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COVER NOTE

from : Secretariat

to : Convention

Subject : Contribution from Senator Lamberto Dini, member of the Convention

The Secretary-General of the Convention has received the attached contribution from
Senator Lamberto Dini, member of the Convention.

The missions of the European Union
Contribution by Senator Lamberto Dini

1. It is right to define the shared objectives before determining how they can be achieved. Delimiting competences meets a need for clarity, for citizens to be close to the Union, and for efficient use of the sovereignty that has been pooled.

The prerequisite for every reflection is the definition of the logic on which “Community federalism” must be based, of the fundamental criterion which must govern the allocation of tasks between the Union and the Member States. A great challenge, not technical but constitutional, facing an area that is unprecedented in terms of size and different identities. Power, if it is to be effective but not oppressive, must be spread over many levels, according to the principles of federalism and subsidiarity, so as to create the conditions for an open political society in such a vast and heterogeneous area. At all events, the Union is different from any previous experience, including the classic case of the United States and that of Germany, which provides what is probably the best model in Europe’s recent history.

The starting point necessarily has to be the “minimal state”. In contrast with nation-states, the Union does not possess the “competence of competences”, in other words the right to decide which matters it is to be responsible for; nor does it have the autonomous authority to allocate powers between the different levels of government, since the Member States continue to be the arbiters of the Treaties. Sovereignty is not inherent in the Union but conferred to it by the Member States. Even in Germany, sovereignty is still formally detained by the Länder, although the situation has evolved in practice.

At present the Treaties do not contain a rule under which in general there would be a presumption that Member States were competent. Article 5 of the consolidated version of the Treaty Establishing the European Community states that “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein”. The principle of reserving powers to the Member States could, however, be formally expressed in the new Treaty, as it is in some federal constitutions.

2. The Union already possesses among its fundamental principles that of the “minimal state”, summarized in the concept of subsidiarity. Subsidiarity is the basic means of reconciling uniformity and diversity in a situation that is unique in terms of the area involved and the variety of cultures, economies and traditions it contains. It was John F. Kennedy who once said that Europe would be “strong because of its unity and free because of its diversity”. Within the Union there are forces tending to produce uniformity and others tending to produce diversity. On the one hand, the protection of fundamental rights imposes a single set of rules throughout the Community, on the other, competition, not only between firms but also between states and regions, suggests that uniformity is undesirable in some fields, such as taxation.

Deciding what is to be done in common and what falls within the sphere of the Member States is prevalently a political matter; by contrast, verifying the conformity of a measure or an action with respect to that judgement is a legal matter. What is best dealt with by the Union may also change over time. In this respect, it is sufficient to consider the environment, the prerogative of the Member States in the 1950s, or immigration, which only found a place in the Treaty of Maastricht, and even then a marginal one. The desirable relationship between uniformity and diversity can be effectively expressed in the formula “as much uniformity as necessary; as much diversity as possible”.

3. Various factors have contributed to an outright revolt, not only by Member States but also by local authorities, against the excessive interference of the Union. Consequently, the allocation of competences has become the key aspect of the reform. It is from these objections, raised in particular by the German Länder, that it is necessary to start out in order to arrive at a politically consistent and socially transparent order. The objections can be summarized as follows:

- a) the present definition of subsidiarity is not sufficient. Notoriously, it refers to objectives that “cannot be sufficiently achieved by the Member States” and that “can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community” (Article 5 of the EC Treaty). The wording, agreed with difficulty during the Maastricht Treaty negotiations, summarizes the duty not to interfere and the duty to supplement, as dialectic terms in the relationship between the Union and the Member States. It is intended as a rational guide in the choice of where to place power while avoiding excesses and gaps. The definition is sufficiently broad to leave scope for flexibility in the policies to be pursued. The Treaty of Amsterdam sought to clarify the content and interpretation of Article 5 in a

protocol. It would perhaps be possible to define the concept of subsidiarity better in the new Treaty, but it would be far from easy;

- b) the core competences of the Union are summarized in Article 3 of the EC Treaty. In referring to the various sectors (from transport to the environment), the text indicates different levels of intensity for common action, using terms such as “common policies”, “policies”, “measures”, “encouragement”, “promotion” and “contributions”.

This list should be replaced with a more rational formulation that would instead distinguish, along the lines of the note distributed by the Convention Presidency, between a very small number of competences allocated exclusively to the Union (e.g. the common commercial policy), competing competences in the majority of fields, where the action of the Union and that of the Member States would converge on an equal footing, and complementary competences, in which the Union would play a marginal role (e.g. culture and social security).

- c) in order to ensure the system is flexible, a mechanism is necessary whereby, without revising the Treaties, new competences can be added and others removed, possibly by reallocating them within the three-part division outlined above. There are periods in which the role of the central authority grows in importance with respect to that of the components of the federation and others in which the latter’s functions expand with respect to those of the centre. The direction of the movement depends on the needs of the moment and the effectiveness of the respective institutions. As things stand today, Article 308 of the EC Treaty allows the Union to invoke specific competences if this is necessary to achieve its objectives and the Treaties do not provide the necessary powers. This article has been much criticized, especially by the German Länder, but it has nonetheless permitted important progress to be made. An alternative formula is conceivable, whereby national governments would be able, possibly on the basis of unanimous decisions, to add or remove Union competences, after receiving the assent of the European Parliament and with the approval of the national parliaments.

- d) the problem of the allocation of competences has its roots in a twofold shortcoming that must be made good:
- on the one hand, the inefficiency of Community action in fields in which that of the individual Member States is nonetheless manifest, even if measured only with the yardstick provided by the definition of subsidiarity in Article 5 of the EC Treaty; foreign policy and defence policy are exemplary in this respect;
 - on the other hand, an excess of regulation and undue interference in sectors in which the Member States would be better placed to act.

The response to the first deficiency must be to bring the management of common matters closer to the federal model, as the representative of the Italian Government, the Honourable Gianfranco Fini, has already pointed out. This implies majority decision-making in the Council, and a role for the European Parliament and Court of Justice, together, for the sake of consistency, with the abolishment of the present pillar structure.

The second deficiency must be tackled by restoring transparency, rationality and responsibility to Community law-making. To achieve this, the Convention must transfer all the provisions of a constitutional nature into a new document, regardless of whether it is given the name of Constitution. It must identify and separate out all the aspects of an administrative and legislative nature currently contained in hundreds, probably thousands, of articles in treaties and protocols;

- e) the main challenge, in fact, does not lie so much in defining the matters for which the Union and the Member States are respectively competent as in delimiting the spheres for competing competences. This brings to the fore the problem of the institutional framework, which needs to be constructed in such a way that, where competences are shared, the Union has a power of overall guidance while the Member States enjoy more autonomy in the implementation of policies. This is already happening, for example, in the field of competition policy and is being invoked for the Community's structural and industrial policies. In order to achieve a rational allocation of legislative and administrative powers, it is necessary to return to the concept, discussed in vain in all the previous intergovernmental conferences, of a hierarchy of rules and hence of a definition of legislation, whose general nature distinguishes it from the activity of execution. Thus, the original spirit of directives, which should be the legislative act par excellence, has been partly lost because they contain

too many detailed provisions whose drafting would be better left to the Commission or the Member States;

- f) once the three-part division of competences and the different quality of Union intervention it implies have been clearly established, a mechanism introduced to ensure flexibility in the transfer of competences from one category to another, and a classification of rules (as constitutional provisions, laws and regulations) adopted matching the different forms of intervention, there is the problem of the institution that should verify compliance with the rules and principles, correct abuses of power and shortcomings. Checks already exist, ranging from the reports prepared by the Commission to accompany proposed interventions by the Union to the rulings of the Court of Justice. It will be necessary to avoid paralyzing procedures, to involve the Member States and to ensure uniform interpretations, which is why the Court of Justice must always have the last word. It would nonetheless be possible to have a different and quicker-to-respond institution, a mixed Commission in which the Member States would also participate, charged with passing prior judgement on the compliance of Union interventions with the division of competences.

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