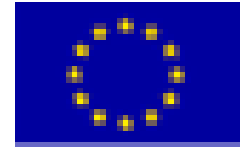


**From the Convention to the IGC:  
Mapping Cross-National Views  
towards an EU-30**



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**Division of Competences in the European Union**

**Strategy Paper**

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I. Introduction .....	2
I.1 Outline of the paper.....	4
II. Dividing competences in federal systems .....	4
II.1 Federalism in comparative perspective.....	5
II.2 Federalism in practice: Belgium, Canada, Germany & Switzerland.....	7
II.3 The Convention and Division of Competences .....	9
II.4 Conclusions from the workshop .....	11
III. The Convention's Work on Competences .....	12
III.1 Preliminary work on delimitation of competences.....	12
III.2 From Preliminary draft Constitutional Treaty to Draft Constitution.....	14
IV. Conclusions.....	15

## I. Introduction

‘Who governs?’ is one of the most crucial questions to be addressed by any political system. It is a question that the European Union managed to avoid for half a century. Now, however, it has become a key component of the deliberations of the Convention on the Future of Europe chaired by former French President Valéry Giscard d’Estaing and will be so again in the forthcoming Intergovernmental Conference due to open in Autumn 2003.

It is one of the unusual features of the European Union that the division of competences between the Union and the component states is not clearly defined.<sup>1</sup> While most analysts and practitioners can agree that the Union may act only when granted the right to do so by the Member States, it is frequently asserted that the Union or ‘Brussels’ plays too large a role in people’s lives, delving into the ‘nooks and crannies’ where it is not wanted. Yet, at the same time, it seems that the citizens of Europe would like the Union to be **more** active in certain fields, notably in foreign policy, something that Member State governments have seemed reluctant to accept in practice if not rhetorically.

That the powers or ‘competences’ of the Union are not well-defined should come as no surprise to students of European integration. After all, it has been asserted that the founding fathers, particularly Jean Monnet, favoured a form of incremental functionalist integration.<sup>2</sup> It was not the expectation that the Union, or Community as it was then called, should be granted widespread powers on day one. The scholars of neofunctionalism who followed the process in the 1950s and ‘60s expected ‘spillover’ from one policy sector to another, as initially seemed to happen with the progression from coal and steel to atomic energy.<sup>3</sup> By the mid-1960s, however, it had become quite clear that integration would not progress as smoothly or automatically as some of its protagonists had hoped. Instead, member state governments continued to be the gatekeepers of decision-making power: the EC/U could only exercise power where the member states chose to grant it; in many areas it chose not to do so.<sup>4</sup>

Over the years, the European Union has acquired competences in many areas, notably those around the internal market. However, in moves apparently in the opposite direction, the Treaty on European Union (TEU) introduced the principle of ‘subsidiarity’ (that decisions

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1 As the Praesidium of the Convention has noted, ‘The existing system of delimitation of competence was established according to objectives to be achieved and means for achieving those objectives.’ European Convention Secretariat, *Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored*, CONV 47/02 (Brussels: 15 May 2002), hereafter CONV 47/02.

2 For discussions of Monnet’s approach see, for example, Roy Pryce, ed., *The Dynamics of European Union* (London: Croon Helm, 1987), Chapters 1 and 2; Kevin Featherstone, ‘Jean Monnet and the “Democratic Deficit” in the European Union’, *Journal of Common Market Studies*, Vol. 32, No. 2, June 1994, pp. 149-70; William Wallace and Julie Smith, ‘Democracy or Technocracy? European Integration and the Problem of Popular Consent’, *West European Politics*, Special Issue on *The Crisis of Representation in Europe*, ed. Jack Hayward, Vol. 18, No. 3, July 1995, pp. 137-57

3 On the neofunctionalist writers, see Leon Lindberg and Stuart Scheingold, eds., *Europe’s Would-be Polity* (Englewood Cliffs, NJ: Prentice Hall, 1970) and Ernst B. Haas, *The Uniting of Europe: Political, Social and Economic Forces, 1950-57* (London: Stevens, 1958).

4 The issue came to a head in 1965 when Commission President Walter Hallstein sought to speed up the transitional period, which would have resulted in a move to qualified majority voting (QMV) as envisaged in the Treaty of Rome. President de Gaulle of France was not ready for such a move. There followed a period of the ‘empty chair’ when France effectively stalled EC business by refusing to take its seat in the Council of Ministers. The solution was the Luxembourg Compromise of 1966 which ensured that the vast majority of decisions were taken by unanimity until the mid-1980s when the Single European Act altered the decision-making procedures to include QMV in a number of areas. Thus for almost two decades the neofunctionalists’ expectations appeared to be fundamentally flawed as member states demonstrated their reluctance to cede any more powers to the Community. Yet if governments would not cede powers, the European Court of Justice pursued a federalist approach to interpreting Community law in a series of landmark rulings, notably *Costa v. ENEL* and *Van Gend en Loos*. FULL REFS

should be taken as close as possible to the citizen), while the Treaty of Amsterdam has a Protocol on the Application of the Principle of Subsidiarity and Proportionality, the latter concept requiring that ‘any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty’.<sup>5</sup> Principles designed to limit the powers of the Union had thus been adopted.<sup>6</sup> Nevertheless, the way powers or competences are allocated to the Union has remained opaque, hard even for experts to understand, far less the average European citizen.

The European Council finally realized the need to address the issue in the 2000 Intergovernmental Conference, which culminated in the Treaty of Nice. However, rather than agreeing fundamental reform of the Union at that time, the Heads of State and Government meeting in Nice in December 2000 issued a Declaration on the future of Europe, which ‘call[ed] for a deeper and wider debate about the future of the European Union’.<sup>7</sup> The Declaration outlined certain questions to be addressed by the Swedish and Belgian presidencies, the European Parliament and the Commission, as preparations for a new Intergovernmental Conference in 2004. In particular the question of ‘how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity’ was to be addressed.<sup>8</sup>

In accordance with the Nice requirements,<sup>9</sup> the European Council meeting in Laeken in December 2001 outlined the framework for a Convention on the future of Europe that would prepare the way for the next Intergovernmental Conference and also produced a Declaration on the Future of the Union.<sup>10</sup> The Declaration noted the need to bring Europe ‘closer to its citizens’ but at the same time recognized that there is a fundamental mismatch between what the Union actually does and what its citizens believe it should do.<sup>11</sup> This is not simply a case of saying that the Union has too many powers; it is perceived as being too involved in details best left to members states and regions while at the same time failing to tackle many issues that its citizens would like to see tackled at the European level, notably ‘justice and security, action against cross-border crime, control of migration flows and reception of asylum seekers and refugees from far-flung war zones...employment and combating poverty and social exclusion...foreign affairs, security and defence’.<sup>12</sup>

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5 Protocol on the Application of the Principle of Subsidiarity and Proportionality, reprinted in Andrew Duff, ed., *The Treaty of Amsterdam – Text and Commentary* (London: Federal Trust for Education and Research, 1997), p. 293.

6 It is important to recall, however, that the subsidiarity principle is open to interpretation - how close a decision needs to be taken to the citizen is, to some extent, a value judgment. Moreover, as paragraph (3) of the Protocol on the Application of the Principle of Subsidiarity and Proportionality states:

The principle of subsidiarity does not call into question the powers conferred on the European Community by the Treaty, as interpreted by the Court of Justice. The criteria referred to in the second paragraph of Article 3b shall relate to areas for which the Community does not have exclusive competence. The principle of subsidiarity provides a **guide** as to how those powers are to be exercised at the Community level. Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. **It allows Community action within the limits of its powers to be expanded where circumstances so require, and, conversely, to be restricted or discontinued where it is no longer justified.**’ Ibid, pp. 293-4 (Emphasis added).

7 In the Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts brought about fairly significant reforms in terms of the weighting of membership of the various institutions to prepare the Union for enlargement to 27 but it did not undertake the sort of root and branch reforms to the Union’s decision-making processes that many deemed necessary if the enlarged Union was to function effectively. The Declaration on the future of the Union may be found at the end of the Treaty.

8 Declaration on the future of the Union, para. 5.

9 Ibid. para. 4.

10 See European Council, *Presidency Conclusions of the European Council Meeting in Laeken, 14 and 15 December 2001*. The Laeken Declaration on the Future of the European Union is at Annex 1.

11 European Council, *Presidency Conclusions of the European Council Meeting in Laeken, 14 and 15 December 2001*, pp. 20-1.

12 Ibid.

Thus, the Declaration concluded that it was important to improve the divisions and definitions of competence in the EU and to make them more transparent.<sup>13</sup> This, the Declaration acknowledged, might 'lead both to restoring tasks to the Member States and to assigning new missions to the Union, or to the extension of existing powers'.<sup>14</sup> In order to clarify matters for the citizens, the Declaration speculated on whether it would be possible to distinguish between 'three types of competence: the exclusive competence of the Union, the competence of the Member States and the shared competence of the Union and the Member States.'<sup>15</sup> Related to this, the Declaration stipulated that it was also necessary to determine whether there should be any reorganization of competence, noting the danger of creeping competence to the Union and at the same time the danger that the dynamic of integration could stall.<sup>16</sup> The Declaration thus set the framework for the first systematic analysis of division of competences between the Union and its member states.

### **I.1 Outline of the paper**

In the framework of the CONVEU-30 network, kindly supported by the European Commission under the 'Public debate on the future of Europe Programme' and the Foreign and Commonwealth Office, the Royal Institute of International Affairs convened a workshop on 'Governing Together in the New Europe: divisions of competences and federal models'. The aim of the workshop was to consider the nature of other, federal, models of governance and to consider parallels with and lessons for the European Union in the light of the Convention's discussions on the division of competences in the Union. This paper outlines the key points made in the workshop and then outlines the Convention's work on divisions of competence, looking at the initial work undertaken by the Praesidium and various working groups, notably the Working Group on complementary competences, and outlining the approach taken in the draft constitution presented to the European Council meeting at Thessaloniki on 20 June 2003. It concludes by outlining some of the outstanding questions that member states will have to address in the forthcoming Intergovernmental Conference.

## **II. Dividing competences in federal systems**

The challenges the EU faces in allocating competences are not new - they reflect something that every federal system of government has had to do. Of course, few people would claim that the EU is a federation or federal state. Yet many argue that it has federal elements. Are there then lessons for the European Union to learn from any existing systems of governance? This was the main question addressed at a workshop organized in the CONVEU-30 framework at Robinson College, Cambridge on 12/13 April 2003. The workshop focused on three broad themes:

- a comparative analysis of federalism
- cases studies of four federal or confederal systems: Belgium, Canada, Germany, and Switzerland
- division of competences in the EU in the light of the Convention on the future of Europe

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13 For other aspects of the work of the Convention see [www.swp-berlin.org/projekte/conveu-30.html](http://www.swp-berlin.org/projekte/conveu-30.html)

14 *Presidency Conclusions, December 2001*, p.21.

15 *Ibid.*

16 *Ibid.*,p. 22.

In particular, speakers considered whether the Union could be seen in any way to approximate to a federal system, particularly with respect to the division of competences, and what implications this might have.<sup>17</sup>

## II.1 Federalism in comparative perspective

Professor Vernon Bogdanor reminded the audience that Dicey had viewed a federal state as ‘a political contrivance to reconcile national unity with state power’, where ‘national’ refers to the federal level and ‘state’ to the component units. K C Wheare’s definition of federalism requires that two governments be independent and co-ordinate within their own spheres, generally set out by the division of competences codified in a constitution, which is supreme. In the EU, states’ law-making powers are limited but the powers of the Union can be extended only by the European Council i.e. by member states acting jointly and unanimously.<sup>18</sup> Residual rights do lie with the EU but there is no equivalent to the 10<sup>th</sup> Amendment of the US Constitution. The Commission can be seen as a federal institution because it is independent of the states, but, Bogdanor argued, the EU is not a federal state even though it exemplifies K C Wheare’s federal principle; the principle alone is not sufficient.

The EU can be seen as a union of states, set up *by states*, in contrast to the US, which was established by the people. It is important to distinguish between a federation and a federal union of states; in the latter component states delegate certain powers to a higher body, in order to make external relations into internal ones, especially regarding defence. A confederation, unlike a federation, permits component states to have different forms of government, which is precisely what the EU has. The Union might be an economic federation, but it does not even approximate to a confederation in the foreign and defence policy fields and recent events in Iraq have not made cooperation in these fields any more likely. Thus, the EU seems closer to the German Zollverein whose competences included competition, trade and an internal market; there was also a common currency alongside national currencies.

Bogdanor argued that an act of will was needed in order to create a federation; one would not just ‘naturally’ come about. Indeed, it is necessary for sentiments to favour union rather than national identity for a federation to come about and such sentiment needs to be developed. Perhaps a single European consciousness could develop by way of confederation, as happened in Switzerland, but so far, it was pointed out, ‘The EU has gone ahead of the consciousness of European peoples’. In both Switzerland and the USA, coercion was necessary to create the federation, which is something that would obviously be unacceptable now. In any case, it is worth remembering that the Founding Fathers did not talk about setting up a federation but rather a ‘system to solve problems’, as was indeed the case in the early years of European integration.

For a federation to function, a component unit needs to be in some way subordinate to the higher union, although it is possible for the federal level to build a nation from the top down. A stumbling block in the EU at present is that small states are concerned about being dominated by the large member states, which would not occur in a genuine federation where states retain autonomy. Traditional conceptions of federation do not fit the EU perfectly.

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17 A full version of the workshop report and the papers presented are available at <http://www.riia.org/index.php?id=97>

18 The situation is a little more complicated in that Article 308 is sometimes perceived to be a way of expanding the Union’s competences. The Convention’s Working Group on complementary competences was at pains to ensure that it be made clear that Article 308 cannot be used ‘as the basis for widening the scope of [Union powers] powers beyond the general [Treaty] framework’ or ‘be used as a basis for the adoption of provisions whose effect would, in substance be to amend the Treaty’ (Convention Secretariat, *Final report of Working Group V [‘Complementary Competences’]* CONV 375/02 Rev 1 (Brussels: 4 November 2002), p. 15, quoting Opinion 2/94.

Instead, the EU could be evolving towards something new. Weiler contends that the EU has the external appearance of a state but is not actually a state. However, one might be able to argue that the EU could be a new type of state. After all, one only needs to see how the concept of state has evolved over time to see that it need not be a constant. What about the relationship between economic and political unity? Economic unity is not necessarily a precondition for powerful political union. Could there be something in the nature of the internal market that has stifled impulses towards political unity at higher levels, Bogdanor wondered? Also, if a common foreign and security policy is a key feature of a federal state, why is the UK so in favour of creating a Council Presidency for continuity in the EU's CFSP? There is significant public support for CFSP, so maybe it is the elites rather than the people who are not yet ready for integration in this area.

Moreover, it was noted, there may be intergovernmental decision-making in non-Community policy areas, but even these relations are very different from intergovernmental relations between other states, especially in the fields of justice and home affairs. EU relations have a different quality from and an institutional dimension not usually present in other intergovernmental negotiations. Rather than considering the EU as a federal state, federation or federal union of states, perhaps it is better to view the EU as a system of multi-level governance, where sovereign rights are shared and divided between supranational, national, and subnational institutions.

As Bogdanor pointed out, Wheare's criteria for the federal principle entail the presence of a constitution, that the constitution be supreme and that there be an independent arbiter of that constitution.<sup>19</sup> While some would dispute the idea that the EU already has a constitution, it is possible to argue that the founding treaties as amended occupy that function.<sup>20</sup> Moreover, the European Union can be seen to have another prerequisite of a federation, a supreme judicial arbiter, in the form of the European Court of Justice, which interprets EU law and, in particular, has asserted the supremacy of EU law over national law. Thus, in her presentation, Erin Delaney (Centre of International Studies, Cambridge) argued that one key element of a federation is the presence of a supreme judicial arbiter. Such a body interprets the constitution (N.B. only the federal court, not state courts, has the right to do this), monitors the division of competences between the states and centre, conducts judicial review, oversees a bill of rights; it may also exercise an integrative influence through monitoring the uniformity of the federation.

To date, Delaney argued, the European Court of Justice (ECJ) has had an integrationist, even federalizing, influence on the European Union, but is it actually a federal court? Member states and Community institutions have access to the ECJ, and, under Article 230 of the Amsterdam Treaty (formerly Article 173), so do individuals. Though this access for individuals is very limited, its provision moves away from the principles of public international law that governed the original Community legal system.

Article 234, under which national courts request interpretations of Community law from the ECJ, is of central importance in creating a constitutional order from the Treaties, but it requires co-operation from the national courts. However, although the ECJ acts as an interpreter of Community law, it does not directly monitor any division of competences, and judicial review is conducted by the national courts. If one of the hallmarks of a federation is

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19 Vernon Bogdanor, 'Federalism and the Nature of the European Union', p.2, available at <http://www.riia.org/pdf/research/europe/Bogdanor.pdf>

20 Prior to the start of the Convention there was a good deal of hostility to the idea of calling any Union treaty a constitution, notably in the UK. There was also a heated debate in the UK in the latter stages of the Convention as to whether the draft constitution put forward by Giscard represented a quantum change in the nature of the EU or merely some 'tidying up' of the treaties, as the Government's representative on the Convention, Peter Hain, asserted. While the draft would seem to go beyond mere 'tidying up' in terms of the proposed changes to the institutional framework of the Union, much in the existing treaties can be construed as endowing the Union with a constitution already.

its relationship to the people, the ECJ would seem to be too inaccessible to constitute a federal court in this respect as people have to go via national courts. (On the other hand, Tanja Börzel points out, the ECJ enforces federal law by empowering domestic actors.) That the ECJ does not equate to a federal court matters only if the EU wants to become a state, Delaney argued. Along with most participants in the workshop that was not something that Delaney predicted happening. However, she did envisage one potential problem associated with delimiting competences more clearly. Divided (as opposed to shared) competences could lead to an adversarial relationship between the ECJ and national courts: when a disagreement arises, who has *Kompetenz-Kompetenz*? A delimitation of competence would change the nature of the European legal system, and it is not clear that the current procedures, namely Articles 234 and 230, would be enough to protect European interests as the co-operative relationship between the ECJ and national courts disintegrates, which Delaney believes is beginning to happen. Thus any formal delimitation of powers enshrined in a new constitution should be supplemented with a stronger role for the ECJ.

Tanja Börzel argued that the principle of federalism allows a better understanding of the EU than traditional theories of IR or European integration because it ‘does not rely on a state-centric ontology’.<sup>21</sup> She suggested that the Union is a federal *system*, not a federal *state*, but that it is on the way to being federal, even though a federal system will not necessarily become a federal state.

Börzel outlined two models of federalism, the dual federalist or separation of powers model and co-operative federalism, as practised in the United States and Germany respectively. The separation of powers or ‘dual federalism’ seen in the USA emphasizes the institutional autonomy of different levels of government, aiming at a clear separation of powers between the union and the states. Competences are allocated according to policy sectors rather than policy functions. By contrast, Co-operative federalism as practised in Germany is based on a functional division of powers among different levels of government. The federal level makes the laws and the subunits implement them. Most competences are therefore shared, but to compensate the lower level of governance for its lack of ‘self-determination’, the units have strong participatory rights in decision-making at the federal level. The EU requires the consent of member states to legislate even in its areas of exclusive competence, which ensures that states retain significant leverage over the EU. Moreover, as is the case in Germany, it is typically the member states which are responsible for the implementation of EU law. Thus, Börzel argued, the EU corresponds more closely to the cooperative model of federalism.

## II.2 Federalism in practice: Belgium, Canada, Germany & Switzerland

Turning to specific examples of federalism, Paolo Dardanelli and Clive Church outlined the development of the country to which the EU is so often compared, the **Swiss federation**. Switzerland can be described as a confederation before 1848 and a federation afterwards. In fact, Dardanelli asserted, it is the last phase of the confederation (1815-1848) that has parallels with what the EU is going through now, except that then the emphasis was on security, not economics. The drive for political modernization and economic integration at that time led to pressure for federalization, although this was resisted by the smaller states,<sup>22</sup> resulting in a brief civil war. After the 1848 Constitution, the cantons retained residual powers and a stake in federal decision-making.

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21 Tanja A. Börzel, ‘What can Federalism teach us about the European Union? The German Experience’, p. 2, available at <http://www.riia.org/pdf/research/europe/Borzel.pdf>

22 This is in rather stark contrast to the EU where it is the small members that are pushing hardest for a federal Europe in order to protect themselves from the large members.

There are three types of competence in Switzerland – cantonal, joint and confederal. Confederal competence is spelt out explicitly in the constitution, especially regarding the creation of a single economic space. After the introduction of the constitution, there followed a slow but definite process of centralization in terms of legislation; implementation and tax-raising ability largely remained with the cantons, which raise and spend more than the federation.

In the Swiss variant of federalism, institutions rather than ethnicity provide the basis for national identity, which rests on a bottom-up view of the state. Direct democracy (through referenda) is an important part of Swiss political culture, which, with the possible exception of adopting a new European constitution through a referendum, cannot realistically be applied to the EU, partly because a mature civil society is needed for referenda to work. Although one might argue that the EU is composed of 15 states each with mature civil societies this is not the case at the European level; the issue is again, perhaps, one of ‘no demos’.

As co-operative federalism tends to blur responsibilities, making it unclear where accountability lies, it may not be appropriate as a model for the EU when the ‘democratic deficit’ is so stark. Where the example of Switzerland is useful is in showing that the *mechanisms* for permitting a transfer of competences from one level to another are more important than their initial distribution. States’ constitutions are organic, and should not preclude amendment of the federal constitution should that become appropriate. This theme would recur in MEP Andrew Duff’s remarks on the European Convention.

Discussing **Canada**, Gerry Baier pointed out that Wheare had defined the 1867 British North America Act as ‘quasi-federal’ because it lacked the necessary guarantees of provincial autonomy for the units to play a co-ordinate rather than a subordinate role. The early introduction of judicial review to act as umpire between the two levels of government allowed the practice, if not the theory, of Canadian federalism to adhere to Wheare’s requirement that two levels of government be independent and co-ordinate within their own spheres.

Canada’s constitution has two lists of competences rather than the more common situation of a single list of competences with residual competences accruing to the other level. Most competences are conceived as ‘water-tight compartments’: there is very little overlap, although co-operative federalism has increased since the 1960s, thereby marginalizing the importance of federal judicial review, which is important in dual federalist systems such as the United States.

Since the failure of constitutional change in 1992, governments have come to rely increasingly on intergovernmental agreements to co-ordinate initiatives and to demonstrate the responsiveness of the federal system. Enforcement is a problem, so recent agreements have contained internal dispute resolution mechanisms, which emphasize compromise and co-operation. The ‘creeping informalism’ of Canadian federalism raises the issue of democratic accountability: it may be a pragmatic way to resolve disputes, but it is much more difficult for citizens to take the federal government to court for abusing its constitutional authority.<sup>23</sup>

Wilfried Swenden outlined the federal history of another multi-lingual state: **Belgium**. Belgium was transformed from a unitary to a federal state little more than a decade ago as a way of accommodating ethno-linguistic cleavages between the Dutch-speaking majority and the French-speaking minority. There are two types of federated entities in Belgium: communities, determined by language (French, Dutch or German); and regions, which are

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23 Arguably this is similar to the situation in the European Union at present, although as outlined below, the draft Constitution agreed by the Convention on the future of Europe contains proposals that seek to clarify the division of competences within the Union.



territorially determined (Brussels is a region but not a community, whereas Flanders and Walloonian are both regions and communities). The federal executive comprises equal numbers of French- and Dutch-speaking members, and takes decisions by consensus.

Belgian law contains a very detailed catalogue of competences but there is no hierarchy of laws in Belgium; federal and regional law have the same status, so the system can only work when competences rarely overlap, making this a dual federalist system albeit rather different from the US model. There is no separation of functions – the level that legislates also implements. The regions have foreign-policy capacity in the fields in which they have competence, and can sign treaties in those fields. However, the centre has powers in defence, justice, internal security and fiscal policy. Social security also remains almost exclusively at the federal level, thereby allowing for redistribution of resources between regions. The primary responsibilities of the communities are education and pensions. Regions deal *inter alia* with employment policy, urban renewal, energy policy, agriculture and external trade. Constitutional reforms do not require the support of regional parliaments or the people in referenda.

Looking at the **German case**, Börzel pointed out that the *Länder* enjoy strong representation at the *Bund* or federal level through the *Bundesrat*, the second chamber of the federal legislature. However, the directly elected *Bundestag* (and the federal government) provides a counter-weight to this sub-unit representation, and also a focus for a federal identity and political legitimacy. By contrast, neither the Commission nor the European Parliament effectively balances the Council of the European Union. Similarly, vertical party integration is strong in both German chambers, but is virtually non-existent in the EU, as is any effective transnational lobbying from top European industrial associations, Börzel argued.

The EU suffers from a ‘double legitimacy’ trap: weak input legitimacy (from restricted participation) used to be compensated by output legitimacy (from efficiency); this is no longer the case because member states are deprived of the ability to act in areas to do with the internal market (especially in macroeconomic stabilization) yet such powers are not conferred on the Union either. Börzel suggested that in order to escape this trap the EU should move closer to the German model of co-operative federalism. Under this scenario the Council of the EU would develop into a second chamber of the European Parliament (EP), and the EP would be placed on equal footing with the Council in the legislative process. The Commission would become the true European government with tax and spending capacities independent of the member states. Input legitimacy also needs to be strengthened by bringing European citizens closer to the decision-making process *before* decisions are made.

### II.3 The Convention and Division of Competences

Looking explicitly at the questions facing the Convention Angelika Hable and Andrew Duff implicitly demonstrated that Börzel’s proposals are not likely to come about in the short or medium term. Hable raised several key constitutional questions facing the Union and concerns that could arise from proposed changes to the constitutional order in Europe. The first question facing the Convention is that of attribution of competences: ‘Who is responsible for attributing competence? The constitution or the member states?’ How should the treaty and particularly the attribution of competences be amended? There had been suggestions that the treaty should be ‘split’ in order to permit an easier amendment process for the non-constitutional aspects of the treaty, although this suggestion was ultimately dropped.<sup>24</sup> The

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24 The idea of splitting the treaties was proposed by the European Commission in 2001 following work undertaken by the European University Institute in Florence. Commission of the European Communities,

Bourlanges and Badinter Reports both suggest ways of amending the treaties that would move away from the traditional mechanisms whereby it is the member states acting unanimously who can amend the treaties.<sup>25</sup>

There is also a question about who should be the final arbiter of constitutionality if an act of secondary EU law conflicts with national constitutions. Stephane Griller had argued that member states should retain residual competence to control ‘acts of secondary law that are manifestly *ultra vires* or seriously fall below the EU standard of fundamental rights protection’ because the EU is not yet a state.<sup>26</sup>

The Draft Constitution produced by the Praesidium outlines three ‘classical’ categories of EU competence: *exclusive*, *shared* with the member states, and *supporting measures* (original called complementary competences). Any policy not explicitly mentioned in the treaties remains exclusive to the member states. However, in addition to these formal categories, there are also separate categories in the area of CFSP, co-ordination of economic policy, and other extra categories of shared competence. Hable questioned whether these additional categories were necessary given that one of the Convention’s aims was to simplify matters. There was also a danger, Hable argued, of the pillar system re-entering through the back door.

In Hable’s opinion, exclusive competences at EU-level should be limited to i) external trade in goods, ii) monetary policy with regard to members of EMU, iii) urgent actions to interrupt or reduce economic relations with third countries, iv) areas of implicit external competences. For clarity, it would be necessary to decide whether to aim for a step towards federalism with a clearer separation of powers or to retain the present decision-making procedures adapted to the requirements of an EU of 25; the current draft Constitution did not do so, Hable asserted.

Andrew Duff, a member of the Convention, Vice-President of the EP delegation to the Convention; Chair of the Caucus of Liberal Members on the Convention, outlined the achievements of the Convention so far. There was general agreement among conventioners that the three pillars of the Union should be merged; that the executive and legislative functions of the EU need to be fully separated; that the instruments for implementation and decision-making procedures need to be streamlined; a consensus had also developed on the need for the Union to strengthen its capacity to act at home and abroad. In line with the thinking among conventioners, Duff argued that it is necessary to retain flexibility in the system; creating something too rigid would be disastrous. He pointed out that practitioners view all competences in the Union as ‘shared’, though some are ‘more shared than others’, and that it was important to make this clear to the average EU citizen.

In a round-table discussion that looked at the controversial issues of tax harmonization, defence policy, social policy and internal security, Toomas Ilves (former Foreign Minister of Estonia) drew attention to the link between taxation and social policy. He pointed out, for instance, that the ageing populations of Europe will mean more older voters who will want to move freely about the EU, collecting their pensions wherever they happen to be resident. Although the new, small state of Estonia agrees with the old, large state of the UK on the need to defend the national prerogative in these sensitive areas, Ilves hinted that some compromise would be necessary given the nature of the EU’s internal market.

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*Communication from the Commission – A Project for the European Union*, COM(2002) 247 final (Brussels: 22 May 2002), p. 18.

25 For a full discussion of this issue, please see, Angelika Hable, ‘Visions on the reform of competences in the European Convention’, available at <http://www.riia.org/pdf/research/europe/Hable.pdf>

26 See Griller, ‘Grundrechtsschutz in der EU und in Österreich. Gutachten zum 12. Österreichischen Juristentag’ in *Verhandlungen des Zwölften Österreichischen Juristentages*, Band I/2, Wien 1994, pp. 7ff, 49 ff, 54, 55, cited in *Ibid.*, p.6.

There has been very limited progress regarding internal security and defence in the Convention, Ilves claimed; a point that seemed to be vindicated by the Convention's draft Constitution adopted on 13 June. However, the consequences of the Schengen regime at the EU's borders and the free movement of people within the EU would nonetheless necessitate a European Police Force at some stage in the future. Ilves called defence the 'sine qua non' of integration, but he feared only a disaster would bring about the right conditions for political change in this area.

Continuing on the theme of defence, Reinhardt Rummel argued that instead of a dichotomy between internal and external security, we should think of a continuum along which different issues fall. The EU should remain flexible in order to adapt to changing conditions. He was sceptical about whether the Europeans could deal with significant threats given their reluctance to pay for defence resources, and urged the EU to intertwine the non-military component of security (which it already has) with the military component of security, which it currently lacks. The Europeans need to 'think big' – in terms of 25-30 members – in order to contribute their 'fair share' to global security.

Geoffrey Edwards echoed Rummel's insistence on flexibility, arguing that 'form should follow function'. By asking 'What do we want from Europe?', Edwards presented the British approach to the Convention, emphasizing that the UK prefers co-operation and co-ordination between sovereign states, whose governments remain the primary source of legitimacy of the EU. Therefore, although the UK supports ending the pillar structure, it would still require CFSP and justice and home affairs to remain intergovernmental. The Convention, Edwards felt, had come at the wrong time to look at these issues with clarity in the UK: the question of membership of the euro had yet to be resolved, and the Iraq crisis had cast a shadow on proceedings.

Rounding off the session of national perspectives on the Convention and division of competences, Mette Eilstrup-Sangiovanni pointed out that the European debate in Denmark is in many ways similar to that in the UK. It has been 'held hostage' to the 'opt-out school' versus the 'stay-in school' argument. The government, using the slogan 'a slimmer but stronger EU', insisted on clarification of the distribution of competences. Meantime, whereas in general Danes want to reduce EU-level actions, they are in favour of giving the EU enhanced competence in the internal security field. Danes have insisted on retaining the entire welfare sector exclusively at the state level, Eilstrup-Sangiovanni maintained, but there was a willingness to delegate some social policy.

#### **II.4 Conclusions from the workshop**

Lessons can be drawn from other federal systems and the means they employ to divide or share competences, provide for judicial review and allow individual citizens access to the centre when looking at the European Union. However, the EU is a unique institution that combines a federal first pillar of Community competence with more intergovernmental second and third pillars, even if the formal pillar structure is to be removed. The issues being raised in the Convention refer to institutional reform and legal questions but avoid a full discussion of the structure of the Court of Justice. Perhaps the EU is destined to create a new type of hybrid political system borrowing federal principles in areas of international trade and the internal market, but reserving more traditionally 'sovereign' issue areas as member state competences. Certainly, areas of defence and tax harmonization, typically seen in federal states, appear to be held particularly dear to wide range of states in the soon-to-be enlarged EU, and are unlikely to be ceded easily or quickly to the federal level. We have seen a steady expansion of EU (or federal) competence over the past fifty years, with further increases possible or probable in some policy areas. Whether the current *impasse* over foreign policy indicates that the plateau of integration has been reached, or whether it is just another hurdle

on the path of further federalization, remained open at the time of the workshop and as we shall see below by the end of the Convention as well.

### III. The Convention's Work on Competences

#### III.1 Preliminary work on delimitation of competences

John Tomlinson and Lena Hjelm-Wallen outlined the tasks facing the Convention in the area of competences extremely well in a joint contribution to the Convention in October 2002:

Many [citizens] are unclear about the division of competences between the Union and the Member States. This gives rise to unjustified fears of a drift of power to the centre with no adequate democratic oversight.

... the Treaties do contain provisions which set out where the Union has competences. But they are unsystematic and scattered throughout the Treaties. And the different levels of competence that the Union can exercise – exclusive, shared, limited to supporting national action – are nowhere clearly explained: they emerge from the wording of individual policy chapters and the case law of the Court of Justice.

This is unsatisfactory. A new constitutional Treaty should set out clearly the **principles** underlying the division of competences, the **scope** of the Union's competences, and explain **the different ways in which the Union can exercise these competences**.<sup>27</sup>

After an initial discussion in the plenary session (15-16 April) the Praesidium produced a discussion paper on 'Delimitation of competence between the European Union and the Member States – Existing system, problems and avenues to be explored' in May 2002.<sup>28</sup> The paper noted that the current system represents an attempt to ensure flexibility and the need for 'precision in delimiting the competences'<sup>29</sup> but also recognized that the system is rather opaque.

The Praesidium nevertheless identified three types of legislative competence held by the Community/Union: **exclusive**, **concurrent** (or shared) and **complementary**.<sup>30</sup> Briefly, exclusive competence is where the Union alone may adopt rules in a policy area, including the common commercial policy, the Common Customs Tariff and monetary policy for eurozone states. Concurrent competence is more complicated, covering 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.'<sup>31</sup> Finally, complementary competence refers to areas where the Community/Union's scope for action is only in support of member states' action in areas where competence remains primarily with the member states. This title was deemed to create some confusion and members of the Convention argued that it should be changed to something a little more comprehensible such

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27 European Convention Secretariat, *Contribution by Ms. Lena Hjelm-Wallen, member and Lord Tomlinson, alternate member of the Convention: 'Competences'* CONV 377/02 (Brussels: 29 October 2002), p. 3.

28 CONV 47/02.

29 Ibid., p. 2.

30 Ibid., pp.6-7. There are other types of competence outside the legislative sphere. In particular, it is the member states that are largely responsible for implementing legislation.

31 Ibid., p. 7.

as ‘residual’ or ‘partial’ competence.<sup>32</sup> (The Union has competence only in areas that the member states have granted it; any powers not conferred on the Union remain with the member states. Member states thus retain full competence over all policy areas that are not mentioned in the Treaties, an issue that certain members of the Convention felt might usefully be clarified for the benefit of the citizens.)

Precisely how competences should be delimited was one question facing the Convention. Yet, as the Praesidium pointed out, ‘there is no “ideal” system for the delimitation of competence’.<sup>33</sup> Even a catalogue of competences, which was initially favoured by some members of the Convention, may lead to difficulties when there is a conflict between different levels of government. Since it is also a less flexible system than some others, it became clear very early in the work of the Convention that the idea of a catalogue of competences was unlikely to win much support and so it was quickly dropped. As Peter Glotz and others pointed out, efforts ‘to make rigid distinctions between the respective competences of the Union and the member states is not the right approach. Flexibility has allowed the Union and its members to respond rapidly and pragmatically to new challenges.’<sup>34</sup> Moreover, as the European Commission pointed out, the nature of the EU as an entity that ‘brings together states and peoples via a unique form of political integration’ means that almost all EU policies have both national and European dimensions, i.e., they are primarily shared or complementary (or shared) competences.<sup>35</sup>

The Commission felt that an adequate classification of powers could not be produced, arguing that, ‘the Union must act within the limits defined by the Treaty and respect national identities. A catalogue of powers is legal fiction and not a viable option to achieve this. In contrast, the means for limiting the way in which the European Union uses its powers should be improved.’<sup>36</sup> Despite the Commission’s scepticism, however, the Convention was to consider whether there could be further clarification of ‘the provisions assigning powers to the European Union in certain areas’.<sup>37</sup> For most this should be something more flexible than a catalogue of competences.<sup>38</sup> The Convention was also to look at whether there were areas in which powers could be devolved back to the member states or, conversely, where it might be desirable to extend competence to the Union.<sup>39</sup>

As Glotz *et al* noted in their joint contribution, there was also a need for a set of principles on how the competences, howsoever delimited, should be exercised.<sup>40</sup> Since the use of EU competence depends on the principle of subsidiarity, the monitoring of the delimitation of competences was an area of concern for the Praesidium and for several working groups, notably those on Subsidiarity and National Parliaments as well as that on Complementary

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32 European Convention Secretariat, Note summarising the meeting [of Working Group V on Complementary Competences] on 9 July 2002 CONV 186/02 (Brussels: 12 July 2002), p.3; *Note summarising the meeting [of Working Group V on Complementary Competences] on 6 September 2002* CONV 251/02 (Brussels: 9 September 2002), p.3.

33 CONV 47/02, p. 11.

34 *Contribution from Mr Peter Glotz, Mr Peter Hain, Ms Danuta Hübner, Mr Ray McSharry, Mr Pierre Moscovici, members of the Convention: Division of competences* CONV 88/02 (Brussels: 14 June 2002), p. 2.

35 COM(2002) 247 final, p. 20. The issue was debated in the 15-16 April plenary session of the Convention.

36 Commission of the European Communities Press Room, *Commission proposes a far-reaching overhaul of the European Union* IP/02/750 (Brussels: 22 May 2002), available at <http://europa.eu.int/rapid/start/cgi/p.2>.

37 CONV 47/02, p.15

38 See for example the Contributions by Glotz et al and by Duff et al, CONV 88/02 and CONV 178/02.

39 Additionally, the Praesidium was concerned about the monitoring of the delimitation of competences. However, since the mechanisms for monitoring are driven either by the national parliaments, which are covered elsewhere in the Convention and elsewhere in the CONVEU network, or by the ECJ, whose remit is not per se part of the work of the Convention, the issue will not be addressed here. Suffice it to say that the national parliaments’ monitoring of subsidiarity, which is something that they could have done without any treaty reform, was the source of much discussion within the Convention.

40 CONV 88/02, p.3

Competences.<sup>41</sup> As the Working Group on the Principle of Subsidiarity noted, the better the competences of the Union are delimited the better the prospects for applying the principle of subsidiarity.<sup>42</sup>

There was a strong belief that *ex ante* monitoring of subsidiarity by national parliaments (*ex post* monitoring is somewhat different and the expectation is that it should be done by the European Court of Justice).<sup>43</sup> This is in some respects a very difficult issue since the Union cannot determine what national parliaments do in terms of monitoring EU legislation. National parliaments are free to engage in scrutiny without any treaty reform; some states do currently engage in detailed scrutiny, others do rather less. It is true, however, that if the Commission were to submit draft legislation to national parliaments at the same time as to the European Parliament and to the Council, national parliamentarians could more effectively monitor subsidiarity.<sup>44</sup> Some members of the Convention suggested a new body to monitor ‘compliance with the principle of delimitation of competence’<sup>45</sup> would be desirable but ultimately this idea did not win the support of the Convention.<sup>46</sup>

### III.2 From Preliminary draft Constitutional Treaty to Draft Constitution

In October 2002, Convention President Giscard d’Estaing presented the first of a series of draft constitutional documents. The first document was intended to be in Giscard’s words ‘l’architecture de la future constitution européenne’.<sup>47</sup> Already this was a step further than many had anticipated prior to the opening of the Convention, when the UK in particular had seemed deeply opposed to the idea of a constitution. By October 2002, however, it seemed to be generally accepted that the draft should be for a Constitutional Treaty.<sup>48</sup> The draft was very much a framework document, offering little guidance as to whether the proposed constitution was likely fundamentally to alter the nature of the Union. However, the draft did indicate how certain articles would be fleshed out, including some in Part One, Title III on ‘Union competences and actions’.<sup>49</sup>

Article 7 was to outline the principles of Union action, while Article 8 was intended to establish two key principles: ‘that any competence not conferred on the Union by the Constitution rests with the Member States’ and ‘the primacy of Union law in the exercise of the competences conferred on the Union’. Neither principle was new but their incorporation into the draft Treaty was important in indicating that powers would be attributed by the member states, not by the constitution, and re-iterating the doctrine of the supremacy of EU law. Article 8 was to set out rules for ‘the effective monitoring of subsidiarity and proportionality.’ It was envisaged that Article 9 would list categories of competence, Article 10 the areas exclusive Union competence, Article 11 the areas of shared competence, and

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41 See, for example, CONV47/02, pp.18-19, European Convention Secretariat, *Conclusions of Working Group 1 on the Principle of Subsidiarity* CONV 286/02 (Brussels: 23 September 2002).

42 CONV 286/02

43 Ibid., p. 2. This view was also articulated by the European Commission, Commission of the European Communities Press Room, *Communications from the Commission A project for the European Union Questions and Answers* MEMO/02/103 (Brussels: 22 May 2002), pp. 2-3.

44 See CONV 286/02 for proposals by the Working Group on the Principle of Subsidiarity, pp. 5-7. The Working Group acknowledged that some reforms could be brought about within the existing treaties but others would require treaty amendment, notably to the Protocol on the application of the principles of subsidiarity and proportionality. CONV 286/02, p.2.

45 CONV 47/02, p. 19

46 Duff *et al*, for example, argued that such a body would be impracticable, ‘offend the principle of separation of powers by treading on the prerogatives of the European Parliament’ and, as a *de facto* third chamber, be ‘an unaffordable luxury. CONV 178/02, p.4.

47 Valéry Giscard d’Estaing, *Présentation de l’Avant projet d’un Traité constitutionnel*, Session Plénière 28-29 Octobre 2002, p. 2.

48 European Convention Secretariat, *Summary report of the plenary session – Brussels, 28 and 29 October 2002* CONV 378/02 (Brussels: 31 October 2002), p. 1.

49 *Preliminary draft Constitutional Treaty* CONV 369/02 (Brussels: 28 October 2002), pp. 10-11.

Article 12 the areas in which the Union supports or coordinates member state action (the equivalent of the ‘complementary competence’).

In addition to three areas of competence outlined in Articles 10-12, which essentially matched the definitions that the Praesidium had identified back in May 2002, the draft also proposed in Article 13 yet another group of areas where ‘Member States may define and pursue common policies, within the Union framework and according to specific rules’. This seemed, then to be re-inserting an element of complexity into the proposed treaty, as Hable noted (see above). Potentially even more confusing, however, was the decision to divide the draft treaty into parts, not for the purpose of permitting ease of amendment in some areas but rather so that the ‘Union’s policies and implementation’ could be outlined in depth in Part Two. The idea of simplifying the Treaties and bringing Europe closer to the people seemed to be as far away as ever.

Giscard presented the various proposed Articles in a piecemeal fashion, with Articles debated in groups in the plenary sessions of the Convention. Members of the Convention and alternates also submitted various proposed amendments, some of which were incorporated into a full draft constitution. The draft was presented in two volumes, one containing Part One, the other containing Parts Two, Three and Four, where Part Two, covering the Charter of Fundamental Rights was new, on 26 and 27 May respectively.<sup>50</sup> In addition to the text of Part One in the first volume, however, was a ‘draft text with comments’ in Annex 2. That document made explicit how and why changes had been made to the wording of particular draft treaty articles, including whether and why certain amendments had been accepted or otherwise.<sup>51</sup> Part One retained the format proposed in October but fleshed out the Articles in detail. The revised Part One Title III on Union Competences was accepted without further amendment by the Convention meeting in late May and early June. The final version as submitted by Giscard to the Convention on 12 June and to the European Council meeting in Thessaloniki on 20 June is reproduced below.

#### **IV. Conclusions**

The draft agreed by members of the Convention achieves certain key aims. It succeeds in outlining clearly the principles underlying the division of competences within the Union and it makes explicit the fact that the Union’s powers are conferred on it by the member states, not the constitution. Moreover, it ties the principles of subsidiarity and proportionality to the issue of competences in such a way that the Union should neither be rendered impotent nor be able to wield excessive power. The draft constitution makes clear the broad areas in which the Union has exclusive or shared competence and where it has only the right to undertake ‘supporting, coordinating or complementary action’ (the term ‘complementary competence’ finally having been removed).

So far, so good, one might argue. A clear set of definitions and a clear indication of who does what. However, the matter is not quite so simple. The draft has retained the ‘other areas’ that had been mentioned in Article 13 of the October draft. Now ‘coordination of economic and employment policies’ is enshrined in Article I-14 and common foreign and security policy is in Article I-15. Thus there will not be three categories of competence but at least five, which does not entirely help clarification and simplification. Moreover, while the draft articles are in many ways drafted in such a way that they should be acceptable to the members of the IGC (in marked contrast to the battles still to be fought over institutions), there is still major disagreement about the way certain decisions should be reached. After all, qualified majority

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50 Respectively, European Convention Secretariat, *Draft Constitution, Volume I – Revised text of Part One* CONV 724/03 (Brussels: 26 May 2003) and European Convention Secretariat, *Draft Constitution, Volume II – Draft text of Parts Two, Three and Four* CONV 725/03 (Brussels: 27 May 2003)

51 CONV 724/03, Annex 2.

voting is not the rule in all areas and it is not at all certain that member states will converge on change in the areas of, for example, tax harmonization or foreign policy.

Broadly speaking, however, the draft does achieve its objectives in the area of delimitation of competences and should prove acceptable to the Intergovernmental policies in this regard.

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