 18, CONF 161/02 (EU External Action), which points out that "there are no limits on the potential scope and intensity of a common policy..." in the second pillar and that "... there are no impediments deriving from the delimitation of competence between the Union and Member States…".

of this power through the generally prevalent rule of unanimity: even in those cases in which, thanks to the modifications approved in Nice, treaties can be voted on by qualified majority, that can only take place after a preceding deliberation has been adopted unanimously (common action or common position in the Council and, perhaps, common strategy of the European Council). Probably, for this very reason, in the sectors of interest here, the Community's competencies seem to be more effectively safeguarded than those of the member states by Art. 47 and, specifically for the third pillar, by Art. 29.1.

On the other hand, pursuant to the procedure for treaty-making set down in Art. 24, member states can choose not to be bound by an agreement on the grounds that they have to conform to national procedural dictates set down in the constitution. This opt-out clause gives them the right to take over the treaty-making power related to a certain international agreement and to proceed with its ratification according to domestic constitutional provisions. The result is that the member state has two options: if the internal procedure works out, the result is a mixed Union/member state agreement, for which the mixity derives from the unilateral take over of powers by the state;[15] if the agreement is not approved by internal constitutional organs, it produces a situation similar to an opting-out in that the agreement can still enter into force in the other member states and constitute a commitment for the Union.[16] All of this, it must be pointed out, on the basis not of a division of powers based on codified and objectively determined criteria, but of a unilateral action on the part of a single member state with regard to a power that is in principle a full competence of the Union.

## Conclusions

The foregoing allows us to draw some conclusions as well as develop ideas for the debate under way, aimed at finding a way to bring greater clarity into the division of competencies between the Union and the member states. From a practical point of view, it looks like the member states' objective on this matter is to prevent any kind of uncontrolled expansion of

[15] For a more thorough discussion of the subject, see A. Mignolli, "Sul treaty-making power nel secondo e nel terzo pilastro dell'Unione europea", Rivista di Diritto Internazionale, vol. LXXXIV, no. 4, 2001, p. 978 et seq.

[16] As occurs for other decisions, including treaty-making, which in the second pillar are adopted by unanimity through recourse to the so-called constructive abstention provided for by Art. 23.1.2: the member state in question is not bound to the decision, but accepts that it binds the Union.

the Union's sphere of competence and, more importantly, to set clear bounds to the Union's exercise of its powers, that is, limit interventions as much as possible on the basis of rigorous application of the principle of subsidiarity.

Central to the debate is also the new attention given to the requirements not only of intervention at state level, but also at lower – regional and local – levels (so-called multi-level governance[17]). In the considerations that follow, account will not be taken of this aspect, which would have other implications, even of a constitutional nature, and are beyond the scope of this brief article. Instead, an attempt will be made to suggest a pragmatic approach to the problem, aware that European integration is an evolutionary process that has reached such a level of development that it would be illusory to think it can be dammed up. It seems more practical to try to regulate it, as will be illustrated later, with sluices that are flexible and controllable and that let the water flow only when it is needed and in the amount required.

Community treaty-making power has expanded greatly during the course of European integration. This is probably due to the fact that the Community's international role was initially underestimated and only developed over time with the instruments described. There have been difficulties and contrasts, just as there are still grey zones and elements of doubt. Nevertheless, one cannot help but notice that when the member states have decided to clarify and codify these grey zones at all costs, as occurred with the common commercial policy during the Nice revision, they have only made things worse. The new Art. 133, if ever it should enter into force, with all its distinctions and definitions, represents an example of how not to proceed in pursuing a clearer limitation of powers.[18]

What should be evident from the foregoing, instead, is that the Community's external powers have developed according to certain fundamental principles worked out by the Court's case law and gradually adapted to new requirements – principles now rooted in the Community's legal order and to be safeguarded as they provide the system with the

[17] See the White Paper on European governance presented by the Commission in July 2001, COM(2001) 428 final, which is based on the values of "proximity", "participation" and "involvement" in response to a widespread feeling among Union citizens of being removed from Union institutions. See also the Report on Proximity (CDR 436/2000) adopted by the Committee of Regions on 20 September 2001.

[18] C. Herrmann, "Vom misslungenen Versuch der Neufassung der gemeinsamen Handelspolitik durch der Vertrag von Nizza", Europäisches Zeitschrift für Wirtschaftrecht, vol. 12, no. 9, 2001, p. 274 defines Art. 133 as modified at Nice as a "perfect example" of unneeded complexity and hopes that it will not be used as a model in the future.

necessary flexibility. Thus, what is needed is not a catalogue of Community competencies. Experience shows that what is rigorously codified in the Treaties is rapidly superseded by the events and new requirements: the evolution of external competencies, for instance, shows that new criteria (implied powers, the principle of parallelism) had to be worked out to extend the very few attributed – "codified" – competencies in this sector so as not to impede the growth of the Community's international role. A negative catalogue, codifying a kind of domestic jurisdiction for member states would seem equally inappropriate in that this would not allow for a clear (in the sense of non-controversial) and at the same time dynamic delimitation of the Union's powers.

A good look at the treaty-making power set down in Art. 24 TEU, applicable to all sectors of foreign policy and therefore endowed with an almost infinite potential for expansion, explains why it seems impossible to restrict the material expansion of the Union's external competencies. One wonders whether the implementation of this kind of provision will not have repercussions on the very scope and perhaps even existence of the principle of conferred powers, to the point of practically voiding it of all meaning.

If that is the case, it must be acknowledged that the European Union is given full and complete treaty-making power, very similar to that of a state, in the field of foreign policy (which can include almost the entire range of external relations) by Art. 24 TEU and in the field of economic relations with third countries by the Community's legal bases, among which the new Article 181 A introduced in Nice. In most cases, these are powers that are part of that "grey area"[19] of powers not exclusive to the Union, but which the latter shares with member states.[20] In fact, as the Commission has pointed out, "nearly all policies have a European dimension and a national dimension".[21] Above all, continues the Commission, what to do is not to

[19] The draft of the (Lamassoure) resolution adopted on 24 April 2002 by the Constitutional Affairs committee of the European Parliament underlines (p. 14) the importance of the "grey areas" of concurrent competences, for which the "instructions", that is, the rules for use, must be indicated in the spirit of the principle of subsidiarity and proportionality (European Parliament, Rapport sur la délimitation des compétences entre l'Union européenne et les Etats membres, 24 April 2002, doc- A5-0133/2002 final, c.d. Lamassoure Report, from the name of its rapporteur).

[20] The Community edifice…organises not the separation but the sharing of powers" wrote the Commission in the communication A project for the European Union, 22 May 2002, COM(2002) 247 final, p. 20.

[21] Ibid., p. 20.

make a rigid and artificial classification,[22] but to rationalise the Union's *modus operandi*, making the principles of subsidiarity and proportionality effectively operational.[23] Therefore, rather than delimit the Union's powers – whatever the instrument used – an attempt must be made (and it is an imperative) to try to establish criteria for the clearest and most predictable exercise of the Union's powers.[24] In other words, people are going to have to resign themselves to the fact that the Union can intervene in almost every sector – and even in sectors that seem excluded today but which could require Union intervention tomorrow.

What seems essential is to ensure that such an intervention takes place only when and to the extent to which it is actually needed to pursue a common interest.[25] The key to this regulation could be greater legalisation of the principle of subsidiarity and, for exclusive powers, the principle of proportionality.[26] Above all, the criteria to be followed to justify an intervention must be defined more precisely and the compliance with them should be made subject to some form of judicial control – in ways and

[22] Or worse yet, a renationalisation of powers, as requested fortunately by only a small minority in the European Parliament which would like to see a "slimming down of the *acquis*" by giving national parliaments veto power on matters of subsidiarity. It is clear that that would paralyse the entire Community decision-making process (see Minority Opinion, annexed by European MPs to the Lamassoure Report, p. 25).

[23] A project for the European Union, p. 23.

[24] Point G of the draft resolution adopted on 24 April 2002 by the Constitutional Affairs Committee of the EP (p. 5 et seq. of the Lamassoure Report), sets out three criteria to legitimate Community intervention: none of them provides for a material delimitation of powers. The criteria deal with the "pertinent space" or the transnational dimension of action, "synergy" or greater efficacy of action in terms of economies of scale, and "solidarity" or economic and social cohesion that takes into account the disparity in development in the various areas of the Union.

[25] Cfr the considerations contained in Working paper no. 1° of the Friedrich Ebert Stiftung, *The exercise of European competencies is the real problem, not the allocation of competencies in the Treaties*, September 2001, http://www.europa.eu.int/futurum/conothbis_it.htm#att, which notes that "the accusation that competencies at European level are boundless can – if at all – only be explained by the way competencies are exercised by the Community institutions; in other words, from inadequate respect of the principles of subsidiarity and proportionality" (p. 4, italics in the original).

[26] This idea is not in contrast with the proposal being discussed in the Convention of introducing a provision into the Treaty recalling "the general principle whereby legislative competence rests with the member States except where it is conferred on the Union/Community" (doc. CONV 47/02, 15 May 2002, p. 13). Actually, it would be the exercise of the powers that would in principle lie with the member states, except for those cases in which the intervention of the Union is needed pursuant to application of the principle of subsidiarity (and modelled according to the criterion of proportionality).

means to be defined – entrusted to the Court of Justice, thereby strengthening its role as the Union's constitutional judge.[27]

In conclusion, attention must be called to some of the risks of extending the solution set down in Art. 24 too far, that is, by granting the individual states the power to define their respective competencies on a case-by-case basis, depending on their domestic political requirements and their internal legal order. The regulatory criteria for the exercise of the Union's powers, to be defined and submitted to a judicial guarantee, must respond to the objective requirements of the certainty of law and respect for the principle of the rule of law which underlie the European legal order.

To conclude, an exhortation by Alain Lamassoure:[28]

> Sommes-nous prêts à passer du code de conduite, détaillé, subtil, ésotérique, élaboré par les diplomates pour leur propre usage, à un véritable partage des rôles de type constitutionnel, compréhensible et acceptable par les citoyens et leur représentants? Si ce n'est pas le cas, épargnons-nous la rédaction d'un sous-traité de Nice. Mais si la réponse est positive, c'est un chapitre très nouveau de l'histoire communautaire qui va s'ouvrir. Il y faudra une architecture juridique et politique sensiblement différente. La réalisation de l'Union politique de l'Europe élargie est à ce prix.

[27] In agreement with the Lamassoure Report (A5-0133/2002 final, p. 23). The Convention has also discussed the matter of improving the definition of the criteria for application of the principles of subsidiarity and proportionality, as well as the need to improve checks, both political and judicial, to ensure their respect (pp. 17-19).

[28] Ibid., p. 26: "Are we ready to move from the detailed, subtle, esoteric code of conduct drawn up by diplomats for their own use to a real constitutional-style sharing of roles, which is understandable and acceptable to citizens and their representatives? If this is not the case, we should spare ourselves the trouble of drafting a sub-Treaty of Nice. But if the answer is yes, it will open up a very new chapter in the history of the Community. It will require a noticeably different legal and political architecture. This is the price to be paid for achieving the political Union of an enlarged Europe."