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aan: de Conventie

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Betreft: Bijdrage van de heer Elmar Brok, lid van de Conventie:  
"De bevoegdheden van de Europese Unie"

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De secretaris-generaal van de Conventie heeft van de heer Elmar Brok, lid van de Conventie, de bijdrage ontvangen die in bijlage dezes staat.

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## **Contribution by Mr Elmar Brok, Member of the Convention**

### **The Competences of the European Union:**

#### **Why We Need Comprehensive Competence Lists in the future EU Constitution to Replace the Complex Legal Bases Currently Scattered Throughout the Treaties**

##### **1. The crucial importance of the competence issue**

Next to the institutional power issues, the most important issue to be solved by the Convention in drafting a Constitution is – according to the Laeken Declaration – the appropriate division of competences in Europe. The citizens want to know: “Who does what in Europe?”. The Constitution of the European Union must, in its Part One, give a very clear answer to this question. The results produced by the Convention in this respect will decide whether the European Union will not only function, but also gain the respect and the confidence of the Member States and the citizens on which it is based.

##### **2. The current situation: complexity as a result of history**

Currently, Union and Community competences are scattered throughout the Treaties and cover, in a quite unsystematic way, hundreds of provisions and paragraphs. The different natures of these competences – exclusive, shared or supporting – are nowhere defined or explained, but only emerge after intensive (and often very controversial) legal analysis of each individual provision, very often only with the help of the case-law of the Court of Justice.

This makes the Treaties very long and barely readable texts, in particular from the citizens’ perspective. For decision-makers as well as for economic operators, it very often creates considerable legal uncertainty about the scope of Union competences in a given area and about the extent of the competences of the Member States. From this also result considerable problems regarding the application of the important principle of subsidiarity which, according to Article 5(2) EC, applies “in areas which do not fall in its [= the Community’s] exclusive competence”; unfortunately, it is not made clear in the Treaties which competences actually do fall within such exclusive competence.

The very unsystematic order as well as the usually extremely complex wording of the Treaties' competence provisions (also called "legal bases") are the result of particular historic situations at the moment of the Treaty (amendment) negotiations, which in the past followed the traditional intergovernmental method. The most important reason for the lack of a logical scheme and a simple, transparent wording is however procedural: originally, unanimity in the Council had been the rule with regard to most legal bases in the Treaties; only step by step, majority voting and co-decision by the European Parliament were introduced. This step-by-step introduction of a modern legislative procedure has not yet been paralleled by a simplification of the legal bases themselves, probably for lack of time and political impetus during past intergovernmental conferences. A good example for this is the internal market competence which today is spread over more than seven Treaty provisions<sup>1</sup>, even though their conditions and procedures are essentially the same (qualified majority voting; codecision).

### 3. "Competences lists" are desirable and feasible

If we want to establish a Constitution of the European Union which is both understandable and a source of identification for the European citizens, the situation described above cannot be allowed to continue. Clearly, the better approach would be to have comprehensive lists of competences, grouped systematically into three categories: exclusive, shared and supporting competences. Models for such competence lists can be found in Constitutions around the world, for example in the U.S. Constitution<sup>2</sup>, in the German Basic Law<sup>3</sup> and in the Spanish Constitution<sup>4</sup>.

Is it possible to bring all existing competences of the European Union/the European Communities into the form of lists of competences as known in other Constitutions? Of course, it is never easy to simplify legal texts which have a long (and most of the times very successful) history. And it is admittedly not an easy task to apply the technique of constitutional drafting – which requires clear and concise wording with the potential to last for several decades – to wording which is the result of several intergovernmental conferences and of the efforts of diplomats, civil servants and lawyers of the respective delegations.

The attached **Preliminary Lists of Union Competences** – established with the help of legal experts from the Centre for European Law at the University of Passau – prove that the establishment of

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<sup>1</sup> Cf. Articles 40; 46(2); 47(1); 47(2); 55 in conjunction with 46(2), 47(1) or 47(2); 57(2); 95 EC. Following simplification of procedures and legal instruments, the internal-market related legal bases in Article 42, 45(2), 93, 94 EC could be added to this list.

<sup>2</sup> Section 8 of the U.S. Constitution of 17 September 1787.

<sup>3</sup> Articles 73-75 of the German Basic Law of 23 May 1949.

<sup>4</sup> Articles 148 and 149 of the Spanish Constitution of 27 December 1978.

constitutional lists of exclusive, shared and supporting competences is very well feasible and could lead to very desirable results. These competence lists are the result of a systematic analysis of the entire *acquis*. They are meant to cover *all* competences as they exist at the moment.

The establishment of these competence lists is based on the following six presumptions, resulting in particular from the deliberations in Convention Working Groups “Legal Personality”, “Simplification”, “Charter” and “Freedom, Security and Justice”:

- i. The current duality between Union and Communities will be replaced by **a single legal personality of the Union**. This will also lead to the application, as a rule, of the Community method to what is today the “third pillar”.
- ii. The competences of the Union will, as a general rule, be exercised according to **a single legislative procedure**, the co-decision procedure. Exceptions to this rule will have to be laid down in specific provisions.
- iii. The competences of the Union will be exercised through **a single set of legal instruments**, including Union laws, Union framework laws, Union decisions, Union recommendations and Union opinions. The choice between these legal instruments shall be governed by the principle of subsidiarity and in particular by the principle of proportionality. This would also cover the very few exceptional cases where the *acquis* currently prescribes a specific form of legal instrument to be used<sup>1</sup>.
- iv. The competences of the Union will be grouped into **3 categories of competences: exclusive competences, shared competences and supporting competences**. In areas of supporting competence, no full harmonisation of the laws and regulations of Member States shall be allowed, even though the use of all legal instruments (including legislation) must remain possible. General definitions of these competence categories in the Constitution will reduce the need for determining for each legal base the extent of the Union’s competence.

The **general objectives of the Union** will be summarised in (a) general provisions in the Title “Definition and Objectives of **the** Union” of the Constitution and (b) the objectives with cross-sectoral importance included in the Charter of Fundamental Rights, to be inserted at the beginning of the Constitution (e.g. Article 35 of the Charter: a high level of human health protection; Article 37 of the Charter: a high level of environmental protection; Article 38 of the

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<sup>1</sup> See Article 89 EC, which prescribes the use of “regulations”. See also Articles 44, 46(2), 47, 52 and 94 EC, which only allow for “directives”; however, it is questionable whether limitations still follow from the latter provisions in view of the general internal market competences under Article 95 EC (where the use of all legal instruments, including regulations, is allowed).

Charter: a high level of consumer protection). This would reduce the need for integrating wording with regard to general objectives in each provision on competences, as it is currently the case (cf. Articles 152(1), 153(2) and 174(2) EC).

- vi The **advisory roles of the Committee of the Regions, of the Economic and Social Committee** and of other bodies and organisations does not need to be referred to in each relevant legal basis, as it is currently the case. In a Constitution, they could be covered by a general provision in the context of the prerogatives of these bodies and organisations, listing the competence fields in which consultation is compulsory.

#### 4. **From around 200 legal bases to 3 comprehensive competence lists**

The establishment of lists of exclusive, shared and supporting competences in the Constitution would allow for taking over most of the substance from the current Treaties while at the same time reducing considerably the existing text: around 200 Treaty articles with legal bases could be reduced to 3 comprehensive constitutional provisions listing the competences falling under each category.

This would have the very desirable side-effect that there would no longer be a need for a very long and complex Part Two of the Constitution (which, according to first thoughts, was said to include up to 414 provisions). The competence lists therefore would contribute to achieving in the end a simple, concise and transparent constitutional text.

**Most important, such lists of competences would allow for settling all power issues – the issue of competences being one of the most important thereof – in Part One of the Constitution. The answer to the question “who does what” would not have to be searched in a jungle of 414 complex provisions in Part Two, but clearly result from the competence lists in Part One of the Constitution.**

Of course, the attached preliminary lists of competences are only a first draft based on the existing acquis. They are intended to illustrate the positive potential of competence lists and to serve as a basis for the discussions in the Convention on competences. In the course of these discussions, the lists should be further refined and possibly modernised, resulting in the end in a shorter wording.

## 5. Maintaining the flexibility of the competence system

Competence lists should achieve a clearer demarcation of Union and national competences and a better readability of the constitutional text. They should neither question what has been achieved over the past decades of European integration nor deprive the Union of its current flexibility of action. The competence lists should therefore be complemented in the constitutional text by

- (i) an “**acquis preservation**”-clause which should clarify that the competence provisions of the Constitution build on the *acquis* existing at the date of the entry into force of the Constitution;
- (ii) a **flexibility clause**, based on the current Article 308 EC, which should allow for maintaining the Union’s ability of action also in unforeseen cases and under the conditions of a Union comprising up to 27 Member States.

### PRELIMINARY LISTS OF COMPETENCES

The following lists of competences are drawn directly from the existing *acquis* of the EU and the EC Treaty, and follow their spirit and wording as closely as possible.

These competence lists will have to be further refined and simplified for the purposes of constitutional drafting and integration into Part One of the Constitution. For the moment, these preliminary lists should ensure that no aspect of the existing competences is overlooked or neglected in the drafting of the Constitution. They should therefore serve as point of departure for the further drafting of the constitutional provisions on competences.

The competence lists are based on the following definition of competence categories:

- **exclusive competences** = competences which confer on the Union the power to adopt, in a specific area, all legally binding acts, while Member States can only act in this area if and insofar as empowered to do so by the Union.
- **shared competences** = competence fields in which the power to adopt legally binding act lie both with the Union and the Member States. Member States may exercise their competences only if and insofar the Union has not exercised its own.
- **supporting competences** = competences which allow the Union to supplement, support or coordinate action by Member States with a view to achieving one of the Union’s objectives,

excluding a full harmonisation of laws and regulations of the Member States, but allowing the use of all legal instruments available under the Constitution, including legislation.

#### **Article I: Exclusive competences**

The Union shall have exclusive competence with regard to:

- (a) the fixing of Common Customs Tariff duties<sup>1</sup>;
- (b) the common commercial policy on trade in goods, services (except cultural, educational, social and human health services<sup>2</sup>) as well as on the commercial aspects of intellectual property<sup>3</sup>;
- (c) the monetary policy for the Member States which irrevocably have adopted the euro as their single currency, to be defined and implemented by the independent European Central Bank<sup>4</sup>, referred to in Article [] and in accordance with Part Two of the Constitution and the Statute of the ESCB;
- (d) the monetary law of the euro<sup>5</sup>, including measures to harmonise the denominations and technical specifications of all coins intended for circulation to the extent necessary to permit their smooth circulation within the Union<sup>6</sup>;
- (e) the definition and implementation of the common agricultural policy<sup>7</sup>, in accordance with Part Two of the Constitution;
- (f) the conditions for fishing with a view to ensuring protection of fishing grounds and conservation of the biological resources of the sea<sup>8</sup>;
- (g) measures giving effect to the principles of the Union's antitrust laws<sup>9</sup>;
- (h) the application of the Union's prohibition of State aids<sup>10</sup>;
- (i) the necessary safeguard measures (not exceeding six months) with regard to third countries where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause,

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<sup>1</sup> Cf. Article 26 EC. Cf. the Report Lamassoure, para 19: "customs policy".

<sup>2</sup> Cf. Article 133(6) EC, as amended by the Treaty of Nice.

<sup>3</sup> Cf. Article 133(1) and (5) EC, as amended by the Treaty of Nice. Cf. the Report Lamassoure, para 19: "external economic relations". In Convention Working Group VII "External Action", there was a high degree of support for the use of qualified-majority voting in all areas of commercial policy, including services and intellectual property; cf. the Final Report of Convention Working Group VII, point 8 c).

<sup>4</sup> Cf. Article 105(2) EC. Cf. the Report Lamassoure, para 19.

<sup>5</sup> Cf. Article 123(4) EC.

<sup>6</sup> Cf. Article 106(2) EC.

<sup>7</sup> Cf. Articles 32(4), 37 EC. Cf. the Report Lamassoure, para 22, where this field of policy is only regarded as a shared competence; under the *acquis*, it falls within the exclusive competence of the Community.

<sup>8</sup> Cf. Article 102 of the Treaty concerning the Accession of Denmark, Ireland and the United Kingdom. Cf. the Report Lamassoure, para 22, where this field of policy is only regarded as a shared competence; under the present *acquis*, it falls within the exclusive competence of the Community.

<sup>9</sup> Cf. Article 83 EC. Cf. the Report Lamassoure, para 19: "competition policy".

<sup>10</sup> Cf. Article 89 EC. Cf. the Report Lamassoure, para 19: "competition policy".

serious difficulties for the operation of economic and monetary union<sup>1</sup>;

- (j) the definition of the tasks, priority objectives and the organisation of the Structural Funds of the Union, as defined in Part Two of this Constitution, as well as of the general rules applicable to them and of the provisions necessary to ensure their effectiveness and the coordination of the Funds with one another and with the other existing financial instruments of the Union<sup>2</sup>;
- (k) detailed arrangements regarding the exercise of the right of every Union citizen to vote and stand as candidate in municipal and European Parliament elections<sup>3</sup>;
- (l) measures for the production of Union statistics for the performance of the activities of the Union, without prejudice to the tasks of the ECB and the ESCB in the field of statistics<sup>4</sup>.

***The following exclusive competences (by nature) could also be inserted in the Institutional Part of the Constitution:***

- (m) the staff regulations of Union officials and the Conditions of Employment of other Union servants<sup>5</sup>
- (n) the determination of the salaries, allowances and pensions of the President and Members of the Commission, of the President, Judges, Advocates-General and Registrar of the Court of Justice, of the Members and Registrar of the Court of First Instance; of the President and the Members of the Court of Auditors; of the Members of the Economic and Social Committee; and of any payment to be made in all these cases instead of remuneration<sup>6</sup>;
- (o) the protection of individuals with regard to the processing of personal data and the free movement of such data as regards the Union institutions and bodies, including the establishment of an independent supervisory body responsible for monitoring such protection<sup>7</sup>;
- (p) the rules governing the languages of the Union institutions, without prejudice to the provisions contained in the Statute of the Court of Justice<sup>8</sup>.

## Article II: Shared competences

(1) The Union shall have shared competences with the Member States with regard to:

- (a) the definition and implementation of a common foreign and security policy<sup>9</sup>, including the adoption of economic sanctions and other measures to implement this policy<sup>10</sup>;

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<sup>1</sup> Cf. Article 59 EC.

<sup>2</sup> Cf. Article 161(1) EC. Cf. the Report Lamassoure, para 19: “structural or cohesion policies”.

<sup>3</sup> Cf. Article 19(1) and (2) EC.

<sup>4</sup> Cf. Article 285 EC.

<sup>5</sup> Cf. Article 283 EC.

<sup>6</sup> Cf. Articles 210, 247(8) and 258(4) EC.

<sup>7</sup> Cf. Article 286 EC.

<sup>8</sup> Cf. Article 290 EC.

<sup>9</sup> Cf. Articles 11(1) and 17 EU. Cf. the Report Lamassoure, para 20, where “the running of the common foreign and defence policy” even falls within the Union’s own competence.

<sup>10</sup> Cf. Articles 301 and 60 EC.



- (b) the establishment and functioning of the internal market through measures which bring about free movement of goods, workers, services, capital, payments or freedom of establishment, or which eliminate appreciable distortions of competition within the internal market. This shall include, to the extent necessary for the establishment and functioning of the internal market measures for the mutual recognition of diplomas, certificates and other evidence of formal qualifications; consumer protection measures; social security measures; provisions on financial services; internal-market related fiscal provisions, in particular on indirect taxation; but not provisions relating to the free movement of persons and to the rights and interests of employed persons<sup>1</sup>;
- (c) facilitating the exercise of the rights of Union citizens to move and reside freely within the territory of the Member States, excluding provisions on passports, identity cards, residence permits or any other such document or provisions on social security or social protection<sup>2</sup>;
- (d) the free movement of persons, be they citizens of the Union or nationals of third countries, within the internal market, including measures on the crossing of the external borders of the Union as well as external border controls<sup>3</sup>, to be exercised by the European Border Control Organisation (Eurobord) referred to in Article [];
- (e) the fields of asylum, immigration policy and safeguarding the rights of nationals of third countries<sup>4</sup>;
- (f) provisional measures, not exceeding six months, in the event of one of more Member States being confronted with an emergency situation characterised by a sudden inflow of nationals of third countries, for the benefit of the Member States concerned<sup>5</sup>;
- (g) judicial cooperation in civil matters having cross-border implications insofar as necessary for the proper functioning of the internal market, including the following fields: cross-border service of judicial and extrajudicial documents; taking of evidence; recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases; conflict of laws and of jurisdiction; and civil procedure<sup>6</sup>;
- (h) the approximation, where necessary, of rules on criminal matters in order to prevent and combat crime, including the establishment of minimum rules relating to the constituent elements of criminal acts and to

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<sup>1</sup> Cf. Article 95 EC as well as Articles 93, 94, 96, 97 EC; Articles 40 and 42 EC; Articles 44, 46(2), 47(1) and (2) EC; Articles 52(1) and 55 EC; and Article 57(2) EC; under the *acquis*, these are all shared competences. Cf. however the Report Lamassoure, para 19, where it is suggested that “the legal basis for the internal market (including the four freedoms and financial services)” should be the Union’s own competence.

<sup>2</sup> Cf. Article 18 EC.

<sup>3</sup> Cf. Articles 61(a) and 62 EC

<sup>4</sup> Cf. Articles 61(a), (b) and 63 EC. Cf., however, the Report Lamassoure, para 20, which considers “the legal basis of the common area for freedom and security” as an own competence of the Union.

<sup>5</sup> Cf. Article 64 EC.

<sup>6</sup> Cf. Article 65 EC.

penalties in the fields of organised crime, terrorism and illicit drug trafficking<sup>1</sup>;

- (i) police cooperation, meaning cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), referred to in Article []<sup>2</sup>;
- (j) judicial cooperation in criminal matters, meaning cooperation between judicial and other competent authorities of the Member States including cooperation through the European Judicial Cooperation Unit ('Eurojust'), referred to in Article []<sup>3</sup>;
- (k) the definition and implementation of the common transport policy, covering rail, road, inland waterway, sea and air transport<sup>4</sup>;
- (l) ensuring, within the scope of this Constitution, the application of the prohibition of discrimination on grounds of nationality<sup>5</sup>;
- (m) the combating of discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation<sup>6</sup>;
- (n) social policy measures outside the internal market context<sup>7</sup>, including improvement in particular of the working environment to protect workers' health and safety; working conditions; social security and social protection of workers; protection of workers where their employment contract is terminated; the information and consultation of workers; representation and collective defence of the interests of workers and employers, including co-determination; conditions of employment for third country nationals legally residing in Union territory; the integration of persons excluded from the labour market; equality between men and women with regard to labour market opportunities and treatment at work; the combating of social exclusion; and the modernisation of social protection systems. This competence does not cover pay, the right of association, the right to strike or the right to impose lock-outs<sup>8</sup>.
- (o) ensuring the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value<sup>9</sup>;
- (p) prudential supervision of credit institutions and the stability of the financial system, in particular by

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<sup>1</sup> Cf. Article 61(a) in fine EC and Articles 29(2), last indent and 31(e) EU.

<sup>2</sup> Cf. Articles 30 and 32 EU.

<sup>3</sup> Cf. Articles 31 and 32 EU.

<sup>4</sup> Cf. Articles 71 and 75(3) EC and the Report Lamassoure, para 22.

<sup>5</sup> Cf. Article 12(2) EC.

<sup>6</sup> Cf. Article 13 EC

<sup>7</sup> The shared internal market competence under Article II(1)(b) already allows for the adoption of social policy measures where they contribute to removing obstacles for the four fundamental freedoms (in particular free movement of workers) or otherwise to remove distortions of competition.

<sup>8</sup> Cf. Article 137 EC.

<sup>9</sup> Cf. Article 141(3) EC.

taking into account the contribution of the ECB and, under its governance, the ESCB<sup>1</sup>;

- (q) trade in cultural services, educational services, and social and human health services<sup>2</sup>;
  - (r) measures to strengthen, if necessary, the economic and social cohesion of the Union through specific action outside the Structural Funds and without prejudice to the measures decided within the framework of the other Union policies<sup>3</sup>;
  - (s) to conduct a policy of high nuclear safety and security standards, allowing installations to remain in use in those Member States that have opted to use this source of energy, and to guarantee non-proliferation, in accordance with Part Two of this Constitution<sup>4</sup>;
  - (t) a policy on the environment, including provisions primarily of a fiscal nature; measures affecting town and country planning, qualitative management of water resources or affecting, directly or indirectly, the availability of those resources and land use with the exception of waste management<sup>5</sup>;
  - (u) the prevention of and fight against fraud affecting the financial interests of the Union through deterrent measures taken with a view to affording effective and equivalent protection in the Member States<sup>6</sup>;
- (2) The special situation of the United Kingdom, Ireland and Denmark with regard to the competences referred to in paragraph 1 (d)-(h) is determined by Protocols annexed to this Constitution<sup>7</sup>.

### **Article III: Supporting competences**

The Union shall have supporting competences with regard to:

- (a) measures strengthening customs cooperation between Member States and between the latter and the Commission<sup>8</sup>;
- (b) joint programmes which encourage the exchange of young workers<sup>9</sup>;
- (c) incentive measures in the field of employment designed to encourage cooperation between Member States and to support their action in this field through initiatives aimed at developing exchanges of information and best practices, providing comparative analysis and advice as well as promoting

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<sup>1</sup> Cf. Article 105(5) EC.

<sup>2</sup> Cf. Article 133(6), second subparagraph EC.

<sup>3</sup> Cf. Article 159(3) EC.

<sup>4</sup> Summarises the competences under the Euratom Treaty in a modernised form; cf. also the proposed Article 17 of the Feasibility Study of the Commission “Contribution to a preliminary draft Constitution of the European Union – Working Document” of 4 December 2002. It is suggested to include the details of Euratom policy in Part Two of the Constitution or in a Protocol annexed to the Constitution.

<sup>5</sup> Cf. Articles 174 and 175 EC. Cf. also the Report Lamassoure, para 22.

<sup>6</sup> Cf. Article 280(4) EC.

<sup>7</sup> It should be discussed in the Convention whether this special status could be modified.

<sup>8</sup> Cf. Article 135 EC.

<sup>9</sup> Cf. Article 41 EC. Broader is the Report Lamassoure, para 25, where “youth” is considered to be a complementary competence.

innovative approaches and evaluating experiences, in particular by recourse to pilot projects<sup>1</sup>;

- (d) measures contributing to the development of quality education and of a European dimension in education, particularly through the teaching and dissemination of the languages of the Member States and through encouraging mobility and exchange programmes for students, teachers and socio-educational instructors<sup>2</sup>;
- (e) vocational training policy, particularly in order to facilitate adaptation to industrial changes, vocational integration and reintegration into the labour market, mobility of instructors and trainees (particularly young people) and cooperation and exchanges of information and experience between the training establishments and firms in the Member States<sup>3</sup>;
- (f) culture, through improvement of the knowledge and dissemination of the culture and history of the European peoples; through conservation and the safeguarding of cultural heritage of European significance; through non-commercial cultural exchanges; and through artistic and literary creation, including in the audiovisual sector<sup>4</sup>;
- (g) measures to protect, outside the internal market context<sup>5</sup>, human health, covering the fight against the major health scourges, by promoting research into their causes, their transmission and their prevention; health information and education; as well as action in reducing drugs-related health damage, including information and prevention<sup>6</sup>;
- (h) consumer protection measures outside the internal market context<sup>7</sup>, in particular measures which protect the health, safety and economic interests of consumers as well as their right of information, education and to organise themselves in order to safeguard their interests<sup>8</sup>;
- (i) measures contributing to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures by promoting, within the framework of a

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<sup>1</sup> Cf. Articles 127 and 129 EC. Cf. also the Report Lamassoure, para 26, and the Final Report of Convention Working Group V “Complementary Competencies”, point 6.

<sup>2</sup> Cf. Article 149 EC. Cf. also the Report Lamassoure, para 25, and the Final Report of Convention Working Group V “Complementary Competencies”, point 6.

<sup>3</sup> Cf. Article 150 EC. Cf. also the Report Lamassoure, para 25, and the Final Report of Convention Working Group V “Complementary Competencies”, point 6.

<sup>4</sup> Cf. Article 151 EC. Cf. also the Report Lamassoure, para 25, and the Final Report of Convention Working Group V “Complementary Competencies”, point 6.

<sup>5</sup> The shared internal market competence under Article II(1)(b) already allows for the adoption of human health measures where they contribute to removing obstacles for the four fundamental freedoms or otherwise to remove distortions of competition; see also Article 35 of the Charter of Fundamental Rights which makes human health protection an objective of all Union activities.

<sup>6</sup> Cf. Article 152 EC. Cf. also the Report Lamassoure, para 25, and the Final Report of Convention Working Group V “Complementary Competencies”, point 6.

<sup>7</sup> The shared internal market competence under Article II(1)(b) already allows for the adoption of consumer protection measures where they contribute to removing obstacles for the four fundamental freedoms or otherwise to remove distortions of competition; see also Article 38 of the Charter of Fundamental Rights which makes consumer protection an objective of all Union activities.

<sup>8</sup> Cf. Article 153(2)(b) EC.

system of open and competitive markets, the interconnection and interoperability of national networks as well as access to such networks<sup>1</sup>;

- (j) specific measures ensuring that the conditions necessary for the competitiveness of the Union's industry exist, in accordance with a system of open and competitive markets, excluding any measure which could lead to a distortion of competition or contain tax provisions or provisions relating to the rights and interests of employed persons<sup>2</sup>;
- (k) a policy with regard to research and technological development to strengthen the scientific and technological bases of Union industry and to encourage it to become more competitive at international level<sup>3</sup>;
- (l) strengthening the effectiveness of civil protection in the event of exceptional events or natural disasters<sup>4</sup>;
- (m) a policy in the sphere of development cooperation, without prejudice to cooperation with the African, Caribbean and Pacific countries in the framework of the ACP-EC Convention<sup>5</sup>;
- (n) economic, financial and technical cooperation measures with third countries<sup>6</sup>;
- (o) tourism<sup>7</sup>;
- (p) sport<sup>8</sup>.

#### **Article IV: External competences<sup>9</sup>**

(1) If and insofar as this Constitution has conferred competences upon the Union, it shall also have the power to conclude agreements with third countries and international organisations, participate in international organisations or otherwise act at international level.

(2) The Union's external competence shall be exclusive in cases where the conclusion of an international

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<sup>1</sup> Cf. Articles 154 and 155 EC. Cf. also the Final Report of Convention Working Group V "Complementary Competencies", point 6; cf. however, the Report Lamassoure, para 22, where this is seen as a shared competence.

<sup>2</sup> Cf. Article 157(3) second sentence EC. Cf. also the Report Lamassoure, para 25, and the Final Report of Convention Working Group V "Complementary Competencies", point 6.

<sup>3</sup> Cf. Articles 164(1), 165, 171 and 172 EC.

<sup>4</sup> Cf. Article 3(1)(u) EC; cf. also the Report by Alain Lamassoure, para 25: "civil defence" as complementary competence; and the proposed Article III-63 in the Feasibility Study of the Commission "Contribution to a preliminary draft Constitution of the European Union – Working Document" of 4 December 2002.

<sup>5</sup> Cf. Articles 177, 179(1) and (3) EC. Cf. also the Final Report of Convention Working Group V "Complementary Competencies", point 6.

<sup>6</sup> Cf. Article 181a EC (added by the Treaty of Nice).

<sup>7</sup> Cf. Article 3(1)(u) EC and the Report Lamassoure, para 25.

<sup>8</sup> Cf. the Report Lamassoure, para 25.

<sup>9</sup> Codifies the doctrine of parallelism according to Case 22/70, *Commission v. Council (AETR)* [1971] ECR 263. Such a provision is also recommended in point 4 of the Final Report of Convention Working Group VII "External Action" (Part A).

agreement affects internal acts of the Union, is provided for in Union legislation or is necessary to enable the Union to exercise its competences internally.

#### **Article V:**

#### **Flexibility clause<sup>1</sup>**

(1) If action by the Union should prove necessary to attain one of the objectives set out by this Constitution and the Constitution has not provided the necessary powers, the European Parliament<sup>2</sup> and the Council, following the codecision procedure under Article 102, shall jointly take all appropriate measures. Throughout this procedure, the European Parliament shall give its assent with the majority of its members; the Council shall act [unanimously] [with a majority representing  $\frac{3}{4}$  of the population of the Union]<sup>3</sup>.

(2) Provisions adopted on the basis of this Article may not comprise harmonisation of Member States' laws or regulations where such harmonisation is not allowed by this Constitution.



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<sup>1</sup> Cf. Article 308 EC. Cf. also the Report Lamassoure, para 31, and para 24 of the EPP Congress Document "A Constitution for a Strong Europe": "It is essential to include a review clause in order to avoid establishing a rigid system for the delimitation of competences."

<sup>2</sup> Cf. para 24 of the EPP Congress Document "A Constitution for a Strong Europe": "The European Parliament should be involved in the decision-making". <sup>2</sup> Cf. Article 181a EC (added by the Treaty of Nice).

<sup>2</sup> Cf. Article 3(1)(u) EC and the Report Lamassoure, para 25.

<sup>2</sup> Cf. the Report Lamassoure, para 25.

<sup>2</sup> Codifies the doctrine of parallelism according to Case 22/70, *Commission v. Council (AETR)* [1971] ECR 263. Such a provision is also recommended in point 4 of the Final Report of Convention Working Group VII "External Action" (Part A).

<sup>2</sup> Cf. Article 308 EC. Cf. also the Report Lamassoure, para 31, and para 24 of the EPP Congress Document "A Constitution for a Strong Europe": "It is essential to include a review clause in order to avoid establishing a rigid system for the delimitation of competences."

<sup>2</sup> Cf. para 24 of the EPP Congress Document "A Constitution for a Strong Europe": "The European Parliament should be involved in the decision-making".

<sup>3</sup> Should be further discussed.