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from :	Secretariat
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Subject :	<b>Contribution from a member of the Convention, Mr Hannes Farnleitner: Division of competences</b>

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The Secretary-General of the Convention has received the attached contribution from  
Mr Hannes Farnleitner, member of the Convention.

# **The delimitation of competence between the European Union and its Member States**

Contribution from Hannes Farnleitner

Member of the Convention

In the Declarations of Nice and Laeken on the Future of the European Union we were asked to prepare a concept for a better and more precise delimitation of competences between the European Union and its Member States, reflecting the principle of subsidiarity. In doing so, special emphasis should be placed on the aims of improving **transparency**, clarifying the definition of the **subsidiarity and proportionality principle** as well as strengthening the **protection against transgressions of competence**. Moreover, the individual spheres of competence should be reviewed as regards their content and updated, if necessary. Apart from a clear **commitment to the sovereignty of competence of the Member States** – the starting point and guiding principle of a future delimitation of competence should in any event continue to be the “principle of allocated powers” according to which the Union/Community merely has the powers conferred upon it by the Treaties.

## **I Categorizing the types of competence**

The individual competence provisions contained in the Treaties were created at different times and under different political conditions; this is why they vary considerably in their set-up. Very broad competences conferred with a view to the objectives to be attained can be found next to very precise and substantive competences defining the concrete action to be taken.

A redefinition of the types of competence should therefore aim at making the delimitation of competence - sometimes hardly comprehensible to citizens -, clearer, more readable and better understandable.

A distinction should be made between the following **three types of competence**:

- **Exclusive competences of the Union/Community,**
- **competences shared between the Union/Community and the Member States**
- **Member States' competences .**

The following **fundamental principles** should apply:

All powers conferred on the Union pursuant to the principle of allocation of competence, should be **expressly assigned** to one of these competence types in **primary law**.

All areas not assigned to the Community/Union are **Member States' competences**. The **general assumption of competence in favour of the Member States** should be expressly enshrined in primary law.

Concerning the individual types of competences the following should apply:

- **Exclusive competence of the Union/Community**

These areas are **completely within the sphere of competence of the Union/Community**, the Member States may not – as it has been the case so far – act autonomously unless expressly authorised to do so by the Union/Community. Exclusive competences could in particular include the following areas: common commercial policy including the common customs tariff, monetary policy, protection of biological resources of the sea, internal organisational and procedural law.

- **Shared competence**

**Both the Member States and the Union/Community** may take action in these fields.

In these areas, both the Member States and the Union/Community have comprehensive powers of legislation. However, as far as legal instruments exist at Community level the Member States must not impair these instruments by taking autonomous or contractual measures. The subsidiarity principle is of special relevance with regard to shared competences. The Union/Community may act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States. The following areas may, among others, be regarded as shared competences: free movement of goods, persons, services and capital, internal market, agriculture, visa, asylum and immigration, transport, competition, tax law and environmental issues.

▪ **Member States' competence**

Some of the **Member States's competences** should **expressly** be mentioned. In current discussions, reference is made, among others, to the following areas: land use planning, animal protection, nature preservation, housing policy or activities of a general economic interest at local level (local water supply and local transport infrastructure), tourism, safeguarding public broadcasting systems with a specific cultural and educational mandate, promoting minorities and their languages on radio and television, promoting the diversity of the press, constitutional issues such as the internal organisation of Member States and definition of their internal/federal structures including self-administration, national administrative and judicial structures).

Moreover, in some areas the **main responsibility lies with the Member States** while the Union/Community may only **support** and **assist their activities**. In such cases, each side is required to take into consideration the activities for the other. Examples include such areas as education, vocational training and youth, culture, health, industry, research and technological development.

In some of these areas, primary law strictly **prohibits** any harmonisation of the laws and regulations of the Member States by means of Community law. Areas concerned include culture, education, vocational training and youth or measures to promote the health sector.

Finally, in the case of some **Member States competences** it makes sense for the Union/Community to take measures geared towards **coordinating national policies**. The Union/Community is, however, not entitled to adopt binding legal acts. Examples could include employment and labour market policies, combating poverty, old-age pension schemes, innovation and entrepreneurial initiative as well as the information society.

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The principle of parallel internal and external competences derived from the Court of Justice's case-law, should be expressly laid down in the Treaty.

Categorizing the types of competence should be paralleled by simplifying the Community's instruments of action and making it clear that the principle of subsidiarity applies. This would not only entail an increase of the rule of law and transparency as regards the activities of the Union/Community but also a clearer delimitation of competence between the various levels.

## **II. Principles of competence and limitations to exercising such competence**

The **legislative sovereignty of competence ("Kompetenz-Kompetenz")**, which applies to European Law as a whole, is essential for preserving the Member States' sovereignty and must therefore continue to be their exclusive right ("Masters of the Treaties"). Any modification of the competence provisions requires their consent.

The **principle of allocation of competence** should continue to be the centrepiece governing the delimitation of competence between the Community/Union and the Member States. The current legal provisions should be complemented by the explicit assumption that - in case of doubt - the competence shall lie with the Member States.

The **principle of subsidiarity** is of central relevance in areas not covered by the exclusive competence of the Union/Community since it constitutes a necessary corrective to competence

provisions which are often based on objectives to be achieved and ensures that decisions take into account the needs of citizens in the best possible manner. Despite the Protocol on the Application of the Principles of Subsidiarity and Proportionality, this fundamental restriction to the exercise of competence is still rather vague, a fact which should be remedied as far as possible, and it should be made sufficiently clear to those applying this provision that its application is subject to the Court of Justice. In order to do so, both a more precise definition of the subsidiarity principle that is geared towards the EU citizen and a more specific review mechanism are required (see item III). More account of the principle of subsidiarity should also be taken when choosing legal instruments. It would be useful to apply this principle not only with regard to the question “whether” Union/Community activities are admissible but also as regards the question “how” the Union should act.

The **proportionality principle** will also play a crucial role in a future European order of competence as it is a major instrument of protection against abuse of competence.

### **III. Effective supervision of compliance with the principle of subsidiarity**

Under Article 230 of the EC Treaty privileged institutions entitled to introduce legal action may institute actions for annulment against an act *after its entry into force*, inter alia, on grounds of lack of competence. In order to ensure that the principle of subsidiarity will increasingly be taken into account when exercising Community/Union competence in the future, a mechanism to be used prior to the entry into force of an act, should be created. However it should neither unduly delay the legislative process nor jeopardise a uniform jurisdiction.

In order to monitor the principles governing competence provisions and the restrictions regarding their exercise, the Treaty should provide for an additional procedure before the Court of Justice in order to check the compliance with the delimitation of competence *prior to the entry into force* of a legal provision (see the possibility of obtaining an opinion from the Court now provided for in Article 300 para. 6 of the EC Treaty with regard to international agreements). The use of an emergency procedure would prevent unreasonable delays. The national parliaments, the Committee of the Regions as well as regions given separate legislative powers by national Constitutions of

Member States, should be entitled to bring such actions. The European **Court of Justice** should in any event remain the competent institution for considering “actions of competence” prior to the entry into force of a legal provision in order to ensure a **uniform jurisdiction**.

#### **IV. Reforming Articles 95 and 308 of the EC Treaty**

In order to ensure the full establishment and functioning of the internal market and a dynamic development of the EU, Articles 95 allowing for the approximation of Member States’ provisions which affect the establishment of the internal market, and Art. 308 designed to round off the EC Treaty, shall be maintained.

When categorising the Community’s system of competence and making it more precise, efforts should also be made to **relieve the strain on these provisions** by establishing Community competences in certain areas (e.g. energy, intellectual property). However, it seems impossible to cover in advance **each and every** concrete case that may require legislative action.

Nevertheless, the Treaty should try to **specify** the scope of application of **Art. 95 and 308 apply** in order to ensure an appropriate delimitation. The review mechanism proposed under item III should also apply to these Articles.

In accordance with the Court’s ruling on the Tobacco Advertising Directive, **Article 95 of the EC Treaty** should be “geared towards” projects that are **primarily and directly** aimed at and indispensable for implementing and completing the internal market.

**Article 308 of the EC Treaty** should not be abolished. It is necessary for cases where a legal basis is neither provided by a concrete individual competence provision nor by the internal market clause enshrined in Article 95 of the EC Treaty, but where the Member States nevertheless think that Community action is required. They should not be forced into acting outside the Community framework.

The **requirement that a unanimous decision** must be taken in the Council for exercising the competence conferred by Article 308 of the EC Treaty, guarantees a **high degree of protection** against misuse. It should be stressed, however, that this Article does not allow for circumventing or watering down other competence provisions contained in the Treaties nor does it put into question the “Kompetenz-Kompetenz” of the Member States. A **reform of Article 308 of the EC Treaty** aimed at making its application subject to less restrictive and **more democratically legitimised requirements for taking decisions** and at underlining its **exceptional character** and explicitly defining its **limited sphere of application**, could comprise the following elements:

- Involving the European Parliament and the Committee of the Regions as well as the Economic and Social Committee in the decision-making process: “(...) the Council shall, acting unanimously **in accordance with the procedure referred to in Article 251 of the Treaty**, on a proposal from the Commission and after **consulting the Committee of the Regions** and the **Economic and Social Committee**, take the appropriate measures.”
- Relieving the strain on 308 of the EC Treaty by creating specific basic legal provisions for areas where it has so far been primarily used (e.g. energy, intellectual property).
- Making it clear in the wording of the Treaty that Article 308 allows for Community action only if this “should prove necessary to attain the objectives emanating from this Treaty” (instead of the current wording: “to attain, in the course of the operation of the common market, one of the objectives of the Community”).
- Making it clear in the text of the Treaty that Article 308 does not provide a legal basis for extending Community powers beyond the scope of the entirety of Treaty provisions. It should thus be expressly pointed out in conformity with the Court of Justice’s case-law, that this Article **does not create a “Kompetenz-Kompetenz”** in favour of the Union/Community. “This Article cannot serve as a legal basis for enacting provisions which given their substance and with regard



to their consequences, might lead to amending this Treaty without complying with the procedure provided for doing so.”

The idea of transforming Article 308 of the EC Treaty into a kind of **evolutionary clause**, allowing to retransfer powers to the Member States, seems interesting at first sight. However, upon closer examination, it becomes evident, that it is precisely such a measure that would question the sovereignty of competence of the Member States. The possibility of rescinding specific individual authorisations on the basis of Article 308 of the EC Treaty - or a similar provision in a future European Constitution – would turn this article into a provision amending the Treaty, which is not the case under the present legal situation. This would call into question the existing concept of the Member States as “Masters of the Treaties”.