

CONV 47/02

NOTE

from :	Praesidium
to :	Convention
Subject :	Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored

Members of the Convention will find attached a discussion paper on the above subject. This note, which further elaborates upon and replaces the note circulated to the Convention as CONV 17/02, takes account of the Convention's debates on 15 and 16 April.

DISCUSSION PAPER

Subject: **Delimitation of competence between the European Union and the Member States**
 – **Existing system, problems and avenues to be explored**

Summary

1. The Nice and Laeken European Councils requested that the delimitation of competence between the European Union and the Member States be examined in order to respond to criticism that the Union should take less action in certain areas and more in others. It was also pointed out that it is difficult for citizens to understand how such a delimitation is made, i.e. "who does what" within the European Union.
2. The note also aims at examining the problems raised with regard to the existing system of delimitation of legislative competence between the European Union and the Member States, while suggesting certain avenues to be explored to solve such problems (part II).

To assist the discussion, part I of the note describes the existing system of delimitation of competence and an annex describes in greater detail the scope of the Union's/Community's competence in relation to that of the Member States' in the various areas covered by the Treaties.

3. The existing system of delimitation of competence was established according to objectives to be achieved and means for achieving those objectives. In certain areas, the fields in which the Union may act are listed in some detail. In so doing, the system endeavours to reconcile the need for precision in delimiting competence with the need for flexibility in order to enable the

Union to adapt to new challenges and respond better to citizens' expectations. As the merits of such a system have been widely recognised, most of the criticisms made tend to relate to the system's "excesses" or to the need to clarify it further rather than the need for a thorough overhaul.

4. The main problems raised with regard to the system of delimiting competence and the avenues to be explored, as described in the note, may be summarised as follows:

(a) The system's lack of clarity

Certain provisions of the Treaties are complex and impenetrable and there are no provisions in the Treaties describing the principles governing the allocation of competence between the European Union and the Member States.

The note suggests that the Convention should examine in particular whether and how to:

- explain in the Treaties the principles governing the existing system of allocation of competence and in particular the principle of allocation of competence;
- further clarify the various types of competence and the areas covered by each type;
- further explain the Member States' competence and in particular, the general principle that Member States have legislative competence except in the cases where this has been allocated to the Union/Community.

(b) The lack of precision of certain provisions of the Treaty

According to some criticisms, some provisions of the Treaty are not sufficiently precise, in particular Articles 94, 95 and 308. At the same time, it is widely recognised that those are the provisions which have enabled the Union to develop dynamically. A minority has requested that the existing system be replaced by a "catalogue" of powers.

It is proposed that the Convention examine:

- possible clarification of the scope of Articles 94, 95 and 308 of the TEC;
- the possibility of laying down stricter rules governing recourse to Article 308;
- whether it is necessary to introduce clarification into other provisions;
- whether a "catalogue" of the Union's powers should be compiled.

(c) Failure to comply with the principles of subsidiarity and proportionality

Many believe that the principles of subsidiarity and proportionality are not always applied by the legislator, with political reasons or reasons of urgency taking precedence over observance of those principles.

The note proposes that the Convention examine whether and, if so, how the application of those principles could be stepped up by the Institutions participating in the legislative procedure.

(d) In some cases the powers of the Union do not match citizens' expectations

As a majority considers that citizens' expectations are one of the main criteria for deciding on the tasks to be carried out at Union level, the Laeken Declaration stresses that citizens want the Union to play a greater role in certain areas, while at the same time they find that the Union intervenes too much in other areas.

On the basis of this principle, the notes suggests avenues to be explored to examine whether and, if so, how to adapt the Union's powers.

(e) Insufficient checks to ensure compliance with the delimitation of competence

At present, political monitoring of compliance with the delimitation of competence is for the most part exercised by the Institutions of the Union. Legislative bodies at national level, in particular the national parliaments, exercise that monitoring only to a lesser degree.

As a broad majority of the members of the Convention call for such monitoring to be intensified, the note suggests avenues to be explored to strengthen political and/or judicial review of compliance with the delimitation of competence and the principle of subsidiarity, in particular by strengthening control by national parliaments and/or setting up an "ad hoc" monitoring mechanism.

INTRODUCTION

5. The question of the delimitation of competence between the European Union and the Member States has been placed at the centre of political debate as a result of claims 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, with the result that the European citizen finds it difficult to understand how powers are divided between the European Union (EU) and the Member States and has the impression either that the EU intervenes in areas where it should not or that it fails to intervene in areas where action at European level is necessary.
6. Seeking 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 a means of monitoring compliance with that delimitation.

I. THE CURRENT SYSTEM FOR THE DELIMITATION OF COMPETENCE

7. The current system for the allocation of competence between the European Union and the Member States ¹ can be summarised as follows (paragraphs 8 to 12):

¹ Annex I to this note contains a more detailed description of the extent of the Union's powers in each of the areas covered by the different types of competence referred to above.

(A) LEGISLATIVE COMPETENCE¹

8. The European Union/European Community (EC) enjoys only those powers conferred on it (Article 5 of the TEC): the Union/Community acts within the limits of the powers conferred upon it and of the objectives assigned to it by the Treaties. 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 attaining them (functional method), successive revisions of the Treaties have replaced this method in certain cases by a substantive allocation of competence consisting of defining the precise actions to be taken by the Community, in some instances accompanied by specific exclusions of competence (method of substantive allocation). Thus in certain areas the Union's legislative competence is defined both in terms of objectives and subjects.²
9. Three types of legislative competence are conferred upon the Union/Community: exclusive, concurrent (or shared) and complementary. In the absence of any definition in the Treaty, these may be defined as follows:

- (a) Exclusive competence: the Union/Community enjoys exclusive competence when it alone is able to adopt rules in an area. Any intervention by the Member States is excluded unless it has the authorisation of the Community Institutions or where there is a lacuna needing to be filled.

The areas where the Union has exclusive competence are: common commercial policy (to the extent existing prior to the entry into force of the Treaty of Nice), living marine resources in the zones covered by the Treaty; establishment of the Common Customs Tariff; 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 on the basis of its concurrent competence. task which,

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 as a matter of

¹ For the purposes of this note, legislative competence refers to the adoption of legislative texts in the literal sense 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").

² Cf. Article 137 of the TEC, social policy; Article 29 of the TEU, police and judicial cooperation in criminal matters.

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 When a harmonisation measure has been adopted, the Member States may retain national provisions justified by certain requirements.

As regards the Treaty on European Union, only the section of Title VI relating to 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: this covers areas in which Member States may legislate until such time and insofar as the Union/Community has not exercised its powers by adopting rules, which it may do as of right. Once the Union/Community has legislated in such an area, Member States may no longer legislate in the field covered by this legislation, except to the extent necessary to implement it, and the legislative rules adopted have precedence over those of the Member States. Community competence thus becomes exclusive through its exercise.

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 can therefore be better achieved at Community level) 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.³ Most Union/Community powers fall within this category:

- TEC: citizenship; agriculture and fisheries; the four freedoms (goods, people, services and capital); visas; asylum and immigration; transport; competition; taxation; social policy; environment; consumer protection; trans-European networks (interoperability

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).

³ This note does not refer to the issue of legal instruments of the Union and the hierarchy of norms which, although linked to the question of delimitation of competence, is the subject of a separate discussion paper.

- and standards); economic and social cohesion; energy; civil protection; tourism.¹
- Title V of the TEU (common foreign and security policy), with the exception of defence.²
- Title VI of the TEU (police and judicial cooperation in criminal matters).³

(c) Complementary competence: this covers areas in which the competence of the Union/Community is limited to supplementing or supporting the action of the Member States, adopting measures of encouragement or coordinating the action of the Member States. The bulk of the power to adopt legislative rules in these areas remains in the hands of the Member States and intervention by the Community cannot have the effect of excluding intervention by them.

This category includes economic policy; employment; customs cooperation; education, vocational training and youth; culture; public health; trans-European networks (except for interoperability and standards); industry; research and development; development cooperation; common defence policy (Title V of the TEU).

(d) Member States' competence: This covers areas not referred to in the Treaty and therefore, as a result of the principle of conferred powers, not within the competence of the EU/EC and remaining within that of the Member States, areas where the Treaties expressly exclude Union competence or expressly recognise the competence of Member States, and areas in which the Treaty forbids the Union/Community to legislate.⁴

* * *

¹ The extent of the powers conferred on the Community by the relevant chapters of the Treaty varies depending on the area (see Annex). The Treaty does not contain a specific legal basis covering the fields of energy, civil protection and tourism. The Community can therefore act only on the basis of Article 308 of the TEC.

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 (see page 4, point (a)).

³ Apart from the provisions relating to the setting up of joint bodies.

⁴ In certain cases the Treaty limits the exercise of Member States' competence by imposing obligations upon them (e.g. the prohibition of discrimination on grounds of nationality, the prohibition on granting State aids incompatible with the common market, etc;).

10. Although the competence of the Community is in principle allocated to it explicitly by the Treaties, the Court of Justice has taken the view that in some cases competence flows implicitly from the Treaty texts or their general structure. These tend to be 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

11. In the Treaty system, the general rule is that competence to implement and apply legislation in accordance with their respective constitutional rules (in some cases these provide for implementation by constitutional entities) rests with the Member States, with due regard for the Treaties and subject to monitoring by the Commission, national courts and the Court of Justice.² The Community exercises such competence in a subsidiary capacity only.³

(1) Implementation of legislative acts ("third-level" rules):

This concerns the drafting of normative rules of general application, the purpose of which is to apply legislative acts.

In accordance with the general principle referred to above, the implementation of Community legislative acts 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 regulations⁴ in accordance with the basic legislative act.

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 Article 10 of the TEC; Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaty of Amsterdam (cf. Selected Instruments, Book I, Volume I, p. 567) and Declaration No 43 annexed to the Final Act of the Amsterdam IGC relating to that Protocol.

³ Articles 202 and 211 of the Treaty.

⁴ In that case, the power of implementation by the Community of its legislative acts is, with the exception of specific cases, 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, who have the right to inspect the implementing decisions which the Commission must take, and which they will then be under an obligation to implement (Article 202 TEC).

(2) Administrative, material or budgetary implementation of Community acts ("fourth-level" rules):

This concerns administrative implementing measures, individual decisions, sanctions to ensure compliance with Community law, checks, etc. The adoption of such measures is a matter for Member States, which determine, in accordance with their constitutional and political framework, the proper bodies, procedures and conditions for ensuring the correct implementation of Community law. The Union/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

12. There are currently two types of checks to ensure compliance with the delimitation of competence and the subsidiarity principle:
 - (a) political control: the question of whether the Treaties do or do not confer on the Union competence to act in a specific case and to what extent the subsidiarity principle is being complied with rests to a large extent with the Community Institutions participating in the legislative process. Each Institution must act in accordance with the powers allocated to it. The governments of the Member States, national parliaments and public opinion also exercise such a 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 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.

II. PROBLEMS AND AVENUES TO BE EXPLORED

13. The current system of delimitation of competence, the result of successive reforms of the Treaty which have accompanied the development of the Community, attempts to reconcile two requirements: on the one hand, the need for precise delimitation and, on the other, the need for a degree of flexibility.

14. The "functional" method of allocating powers laid down in the original Treaties which implies the existence of provisions granting the Community "functional" powers to meet its objectives (particularly Articles 94, 95 and 308 TEC), although less precise than the method of substantive allocation, nonetheless allows for some adjustment of the Union's powers to the new challenges which are emerging as the objectives of the Treaties are attained, without the need for recourse to the cumbersome procedure for revising the Treaties. Through successive reforms of the Treaties, the system of delimitation by objectives has been supplemented by delimitation by subject (either by means of a positive list of subjects, or by specific exclusions from competence) in areas where the need for greater precision has been felt. This has particularly been the case in areas where new powers have been allocated to the Community or in areas where qualified majority voting has replaced unanimity.
15. Any consideration of the problem of delimiting competence must take account of this need to find a balance between the demand for some flexibility and the demand for precision in delimitation. Every constitutional system which establishes a federal system or a system with a strong regional component tries to strike this balance in one way or another, but there is no "ideal" system for the delimitation of competence. In all existing constitutional texts – even in those based on a catalogue of powers – grey areas exist and constitutional courts are called on to resolve questions relating to the resultant conflicts of competence.
16. That said, it must be stressed that the majority of the criticisms made about the current system of allocating competence refer to the "excesses" of the system, to the need for it to be clarified, or to the need to make some adjustments to the allocation of competence, rather than to the need to change the system itself. The benefits of the system, which enables the Union to adapt to new challenges and to meet the expectations of citizens more effectively, have been widely acknowledged.

17. With non-legislative powers largely remaining with the Member States, the criticisms relate particularly to legislative powers, both as to their delimitation and as to monitoring compliance with it. As a result, let us examine only those problems raised by the delimitation of legislative powers between the European Union and its Member States, while suggesting paths to be explored to respond to such problems.^{1 2}

(a) The system's lack of clarity

18. One of the problems most often raised in relation to the system of delimiting legislative powers is its lack of clarity. Several factors might be cited in support of this criticism: the incorporation at the time of successive amendments to the Treaties of provisions drafted in a fashion which is often complex, as a result of political compromises; the lack of clarity in the drafting of certain provisions; the fact that neither the system for delimiting powers, nor the principles governing such a delimitation, nor the types of competence available to the Union and the areas covered by each type of competence are clearly defined by the Treaty; finally, the new open methods of coordination, which set objectives without taking account of the allocation of powers, contribute to the system's lack of clarity and give the impression that the Community's powers are very broad where this is not in fact the case. Thus misunderstandings and false ideas about the extent of the Union's legislative competence often exist because of the system's lack of clarity. Cases in point are culture, health and education, areas mentioned by several members of the Convention during the debates on 15 and 16 April. Although these are areas in which the Community's activities are limited to complementing the actions of the Member States, particularly by means of support programmes financed through the Community budget, and in which the Treaties expressly forbid the Community from legislating, the erroneous notion exists that the Community is competent to legislate in these areas.
19. Means must therefore be found to make the delimitation of competence clearer.

¹ However, some clarifications and explanations could be made in this area.

² The question of the simplification of the Treaties which, in the same way as the question of the Union's legal instruments, is linked to that of the delimitation of competence, will not be examined in this note.

20. Avenues to be explored:

- (1) *what clarification needs to be incorporated into the Treaties to explain better the principles regulating the current system of allocating powers, and in particular the principle of allocated powers, according to which the Union/Community cannot act in areas in which no power has been conferred on it, since these areas come under the powers of the Member States, who exercise those powers in accordance with their constitutional systems. During the discussions on 15 and 16 April, many members of the Convention argued that this principle, which is already implicit in the Treaty, should be made explicit.*
- (2) *whether and, if so, how to clarify concepts relating to the different types of competence available to the Union, and the areas coming under each of those types.*
- (3) *whether and, if so, how to spell out in the Treaty the powers which remain with the Member States. During the debates on 15 and 16 April, some speakers supported the idea of an Article of the Treaty listing the cases of explicit exclusion from Union/Community competence or the areas covered by the legislative competence of the Member States. However, a majority seemed to prefer the idea of recalling in the Treaty the general principle whereby legislative competence rests with the Member States except where it is conferred on the Union/Community. They felt that such a list risked setting in stone the areas of competence of the Member States thereby running counter to the need for flexibility to adapt to new realities.*
- (4) *examine the possibility of including in the Treaty a reference to the open method of coordination while establishing its limits.*

(b) The lack of precision of certain provisions of the EC Treaty and particularly its "functional" provisions (Articles 94, 95 and 308 of the TEC)

21. Some believe that the lack of precise boundaries in some provisions allocating competence has the result that the Union acts in areas where it is not competent, thus infringing the powers of the Member States. The question arises in particular in regard to Articles 94, 95 and 308 of the EC Treaty ¹, but could also be examined in relation to other provisions of the Treaties.
22. Regarding Articles 94, 95 and 308, these provisions have been criticised by some on the grounds that, given their extremely broad sweep, they allow the Community to exceed the competences allocated by the Treaties. Certain members of the Convention noted that, while it may well be true that given their functional character, these provisions by their nature have a broad scope and may affect areas generally reserved to the Member States, these are the provisions which have made possible the dynamic development of the Community and the achievement of certain key policies of the Treaty such as the internal market. A large majority of those who spoke on the matter argued for keeping the evolution of competences flexible and dynamic and so for retaining those provisions. In addition, use of them is limited, as the Court of Justice has pointed out. ² Some clarification and explanation of the use of these provisions is therefore possible.

¹ Articles 94 and 95 of the TEC allow the Community to issue directives or adopt measures for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market or which have as their object the establishment and functioning of the internal market. Article 308 of the TEC enables the Community (by unanimous decision of the Council) to adopt the measures necessary to attain the objectives of the Community in the course of the operation of the common market if the Treaty has laid down such objectives but has not provided the powers necessary to attain them

² The Court has pointed out that Article 95 of the TEC merely confers on the Community legislator general competence to regulate the internal market, and that any measure adopted on the basis of that provision must effectively be aimed at improving the conditions for the establishment and functioning of the internal market. As regards recourse to Article 308 of the TEC, the Court has noted, in particular, that that article may not be used to extend Community competence beyond the framework established by the Treaties, or to harmonise Member States' legislation in fields in which the Community is prohibited from so doing by Treaty provisions conferring competence on the Community (e.g. Article 129, employment; Article 151 (culture, etc.)).

23. As regards Article 308 of the TEC, a minority has called for its deletion. If such a course of action were to be considered, it would be necessary to weigh up the risk of paralysing the Community's activities by preventing it from adapting it to new realities and acting in certain cases where, to attain a Community objective laid down by the Treaty, but for which the Treaty did not provide all the necessary means, the Community would consider (with the Council acting unanimously as laid down in Article 308) that a measure needed to be adopted.
24. It has also been suggested that the architecture of the Treaties be changed radically, abandoning the current method of functional allocation ¹, as one which would enable the Community to take powers not attributed to it by the Treaty, and replacing it with a system exclusively delimiting subjects, by drawing up a "catalogue" of powers. ² The risks and problems created by such a change were expounded at length by several members of the Convention during the debates on 15 and 16 April.
25. Avenues to be explored:
- 1) *possible clarification of the scope of Articles 94, 95 and 308 of the TEC, particularly on the basis of the clarifications provided by the case-law of the Court of Justice;*
 - 2) *the possibility of making recourse to Article 308 more difficult, while at the same time creating in the Treaty specific legal bases for areas where use is often made of this provision ³;*
 - 3) *whether and, if so, to what extent clarifications should be introduced into the provisions assigning powers to the European Union in certain areas. More practically, this would involve examining whether and in which areas greater use should be made of delimitation by subject or of specific exclusions.*

¹ It should be noted that the functional system existing at present is not a "purely" functional system, but is accompanied in some cases by delimitation by subjects.

² As suggested by Mr Teufel and others during the debates on 15 and 16 April.

³ Following the example of the Treaty of Nice in respect of economic, financial and technical cooperation with third countries.

- 4) *whether it is necessary to compile a "catalogue" of Union competences and to examine in particular to what extent such a catalogue would really mean a more precise delimitation of competences between the Union and the Member States, and the consequences of drawing up such a catalogue with regard to adaptation of Union competences and the development of the European Union.*

(c) Failure to comply with the principles of subsidiarity and proportionality

26. Many believe that the principle of subsidiarity, introduced by the Maastricht Treaty as a mechanism to regulate the implementation of the Community's non-exclusive powers, has not produced the expected results. Since the application of the principle of subsidiarity involves political assessment by the Institutions on a case-by-case basis, political considerations, or urgency, may on occasion have overridden compliance with the principle. This is said to have made the Community intervene at times in areas where the objectives of the intended action could have been sufficiently attained by the Member States.¹ The same applies to the principle of proportionality. Some consider that in some cases the Community's action has gone beyond what is necessary for achieving the objective in question.

27. Avenues to be explored:

- 1) *The question arises of whether clarifications and more detailed criteria should be introduced for the application of the principles of subsidiarity and proportionality, and whether the means to ensure compliance with those principles should be strengthened, in particular with regard to the Institutions taking part in the legislative procedure, namely the European Parliament, the Council and the Commission.*

¹ The Directive of 29 March 1999 relating to the keeping of wild animals in zoos (OJ L 94, 9.4.1999, pp. 24 to 26) has been instanced here.

- 2) *Regarding the introduction of more detailed criteria, the question is whether or not the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the Amsterdam Treaty, is sufficient. Regarding checks on compliance with these principles, see paragraph (e).*

(d) In some cases the powers of the Union do not match citizens' expectations

28. It was clear that a large majority in the debates on 15 and 16 April considered that citizens' expectations and the principle of subsidiarity should be the main criteria for decisions on the tasks to be carried out at Union level. Some members considered that other principles such as solidarity should also be taken into account. On similar lines, the Laeken Declaration stresses that citizens want the Union to play a greater role in certain areas, while at the same time they find that the Union intervenes too much in others.
29. On this basis, the main question is to what extent the powers of the Union should be adjusted so that it focuses, and intensifies its action, on its essential tasks, and in particular on certain fields which are of most importance to the citizen, in areas in which only the Union can act, given the cross-border aspects of the action, or in areas in which the Union can act more effectively than Member States individually.
30. Avenues to be explored:
- 1) *whether there are areas in which the Union is not competent but it would be desirable for it to act or whether there are areas in which it should take more action;*
 - 2) *whether there are areas referred to in the Treaties where action would be more effective if it were taken at Member State level;*
 - 3) *whether there are areas covered by the complementary or shared competence of the Union which should be covered by exclusive competence and vice versa.*

(e) Insufficient monitoring to ensure respect for the delimitation of competence

31. While noting that clarity and precision in the delimitation of competence between the Union and Member States could be improved, several members of the Convention considered that the best guarantee for ensuring compliance with that delimitation would be to establish an effective monitoring mechanism. Furthermore, as there is no "ideal" system for distributing powers, there will always be conflicts of competence. Accordingly, stepping up monitoring to ensure compliance with the delimitation of competence, including the principle of subsidiarity, is essential.
32. At present, political control of compliance with the delimitation of competence and the principle of subsidiarity is for the most part exercised by the Institutions of the Union participating in the legislative process. Legislative bodies at national level exercise such a control to a lesser degree. Each national parliament only exercises such control to the extent that it is able to control or influence the position which will be adopted by its Government within the Community Institutions. As this control is carried out during the legislative procedure within the Union ("ex ante"), there is no mechanism for monitoring compliance with the principle of subsidiarity in the implementation and application of the Union's legislative acts ("ex post").
33. Judicial control is a matter for the Court of Justice and national courts.
34. Avenues to be explored:

The main question to be examined here is whether monitoring, political, and/or judicial, of compliance with the delimitation of competence and the subsidiarity principle should be strengthened (and if so how).

- 1) *This would firstly involve examining whether and how the existing controls should be strengthened. As regards political controls, the possibility could be examined of giving national parliaments a greater role in checking compliance with these principles, either by their participation in the legislative procedure within the Union itself, or by enhancing their participation and control when positions are established by their Government.*¹

One could also consider strengthening of control by the Court of Justice of the conformity with these principles of the legislative acts adopted, particularly by giving national parliaments the power to bring an action for annulment before the Court in the event of violation of the principles of subsidiarity and allocation of competence. Some have also raised the possibility of giving this power to constitutional bodies with legislative powers in the Member States or to the Committee of the Regions.

- 2) *As several members of the Convention asked on 15 and 16 April, one should consider whether such strengthening should include the creation of a new mechanism for monitoring compliance with the principle of delimitation of competence and, if so, the political or judicial nature of such a mechanism and its composition and role. Several formulae have been put forward in this context ("subsidiarity" committee of the European Parliament and Council, establishment of an "ad hoc" body made up of national parliament; inclusion of representatives of national parliaments in Member States' delegations in the Council; a "mixed" European Parliament; mechanism for cooperation between the Court of Justice and national constitutional courts; new "ad hoc" Court, etc.).*
- 3) *The possibility could be examined of setting up a mechanism to monitor compliance with the principles of delimitation of competence and subsidiarity when Member States implement legislative acts adopted by the Union.*²

¹ See in this respect the Protocol on the role of national parliaments in the European Union (selected instruments taken from the Treaties, Book I, Volume I, p. 375).

² Annex II hereto contains more detailed questions concerning the various points.

EXTENT OF THE COMPETENCE OF THE UNION/COMMUNITY IN THE VARIOUS AREAS REFERRED TO BY THE TREATIES

A. TREATY ON EUROPEAN UNION

(a) Common foreign and security policy (CFSP) (Title V of the TEU)

The second indent of Article 2 of the TEU states that the Union shall set itself the objective "to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the progressive framing of a common defence policy, which might lead to a common defence, in accordance with the provisions of Article 17".

The competence of the Union in the CFSP area is potentially very wide: it may cover "all areas of foreign and security policy". The objectives of this policy are also very general: to safeguard the common values, fundamental interests, independence and integrity of the Union; to strengthen the security of the Union; to preserve peace and strengthen international security; to promote international cooperation; to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms. Title V does not contain "substantive" provisions limiting the scope of the Union's action.

The powers of the Union in the CFSP area are "concurrent" with those of the Member States, except in the case of defence policy (the Petersberg tasks), where they are complementary. These powers are exercised selectively, on a case-by-case basis, either by the Union or jointly by the Union and the Member States.

(b) Police and judicial cooperation in criminal matters (Title VI of the TEU)

The Union's powers to act in this area are defined both in terms of objectives and in terms of the areas in which the EU may act.

The Union's objective is to provide citizens with a high level of safety within an area of freedom, security and justice, by preventing and combating racism and xenophobia (first paragraph of Article 29 of the TEU). The areas in which the Union may act are limited: police cooperation (directly and through Europol), judicial cooperation on criminal matters and the approximation of rules on criminal matters in the Member States (second paragraph of Article 29). Competence has been expressly reserved to the Member States for the maintenance of law and order and the safeguarding of internal security (Article 33 of the TEU).

All the areas of Title VI come under concurrent competence, except for the creation and establishment of joint bodies such as Europol and Eurojust, where the Union has functional exclusive competence, given that by its nature it cannot be exercised by each Member State acting individually.

B. TREATY ESTABLISHING THE EUROPEAN COMMUNITY

(a) Areas coming under the exclusive competence of the Community

- Common commercial policy (in its extent before Nice);
- Biological marine resources of the sea in the areas covered by the Treaty;
- Monetary policy for the twelve Member States belonging to the euro area;
- Areas where the Community has legislated copiously on the basis of its concurrent powers. To give an example, the conclusion of international agreements concerning certain aspects of transport, or in areas for which the Community has achieved complete harmonisation of the arrangements for access to self-employed activity.
- Special case: the internal market ("functional" exclusive competence, where the Member States retain competence in some areas) (see(b)).

(b) Areas coming under the concurrent (or shared) competence of the Community and of the Member States

Most TEC areas fall into this category. The "potential" competence of the Community varies in scope depending on the area in question.

1. Citizenship of the Union

The Community may adopt provisions to facilitate and adopt measures for the exercise by the citizens of the Union of certain rights recognised by the Treaty: the right to move and reside within the territory of the Member States; the right to vote and to stand as a candidate in elections to the European Parliament and in municipal elections; the right to petition and the right to apply to the Ombudsman.

The Community may also adopt provisions to add to these rights (to be adopted by the Member States in accordance with their respective constitutional requirements).

2. Agriculture and fisheries (except the part coming under exclusive competence)

The objectives of the Community's action are very broad: to increase agricultural productivity by promoting technical progress, and to ensure a fair standard of living for the agricultural community; to stabilise markets; to assure the availability of supplies, and to ensure that supplies reach consumers at reasonable prices. These objectives are to be attained particularly by the establishment of a common organisation of agricultural markets.

The Community has very extensive competence in these areas.

3. The four freedoms (goods, persons, services and capital)

This involves the adoption by the Community of measures to abolish obstacles to the free movement of goods, employed and self-employed persons, services and capital within the Community.

Potentially this involves very broad, one might almost say unlimited, competence (it has been noted that the concept of what is necessary for the internal market could be interpreted very broadly), which has been exercised to a considerable degree by the Community. To guarantee these four freedoms, the Community has legislated copiously in the area of the freedom of establishment and the freedom to provide services; company law; banks, insurance and property; the free movement of employed persons; public contracts; the mutual recognition of qualifications; the coordination of social security systems, etc.

4. Visas, asylum and immigration

The Community may adopt a range of measures in order progressively to establish an area of freedom, security and justice. The content of these measures is defined in rather detailed fashion in the Treaty ("substantive" allocation). The measures are:

- to ensure the free movement of persons, as well as some flanking measures concerning external border controls, asylum and immigration,
- other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries,
- measures in the area of judicial cooperation in civil matters,
- measures to encourage and strengthen administrative cooperation.

Some of these measures may only contain minimum requirements, with the Member States remaining able to go beyond those requirements.

5. Transport

The aim of this policy is basically to establish an internal market for transport. To attain this objective, the following measures may be adopted:

- common rules applicable to international transport;
- conditions under which non-resident carriers may operate transport services within a Member State;
- measures to improve transport safety;
- any other appropriate provision.

The Community's competence is very extensive ("any other appropriate provision" is a very broad concept).

6. Competition

The competition system in the TEC rests on the fundamental principle of banning agreements, the abuse of a dominant position and aid granted by States (unless their compatibility with the common market can be established). The Council draws up Regulations or Directives on the application of this principle.

When an agreement or abuse of a dominant position does not affect trade between States, and when its effects are felt only in the territory of one State, then only the national law of that country applies.

This is an area in which the Community exercises its competence, particularly as regards controls, in a fairly intense fashion.

7. Taxation

Taxation is not mentioned as a Community policy or action in Article 3 of the EC Treaty. The Community's competence in this area is defined in a relatively narrow way, mainly connected with the implementation of the internal market. Some provisions of the Treaty concerning other areas also refer to taxation (e.g. the environment). In the area of indirect taxation, the Community has competence in relation to the harmonisation of rates of VAT and customs duties. In the area of direct taxation, competence falls in the main to the Member States.

8. Social policy

The aims of this policy are the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To attain these objectives the Community may adopt minimum requirements in a number of areas listed in the Treaty (substantive delimitation):

- improvement of the working environment,
- working conditions,
- the information and consultation of workers,
- the integration of persons excluded from the labour market,
- equality between men and women.

There are explicit exclusions from Community action in certain areas (pay, the right of association, the right to strike and the right to impose lock-outs). Member States may always introduce more stringent measures.

9. The environment

The Community may adopt minimum requirements in this area, contributing to the pursuit of the following objectives:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilisation of natural resources;
- promoting measures at international level to deal with regional or worldwide environmental problems.

Community competence in this area is relatively broad. Member States may always introduce more stringent measures.

10. Consumer protection

The Community contributes to the objective of promoting the interests of consumers and ensuring a high level of consumer protection by:

- measures in the context of the internal market;
- measures which support and supplement the consumer protection policy pursued by Member States.

The measures adopted by the Community may only contain minimum requirements. Member States may introduce more stringent measures.

11. Trans-European networks (interoperability and standards)

Very small area where the Community's competence is therefore relatively limited. The Community contributes to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructure, by action to ensure the interoperability of networks, particularly in the field of harmonisation of technical standards.

12. Economic and social cohesion

The Community's action is intended to strengthen its economic and social cohesion by reducing the gaps between the levels of development of different regions by means of the structural funds (EAGGF (Guidance), European Social Fund, European Regional Development Fund) and the Cohesion Fund (the environment and trans-European networks in the transport infrastructure context).

13. Energy, civil protection and tourism

There are no specific provisions in the Treaty concerning these areas. Since Article 3, however, provides that the Community's activities shall include "measures" in these spheres, the Community has adopted some very limited measures on the basis of Article 308 of the TEC. As regards energy, certain provisions of the EC Treaty on other matters refer to it (e.g., the trans-European networks).

(c) Fields in which the Member States have exclusive legislative competence and the Union merely supports their action (complementary competence)

These are fields in which the Member States have exclusive competence to legislate, and the Community has no power to oblige them to alter their legislation.

1. Economic policy

The Community's action in this field seeks in particular to coordinate Member States' economic policies by adopting resolutions on the broad lines of Member States' economic policies and to monitor developments in the budgetary situation and public indebtedness in the Member States.

The conduct of Member States' economic policies remains in their hands.

2. Employment

The Community contributes to the achievement of a high level of employment by encouraging cooperation between Member States and, if necessary, supplementing their action. Member States remain competent in the field of employment. The Community can set up a coordinated employment strategy of which Member States take account in their employment policies. To support the implementation of that strategy, the Community can adopt incentive actions to promote cooperation on the part of the Member States and support their action. Harmonisation by the Community is excluded.

3. Customs cooperation

The Community can adopt measures to strengthen customs cooperation among Member States.

4. Education, vocational training and youth

The purpose of this policy is to contribute to the development of the highest possible level of knowledge through wide access to education and the implementation of a policy of initial and continuous vocational training for workers. Member States remain fully responsible for the organisation and content of their education and vocational training systems and for their cultural and linguistic diversity, while the Community restricts itself to supporting and supplementing Member States' actions. There is no possibility of any harmonisation.

5. Culture

The Community can implement incentive actions to support and supplement the cultural activities of the Member States in accordance with their national and regional diversity, while highlighting the common cultural heritage. There is no possibility of any harmonisation.

6. Public health

The Community's action, which supplements and supports national policies in this field, concerns the improvement of public health and the prevention of human diseases and infections. There is no possibility of any harmonisation. The organisation and supply of health services are matters expressly reserved to Member States.

7. The trans-European networks (excluding the interoperability of networks and technical standards)

The Community's action contributes to the establishment and the development of trans-European networks in the transport, telecommunications and energy infrastructure sectors through:

- the establishment of a body of guidelines covering the objectives, priorities and broad lines of action in the field of trans-European networks;
- support for projects of common interest supported by the Member States and defined within the framework of those common guidelines.

8. Industry

The aim of action in this field is to help ensure that the conditions necessary for the competitiveness of Community industry are created by means of specific measures intended to support the action of the Member States. In general those measures take the form of programmes financed by the Community budget and must not cause any distortions of competition.

9. Research and technological development (RTD)

The aim of Community action in this field is to strengthen Community industry's scientific and technological bases and encourage the development of its international competitiveness, at the same time promoting research projects deemed necessary under other chapters of the Treaty.

In pursuing those objectives, the Community takes a series of actions supplementing actions taken in the Member States and in particular sets up a framework programme embodying all RTD actions and implemented by specific programmes.

10. Development cooperation

Community policy in this field is complementary to those of the Member States, and in particular is aimed at the economic and social development of developing countries through the adoption of measures that may take the form of multiannual programmes.

(d) Matters within the exclusive competence of the Member States

These matters are:

1. fields that are not within the competence of the Union and consequently remain the competence of Member States, e.g., the internal organisation of States, national identity, national military structure, national public administration, etc.;
2. fields expressly reserved to the Member States by the Treaty ¹:
 - public order and public security;
 - the enforcement of criminal law and the administration of justice;
 - pay, the right of association, the rights to strike and to lock out;
 - the organisation and the supply of health services and medical care;
 - rules governing the system of property ownership;
3. fields in which the Treaty forbids the EC to legislate: education, vocational training, culture, health and employment.

¹ The Treaty, furthermore, grants Member States various derogations from the four freedoms of movement on grounds of public order, public safety or other considerations of general interest listed in the relevant provisions.