

EUROPESE CONVENTIE

SECRETARIAAT

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BEGELEIDENDE NOTA

van: het secretariaat

aan: de Conventie

Betreft: Bijdrage van Dr. Teija Tiilikainen, lid van de Conventie

De secretaris-generaal van de Conventie heeft van Dr. Teija Tiilikainen, lid van de Conventie, de bijdrage ontvangen die in bijlage dezes staat.

THE COMPETENCES OF THE EUROPEAN UNION

Contribution from Dr. Teija Tiilikainen

Dynamism as the starting point for the division of competences:

The overriding purpose of European integration is to increase the Member States' ability to respond to the challenges presented by the changing structures of world economy and politics. The world is in a continuous process of change and for that reason, the dynamic character of the European integration is one of the greatest advantages it offers to the Member States. It is, therefore, not expedient to try to lock the division of competences between the EU and Member States, for instance, with the means of an exhaustive catalogue of competences. Dynamism – and the capacity to contribute to the Member States' adaptability to changes in their political and economic environment – provides the force of integration also in the future.

Dynamism adopted as the starting point for determining the division of competences should by no means hamper either the *clarification of this division in the constitutive Treaties* or the strengthening of the *control system* it is vested with. A more comprehensible system of competences – and one that improves the implementation of the principle of subsidiarity in practice – must be the goal of these revisions. A third element to be addressed as an important part of this revision deals with the *instruments* that the EU employs in exercising its competences.

Even if the ongoing revision process were to focus on the structural characteristics of the division of competences in the EU, it could also take into consideration the most urgent amendment needs acknowledged in the EU's tasks. Security, in a very broad sense, encompassing eg. the fight against terrorism and organised crime as well as food safety, is

one of the most pivotal fields in which the EU's capacities must be improved. This also corresponds, to a large extent, with the citizens' expectations in most Member States. External action is another field in which the cohesive use of the Union's competences must be increased in order to efficiently fulfil the functions assigned to the EU. But, as a whole, the ongoing revision of competences should place main focus on *how* the EU exerts the competences it is attributed to instead of re-defining *what* these competences are.

The character of the EU's powers:

The EU's competences are by nature *competences attributed* to the Union by its Member States. This shall also serve as the starting point for the present revision. The basic character of the EU's competences is closely linked with the way of defining sovereignty (eg. in terms of 'Kompetenz-Kompetenz') in the EU. In the present circumstances, the transfer of sovereignty to the EU would result in insurmountable challenges to the EU in terms of democratic accountability and external capacity. The character of the EU's competences, as competences derived from the Member States, shall consequently be retained. This also implies that the constitutive treaties shall only prescribe the competences – exclusive or shared – assigned to the EU whereas the competences of the Member States shall – in the form of general competences – be left intact.

According to the current interpretation of the Treaties, the EU is, in addition to the powers explicitly conferred to it, entitled – on the basis of its objectives – to certain implied powers and that has injected dynamism into the system. This source of dynamism should not be subdued. The same applies to the system of additional powers explicitly adopted in the Treaties (art. 95 and 308) although the use of the system must be subject to continuous control in order to avoid its abuse.

The clarification of the division of competences in the constitutive Treaties:

The division of competences shall be made more comprehensible, in part, by reinforcing the systematic characteristics of political powers in the EU and, in part, by creating an efficient machinery to control the division of competences and its guiding principles.

The systematic character of the EU's powers shall be increased by making a more concrete distinction between *legislative powers* and *executive powers* in the EU. This distinction could, furthermore, contribute to the clarification of the division of powers among EU institutions.

Dividing legislative powers in the EU system into

- the exclusive powers of the EU
- powers shared by the EU and the Member States
- powers supplementing or coordinating that of the Member States

corresponds adequately to the current needs of political control and regulation. Basing the explicit formulation of the EU's competences directly on competences instead of its objectives would already improve the comprehensibility of the EU system. The aforementioned framework for the EU's powers could provide the starting point for the presentation of the division of powers. The framework very clearly indicates the very few cases in which the exclusive powers of the EU are applied.

The *simplification of the EU's instruments*, providing another means of clarification, should take place in close connection with the aforementioned categories of competences.

The whole political system would become more predictable and, consequently, comprehensible, if the choice of legislative instrument reflected more closely the type of competence exercised on a given occasion. It should also be examined to what extent the stipulation of these various legislative instruments could be based on identical models of decision-making concerning each type of instrument.

The control of the division of competences:

Another possibility to clarify the system is to reinforce the control of the application of the division of competences. It seems evident that the present decentralised control – exercised by each EU institution – is not sufficient. The principle of subsidiarity must be provided with a coherent mode of application in each case. A centralised system to monitor compliance with the principle of subsidiarity would also increase the transparency of its application.

As to the institutional solutions to effect the aforementioned monitoring, the choice is between political and judicial monitoring. Another issue to be addressed concerns determining the most expedient phase for this intervention in the legislative process.

Political monitoring could contribute favourably to the democratic structures of the EU. Some form of political control would be – by nature – more open and transparent than that of a court. A political organization of monitoring could be made more representative with respect to the different levels of decision-making reflected by the principle of subsidiarity and would therefore be likely to gain a more legitimate position. Last but not least, the monitoring of the application subsidiarity is based upon a political consideration of the appropriate level of action. This forms an important argument in favour of a political mechanism.

The virtues of a judicial organ stem from the objectivity and impartiality of these organs vis-à-vis the legislative actors of the EU. Judicial monitoring could, in this case, take place before the adoption of a legal action. The heaviest argument against judicial monitoring stems from the apparent character of this monitoring based upon the consideration of the political appropriateness of the application of subsidiarity.

The risks of monitoring by a new political organ lie in the likelihood in which this would slow down and complicate the legislative processes. There seems to be fairly sound arguments in favour of political monitoring of the compliance with the principle of subsidiarity prior to the final adoption of a legal act, provided that this can be effected in a manner that does not furthermore complicate the institutional structure.

The material competences of the EU:

The revision of the division of competences should mainly focus on the way in which the EU exerts the competences – exclusive or shared – attributed to it rather than on the material contents on these competences. One could, however, try to identify those fields of competences where the need for adjustment is most apparent.

Security, understood in a broad sense, is one of the fields in which advantages derived from reinforcing the EU's role seem to be most uncontroversial. Reinforcing the EU's capacity to respond to the changing threats to human security should be carefully studied. One applicable instrument is provided with the furtherance of the area of freedom, security and justice.

The EU's external relations seems to be a field in which the Union's ability to effectively carry out the capacities attributed to it are severely hampered by the current institutional divisions. The pillar structure of the EU leads to a situation where both the bases of the

Union's competences and the instruments used are dispersed in various parts of the constitutive Treaties. The lack of unity can also be noticed in the EU's decision-making and representation systems relating to external policies. The EU must improve the coherence of utilising its external capacities if it is to achieve a more effective international role. For increasing the coherence of the EU's international action and to take in full use those external capacities that the Union is already provided with we should examine different options, including modification of the existing pillar structure. Another institutional improvement logically connected with the aforementioned suggestion, is that the European Communities and the EU be turned into one single legal personality.
