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The Vertical Distribution of Competences in the EU Draft Constitutional Text

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It is the purpose of this article to provide an analysis of the provisions on the distribution of competences between the Union and the member states laid down in the initial Draft constitutional text prepared by the Praesidium. This text is based on the work of the European Convention of the Future of Europe currently underway in Brussels.

The Union's system of competences has taken up a significant part of the Convention's time. It was discussed in general terms in two early plenary sessions in April and May 2002. Two working groups were subsequently set up on the subject, one on Subsidiarity and the other on Complementary Competencies. The reports produced by the two groups were then discussed in plenary session, respectively in September and November of the same year. Finally, one title of the first part of the Draft constitutional text (Articles 1 to 16) presented by the Praesidium on 6 February 2003 was devoted to the topic. The many proposals for amendment put forward by the members of the Convention were examined during the plenary sessions of 27/28 February and 5 March 2003. Finally, at the end of February 2003, the Praesidium approved a draft for a protocol on the application of the principles of subsidiarity and proportionality, which also drew proposals for amendment.

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So much attention on the part of the Convention is not surprising. In any political structure with multi-level government, delimitation of the respective spheres of action is of central constitutional importance. But the matter seems to be particularly delicate and complex in the European Union because of the peculiarities of its construction. In fact, the current system of distribution of competences between the Union and the member states had, in recent years, given rise to increasing perplexity in political circles and among legal scholars. Hence, the need to further define and clarify the system of competences was established by the Nice (2000) and Laeken (2001) Declarations on the Future of Europe as one of the main questions on the Convention's agenda.

The current system of distribution of competences

The principle of conferral

From the beginning of the European integration process, the vertical system of distribution of competences was based on the principle of conferral. As of the Treaty on the European Union (TEU), this principle was flanked with those of subsidiarity and proportionality. The principle of conferral means that the Union does not have general competences, but only those that are specifically conferred upon it by the member states in the founding treaties and their subsequent modifications. The Union can only act on the basis of a provision of the Treaties that authorises it to do so.

This principle is widely applied in the legal orders of federal-type states or states that have multi-level governments. In order to function effectively, however, it calls for a clear-cut separation of the powers of the various levels set down in special lists sanctioned by the constitution. Even in this case, there can be interpretative problems in defining the limits between the various levels, but under the conditions mentioned, they can be solved by appropriate mechanisms for control of constitutionality.

The situation is quite different in the European Union. The powers of the Union and the member states are intertwined and interdependent on both the executive and the legislative planes. Thus it is impossible to make a clear distinction between the respective spheres of action, which on the contrary continually intersect and integrate with one another. The competences of the Union are defined in terms of objectives to be reached rather than matters to be regulated. There is no catalogue of the sectors for which the Union is responsible. Typical instead are provisions like Articles 94, 95 and 308 TEC, which authorise the Union to adopt measures aimed at the proper functioning of the internal market or the pursuit of other community

objectives, without any kind of limitation. These are functional powers that could potentially affect any sector, even those reserved for the member states (such as health, education and culture).

On the other hand, this system seems to be perfectly in keeping with the basic philosophy of the European construction, seen as a stepwise process aimed at an "ever closer union among the peoples of Europe" (Preamble TEC, Article 1 TEU). This evidently justifies a teleological (and therefore generally expansive) interpretation of competences, as has indeed occurred on the part of the Union's political and judicial institutions.

It is obvious that in this kind of context, the principle of conferral loses much of its delimiting properties. At the most, it serves to underline the historic-legal derivation of the Union's powers from those of the member states. The latter continue to be the "lords" of the treaties (to use the language of the German Constitutional Court) and therefore, by changing the treaties, they can extend or restrict the Union's objectives and competences.

The principles of subsidiarity and proportionality

The system's centre of gravity has gradually shifted from the rules on the conferral of competences to those relative to their exercise. This development was sanctioned by the TEU, which brought in the principles of subsidiarity and proportionality alongside that of conferral. It is no coincidence that this took place at a time when, with the transition from the common market to economic and monetary union, as well as the institution of the second and third pillars, the Union's tasks were expanding to the sectors of foreign, home and economic and monetary policies.

Of the two principles, subsidiarity has come to play the more important role. Once the idea of a clear separation of competences between the Union and the member states was abandoned, the objective became to coordinate their exercise according to the criteria of subsidiarity as set down in Article 5 TEC. But the wording of this provision is neither clear nor precise. First of all, the principle applies only to the Union's non-exclusive competences, hence the need to distinguish between those that are exclusive and those that are not – a problem for which the treaties do not provide explicit indications. Secondly, the criteria for defining the level that is competent to act are not consistent. In fact, the Union is called upon to intervene subsidiarily when state action is insufficient or when it is deemed that the Union can be more effective. But the two conditions are not mutually exclusive: the action of the Union could be more effective even if that of the state were sufficient, and vice versa. Therefore, the provision leaves the Union's institutions broad discretion to decide whether to opt for one or the

other criterion and, thus, whether to assert the competence of the Union or leave the member states free to exercise theirs.

This is why it was soon felt that the conditions for the application of the subsidiarity principle had to be defined more precisely. The European Councils of Birmingham and Edinburgh at the end of 1992, a Commission document of the same year, a 1993 inter-institutional agreement (European Parliament, Council, Commission) and, finally, the protocol annexed to the Treaty of Amsterdam all dealt with the matter. But the situation was not substantially improved. On the contrary, the Amsterdam Protocol explicitly declares that subsidiarity is a dynamic and bilateral concept that can work both to broaden and to reduce the Union's action, depending on the circumstances.

Nor does the principle of proportionality, by which the Union's action has to be commensurate with the objectives to be pursued, make up for the shortcomings of the principle of subsidiarity. From a formal point of view, the two principles receive equal recognition in Article 5 TEC and are considered together in the Amsterdam Protocol. But *de facto*, the principle of proportionality plays a minor role and, here again, the wording of the provision leaves EU institutions an ample margin of discretion.

The mechanisms for political and judicial control

Above and beyond the principles mentioned above, the European system of powers was to be balanced and guaranteed by the political control of the Council. As is known, the Council is the Union institution made up of the governments of the member states. In general, exercise of the competences of the Union calls for a Council decision, in which the Commission and the European Parliament (EP) concur in various ways. While the Commission or the EP are institutionally tasked with safeguarding the prerogatives of the Union, the Council seems to be the natural guardian of national powers.

But the Council's guarantee has been only partially effective in limiting the expansion of Union competences. First of all, individual governments only had full control in this area as long as there was unanimous voting in the Council, which gave each government the right of veto. But as of the Single European Act of 1987, the areas of unanimous decision-making have been progressively reduced. Secondly, the interests of a state are not necessarily represented in their entirety and complexity by the governments alone. There are also the national parliaments, the local authorities and the citizens themselves, whose interests do not always coincide with those of the national governments. In fact, governments may want to shift domestic competences to the Union for the very purpose of getting around the prerogatives of parliaments, sub-state entities or private persons. This has

happened not infrequently: sometimes on the initiative of the Council, sometimes because the Council was unable (or unwilling) to oppose a Commission or EP initiative, sometimes due to the inertia of the other actors mentioned above.

Judicial control mechanisms have not worked any better. In their institutional capacity, the judges in Luxembourg have naturally favoured the process of European integration, strengthening the Union's prerogatives and the effectiveness of its legal system. In this framework, the case law of the European Court of Justice (ECJ) has been oriented towards a broad interpretation of the Union's attributions, rather than their limitation to safeguard national powers. This is confirmed by the fact that until recently no judgements had ever been issued that considered Union acts illegitimate because of a lack of competence on the Union's part.

It has to be recalled that the rules on this matter, because of the way they are worded, are more conducive to political rather than judicial control. In fact, it is hard for the judges in Luxembourg to censure the discretionary decisions of the Union's political institutions with respect to subsidiarity and proportionality. That can be envisaged only in marginal cases of evident excesses or a total lack of valid motivation.

The discussions that led up to the Nice and Laeken Declarations

Criticism of the current system of Union competences and proposals for change have gradually increased over the years. Some think that the system requires a radical overhaul: the Union's competences should be delimited by a precise catalogue, residual competences pursuant to Article 308 TEC eliminated, and a good number of powers returned to the member states. The principles of subsidiarity and proportionality should be formulated in stricter terms and their respect ensured by means of new and *ad hoc* mechanisms of political and judicial control. It is no coincidence that the German Bundesrat advocates this solution to protect the prerogatives of the Länder.

Another, more moderate trend is in favour of correcting, but not revolutionising the current system. The shortcomings in terms of clarity and precision have to be remedied, the competent level and the intensity of action better defined, the instruments set out to protect the principle of subsidiarity made more effective. But a clear separation of the competences of the Union and the member states is not feasible, as it would be incompatible with the specificities of European integration. The flexibility of the basic rules and the institutional mechanisms of the system should be maintained. Even more, there should be just as much concern for safeguarding the competences of the state as for protecting those of the

Union, frequently paralysed by intergovernmental procedures and unanimous decision-making. This is the line that is emerging – and it's not surprising – from the documents of the Commission and, albeit with a different accent, of the European Parliament.

It is not easy to place the Nice and Laeken Declarations on the future of Europe in one camp or the other. Both state that the current system of competences has to be reviewed and that this should be one of the crucial points of the new constitutional text. The fact that the Nice Declaration calls for a more precise definition of the competences of the Union and the member states could make one think that it is in favour of a clear-cut separation of the two spheres of action. The Laeken Declaration speaks of a greater and more transparent division of competences. This could be associated with the idea of substantially shared competences that have to be coordinated better during their exercise. But these are nuances and whatever the exact interpretation of the two declarations, in the end, what matters is that neither laid down a binding mandate for the work of the Convention.

The orientations during the Convention's early work

It soon became clear that the members felt that the current system of distribution of competences is in need of correction, but not drastic modification. This emerged during the discussions of the first plenary sessions on the tasks of the Union. The minutes of the (15-16) April and (23-24) May 2002 sessions report that the majority of the members agreed on the need to clarify the respective spheres of competence of the Union and the member states, but that this should not lead to a change in the system as a whole. In particular, the idea of a positive or negative list of competences was rejected in that it would make the system rigid. The delimitation of the spheres of action of the Union and the member states must remain flexible. Instead, what is needed is a differentiation of the intensity of action depending on the various sectors. Above all, it is important to have clear and democratic principles for decision-making, as well as suitable instruments for control. Basically, procedural guarantees, inherent in the decision and control mechanisms, are to be preferred over a rigid delimitation of competences.

The same kind of indications are given in the report drafted by the Working Group on Subsidiarity. It underlines the need for better controls over the application of subsidiarity, in particular *ex-ante* political controls. The Working Group put forward the "innovative and bold" proposal to bring the national parliaments into the workings of those mechanisms. At the same time, it insisted on a few principles or "golden rules" (according to the definition of the

Group President): no new institutions, no lengthening or blocking of legislative procedures, no weighty bureaucracy. Hence, improvement of the system, but with no substantial changes in the overall architecture.

Going partially in the other direction was the Working Group on Complementary Competencies, whose work extended to all questions of competence (excluding subsidiarity examined by the preceding group). This Working Group recommended establishing a fundamental delimitation of the powers of the Union in each sector in which it operates; reviewing the reference to "an ever closer union" in Article 1 TEU, so as not to give the impression that further transfer of competences to the Union could potentially go on forever; defining more effectively the provision of Article 6.3 TEU on respect of national identity; restricting the scope of harmonisation or other measures that can be adopted pursuant to Articles 94, 95 and 308 TEC; as well as excluding recourse to legislative acts in the exercise of complementary powers.

It is significant that the report by this last Working Group was negatively received. In fact, when it was discussed in the plenary session (7-8 November 2002), the Chairman of the Group had to defend the report from considerable criticism. The Group was accused of putting forward once again the idea of a catalogue of Union and member states' competences which had already been rejected by the Convention; of having misunderstood the meaning of the reference to an "ever closer union" which refers to the European peoples and has no implications for competences; and of wanting to introduce too many restrictions on complementary, harmonising and residual competences (ex Article 308 TEC). The closing statement on the part of the session chairman speaks for itself: "a broad majority of members of the Convention do not agree with the approach adopted in the report".

The provisions on competences in the Draft constitutional text

On 6 February 2003, the Praesidium made public an initial series of Articles (1-16) of the Draft constitutional text. The provisions on competences were grouped together in eight articles (8-16) under Title III. The Praesidium pointed out that the text was based on the preceding plan for constitutional architecture of 28 October 2002 and reflected the reports of the various Working Groups (including those on Subsidiarity and on Complementary Competencies).

Articles 8 and 9 respectively set down the fundamental principles on competences and the relative rules for application. To the traditional principles of conferral, subsidiarity and proportionality are added those of

loyal cooperation, the primacy of EU law and respect for national identity. In defining these principles, as well as their inherent rules for application, the wording of the draft does not differ greatly from that of the existing treaties or that developed in European case law. For the principles of subsidiarity and proportionality, reference is made to a special Protocol to be annexed to the Constitution with the specification that the Protocol will allow for national parliaments to monitor the application of subsidiarity.

In Article 10, powers are classified into various categories, each of which is defined. Thus, a distinction is made between exclusive competences, shared competences and measures that support state action or complementary competences. The Union's powers in economic, foreign and security policy (and in the future in common defence policy) are mentioned separately. When competences are exclusive, only the Union can legislate, unless it authorises the member states to do so. When competences are shared, the state can also legislate but only as long as the Union has not exercised its competences. As for supporting competences, the Union's action does not replace that of the member states. Furthermore, Article 10 establishes that the Union's competences have to be exercised in conformity with the specific provisions contained in Part II of the Constitution (regulating the various policies of the Union).

Articles 11 to 15 contain special provisions for each of the categories of competences set down in Article 10. The provisions for exclusive, shared and supporting competences list the sectors that fall under each of these powers. The wording of these lists seem to be peremptory for exclusive and supporting competences, exemplificative for shared powers. Article 15 adds that the exercise of supporting competences does not involve the harmonisation of state legislations.

Title III of the Draft closes with an Article on flexibility (Article 16). The provision copies the current Article 308 TEC and allows the Union, under certain conditions, to adopt the measures required even if it has not received an explicit conferral of power. Article 16 adds the following conditions to those of Article 308: the prior consent of the European Parliament is required; Commission proposals on the matter must first be submitted to national parliaments; the Union cannot adopt harmonisation provisions in sectors in which the Constitution rules it out.

As mentioned, Article 9 of the Draft calls for a Protocol on application of the principles of subsidiarity and proportionality to be annexed to the Constitution. The Draft for such a Protocol (obviously destined to replace the Amsterdam Protocol) was presented by the Praesidium on 27 February 2003.

The salient points of the new Protocol can be summarised as follows: the legislative proposals of the Commission must be flanked by a "subsidiarity

sheet" explaining the reasons for Union action, as well as the financial and legislative impact of the proposal. The early warning mechanism established is meant to strengthen the national parliaments' monitoring of the application of the principle of subsidiarity. They have six weeks within which to give a reasoned opinion on the Commission's legislative proposal. If at least one third of national parliaments feel that the principle of subsidiarity is not being respected, the Commission has to re-examine its proposal. After having done so, it can decide to uphold the proposal, amend it or withdraw it. As for referral to the European Court of Justice for violation of the principle of subsidiarity, member states are legitimated to act, possibly upon request of the respective national parliaments. The Committee of Regions may also appeal for legislative acts on which it was consulted.

A critical evaluation

Structural aspects

It is undoubtedly positive that the fundamental provisions on competences were grouped together in a single title of the Draft. The Praesidium thereby confirmed the approach already taken in the previous draft on constitutional architecture of October 2002 and followed the recommendations put forward by the Working Group on Complementary Competencies. This is a clear improvement on the current situation, in which the provisions regarding competences are scattered throughout the treaties.

The structure of Title III of the Draft (Articles 8 to 16) nevertheless raises some doubts. First of all, the inclusion of principles such as the primacy of Union law, loyal cooperation between the Union and the member states and the respect of national identity does not seem to be justified here. Admittedly, these principles are important, but they are general principles that do not deal specifically with competences. They could be more suitably placed in Title I of the Constitution (and in fact Article 1.2 already refers to the national identity of member states). Otherwise, Title III would have to make room for other principles (such as solidarity, integration, consistency, etc.) which also have an impact on the Union's competences.

Title III of the Draft could be streamlined in other respects. Article 10, in which the competences are classified, mentions the Union's competences in the fields of economic, foreign and security policy (in addition to exclusive, shared and complementary competences). But the competences in the economic, foreign and security fields can in no way be considered as "categories" of competences comparable to the others included in Article 10. They are rather sectors for which powers are attributed to the Union and in

respect of which it has to be decided into what category of competences (exclusive, shared or complementary) they fall. The proper discipline of these sectors, like all others, will then be established in Part II of the Constitution with all the specificities required. Therefore, the references in Article 10.3 and 10.4 to economic, foreign and security policy should be eliminated, as should those (on the same subjects) contained in Articles 13 and 14.

Analogous considerations hold true for the provisions of Article 12 regarding research, technological development and space (Article 12.5), as well as development cooperation and humanitarian aid (Article 12.6). It is important to repeat here that Part II of the Constitution will contain the specific provisions regulating the various sectors. Therefore, Title III, with its general provisions on competences, should only address the problem of bringing the various sectors under the three categories of competences. Thus it must be decided whether the sectors in question are to be included among shared competences, as their position in Article 12 seems to suggest, or whether it would be better to consider them as complementary competences because of the contents of the powers attributed to the Union.

Furthermore, a number of repetitions could be avoided. The principle of loyal cooperation (without prejudice to the comment made previously) is repeated in Articles 8.5, 9.4, 9.5 and 14. Analogously, the reference to specific provisions in Part II (to determine the scope of prerogatives in the various sectors) is first established in a general manner for all competences, and then repeated in the provisions relative to shared powers (Article 12.2) and complementary competences (Article 15.1). These specifications of the general principle are obviously not necessary. As for the single market, it will have to be decided whether it is an area of exclusive or shared competence; for the moment it is found in both categories.

The foregoing deals with provisions of Title III that can be eliminated. But the opposite can also be envisaged. For example, some provisions that appear in Title V of the Draft (which deals with Union acts) should be moved, at least partially, to Title III. This holds true for Article 28 on the division of executive powers between the Union and the member states, and Article 32 on the kind of act to adopt in conformity with the principle of proportionality. The Protocol on the application of the principles of subsidiarity and proportionality merits a discussion of its own.

As already mentioned, Article 9.2 of the Draft refers to a Protocol on the rules of application of the principles of subsidiarity and proportionality to be annexed to the Constitution. The same solution was adopted in Amsterdam, but it is worth reflecting on whether it should be maintained. The technique of annexing protocols may be necessary in some cases; thus, putting the European Union's Charter on Fundamental Rights into a special protocol

appears to be justified (see Article 5.1 of the Draft): incorporating the Charter's 50 articles directly into the constitutional text would throw it off balance (at least Part I). Furthermore, this may not be the right moment to undertake a revision of the Charter. But there do not seem to be analogous reasons for not including the rules of application of the principles of subsidiarity and proportionality in the body of the constitutional treaty. The Draft Protocol passed by the Praesidium is made up of nine clauses which could be compacted in number and scope. It should be relatively easy to incorporate them in Title III, thereby avoiding recourse to a protocol. It's hardly necessary to point out that the many protocols annexed to the treaties is one of the sources of complication of EU law.

All in all, Title III on the distribution of competences could be restructured and simplified around three groups of provisions: the first dedicated to the fundamental principles and relative rules of application, including the clause on flexibility; the second aimed at distinguishing the various categories of competences and listing the sectors that fall into each; the third relative to the mechanisms for control. The provisions of the Protocol on subsidiarity and proportionality could be channelled into this last group.

The fundamental principles and their rules of application

As already mentioned, the principles of conferral, subsidiarity, proportionality and flexibility are defined in the Praesidium's Draft in terms similar to those used in the existing treaties.

With regard to the principle of conferral, Article 8.2 adds that any competence not attributed to the Union remains with the member states. There is no specification like this in Article 5 TEC, but it is appropriate and was demanded by many. The same specification should be explicitly extended to implementing measures. In fact, Title III essentially regulates the Union's legislative powers, neglecting executive ones. It deals with the latter, to some extent, in Article 28 of the Draft under the title "implementing acts". But it would be better if this matter were covered in Title III because it is relevant to the division of competences between the Union and the member states. This is where it should be set down that the implementation of Union rules is up to the member states unless otherwise stated in the Constitution (obviously including Part II thereof).

A special provision on executive competences would also clarify other provisions of Title III of the Draft which could otherwise be misleading. Consider Article 10.1 which states that in the presence of an exclusive competence of the Union, only the Union can adopt "legally binding acts" in the relative sector; or Article 10.2 which, dealing with shared competences,

states that the member states can intervene only if the Union has not exercised its powers. It is evident that these expressions do not apply to implementing measures, which in principle remain a state competence. Possibly, when speaking of executive powers, a distinction could be made between those of a normative nature and those of an administrative nature: the latter would be reserved for the member states (with certain exceptions), the former shared by the Union and the member states and exercised in conformity with the criteria of subsidiarity and proportionality.

Moving on to the principle of subsidiarity, the definition found in Article 8.3 of the Draft is taken almost word for word from the current Article 5 TEC. In fact, the difficulty mentioned earlier to reconcile the criterion for insufficient state action with that for greater effectiveness through European action remains. On the other hand, the problem related to the fact that the principle is applicable only to non-exclusive competences has been solved, given that Article 11 of the Draft lists the competences of this kind. One could also ask whether the principle of subsidiarity applies to those competences that are made exclusive through exercise, that is, the shared competences that once exercised preclude subsequent state interventions (Article 10.2 of the Draft). The answer would seem to be affirmative, but it might be a good idea to state this explicitly. As concerns subsidiarity, the central problem remains that of control mechanisms, but this will be dealt with in a later section of this article.

The definition of the principle of proportionality is also almost identical to the current one (see Article 8.4 of the Draft and Article 5 TEC), with one addition. With respect to the Union's action, it is specified that its "scope and form" must not exceed the objectives pursued. This addition seems desirable but not sufficient, and this brings us to the basic question regarding the principle of proportionality.

As already mentioned, proportionality has always played a minor role, with the attention generally focused on subsidiarity. It may not be fair to speak of a "strange obsessiveness for subsidiarity", as someone at the Convention seems to have put it.[1] But even there, in the Convention, the principle of proportionality has been somewhat overlooked. In fact, apart from the definition in Article 8.4, there are no other provisions on the subject in the constitutional Treaty or the annexed protocol. For the rules of application, Article 9.3 refers to the protocol, which carries the words subsidiarity and proportionality in its title. But it is enough to glance at the clauses composing it to realise that they all refer to the principle of

[1] See: J. V. Louis, "La Convention et l'avenir de l'Union européenne", *Cahiers de droit europeen*, nos. 3-4, 2002, p. 239.

subsidiarity and not to proportionality.

Yet, this principle has considerable normative potential. Unlike the principle of subsidiarity, it applies to all European competences, even the exclusive ones. Furthermore, it delimits the powers with respect to the member states as well as with respect to any other parties (including, private persons). One could almost say that the principle of proportionality encompasses the principle of subsidiarity, in that it extends to subsidiarity both vertically and horizontally. In fact, the principle in question sets a parameter for legitimacy that is generally applicable. With respect to any measure, the first question is whether or not Union action is required; then, in case of an affirmative answer, the intensity of the measure to be adopted. The Union has a vast array of instruments for action, ranging from non-binding acts (soft law) to those having full legal effects. The principle of proportionality requires that the measures enacted are the least intrusive for the national legal orders and individual freedoms. Therefore, the adoption of a uniform European legislation is a last resort, since other solutions (such as legislation in principle, harmonisation of national legislations, mutual recognition) must be preferred.

It is surprising to see how little attention has been paid by the members of the Convention to the principle of proportionality. The draft Protocol presented by the Praesidium is actually a step backward with respect to that of Amsterdam, which contains a few provisions on the matter. Nor can the gap be filled by Article 32 of the Draft, first because that is not the right place to do so, and secondly because the provision goes nowhere close to dealing with all the problems linked to the principle of proportionality.

Finally, there is the principle of flexibility (Article 16 of the Draft), which must be considered one of the fundamental principles in the matter. This principle already exists in the current system (Article 308 TEC) and has been amply used. In some way it provides a constitutional basis for the theory of implicit powers, in derogation of the rigid application of the principle of conferral. It is to be assumed, however, that the progressive extension of competences explicitly attributed to the Union will make recourse to this instrument less frequent. Mention has been made already to what is new in Article 10 of the Draft compared to Article 308 TCE; in brief: the need to obtain the consent of the European Parliament (which is now called upon only to express an opinion); the prohibition to harmonise domestic laws when this is ruled out by the Constitution; the conferral to the national parliament of a controlling function (albeit defined in very vague terms). In principle, these changes are positive; they respond to the need to strengthen the safeguards vis-à-vis a competence of a residual nature that can be used only in exceptional cases.

The classification of competences

The provisions of Articles 10, 11, 12 and 15 introduce three significant novelties with respect to the present system. First, they divide the competences of the Union into three categories – exclusive, shared and complementary (this expression seems preferable to the term "supporting measures" used in the Draft); second, each category is defined in uniform terms and more precisely with respect to their effects on the competences of the member states; and finally, it provides a list of the sectors that fall into each of these categories. Exclusive and complementary competences are strictly limited to those listed in Articles 11 and 15, while the list of shared competences laid down in Article 12 is merely exemplificative.

The novelties contribute to an overall clarification of the system. In addition, the Praesidium offers a balanced solution to the contrasts between a rigid catalogue of powers and a system of flexible competences. In fact, the former model is followed for exclusive and complementary competences, the latter for shared competences. The difference seems to be justified. Exclusive competences totally exclude the exercise of state powers. On the other hand, complementary competences cannot harmonise national legislations. Thus, a precise list of the relative sectors of competence is useful in both cases. This does not hold true for shared competences, for which only an exemplificative catalogue has been drawn up. As a result, all powers that are not specifically attributed as exclusive or complementary fall into the general category of shared competences (Article 12.1 of the Draft). An evaluation of the sectors attributed to each category is beyond the scope of this article.

Control mechanisms

A further innovative change introduced by the Praesidium's Draft is the early warning procedure, by which national parliaments are involved in monitoring the application of the principle of subsidiarity. This novelty is quite remarkable. By giving national parliaments the faculty to intervene *iure proprio* in the Union's legislative procedures, it sidesteps the obstacle of their domestic constitutional systems. Not without reason: national parliaments are the first to be damaged in the event of a violation of subsidiarity and are therefore naturally interested in the principle being observed. Nevertheless, national parliaments can only express a reasoned opinion which obliges the Commission to re-examine its legislative proposal. But the Commission is free to confirm its proposal and if it then becomes a legislative act of the Union, the national parliaments have no autonomous right to contest its legality before the ECJ. In this regard, the Draft Protocol confirms that only member

states can act, "where appropriate at the request of their national parliaments". Finally, if rejected by the Commission, the criticism of the national parliaments can have an impact only if taken up by the respective governments during Council decision-making or through *ex post* judicial review.

In this perspective, the innovation seems to be incomplete or at least limited and partial. The way of getting around the filter of national legal orders works in the initial phase of the Union's legislative process, but stops immediately thereafter. The national parliaments revert to their institutional role of interlocutors and controllers of their national governments in accordance with the domestic constitutional system. Evidently, the concerns of the Working Group on Subsidiarity (not to lengthen or block Union procedures) as well as respect for a consolidated principle (of non-interference in state legal orders) made the Praesidium prefer a more prudent solution over more advanced ones. Thus, the last sentence of Article 9.2 of the Draft will have to be rewritten. It states that the Protocol will allow national parliaments to "ensure compliance with the principle of subsidiarity": in reality what they are granted is less.

The Praesidium has shown the same caution with regard to the role of the regions (and local authorities). Obviously, the regions, especially those with legislative competences, have a direct and immediate interest in the principle of subsidiarity being respected. But the new early warning mechanism foreseen for national parliaments does not extend to them. The regions may act only through the Committee of Regions, which is given the right to appeal to the ECJ for the legislative acts on which it has been consulted. Why can a similar faculty not be accorded national parliaments through the COSAC or, possibly, the new proposed Congress of Peoples?

In addition to the principle of subsidiarity, the Draft also puts national parliaments in charge of monitoring correct application of the principle of flexibility. It has already been mentioned though that there's some ambiguity in Article 16.2 of the Draft: according to the second part of the provision, the Commission "shall draw member states' national parliaments' attention to proposals based on this Article" (that is, Article 16); but in the first part of Article 16.2, the Commission is requested to inform national parliaments using "the procedure for monitoring the subsidiarity principle referred to in Article 9". How is this to be taken? Probably, in the sense that the early warning procedure provided for in Article 9 also applies to the principle of flexibility mentioned in Article 16. If this is the case, it should be stated more clearly.

That is as far as the innovations in the system of control of competences go. Yet, the principles of conferral and proportionality also merit attention. The same can be said for respect of the limits established for complementary

competences. Moreover, as seen, the discipline for control of the principle of flexibility is very partial.

Particularly surprising is the gap relative to the principle of proportionality. There is no reason for the control mechanisms foreseen for subsidiarity not to be extended to this principle. Indeed, national parliaments and regions are not the only ones interested in compliance with the principle of proportionality, so are private individuals and companies. Thus, the latter could be given the right to contest Union violations of the principle of proportionality directly (in derogation of the limits of the current Article 230 TEC). A "softer" solution could be to allow private parties to appeal in collective form through the Economic and Social Committee, as established for subsidiarity through the Committee of the Regions.

Conclusive considerations

In keeping with the approach prevailing in the Convention, the Draft presented by the Praesidium introduces a number of alterations to the current system of competences without, however, changing the fundamental lines. In particular, the Praesidium has decided to maintain elements of flexibility in the system, rejecting the idea of a rigid catalogue of Union competences and confirming the residual competence laid down in the current Article 308 TEC. An effort has also been made not to weigh down or alter the decision-making procedures and to avoid setting up new *ad hoc* bodies for monitoring compliance with the rules of competence. The real innovations are essentially two: classification of the Union's competences and the areas falling into each category; granting the national parliaments a role in the preliminary phase of the European legislative process for preventive control of compliance with the principle of subsidiarity.

Without affecting the fundamental choices of the Praesidium, a few additions and changes could be made to the provisions of the Draft as concerns the Union's competences. In particular and to recall only the key points made here: the structure of Title III could be reviewed, stripping it of provisions that are not pertinent and integrating it with others that are; the principle of proportionality should be better defined and special rules of application introduced; the special mechanisms set up for monitoring application of the principle of subsidiarity could usefully be extended to the principle of proportionality and, more generally, to the entire system of competences.