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BEGELEIDENDE NOTA

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Betreft: Bijdrage van de heer Vytenis Povilas Andriukaitis, lid van de Conventie:
"The division of competences between the EU and the Members States"

De secretaris-generaal van de Conventie heeft van de heer Vytenis Povilas Andriukaitis, lid van de Conventie, de bijdrage ontvangen die in bijlage dezes staat.

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Division of Competence between the EU and the Member States

Division of competence between subjects of constitutional law is one of the main issues in the theory of constitutional law, for that reason it should be adequately treated in the future Constitution of the European Union - the Constitutional Treaty of the European Union.

A clearer division of competence between EU institutions and the Member States should also be seen as one of the priority and most complicated tasks set in the Laeken Declaration. The treatment of the issue in the future Constitution of the European Union will predetermine the functions and activities of the European Union in the near future.

What needs to be emphasised is that addressing the challenge of more precise definition of EU and Member State competencies and division of competence between them, a vertical division of competence is meant. It is also noteworthy that a vertical division of competence arrangement can strongly affect a horizontal division of competence on both national and EU levels. In this context, note must be taken of the fact that the situation of today is rather a consequence than an imposed reality. That is of critical importance to realise when it gets to giving some competence areas back to EU Member States. The latter proposal meets with some scepticism since it is obvious that certain areas have fallen under EU competence not in an artificial manner, they arise from aspiring to achieve certain common goals and bearing in mind that regulation goals can be reached more effectively on the Union scale than on the scale of each State.

As for the vertical division of competence, the competence to adopt legislation rather than administrative instruments is implied. Four competencies of the EU, reflected in the Constitutional Treaty, should be identified and listed in a systemic way: exclusive competence, shared competence, additional competence, and co-ordination (promotion) of co-operation in certain areas. "Negative" competence must also be born in mind, i.e. neither the European Union nor the Member States may take decisions in some areas (for example, framework provisions of the Treaty establishing the European Community on free movement of goods and capital, on freedom of establishment, competition law). And the general principle, underpinning the functioning of the EU, stipulating the right of the EU to act only in those areas which are granted to it by the Constitutional Treaty should be retained.

Another question to be discussed should be whether certain rules for assigning the kinds of secondary legislation (regulations, directives, decisions, etc.) to certain types of competence should be established. For example, when acting within a certain competence, regulations should be adopted, while in case of a shared competence, it should be directives or other legal acts of that level, and in still other cases non-binding measures may be sufficient.

One more essential issue is merging Pillar I, II and III and the consequent expansion of the Community method for Pillar II and III. Once such a decision is taken, and once the European Union is granted a legal personality, a question will be put as to the vertical division of competence between the European Union and the Member States (e.g. the common foreign and security policy, which is of a particularly importance). The issues that should fall within pillar II and III should be

clearly determined (e.g. decisions on common defence or on sanctions in respect of third countries, etc.), and what is left should be assigned to the shared competence of the EU and the Member States.

The Constitutional Treaty should very clearly stipulate the principles according to which competence is divided. They should not, however, reiterate the currently effective provisions of the Treaties. If the Constitutional Treaty specified detailed norms concerning the division of competence, negative consequences would be unavoidable: (1) the goal of simplifying the Treaties set in the Laeken Declaration would not be accomplished; (2) due to the complexity of the procedure for amending the Constitutional Treaty, amendments to such norms would be impeded, and expedient response to the dynamics of EU activities would be prevented, and (3) the provisions of the effective treaties would have to be abolished. Anyway, the adoption of the Constitutional Treaty will call for the establishment of its relationship with the founding Treaties. In this respect, a discussion on the proposal to introduce a new type of EU legislation - "organic laws" should be held for the currently effective treaties to become that type of legislation. The Constitutional Treaty would be an act of supreme power, while organic laws would have superiority over all the other *acquis*. Organic laws would be adopted at the Council by a special qualified majority under the co-decision procedure.

Article 308 of the Treaty establishing the European Community should not be abolished in order for the Council to be able to take necessary measures on the basis of unanimity in case that is needed for accomplishing Community goals, authority over which is not stipulated in this Treaty, in the area of the functioning of the common market. The same applies to the provisions of Article 95 of the Treaty.

Exclusive Competence

Two approaches are possible in view of the definition and specification of exclusive competence.

The first approach aims at clear final listing of the areas of exclusive competence of the EU, e.g. common commercial policy, economic and monetary union, fisheries policy, etc.). In this context, attention should be drawn to the fact that some are of an opinion that quite a few areas related to the building of the common market should be assigned to exclusive competence of the EU, and regulation in these areas should be based on regulations because when EU Member States are late with the enforcement of the adopted directives, the very process of building and consolidation of the internal market is hindered. However, a large number of instruments related to the building and consolidation of the internal market have already been adopted. On the other hand, essentially, those are the areas that may have national as well as transnational features therefore this proposal should be assessed with great caution.

The other option is to leave this matter for the European Court of Justice, as is the case now.

Each of the two options has advantages and weaknesses. If the limits of exclusive competence of the EU were clearly defined, in a certain respect, legal clarity would be ensured, and there would be no danger of the EU "taking over" new areas under its exclusive control. On the other hand, though, such a system would be less dynamic and would offer less freedom of action in a rapidly changing environment.

Proposals meaning that the Constitutional Treaty should clearly define the areas of exclusive competence of the Member States are under consideration too. Such proposals should be viewed critically, as they would restrict the Member States' freedom of action. These are proposals of doubtful quality from the point of view of a state's sovereignty and national constitutional autonomy.

Shared Competence

There are two possible options of tackling the challenges from this perspective. The first is to have a clear list of identified areas where the EU and Member States should share their competence. The other option is to set general principles meeting which the question of whether the EU may take action in certain cases, or the power of decision should stay with the Member States could be answered. Two issues have to be taken into account in relation to the above. First, the majority of areas that are outside the scope of exclusive EU competence, in essence, can have both transnational as well as national aspects. In this case it all depends on what goals are pursued by each instrument. Second, experience shows that the situation in a modern world is changing dynamically. Therefore a precise catalogue of competencies may not be the most reasonable thing to do since that would limit flexibility and possibility to choose the best instruments for each particular case. Thus the focus is on proper provision and effective implementation of the principles of subsidiarity and proportionality. It is important to ensure that at this point of time all the EU institutions involved in decision-making should assess the proposed initiatives in the light of these principles. The European Commission usually gives a possibility to all the interested parties, before submitting a particular initiative, to offer its comment on the issue. At this stage national parliaments could already be actively engaged by enjoying their right to express their views on such initiatives referring to the principles of subsidiarity/proportionality. Moreover, in order to ensure stronger need to enforce these principles, the Committee on subsidiarity/proportionality could be set up and authorised to evaluate the projects submitted in the light of the said principles. Bearing in mind that the European Parliament is elected by direct vote, the way described above should be seen as the most proper way to ensure the "political" scrutiny over the application of these principles. However this type of control, as performed by national parliaments, may be exercised in the same way as it is done now, i.e. acting according to internal procedures through national governments, which take decisions at the Council. The judicial scrutiny over the principles is ensured by the European Court of Justice. With this in view, the following question is to be answered: whether the Court should have a specialised division for investigating this type of cases, on the other hand though, there is no certainty that the number of such cases will justify the decision to have such a division.

The issue of division of competence is fundamentally the issue of adopting legal acts. As to the implementation of EU secondary legislation, in view of the principle of subsidiarity, the enforcement of the *acquis* in the areas of shared competence should stay with the Member States. At the same time, the executive powers of EU institutions should be more clearly described.

EU actions implying instruments of a recommendation character should be stipulated in other areas where the EU has additional competence or may simply co-ordinate certain actions. For that reason, certain areas should be clearly named as the areas where the EU is not given authority to adopt instruments of a mandatory character.