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Committee on Constitutional Affairs

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DRAFT REPORT

on the division of powers between the European Union and the Member States (2001/2024(INI))

Committee on Constitutional Affairs

Rapporteur: Alain Lamassoure

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PROCEDURAL PAGE

At the sitting of 15 March 2001 the President of Parliament announced that the Committee on Constitutional Affairs had been authorised to draw up an own-initiative report, pursuant to Rule 163 of the Rules of Procedure, on the division of powers between the European Union and the Member States.

At the sittings of 31 May 2001, 3 May 2001 and 14 June 2001 respectively, the President of Parliament announced that she had also referred the matter to the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy, the Committee on Legal Affairs and the Internal Market and the Committee on Regional Policy, Transport and Tourism for their opinions.

The Committee on Constitutional Affairs had appointed Alain Lamassoure rapporteur at its meeting of 24 January 2001.

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The committee/It considered the draft report at its meeting(s) of ... .

At the latter/last meeting it adopted the motion for a resolution by ... votes to ..., with ... abstention(s)/unanimously.

The following were present for the vote: ... chairman/acting chairman; ... and ..., vice-chairman/vice-chairmen; ..., rapporteur; ..., ... (for ...), ... (for ... pursuant to Rule 153(2)), ... and ... .

The opinion(s)of the Committee on ... (and the Committee on ...) is (are) attached; the Committee on ... decided on ... not to deliver an opinion.

The report was tabled on ....

The deadline for tabling amendments will be indicated in the draft agenda for the relevant part-session/is ... on ... .

MOTION FOR A RESOLUTION

European Parliament resolution on the division of powers between the European Union and the Member States (2001/2024(INI))

The European Parliament,

– having regard to the treaty signed in Nice on 26 February 2001, and in particular Declaration 23 on the future of the Union,

- having regard to the Laeken European Summit's declaration of 15 December 2001 on the future of the European Union[1],

- having regard to its resolution of 12 July 1990 on the principle of subsidiarity[2]

- having regard to its resolution of 13 April 2000 containing its proposals for the Intergovernmental Conference[3],

- having regard to its resolution of 31 May 2001 on the Treaty of Nice and future of the European Union[4],

- having regard to its resolution of 29 November 2001 on the constitutional process and future of the Union[5],

- having regard to the opinion of the Committee of the Regions of …….. on

– having regard to Rule 163 of its Rules of Procedure,

– having regard to the report of the Committee on Constitutional Affairs and the opinions of the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy, the Committee on Legal Affairs and the Internal Market and the Committee on Regional Policy, Transport and Tourism (A5-0000/2002),

A. whereas the current system of division of powers in the Treaties is characterised by considerable confusion between objectives, substantive powers and functional powers, arising from the existence of four treaties and two different entities, the Union and the Community, from the proliferation of legislative instruments with differing and sometimes questionable legal scope, and from the absence of a real hierarchy of acts,

B. whereas this situation is the outcome of more than 40 years of existence during which the institutions created for a small Community with strictly economic objectives have had to adapt to successive enlargements and to the increasingly political functions assigned to the Union,

[1] Conclusions of the Presidency - Annex I
[2] OJ C 231.17.9.1990, p. 163.
[3] OJ C 40.7.2.2001, p. 409.
[4] Texts adopted, point 4.
[5] Texts adopted, point 19.

C. whereas the principles of subsidiarity and proportionality introduced by the Treaty of Maastricht have not managed to dispel the impression among the public of growing and excessive intervention by Europe in the details of their daily lives,

D. whereas public opinion polls and the debates held since the Treaty of Nice both reveal a gulf between citizens' expectations of Europe and the issues actually dealt with by the latter,

E. whereas, in the foreign policy sphere, the various arrangements for role-sharing between the Union and the States used over the past 20 years have never allowed the Union to become a fully-fledged player on the international stage,

F. whereas it has only been possible to remedy the rigid framework for functional powers established by the existing treaties by using Article 308, to such an extent that it has served as the legal basis for more than 700 Community legislative measures,

G. whereas the institutional guarantees of compliance with the division of powers are inadequate,

H. whereas the system of powers must be capable of evolving and adapting to social, economic and political changes that might take place in the future,

I. whereas regions with legislative powers now exist in almost half the Member States, where the management of Community programmes and the transposition of European legislation into domestic law are just as much a matter for decentralised authorities as for central government, and consequently the basic Union texts can no longer disregard the role of these particular partners;

Powers of the Union in a constitutional framework

1. Considers the time has come to update the division of powers between the Union and its Member States, taking account of the lessons of the Community's history, the views of the applicant countries and the expectations of citizens;

2. Reiterates its call for a constitution for the Union, which recasts the various treaties and merges them into a single text concerning a single entity, the Union, endowed with legal personality;

3. Considers that this constitutional approach must be accompanied by a new presentation of the powers of the Union and that this presentation must be sufficiently clear to be understandable to all citizens;

4. Considers that a clear distinction must be made between the *objectives* of the Union and its *powers*, defined by subject area; wishes to see a simple list of powers, in which each heading merely states the subject in question and, possibly, describes the spirit in which the Union should exercise its role;

5. Considers that, among the current Treaty provisions relating to powers, those not included in the new text should remain in force but should be ranked as legislative rather than constitutional provisions;

Exercise of powers

6. Considers it essential that the constitution should define a legislative function and an executive function and that consequently the principles of the separation of powers and the hierarchy of acts should be applied at Union level;

7. Considers that legislation - Community 'law' - must be adopted by the two branches of the legislative authority, the Council and Parliament, which are responsible for political choices; whereas implementing measures, the framework for which is established by the law, come under the executive power which, depending on the circumstances, may be the responsibility of the Commission, a specialist European Agency, the Member States or, for those States which so decide, their local or regional authorities;

8. Considers that the political model of the Union must retain two fundamental features: the Union has virtually no management departments, at least for internal policies, for which it relies on the Member States; and the bulk of fiscal and tax power must also remain at national level;

General framework for the Union's powers

Exclusive powers

9. Defines the exclusive powers of the Union as areas in which primary responsibility lies with the Union, the Member States only being able to intervene on the conditions and within the limits established by the Union;

10. Considers that the Union's exclusive powers thus defined must continue to be very few in number and relate, as is now the case, to monetary policy, customs policy and external economic relations;

11. Wishes, however, to see the financing of the Union budget and foreign policy added to the above list;

Shared powers

12. Considers that the list of shared powers must include subjects falling into two categories:

    - those which underpin the internal market, including the 'four freedoms', as well as policies complementing or flanking the single area: agriculture, fisheries, transport, trans-European networks, environment, research and technological development, regional and cohesion policy, social policy, association of overseas countries and territories, development cooperation and energy;

    - those relating to common defence and security, and internal security and justice;

13. Considers that, in this area of powers, Community legislation must establish the guidelines, general principles and objectives, whereas the Member States must be responsible for detailed transposition into their domestic legal systems, in accordance with the principles of subsidiarity and proportionality; also considers that the States must retain the capacity to legislate where the Union has not yet exercised its prerogatives;

14. Considers that the principles of subsidiarity and proportionality must be strengthened by introducing the right to bring an action in the Court of Justice to uphold these principles before Community legislative acts enter into force;

Supplementary powers

15. Considers that, in other areas, it must be made clear that action by the Union may only complement that of the Member States, which retain the power to enact ordinary law; this already applies to education, training, youth, civil protection, culture, sport and tourism but civil and commercial contracts might be added;

Political powers

16. Believes that mention should also be made of political powers involving giving direction and ensuring coordination, which are exercised by the Union institutions, or within the latter, and which are not legally enforceable vis-à-vis third parties;

17. Considers that the latter include powers relating to compulsory coordination of national fiscal policies and employment policies and believes that in the case of fiscal policy it is necessary to put in place new procedures, distinct from the Union's ordinary legislative procedures, which involve representatives of the national parliaments;

Exclusive powers of the Member States

18. Does not consider it necessary to draw up a list of the exclusive powers of the Member States, but rather to apply the principle of presumption that the States have jurisdiction where the constitutional text does not stipulate otherwise; considers, nonetheless, that it would be useful to specify certain areas which, by their very nature, are the exclusive province of national government, such as fiscal policy and the territorial organisation of the State;

Future development of the system

19. Considers it essential to include a review clause to avoid establishing a rigid system of division of powers; in this context, considers that it would be useful to maintain a mechanism, similar to the current Article 308 but the application of which would be the exception; in addition, this mechanism would work in both directions, also enabling powers to be returned to the Member States when the need for Community intervention had ceased; representatives of the national parliaments should be involved in the decision-making procedure;

20. Proposes the introduction of a principle of cost neutrality, under which the Union and the Member States would undertake to ensure that any transfer of powers, in either direction, will be made at constant cost and with a constant tax burden for taxpayers;

21. Suggests that the list of powers should be comprehensively reviewed ten years after its adoption, and thereafter every 20 years;

Partner regions of the Union

22. Proposes creating a 'partner regions of the Union' status, which would apply to regional authorities designated by each of the Member States, giving them certain rights linked to their involvement in Community policies: right to be consulted by the Commission, representation in the Committee of the Regions, possibility of bringing actions directly in the Court of Justice on any competence disputes with the Union;

Judicial guarantees

23. Proposes that the Court of Justice should become a Constitutional Court;

24. Proposes the creation of an additional referral procedure before the entry into force of a legislative measure and which could result in application of the relevant measure being suspended; this referral procedure would work as follows:

    - it could be initiated by the Council, the Commission, the Parliament, a qualified minority of Member States or a significant minority of the partner regions of the Union;

    - the procedure would have to be initiated within a period of one month from adoption of the legislative measure, the Court also having to give a decision within a period of one month;

    - the sole grounds admissible in this *a priori* procedure would be non-compliance with the principle of subsidiarity;

    - for the purposes of preparing the case file and starting the procedure, the Council could appoint a formation composed of members of the national parliaments;

    - if the Constitutional Court declared legislation to be null and void it would mean either that the legislation would be dropped or that it would be completely revised bearing in mind the reasons given by the Court, or recourse could be made to the revised Article 308;

25. Instructs its President to forward this resolution to the Council, the Commission and the Convention.

EXPLANATORY STATEMENT

After consideration of an initial working document drafted by the rapporteur, discussions within the Committee on Constitutional Affairs, hearings arranged by the committee and the first conclusions of the major public debate in the Member States following the Nice European Council and, finally, the conclusions of the Laeken European Council, it is now possible to set out some initial guidelines, subject to the opinion officially requested by Parliament from the Committee of the Regions, which is not yet available. (I)

This report therefore calls on Parliament to adopt the main guidelines that will inform the work of the Convention in this sphere. (II)

I - GUIDELINES CONFIRMED OR CLARIFIED:

1. **The current wording of the Treaty articles on the division of powers is unsatisfactory**.

Drafted at different periods, the outcome of diplomatic compromise, the relevant Treaty articles do not confine themselves merely to the distribution of powers but often describe the content of the related policies in detail (cf. for example, environment policy which is the subject of Title XIX, TEC). These specific provisions, which are unusual in a basic text, sometimes go so far as to prohibit the Union from carrying out any harmonisation whatsoever of national policies in certain spheres (for example, education, vocational training and culture).

Moreover, the treaties combine a definition of competences based on *policy areas* (customs, agriculture, transport, etc.), and competences based on *objectives* (in particular the general provision of Article 94 on the internal market). To make the situation even more complicated, some of these objectives are not assigned directly to the Union, but to the Member States themselves (cf. Article 119 on equal pay for men and women). In other cases, action by the Community is conditional upon measures first having been taken by the Member States (Article 47(3) TEC on the health professions).

The overall picture is not only unnecessarily complicated, it also results in excessive inflexibility; the only way of remedying this has been to make a great deal of use of the general clause extending the scope of Community action: the current Article 308, which has served as the legal basis for almost 700 items of Community legislation!

The outcome is not satisfactory either for the decision-makers or, above all, for citizens and their national representatives. It is of course true that since the Treaty of Maastricht, and in response to a proposal made by the European Parliament (1990 Giscard d'Estaing report), the principles of subsidiarity and proportionality have been introduced into the action taken by all the institutions; in addition, the legislative work of the Union has undoubtedly declined: in 1995 the European Commission submitted 71 proposals for directives and 290 proposals for regulations, in 2000 the corresponding figures were 48 and 193. But is anyone aware of this? The national parliaments, elected representatives of the regions and even the general public are under the impression that 'Europe' is intervening to a growing and excessive extent in the details of their daily lives, whereas the Union seems to them to be ineffective on the international stage, where its action would appear to be more justified.

Consequently, it is necessary to **clarify the situation by redrafting the treaties, drawing inspiration from democratic constitutions, rather than diplomatic instruments**. This is all the more appropriate because the constitutional approach, strongly recommended by Parliament on the basis of the Duhamel report, now enjoys broad public support and is approved by a majority of the governments of the Fifteen.

2. **As well as mere *clarification*, the treaties need to be brought up-to-date**

The time has come to draw the lessons of 40 years of Community life, and above all to take account of the views of new players in the European game: the regions with legislative powers, which now exist in almost half the Member States; the applicant countries, whose expectations of the Union sometimes differ from our own, and last but not least public opinion since the public debate that has taken place during the last year has confirmed the findings of the Eurobarometer polls, which suggest that the Europe which is being shaped in Brussels, Strasbourg and Luxembourg is not always the Europe that the public wants to see.

This updating exercise must be based on the provisions now in place and the vast experience acquired: it is not a case of going back to the drawing board. Even those with the most liberal views do not envisage unravelling the legal framework of the single area, the principle of which owes as much to Margaret Thatcher as to Jacques Delors. Nonetheless, there can be no no-go-areas, the aim being to develop a Community *spirit* rather than to timidly defend the status quo, which goes under the rather quaint name of the 'acquis'.

Whatever clarification exercise is carried out, the 'grey area' of competences shared between the Union and the States will be significant, or even predominant. It will therefore be necessary to determine '**ground rules**' **for this grey area**, in accordance with the principles of subsidiarity and proportionality.

Once established, the division of powers needs an **arbiter, who is independent of the political authorities involved**, i.e. of a judicial nature. The original concept of the Court of Justice was that its main role was to ensure the uniformity and pre-eminence of Community law. In the future the Union will need an authority to guarantee that the respective prerogatives of the various parties are observed.

The Community experience, and that of Federal States, demonstrates that it is useful to **review** the distribution of powers at regular intervals. If this is not done, the federal level has a tendency to take over an ever greater number of decisions, despite the stated political will and the case law of the constitutional court.

II - FURTHER GUIDELINES PROPOSED

The first aim of this report is to secure confirmation of the initial approach set out above. However, Parliament also has to express a view on other political options that will be submitted to the Convention.

1. **The political model of the Union must retain its historic originality in two vital areas**.

1.1 The Union does not have any management services. The management of policies and Community appropriations is a matter for the administrations of the Member States, or

specialist agencies.

1.2 Similarly, the main financial power (budget and taxation) must remain at the level of the Member States.

These two points are so consubstantial with the EEC that they tend to be overlooked in the political debate. However, they constitute a major difference compared with the philosophy underlying the main existing federal regimes, where the exercise of legal powers is generally accompanied by corresponding financial powers. For example, Article 104a of the German Basic Law says that *'the Federation and the Länder shall separately meet the expenditure resulting from the discharge of their respective tasks'*, and under the Spanish Constitution, *'the original power to establish taxes by means of law belongs exclusively to the State'* (Article 133-1) but *'the Autonomous Communities shall enjoy financial autonomy for the development and exercise of their competences'* (Article 156). The same principle is found in Belgium and in the American Constitution (since the XVIth amendment) and the Canadian Constitution.

For the most part, however, the European Union has to make do with only a legislative power, that of establishing rules, or law-making. Secondarily, it has the power to coordinate measures taken by the Member States. However, the Member States retain a monopoly on the actual management of public policy, financial redistribution to disadvantaged sections of the population and, finally, direct contact with citizens; as well as a virtual monopoly of countless policies involving financial, budgetary or tax incentives.

It is likely that over time this original feature will become less marked: will it be possible to go on operating in a political system where the main rules of the game are established at one level whereas financial redistribution is organised within a different framework? The existing system has the disadvantage, among other things, of encouraging the Union to legislate in all sorts of areas since this is the only means of action available to it. It is not surprising that the remote and anonymous European authority, which does nothing but impose a proliferation of bans or constraints, is an ideal scapegoat compared to the national or regional administrations which are close to the public and headed by friendly local elected representatives, who are extremely generous in handing out financial aid.

However, it is obviously impossible to do otherwise as long as there is no independent democratic power at European level.

2. The **treaties must clarify the concepts of *legislative* and *executive* powers at Community level**.

The confusion between the nature of the three political institutions of the Union is not an inevitable consequence of the nature of 'political animal' that is Europe, but the result of the governing bodies of the economic Europe of Six set up in Rome in 1957 being extrapolated to the political Union of Fifteen. Half a dozen treaties later, there is still no title or chapter of the basic texts which mentions a 'legislative function' although in the meantime hundreds of directives and thousands of regulations have been adopted; at the very most, the Council's legislative role is mentioned in passing in Article 207(3) of the EC Treaty.

The treaties are silent on this issue and case law and expert opinion do not shed much light on the matter. To give an illustration, there are judgments in which the Court of Justice of the European Communities has taken the view that the competition directives, provided for by Article 86(3) and falling within the competence of the Commission, should be classified in the general category of directives covered by the present Article 249 TEC, in other words that the Commission itself also had an autonomous legislative power! (Judgment of 6 July 1982 *France v Commission* and judgment of 30 June 1998, *Greece v Commission*). Then there are the acts adopted by the supreme political authority, the European Council, which have names as varied and as vague as *'conclusions of the Presidency, summary of decisions, Council acts, reports, declarations, solemn declarations'*, but have no legal force whatsoever and whose scope, as one lawyer has nicely put it, amounts to the *'power to make high-flown statements'* (P-Y Monjal, October 2000).

The only people who benefit from this confusion are the initiated. In 2002 the basic principles of good governance and democratic scrutiny require clarification of the respective roles of each institution. Who is responsible for defining the common interest? Who establishes political principles? Who translates these principles into practical rules? Who is responsible for monitoring and who enforces the rules? The public has a right to know.

There are three ways of achieving this clarification:

- by recognising that, as in the case of the Community budget, there are **two branches of the legislative authority**: Parliament, representing the citizens, and the Council, representing the States. Recognition of this principle should logically lead to the two branches being given equivalent powers (codecision), as Parliament has repeatedly pointed out;

- through a return to the original philosophy behind the Community legal system, under which the **political authority establishes the legal principles (the law), with the practical arrangements being a matter for the executive**. In line with this approach, Parliament's resolution of 13 April 2000 proposed making a distinction between *legislative acts*, which would be adopted by the Council by qualified majority and subject to codecision with Parliament, and *administrative acts* which would be a matter for the Commission;

- by establishing the general rule that the **application of principles (executive power) is a matter for the Member States** or their regional or local bodies, but that it may, on a case-by-case basis, be delegated by the legislator to the Commission or a specialist agency.

3. The *fundamental objectives* of the Union should be set out in a constitutional preamble, or a preliminary article of the Treaty or Constitution, similar to the present Articles 2 of the EU Treaty and the EC Treaty, rather than in chapters dealing with the distribution of powers.

The common market Treaty, and subsequently the single European act established ambitious political objectives. These objectives have now been largely attained: there has been a common market for more than 30 years and monetary Union is the crowning achievement of the single area, even if it is still incomplete. Although some reference should be made to these original goals, it is no longer necessary or even desirable to mix-up *objectives* and *policy areas* in order to establish the distribution of powers. To take a recent example, although it is a good idea that the Union should intervene to tackle a number of very specific problems in the sphere of sport, such as the fight against doping, it is absurd that such measures should be

based on the Union's responsibility for the internal market, which results, for example, in ill-advised case law such as the Bosman judgment. **It is therefore proposed that the common market and the single area should be mentioned among the major underlying objectives, which continue to inspire and inform action by the present Union, but that in establishing competences the focus should be on subject areas**.

4. A detailed analysis of powers, sector by sector, requires a major effort involving the Commission, government representatives and members of the national parliaments: it will obviously be the Convention's main task. At this stage, we suggest that Parliament should state its position on a general framework, based on the current division of powers, amending them in those areas where change is obviously required when there is a shift from a diplomatic approach to a constitutional approach.

For these purposes, the powers devolved to the political authority (Council and Parliament in the case of the Union, national authorities and, possibly, regional and local authorities in the case of the Member States) could be classified in the following categories:

4.1 *Exclusive powers of the Union*

4.1.1 In the areas concerned, the Member States must not be able to intervene except at the express invitation of the Union, in line with the provisions of the German Basic Law (*Grundgesetz*) (Article 71) and the Spanish Constitution (Article 150).

4.1.2 The Union's exclusive powers must remain very limited:

- *monetary policy* (already the case),

- *customs policy* (already the case),

- *external economic relations*, where there seem to be no grounds whatsoever for restricting competence to trade in goods, as was done at Nice.

The following areas should be added:

- ***financing of the Union budget***. There is no possible justification for expenditure determined by the Union itself being financed by national resources, or for the national parliaments to be required to approve the taxes necessary to fund expenditure decided in the last resort by the European Parliament.

All too often it is forgotten that the original principle established and applied for 20 years was that the Community budget was funded by real own resources, excluding national payments. The reverse approach, which now prevails, is totally anti-Community: it encourages each country to calculate whether it is getting a fair return on its investment and every year we see the countries that are always net contributors lining up against the countries that are always net beneficiaries. At any event, is difficult to see how this system, which encourages national self-interest, could withstand the severe financial shock of enlargement.

The Convention will have to ask itself whether ***foreign policy***, like monetary policy and trade policy, should not in future become an exclusive preserve of the Union. This idea will send shivers through the diplomatic services, but it was overwhelmingly endorsed by public

opinion on the continent even before 11 September (cf. Eurobarometers). It is clear, in any case, that it would be illusory simply to suggest a stronger dose of Community medicine in the CFSP; this is what has been done periodically for more than 20 years, with the creation of political cooperation, then the provisions of the Treaty of Maastricht on the CFSP, and finally with the creation of the office of High-Representative, with a political outcome that we are all too well aware of. In this sphere, power-sharing amounts to relying on the goodwill of national leaders. However, after the terrible ordeals that the Union and its Member States have faced since the 1990s, in former Yugoslavia, Africa and the Middle East, recent events have confirmed only too clearly that in today's Europe the media coverage afforded to a national leader who appears individually on the international stage is irresistible compared with a team approach.

On the other hand, we are not suggesting that *agriculture and fisheries* or *cohesion policy* should be included among the Union's exclusive powers. Although agricultural policy and regional policy have played a key role in the success of the EEC and still account for a significant share of the Community budget, they are areas where, after 40 years and with a view to the accession of new members, an adjustment can be made between the respective roles of the Union and its members.

As far as the *use of languages* in the Union is concerned, this is a matter for the basic text itself (Treaty or Constitution).

4.2 *Powers shared* between the Union and the Member States

4.2.1 The list should include subjects in two categories.

- the legal bases of the internal market and the single area: the *'four freedoms', the approximation of national legislation linked to the internal market*. As well as policies complementing or flanking the single area: *agriculture, fisheries, transport, trans-European networks, environment, research and technological development, regional and cohesion policy, social policy, association of overseas countries and territories, development cooperation*.

Energy should also be included in this category, even though the current treaties restrict Community ambitions in this sphere.

- Powers relating to *common defence and security*, and to *internal security and justice* (third pillar).

4.2.2 The 'ground rules' for shared powers could be based on the following principles.

4.2.2.1 **Community legislation would establish the guidelines, principles and objectives** - possibly putting figures to them - whereas the Member States would be responsible for transposition and practical implementation in their domestic legal systems. It is here that the principles of subsidiarity and proportionality would come fully into play.

4.2.2.2 The national governments could enact legislation in the absence of European regulations, but where European legislation existed it would take precedence over national law.

4.2.2.3 If one wants to simplify the current wording of the basic text, for example on powers linked to the internal market, **each heading should be limited to one or two sentences**, describing the subject concerned and indicating what must be the spirit of the Union's role in accordance with the principle of subsidiarity. Finally, a general article would say that in the policy area concerned, the Community institutions would take account of measures taken by the Community and (or) the Union on the basis of the earlier treaties. **In this way, the corresponding provisions of the EC and EU Treaties, which are too detailed to be included in the new text, would retain their legislative force but would no longer have 'constitutional' force**.

To illustrate how this would work, let us take the example of *State aid*. The EC Treaty currently devotes 18 paragraphs, or two full pages of the Treaty to this matter. A new version would say that '*in the case of State aids of all kinds, the Union shall draw up rules on their compatibility with the internal market and establish a system of penalties applicable to donors and beneficiaries*'. The detailed provisions now set out in Articles 87 to 89 of the EC Treaty would remain the reference framework for action by the Union, but could be changed by a legislative measure.

4.3. *Supplementary* Union *powers* would relate to areas where the main initiative must remain with Member State governments: *education, training, youth, civil protection, culture, sport, tourism*. Here too, the scope of Community action would have to be specified in each case, without going into the detail of the relevant existing articles.

This list corresponds to the law as it now stands but it would probably be appropriate to add *civil and commercial contracts*, as Parliament has pointed out on a number of occasions that the increase in individual travel within the Union means that it would be useful to adopt common approach to matters hitherto covered by bilateral national agreements (for example, mixed marriages or the recovery of commercial debts).

4.4. The *political powers* of the Union (within the meaning of 'political powers' in Article 197 of the Portuguese Constitution).

4.4.1 A large part of the Council's work does not have direct legal force, despite being extremely important. This is obviously true of the European Council itself, but also of work done at ministerial level. Under the second and third pillars in particular, the Union's activities result in *common strategies, common measures, joint actions, common positions, coordination and cooperation'*, or even *'decisions'*, which are political guidelines not legally enforceable vis-à-vis third parties. There are also powers that the Union can exercise only vis-à-vis the Member States, such as the penalties provided for in Article 7 of the EU Treaty.

As a general rule, one of the novel successes of the Union is to have encouraged national governments to work together, within common institutions, to exchange information and coordinate their action, even in areas which remain within national jurisdiction. This is a considerable achievement, which is not fully recognised outside the Council itself and which it is crucial to preserve.

This power to give impetus and direction and to ensure coordination is exercised mainly in the Council, or by the Council, but the Commission and Parliament may participate either by delivering opinions or through resolutions or recommendations.

4.4.2 Alongside what could be described as 'welcome' or 'desirable' coordination, which can cover a wide range of topics, is important to mention specifically the **compulsory coordination** that exists in relation to economic and monetary union (Article 99 of the EC Treaty) covering the ***coordination of national fiscal policies***.

As Parliament pointed out when the Treaty of Maastricht was adopted, and as is now plain for all to see since introduction of the euro: monetary union will not produce its full benefits unless it is accompanied by close coordination of fiscal policies. A first step has been achieved with the 'Stability and Growth Pact' and the informal meetings of the euro group. To make further progress, it will probably be necessary to establish two principles:

- Apart from the funding of European policies, which are covered by the common budget (see above), budgetary policy (expenditure, revenue, funding of the balance) falls within the exclusive jurisdiction of the Member States. However, the members of monetary union are under an obligation to coordinate their national fiscal policies.

- In the case of national policies which, in all countries of the Union, lie at the heart of Parliamentary power, **coordination has to be based on new procedures**, that are distinct from the procedures applying to ordinary Union law, **involving representatives of the national parliaments**.

If the second of these principles is adopted, the Convention will have to clarify the arrangements for involving the national parliaments.

4.4.3. *Employment policy* raises a specific problem.

At first sight, it could be included among the shared powers. However, from the first White Paper in 1992 up to the strategies defined by the Lisbon and Luxembourg European Councils, it has not been possible to avoid public disquiet because of a fundamental ambiguity; on the one hand employment is, quite rightly, a major concern of the members of the European Council, which has led them to make it priority in all their agendas; however, on the other, it is clear that the Union's own powers and resources can make only a marginal contribution in this area. Disquiet and ambiguity are indeed reflected in the current wording of the Treaty, which is particularly convoluted: the activities of the Community include *'the promotion of coordination between employment policies of the Member States with a view to enhancing their effectiveness by developing a coordinated strategy for employment'* (Article 3(i) of the EC Treaty).

Consequently, rather than making employment policy a shared responsibility, it might be a good idea to **make employment an area where there is compulsory coordination**, in line with the arrangements for fiscal policy.

4.4.4 *Closer cooperation* would naturally come under the category of political powers.

4.5 *Exclusive powers of the Member States*

4.5.1 It must be clearly stated that, **where the basic Treaty says nothing, competence for ordinary law remains with the sovereign Member States** (cf. Article 15 of the Austrian federal constitutional law of 1920, Article 70-1 of the German Basic Law and the more

sophisticated provision of Article 149-3 of the Spanish Constitution).

4.5.2 Going beyond this general principle, it should also be spelled out that certain areas, by their very nature, fall within national jurisdiction.

- this is obviously the case for *fiscal policy* (see above), apart from the financing of common policies.

- it is also the case for the ***territorial organisation*** **of the country**. Clarification of this point will be particularly useful if the suggestion below that the Union should recognise the existence of 'regional partners' is taken up. It is important that there should be no ambiguity about the fact that each Member State is entirely and exclusively competent to define the level, geographical scope, powers and status of its regional and local authorities. Each national Constitution in fact devotes considerable space to this matter, for example, Title VIII of the Spanish Constitution, which has devised a new form of differentiated territorial autonomy; Chapter IV, which is at the heart of the Belgian Constitution; Title V of the Italian Constitution, recently amended by referendum; Chapter VII of the Netherlands Constitution on 'the provinces, municipalities and water boards'; Sections VII (autonomous regions of the Azores and Madeira) and VIII ('local authorities') of Part III of the Portuguese Constitution; Titles XII and XIII of the French Constitution; Article 52(8) of the Finnish constitutional law of 1919 on the historic autonomy of the Åland islands, and Article 105 of the Greek Constitution on the peculiar status of Mount Athos. These provisions are at the very heart of national identity and sovereignty.

5. **The principles of subsidiarity and proportionality must be strengthened and enhanced**.

5.1 The principles of subsidiarity and proportionality must of course be written into the basic text, in their present wording, so that they will inform both the distribution of powers and the way which they are exercised. It is suggested below that arrangements should be made for prior judicial review. This will give the Member States and any regions with legislative powers a fundamental guarantee.

5.2 A review of the division of powers suggests that it would also be useful to establish the **principle of cost neutrality**, a fundamental guarantee for citizens and taxpayers: all things being equal, any transfer of powers must be effected at constant cost, with a constant tax burden and constant overheads for the community at large. Any increase in taxes or charges that might result from the transfer of powers to or from the Union, will have to be offset by an equivalent reduction elsewhere so that the operation is neutral for the taxpayer.

6. **The division of powers would have to be subject to regular review**.

Initial discussion has raised some fears that a rigid division of powers might be established on the basis of needs at a specific time, preventing the developments demanded by a rapidly changing world.

This fear is probably exaggerated. All the recent federal constitutions, even those with a very detailed list of powers, have proved capable of the necessary flexibility, to say nothing of the extraordinary capacity for adaptation showed by the American Constitution over two

centuries. It is nonetheless useful to draw on these experiences, alongside experience of the EC and EU, to ensure that the system has breathing space.

6.1 In this context, it is useful to have a fairly general article, such as the present Article 308, provided that two radical changes are made:

- Firstly, a subparagraph could be added allowing powers to be returned to Member States, on a case-by-case basis, where there is no longer any need for Community intervention. Article 72-3 of the German Basic Law contains a provision of this kind.

- Secondly, the **procedure for implementing this article would involve representatives of the national parliaments** on an equal footing with the European Parliament.

Consequently, this provision would still be used only in exceptional circumstances and it could work both ways, in favour of the Union or in favour of the Member States.

6.2 Apart from these case-by-case adjustments, it might be worthwhile to carry out an **overall review after about ten years**. The Spanish Constitution introduced an experimental period of this kind but it is probably a little short (five years).

7. The question of regions with legislative powers can no longer be ignored by the basic texts

This is why the Committee on Constitutional Affairs has proposed that the Committee of the Regions should be formally asked for its opinion. Until that opinion is available, the rapporteur has draw inspiration from the hearings already organised by the committee and his working meetings in Barcelona with the President of the Generalitat of Catalonia, in Alden Biesem with the Presidents of Flanders and Wallonia, in Edinburgh, at the invitation of the European affairs committee of the Scottish Parliament, in Florence with the Conference of peripheral maritime regions, in Porto with the cities of the Atlantic arc, as well as meetings with the President of the Autonomous Community of the Balearic islands and with the European affairs ministers of the Länder of Bavaria and Hessen.

The image of the regions in Europe is still confused by the old controversy about a Europe of the regions. However, the problem can no longer be stated in these terms as it is now accepted that the European Union is and will remain constituted by States.

On the other hand, the emergence of regional, or even local, players is becoming a reality that the Union can no longer afford to ignore in its day-to-day operations. This is firstly because the European Commission considers that, on average, somewhere between 70 and 80 percent of Community programmes are managed by local or regional authorities in the Member States. On top of this, almost half the States of the Union now have regions with legislative powers, the United Kingdom and then Italy having recently set up entities of this kind, which already existed, notably in Germany, Austria and Spain; this means that in the countries concerned the issues of power-sharing between the Union and the Member States, and the problems of transposing Community legislation are of concern not only to central government but also to the regional authorities. However, as the European Commission is not officially aware of the latter's existence, the number of problems involving the conception, application or transposition of Community law has recently increased.

Finally, the forthcoming enlargement of the Union to include many small countries may raise political difficulties for large regions in the existing Member States. This is because it will create a situation in which entities with a few thousand inhabitants are entitled to be represented as such in the Union, each one having a minister and a right to vote in every formation of the Council, one Commissioner, a quota of Commission staff, and members of the European Parliament, as well as having its language recognised as an official language of Europe, whereas historic regions with several million inhabitants, which make a major contribution to the economic dynamism of the Union and to the funding of its budget would still be unrecognised by the European treaties.

Two concerns thus have to be reconciled. On the one hand, the territorial organisation of each country must remain within the exclusive jurisdiction of the national governments, as pointed out above. On the other, the basic treaty can recognise the existence and role of the '**partner regions of the Union**'. In each country, the **list of regions concerned would be determined by the national government**, which would notify Brussels: the list would probably cover regions with legislative powers but it would be up to each government to designate those regions that it regarded as 'partners of the Union'.

Regions so designated would enjoy **certain rights, linked to their involvement in Community policies**: representation in the Committee of the Regions (where not all regions with legislative powers sit at the moment); right to be consulted by the Commission when it is preparing legislation falling within their jurisdiction; possibility of bringing actions directly in the Court of Justice on competence disputes concerning them. On the other hand, the participation of elected regional representatives (or indeed national representatives) in the national delegation to the Council of Ministers must continue to be a matter determined exclusively by government decision.

This proposal, which was introduced into the public debate several months ago, has given rise to conflicting reactions. Elected representatives in federal States are generally very much in favour, as are many regional leaders. Elsewhere, there is opposition in principle to any mention of infra-State authorities. Others fear that a system of 'partner regions' introduces inequalities between countries, as certain States with a tradition of central government are unlikely to make any proposals. However, should we not take account of objective national differences when they have evident repercussions on the operation of the Union? If transport by car ferry is a matter for the national parliament in France and the Scottish parliament in Scotland is it not normal to ask the European Commission, when it is drafting a proposal in this area, to seek the opinion of Edinburgh at the same time as it consults Paris and London? This seems to be no more than common sense. If inequalities exist, they are not the result of European legislation but because of different national choices as to territorial organisation.

8. Smooth operation of the system requires a real Constitutional Court

At the moment, the Court of Justice's role is to *'ensure that in the interpretation and application of this Treaty the law is observed'*, a general provision that applies only to the European Community are not to the Union (Article 220 of the EC Treaty). The judicial review of Community acts is covered by Articles 230 onwards.

Recently the Court has demonstrated a concern to include the principle of subsidiarity in the criteria applied in its judgments (cf. judgments on tobacco advertising, *Germany v Parliament*

and Council and Imperial Tobacco Ltd of 5 October 2000 and the conclusions of the Advocate-General in the *Netherlands v Parliament and Council* case). However, the wording of the treaties and the history of the single market have often led the Court to defend the most Community interpretation. The Court has thus played a key role in the creation of the single area. Now that has been achieved, the Union needs a real Constitutional Court.

This could be based on the existing Court of Justice, whose composition (1 judge per country) is not necessarily incompatible with taking account of the opinions of the Member States. However, two major changes could be made:

8.1 The role of the Court would be presented differently. It would be specifically responsible for ruling in competence disputes involving the Union or one of its institutions.

8.2. Furthermore, just like the procedures that exist in the French Constitutional Court, matters could be **referred to the Court a priori**.

It is not easy to find the right procedure. On the one hand, it is obvious that none of the European institutions is very keen to apply the principle of subsidiarity in practice: referring matters to a neutral arbiter is therefore the only means of keeping the situation under control from the outset. But what is the right time for the Court to give its ruling? As soon as a draft legislation has been published by the European Commission? The danger is that giving the green light at this stage would mean that subsequently, in the Council or Parliament, it would be much easier for abuses to occur because they would be bound to go unpunished. On the other hand, if judicial review came after the vote in Parliament, it could undo months of work at a stroke - but this is of course a risk inherent in any review of constitutionality. The existence of judicial review at the end of the legislative procedure could only encourage Council and Parliament to adopt a cautious approach. The second option is therefore to be preferred.

In 1990, on the basis of the Giscard d'Estaing report, Parliament proposed that within 20 days of final adoption of a legislative act, the Council, Commission, Parliament or a Member State could ask the Court of Justice to verify whether the legislation exceeded the limits of Community competence, bearing in mind the principles of subsidiarity and proportionality. This suggestion could be taken up. However, once the Union has 25 or 30 members, there would be a huge risk of every piece of Community legislation being challenged by someone or other. As the aim is to put in place a safeguard rather than a detailed check at this stage, provision could be made for:

- the possibility of bringing an action in the Constitutional Court, solely on the grounds of subsidiarity/proportionality, in the month following final adoption of a legislative act, the Court having to give a decision within one month.

- an action of this kind would be an option available to **a qualified minority** in the Council or Parliament, the Commission, and a significant minority of the 'partner regions of the Union'.

- for the purposes of preparing the case file and starting the procedure **the Council could meet in a new formation composed of members of the national parliaments**.

- if the Constitutional Court declared legislation to be null and void it would mean either that the legislation would be dropped or that it would be completely revised bearing in mind the reasons given by the Court, or recourse could be made to the revised Article 308 (see above).

- this a priori referral procedure based solely on the grounds of non-compliance with the principle of subsidiarity, would not preclude the same legislation being subject to subsequent review under the ordinary law, on the basis of other provisions of the treaty or constitution.

In conclusion, one idea emerges clearly from this discussion. **Bringing the division of powers up to date inevitably means tackling the fundamental issues not only of the Union's role but also of its very nature** - and of its relations with its Member States. Are we ready to move from the detailed, subtle, esoteric code of conduct drawn up by diplomats for their own use to a real constitutional-style sharing of roles, which is understandable and acceptable to citizens and their representatives? If this is not the case, we should spare ourselves the trouble of drafting a sub-Treaty of Nice. But if the answer is yes, it will open up a very new chapter in the history of the Community. It will require a noticeably different legal and political architecture. This is the price to be paid for achieving the political Union of an enlarged Europe.