

NOTE

from :	Praesidium
to :	Convention
Subject :	Description of the current system for the delimitation of competence between the European Union and the Member States

Members of the Convention will find attached a note describing the current system for the allocation of competence between the European Union and the Member States.

**Description of the current system for the delimitation of competence
between the European Union and the Member States**

- I. The current system for the allocation of competence between the European Union and the Member States can be summarised as follows:

(A) LEGISLATIVE COMPETENCE¹

The European Union/European Community (EC) enjoys only those powers conferred on it by the Treaties (Article 5 of the TEC). Although in the original Treaties legislative competence was generally conferred upon the EC on the basis of objectives to be attained (Articles 2 and 3 of the TEC) and the means of doing so (functional method), successive revisions of the Treaties have replaced this method in certain areas by a precise definition of the action to be taken by the Community, in some instances accompanied by specific exclusions of competence (method of substantive allocation). That is why in certain areas the Union's legislative competence is defined both in terms of objectives and subjects.

Three types of legislative competence are conferred upon the Union/Community: exclusive, concurrent (or shared) and complementary, which may be defined as follows:

¹ For the purposes of this note, legislative competence refers to the adoption of legislative texts or the creation of legal obligations by the Institutions (which it is proposed to call second-level, "secondary legislation") based directly on the Treaties (first-level, "primary legislation").

- (a) *Exclusive competence*: areas in which the Union alone may adopt legislative rules. Any intervention by the Member States is in principle excluded. Member States may act only with the authorisation of the Institutions of the Union or where there is a lacuna needing to be filled.

The areas where the Community has exclusive competence are: common commercial policy, living marine resources in the zones covered by the Treaty, monetary policy for the twelve Member States in the euro area. To these areas must be added those which become areas of exclusive competence because the Community legislates extensively in the area concerned.

Specific mention must be made of the establishment and operation of the internal market. This is a type of functional competence for the harmonisation of legislation, a task which, as a matter of principle, can be carried out only by the Community. However, as long as the Community has not fully exercised that competence, Member States retain the capacity to legislate. Moreover, that competence may cover areas in which Member States retain legislative competence in any event. ¹

As regards the Treaty on European Union (TEU): only the setting up of joint bodies such as Europol or Eurojust may be regarded as falling within the exclusive competence of the Union given that this task, by its very nature, cannot be carried out by each Member State acting individually. ²

- (b) *Concurrent (or shared) competence*: areas in which Member States may legislate until such time and insofar as the Union/Community has not legislated. Once the Union/Community has legislated in a given area, Member States may no longer do so in the field of Community legislation.

¹ See in this connection Directive/93/7/EEC on the return of cultural objects unlawfully removed from the territory of a Member State. Although this is a measure covered by the internal market, it affects Member States' cultural policy, an area in which the EC does not have legislative competence.

² The same applies to the creation and setting up of joint bodies on the basis of the EC Treaty (e.g. Trade Mark Office).

The Union's legislative action in those areas is subject to compliance with the principles of subsidiarity (the Union/Community should take action only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States) and proportionality (any action by the Union/Community should not go beyond what is necessary to achieve the objectives of the Treaty). The intensity of the legislative action sometimes depends on the type of measure and the type of legal act provided for in the Treaties.

Most Union/Community powers fall within this category:

- TEC: citizenship; agriculture and fisheries; four freedoms (free movement of goods, persons, services and capital); visas; asylum and immigration; transport; competition; taxation; social policy; environment; consumer protection; health; trans-European networks (interoperability and standards); energy; civil protection; tourism.¹
- Title V of the TEU (common foreign and security policy)², with the exception of defence.
- Title VI of the TEU (police and judicial cooperation in criminal matters).³

(c) Complementary competence: areas in which the Union/Community confines itself to supplementing or supporting the action of the Member States, or to adopting measures of encouragement or coordination. The bulk of the power to adopt legislative rules in these areas remains in the hands of Member States.

¹ The extent of the powers conferred on the Community by the relevant chapters of the Treaty varies depending on the area.

² As well as providing for adoption by the Council of common actions and common positions, Title V provides for consultation, cooperation or coordination of Member States' action in certain areas.

³ Apart from the provisions relating to the setting up of joint bodies (see page 3, point (a)).

This category includes economic policy; employment; education; vocational training; culture; trans-European networks; industry; economic and social cohesion; research and development; development cooperation; defence (Title V of the TEU).

- (d) Member States' competence: This refers either to areas where the Treaties expressly exclude Union competence or expressly recognise the competence of Member States, areas in which the Treaty forbids the Union/Community to legislate, or, lastly, areas not referred to in the Treaty and therefore, as a result of the principle of allocation of powers, not within the competence of the EU/EC and which are still the competence of the Member States.

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Although competence is in principle allocated to the Community explicitly by the Treaties, the Court of Justice took the view that in some cases competence flows implicitly from the Treaty texts or their general structure. These are, in particular, cases in which competence is necessary to implement aims set by the Treaties, especially in the field of external relations.

(B) NON-LEGISLATIVE OR EXECUTIVE COMPETENCE¹

From a strictly legal point of view, in the Treaty system, the general rule is that Member States are competent to implement and apply legislation in accordance with their respective constitutional rules (in some cases these provide for implementation by constitutional entities), with due regard for the Treaties and subject to monitoring by the Commission, national courts and the Court of Justice². The Council and the Commission exercise such competence in a subsidiary capacity only.

- (a) *Implementation of legislative acts ("third-level" rules)*: is, generally speaking, a matter for Member States. Only if and insofar as the aims of the planned action cannot be adequately achieved by the Member States, or if it proves necessary to ensure uniform application of legislative measures throughout the Member States, will it be necessary for the Community to adopt regulations.³

¹ Non-legislative competence" means the adoption of normative and regulatory texts (which it is proposed to call "third-level") and the adoption of administrative, budgetary and individual, case-by-case, measures (which might be called "fourth-level").

² See Article 10 of the TEC, Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty of Amsterdam and Declaration No 43 annexed to the Final Act of the Amsterdam IGC relating to that Protocol.

³ In that case, the power of implementation by the Community of its legislative acts is in principle conferred by the Community legislator (namely the European Parliament and the Council in the case of codecision and the Council in other cases) on the Commission, assisted by a Committee made up of representatives of the Member States (Article 202 TEC). In fact, while Member States give up some of their implementing powers to the Commission, they exercise a certain degree of control by means of "comitology".

- (b) Administrative, material or budgetary implementing measures for Community acts ("fourth-level" rules): adoption of such measures is a matter for the Member States, which determine freely, in accordance with their constitutional and political framework, the proper bodies, procedures and conditions for ensuring the correct implementation of Community law. The Community may nevertheless intervene in the administrative implementation of Community acts where the Treaty or the Community legislator gives it the power to do so (e.g. competition, administration of certain Community programmes, etc.).

(C) CHECKING THE DELIMITATION OF COMPETENCE

There are currently two types of checks to ensure compliance with the delimitation of competence and the subsidiarity principle:

- (a) political control: the question whether the Treaties do or do not confer competence on the Union to act in a specific case and to what extent the subsidiarity principle is complied with depends to a large extent on the Community Institutions participating in the decision-making process. Each Institution must act in accordance with the powers allocated it. The governments of the Member States, national Parliaments and public opinion may also exercise such control to the extent that they control the positions adopted by their government representatives in the Council;

- (b) *judicial control*: by appeal to the Court of Justice or national courts, the national court being the ordinary community court. The control exercised by the Court of Justice is wide-ranging in the case of the EC Treaty, limited under Title VI of the TEU, and non-existent under Title V of the TEU.

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- II. The question of the delimitation of competence between the European Union and the Member States is at the centre of the political debate following some criticism to the effect that the delimitation is not precise enough and that the European Union has a tendency to legislate, either in areas in which it is not competent (thus encroaching on the competence of the Member States), or in areas in which it is not appropriate for it to do so, or in too detailed a manner. The delimitation is also said to lack clarity: the European citizen finds it difficult to understand how powers are divided between the EU and the Member States and has the impression that the EU intervenes in areas in which it should not do so and, conversely, does not intervene in areas in which action at European level is necessary.

To attempt to address these concerns, the Nice and Laeken Declarations on the future of the Union ask the Convention to look into the question of establishing a more precise delimitation of competence between the European Union and the Member States and checking compliance with that delimitation.

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