

COMPETENCE: CLARITY, CONTAINMENT AND CONSIDERATION

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1. Introduction

It has never been easy to specify with exactitude the division of competence between the EU and Member States.¹ Concerns about the scope of EU power had been voiced for some time, and it was therefore unsurprising that it was an issue identified for further inquiry after the Nice Treaty 2000. The draft Constitution has addressed the issue, and the provisions will be analysed in this article. The discussion will begin with consideration of the nature of the competence problem, and the aims of the constitutional norms in this area. It is necessary to be clear about these background issues in order to assess the constitutional articles dealing with competence. This will be followed by analysis of the principal heads of EU competence set out in the Constitution. They will be considered against the twin criteria of clarity and containment, examining how far the constitutional provisions provide for a clear division of competence between the EU and the Member States, and how far they meet the objective of containing EU power.

2. The Nature of the ‘Competence Problem’

It is clear that the issue of competence is central to the relationship between the EU and the Member States in the new constitution. This was one of the key issues singled out for further investigation after the Nice Treaty in 2000. It is important at the outset to understand the ‘nature of the competence problem’. The EU has always had attributed competence: it can only operate within the powers granted to it by the Member States. This is made clear by Article 5(1) EC. Given that this is so, what then is the nature of the competence problem? A predominant concern was that Article 5(1) provided scant protection for state rights, and scant safeguards against an ever-increasing shift of power from the states to the EU. This was the rationale for the inclusion of competence as one of the issues to be addressed post the Nice Treaty.

This view of the ‘competence problem’ is however based on implicit assumptions as to how the EU acquires competence over certain areas. The inarticulate premise is that the shift in power upward towards the EU is the result primarily of some unwarranted arrogation of power by the EU institutions to the detriment of states’ rights, which Article 5(1) has been powerless to prevent. This is an over simplistic view of how and why the EU has acquired its current range of power. The matter is more complex and more interesting. The reality is that the EU’s power has been expanded by a broad interpretation accorded to existing Treaty provisions, either legislatively or judicially, by a teleological view of Article 308 EC (ex 235), and by

¹ *The Division of Competences in the European Union*, Directorate-General for Research, Working Paper, Political Series W 26 (1997); A. von Bogdandy and J. Bast, ‘The European Union’s Vertical Order of Competences: The Current Law and Proposals for its Reform’ (2002) 39 *CMLRev.* 227; G. de Búrca ‘Setting Limits to EU Competences’ Francisco Lucas Pires Working paper 2001/02 <www.fd.unl.pt/je/wpflp02a.doc>.

the attribution of new competences to the EU through successive Treaty amendments. There are nonetheless differences of view as to the relative importance of these factors.

For some EU competence has been expanded primarily through the broad interpretation accorded to Treaty articles, both legislatively and judicially, and through the expansive interpretation of Article 308. Others acknowledge this, but place equal emphasis on the conscious decision by the Member States to grant the EU competence in areas such as the environment, culture, health, consumer protection, employment, and vocational training. I fall into this latter camp. These decisions were reached after extensive discussion within Inter-Governmental Conferences leading to Treaty revisions. The fact that the EU wields competence in such areas can scarcely be regarded as illegitimate given that the Member States consciously consented to these grants of power. It is of course possible to accept this, and to argue also that the legislative and judicial interpretation accorded to these heads of EU competence has, on occasion, been too expansive.

3. The 'Aims' of the Constitutional Provisions on Competence

It is axiomatic that any view concerning the provisions on competences in the draft Constitution will necessarily be affected by perceptions as to the aims of those provisions. We cannot judge the success or failure of the enterprise without some understanding as to the objectives. The Laeken Declaration² specified in greater detail the nature of the inquiry into competence that had been left open post the Nice Treaty 2000. Under the heading of 'a better of division and definition of competence in the European Union', three more particular issues were addressed. These were the need to make the division of competence clearer and more transparent; the need to ensure that there was not a 'creeping expansion' of EU competence, while at the same time making sure that the European dynamic did not come to a halt; and the desirability of considering whether there should be some reorganisation of competence between the EU and the Member States.

There were then three principal forces driving this part of the reform process: clarity, containment and consideration. The desire for *clarity* reflected the sense that the Treaty provisions on competences were unclear, jumbled and unprincipled. The desire for *containment* reflected the concern, voiced by the German Lander as well as some Member States, that the EU had too much power, and that it should be substantively limited. This argument must nonetheless be kept in perspective. We have already seen that a significant factor in the present distribution of competence has been the conscious decision of the Member States to grant new spheres of competence to the EU. This is where the third factor came into play, *consideration* of whether the EU should continue to have the powers that it has been given in the past, a re-thinking of the areas in which the EU should be able to act.

The reality is that there was little systematic re-thinking of the areas in which the EU should be able to act. I say this not by way of criticism, but by way of explication for the subsequent discussion. The Convention did not conduct any root and branch re-consideration of all substantive heads of EU competence. Nor would this realistically have been possible within the time available. The strategy was, in general terms, to take the existing heads of competence as given. The emphasis was on clarity and containment. When consideration was

² European Council, 14-15 December 2001, SN 300/1/01 REV 1, pp. 21-22.

given to the areas in which the EU should be able to act, and the degree of its competence within those areas, the general tendency was to reinforce EU power, not to 'repatriate' it to the Member States. This is exemplified by the constitutional provisions on economic policy, and by those on foreign policy and defence.

4. The General Approach to Competence in the Draft Constitution

The provisions on competence are contained in Title III of Part I of the Draft Constitution.³ They will be examined in detail below. It will nonetheless be helpful at this juncture to set out certain key features of the constitutional strategy for competence. Firstly, the Constitution retains the central principle that the EU operates on the basis of attributed competence. This is made clear by Article I-9(1), which stipulates that Union competences are based on conferral and that their exercise is governed by subsidiarity and proportionality. This is reinforced by Article I-9(2), which provides that the Union must act within the limits of the competences conferred on it by the Member States, and that competences not conferred on the Union remain with the Member States. There then follow provisions on subsidiarity, proportionality and primacy that will be considered in detail below.

Secondly, different categories of competence are set out in Article I-11. The principal categories are where the EU's competence is exclusive, where it is shared with the Member States, where the EU is limited to supporting/co-ordinating action, with special categories for EU action in the sphere of economic and employment policy, and CFSP. The divide between these categories was the subject of intense debate within the Convention. The 'walls' between the categories shifted significantly.

Thirdly, the Constitution ascribes particular subject matter areas to each of the heads of competence. The utility of this exercise may well be debatable, on the ground that it will lead to undue rigidity and generate more confusion than it resolves.⁴ This issue will be considered in detail below. Suffice it to say for the present that political considerations were of prime importance in this respect. Those concerned about the transparency of EU competence, and its containment, would not have been content with categories of competence, with no specific subject matter areas attached to them. Indeed, it was debate as to which areas should be attached to which categories that occupied much of the Convention's time on competences.

Fourthly, the constitutional strategy was also premised on attaching concrete consequences in terms of EU and state power in relation to each head of competence. The categories therefore matter, since the categorisation has consequences, in terms of the possession and retention of legislative power. This may be thought to be natural. There would after all be little point in delineating categories of competence without spelling out determinative results of the categorisation. There is truth in this. It should also be recognised, as will be seen below, that there are real difficulties from the results of the categorisation specified in the Constitution.

³ CONV 850/03, Brussels 18 July 2003.

⁴ S. Weatherill, 'Competence', in B. de Witte (ed.), *Ten Reflections on the Constitutional Treaty for Europe* (European University Institute, 2003), pp. 45-66.

5. Exclusive Competence

(a) The Constitutional Provisions

Article I-12 sets out the areas within which the EU is to have exclusive competence. It provides that:

1. The Union shall have exclusive competence to establish the competition rules necessary for the functioning of the internal market, and in the following areas:
 - monetary policy, for the Member States which have adopted the Euro,
 - common commercial policy,
 - customs union,
 - the conservation of marine biological resources under the common fisheries policy.
2. The Union shall have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, is necessary to enable the Union to exercise its competence internally, or affects an internal Union act.

The consequence of inclusion within the list of exclusive competence is set out in Article I-11(1):

“When the Constitution confers on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of acts adopted by the Union.”

We have seen that the constitutional deliberations on competence were motivated, *inter alia*, by the desire for greater clarity and the need to contain EU power, albeit without thereby preventing the EU’s aims from being fulfilled. The constitutional provisions on exclusive competence will be considered against these twin criteria.

(b) Clarity

The *general domain of exclusive competence comes out reasonably in terms of clarity*. The areas deemed to fall within exclusive competence are laid down in Article I-12(1). There will be borderline issues as to whether action falls within one of these areas, as opposed to that of shared competence. Borderline disputes of this nature are inevitable whenever lines are drawn. The categories of exclusive competence are however relatively discrete and borderline disputes should not be too difficult to resolve. We do however need to address problematic issues that can arise in relation to the competition rules, and the customs union.

There are some ambiguities about the relationship between the competition rules, which are a species of exclusive competence, and the internal market, which is shared competence. It should be stated at the outset that, in terms of drafting, it is not clear why competition should not simply be one of the indents within Article I-12(1). It is nonetheless clear that the basic competition rules presently dealt with in Articles 81 and 82 EC fall within the domain of exclusive competence. It should be noted that the EU’s exclusive competence relates only to the ‘establishment’ of these rules, and not their ‘application’. This is in recognition of the new

reality in competition law, whereby national courts now have full competence to apply the entirety of Article 81.⁵ The key issue is whether, subject to that caveat, the EU's exclusive competence applies not just to Articles 81 and 82, but also to instances where the competition rules have an impact outside of this 'immediate area', such as Article 86 EC, which deals with the extent to which public undertakings are subject to the ordinary norms of Articles 81 and 82. It is unclear whether this aspect of the competition rules also falls within the domain of exclusive competence, or whether it is to be dealt with through shared competence, which covers, *inter alia*, the internal market. The wording of Article I-12(1) is important in this respect. It provides that the EU has exclusive competence 'to establish the competition rules necessary for the functioning of the internal market'. This indicates that the exclusive competence attaches not only to the establishment of the basic competition rules in Articles 81 and 82, but also to Article 86, given that this concerns the relationship between public undertakings and the competition rules in the overall functioning of the internal market. The structure and content of Part III of the Constitution reinforce this conclusion. In Part III the basic competition rules are laid down Articles III-50-51, and the rules relating to public undertakings are found in Article III-55. They come within Section 5 entitled the Rules on Competition, which is one of the Sections of the Chapter dealing with the Internal Market. It is therefore rational to conclude that the wording of Article I-12(1), which accords the EU exclusive competence to 'establish the competition rules for the functioning of the internal market' covers the entirety of subsection 1 of Section 5 of the Chapter dealing with the application of the competition rules to undertakings in the internal market.

There will be some difficult borderline problems between provisions relating to the customs union, and other aspects of the internal market. The customs union is a species of exclusive competence; the internal market more generally is shared competence. In Part III of the Constitution the detailed rules relating to the customs union are to be found in Section 3 of the Chapter on the Internal Market. Section 3 deals with the 'Free Movement of Goods' and the customs union is the first of three subsections, the others dealing with customs cooperation and the prohibition of quantitative restrictions. Section 6 of the same Chapter regulates fiscal provisions. It is clear from the ECJ's jurisprudence that there can be difficulties in deciding whether a case is concerned with the customs union, tariffs, quotas and the like, or whether it is really 'about' discriminatory taxation.⁶ There may also be 'categorisation difficulties' in relation to the divide between tariffs/ quotas and other quantitative measures that might limit imports.⁷ The fact that the customs union falls within the domain of exclusive competence, while the other issues come within shared competence, renders such divisions more significant.

There are also difficulties in terms of clarity concerning the scope of the EU's exclusive external competence. The existing case law on the scope of the EU's external competence, and the extent to which it is exclusive or parallel with that of the Member States, is complex to say the

⁵ Council Reg. 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.

⁶ P. Craig and G. de Burca, *EU Law, Text, Cases and Materials* (Oxford University Press, 3rd ed., 2002), pp. 607-11.

⁷ *Ibid.* Chaps. 14-15.

least.⁸ Article I-12(2)⁹ stipulates three instances in which the EU has exclusive external competence: where the conclusion of such an agreement is provided for in a legislative act of the Union; where it is necessary to enable the Union to exercise its competence internally; or where it affects an internal Union act.¹⁰ We shall consider this provision in terms of containment in the following section. Suffice it to say for the present, that the third situation that is specified, where the international agreement ‘affects an internal Union act’ is vague and unclear.

(c) Containment

When judging the domain of exclusive competence from the perspective of containment, it is necessary to distinguish Article I-12(1), which deals with internal exclusive competence, from Article I-12(2), which is concerned with external exclusive competence. The *domain of exclusive internal competence, dealt with by Article I-12(1), fares pretty well when judged in terms of containment*. This is because the areas that come within this category are relatively discrete and the overall list is small. This is important because the consequences of inclusion within this category are severe: the Member States have no autonomous legislative competence and they cannot adopt any legally binding act. They can neither legislate, nor make any legally binding non-legislative act. A broad concept of exclusive competence would therefore have had the opposite effect of containment, since it would have enhanced the power of the centre at the expense of the Member States.

The importance of this point can be seen from earlier formulations of this category. The main change in the current text is the removal of the four freedoms from the sphere of exclusive competence, and their re-assignment to the category of shared competence. The reason given for this change was the creation of a specific provision dealing directly with the four freedoms, Article I-4, which was said to make their legal and political importance more visible than hitherto, and to underline the fact that they are directly applicable. While it might be felt to be desirable for political reasons to emphasise the centrality of the four freedoms, the argument based on direct applicability is odd to say the least, given that many other Treaty provisions have this quality. The real reason for the excision of the four freedoms from Article I-12(1) may have been rather different. If they had remained within the category of exclusive competence, Member States would have had no legislative capacity in these areas, nor could they have adopted any legally binding non-legislative act. Taken literally, this would have meant that a Member State would have been precluded from enacting legislation that, for example, liberalised trade in postal services, unless it had first secured the agreement of the Union. Thus, Member State action which was ‘ahead’ of EU action would have been pre-

⁸ For a brief overview see, Craig and de Burca, n. 6, pp. 127-32. For more detailed treatment see, D. McGoldrick, *International Relations Law of the European Union* (Longman, 1997), I. Macleod, I. Hendry, and S. Hyett, *The External Relations of the European Communities: A Manual of Law and Practice* (Oxford University Press, 1996); A. Dashwood and C. Hillion (eds.), *The General Law of EC External Relations* (Sweet & Maxwell, 2000); M. Cremona, ‘External Relations and External Competence: the Emergence of an Integrated Policy’, in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, 1999).

⁹ See also, Art. III-225.

¹⁰ The procedure for the making of such agreements is set out in Art. III-227.

cluded even though it might have been in accord with the overall aims of the EU, and even though it might well have been the catalyst for EU action in such areas.¹¹

The *domain of exclusive external competence provides, by way of contrast, little containment of EU power*. It may well extend the legal status quo ante. We have already seen the three situations where conclusion of an international agreement falls within the EU's exclusive competence.

The first of these situations, where the conclusion of such an agreement is stipulated by a legislative act of the Union, may seem unproblematic. This is not however so. Article I-12(2) does not state that the Union shall have exclusive external competence where a Union legislative act says that this shall be so. Nor does it state that the EU shall have such exclusive external competence only in the areas in which it has an exclusive internal competence. It states that where the conclusion of an international agreement is provided for in a legislative act, the Union will have exclusive external competence in this regard. The consequence is that express external empowerment to conclude an international agreement is taken to mean exclusive external competence, with the corollary that Member States are pre-empted from concluding any such agreement independently. The same reasoning would seem to apply *a fortiori* where a Treaty article, as opposed to a legislative act, accords the Union power to conclude an international agreement, but there is no mention of this in Article I-12(2).

The same elision of external power and exclusive external power is evident in the second of the situations listed in Article I-12(2). It is of course true that there is ECJ jurisprudence that accords the EU competence to conclude an international agreement where this is necessary to effectuate its internal competence, even where there is no express external competence.¹² It is however necessary to see this type of EU power within the context of the new constitutional order of competence established by the Constitution as a whole. The effect of this part of Article I-12(2) is that the EU has exclusive external competence to conclude an international agreement where it is necessary to enable the Union to exercise its competence internally, and that this is so irrespective of the type of internal competence possessed by the EU. Taken literally this means that exclusive external competence to conclude an international agreement resides with the Union, where this is necessary for the exercise of internal competence, even where the internal competence is only shared or even where the EU can only take supporting or co-ordinating action. This conclusion could be limited by fastening on the word 'necessary' and arguing that the conclusion of the international agreement did not fulfil this pre-condition. The conclusion might also be limited by arguing that any EU external competence to make an international agreement must be bounded by the nature of its internal competence in the relevant area.¹³ This would mean that the EU could not make such an agreement if the content thereof were to take the EU beyond supporting or co-ordinating action in an area where its internal competence was thus limited. Even if this qualification were to be accepted, the effect of Article I-12(2) would still be that the EU would have exclusive external competence to conclude an international agreement that was necessary to enable the EU to exercise an internal competence, even where the internal compe-

¹¹ This conclusion could only be avoided by qualifying the peremptory wording of Article I-11(1) so as to make it read something quite different. It would be necessary in effect to add a further clause at the end of the provision to the effect that Member States would be able to legislate where the legislation was in accord with the principles of free movement. This would fundamentally alter the whole nature of exclusive competence.

¹² See n. 8.

¹³ See, e.g., Art. 133(6) EC.

tence only allowed supporting action, provided that the international agreement did not contain provisions that went beyond this type of action.

The third of the situations mentioned in Article I-12(2), that the EU shall have exclusive competence for the conclusion of an international agreement when its conclusion ‘affects an internal Union act’, is also problematic. This is in part for the same reason as identified in the previous paragraph: this accords the EU exclusive external competence where the conclusion of the international agreement affects an internal Union act, even where the internal act is made within the sphere of shared power, or where the EU’s competence is limited to supporting action. This part of Article I-12(2) is also problematic because of the very vagueness of the specified criterion. An international agreement may ‘affect an internal Union act’ directly or indirectly, and the impact on the Union act may be significant or tangential. It will doubtless fall to the ECJ to decide how direct or significant the impact of the international agreement on the internal act must be in order for the EU to have exclusive competence in this regard.

The content of Article I-12(2) is in marked contrast to the more cautious recommendations of Working Group VII on External action. The Working Group consciously disaggregated the existence of EU competence to conclude an international agreement and the impact that this would have on the delimitation of competence between the EU and the Member States. As to the former, it recommended that the EU should, in addition to the grant of express competence, have competence where the conclusion of an international agreement was necessary for the implementation of internal policy, or where it ‘reflected’ its internal competence in areas where it had exercised this competence by adopting secondary legislation. As to the latter, the Group felt that the delimitation of competence between the EU and the Member States varied from one policy area to another.¹⁴

6. Shared Competence

(a) The Constitutional Provisions

The areas *in which the EU has shared competence are set out in Article I-13(1)* of the Draft Constitution:

“The Union shall share competence with the Member States where the Constitution confers on it a competence which does not relate to the areas referred to in Articles 12 and 16.”

It is clear therefore that shared competence is the default position under the Constitution. If an area does not fall within exclusive competence, Article I-12, or the category of supporting and co-ordinating action, Article I-16, then it will be deemed to come within the category of shared power. Article I-13(2) provides a non-exhaustive list of the ‘principal’ areas of shared competence. They are the internal market; the area of freedom, justice and security; agriculture and fisheries, with the exception of the conservation of marine biological resources; transport and trans-European networks; energy; parts of social policy; economic, social and territorial cohesion; environment; consumer protection; and common safety concerns in public health matters. *The consequences of shared competence are to be found primarily in Article I-11(2):*

¹⁴ *Final Report of Working Group VII on External Action*, CONV 459/02, Brussels 16 December 2002, pp. 4, 16.

“When the Constitution confers on the Union a competence shared with the Member States in a specific area, the Union and the Member States shall have the power to legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence.”

We can now assess the provisions on shared power against the twin criteria of clarity and containment.

(b) Clarity

Working Group V on Complementary Competencies was rather vague about the very nature of the divide between exclusive and shared competence, and concluded that the respective areas should be defined in accord with the ECJ’s jurisprudence.¹⁵ This ambivalent approach to the divide between exclusive and shared power would not have enhanced clarity. Nor would recourse to the case law have been conclusive, since it does not embody clear principles in this regard, as exemplified by the fact that the jurisprudence failed to provide a definitive answer to the meaning of exclusive competence for the purposes of applying subsidiarity. The general approach in the Draft Constitution is to be preferred. It is now clear that shared competence is the default position. This is readily apparent from Article I-13(1). The areas set out in Article I-13(2) are then merely examples of the principal areas where shared competence operates. This does provide some degree of clarity. There are however three points that should be borne in mind that affect clarity in relation to shared competence.

The first point to bear in mind is that *the default position regarding shared competence must itself be qualified*. Article I-13(1) states that all competences other than those found in Article I-12 concerning exclusive competence, and I-16 relating to supporting action, are to be regarded as shared, with the principal areas of shared competence being set out in Article I-13(2). This overall picture must nonetheless be read subject to the special category of competence dealing with economic and employment policy, Article I-14, and that dealing with foreign and security policy, Article I-15. The rationale for these separate categories will be considered below. It is true that in some general sense the regime that operates in these areas can loosely be regarded as one of shared power. It is clear however that the very existence of these categories is indicative that they are not to be regarded simply as ordinary examples of shared power. It is clear moreover that the legal consequences of inclusion within the general category of shared competence, set out in Article I-11(2), do not capture the reality of the divide between EU and Member State power in economic and employment policy, and the CFSP, as is apparent from the detailed provisions on these areas in Parts I and III of the Constitution.

It is also important to recognise that *the way in which power is shared in the diverse areas covered by the general category of shared power differ significantly*. The precise configuration of power sharing in areas such as the internal market, consumer protection, energy, social policy, the environment, and the like can only be determined by considering the detailed rules that govern these areas, which are found in Part III of the Constitution. The sharing of power in relation to, for example, the internal market and the four freedoms is very different from the complex world of power sharing that operates within the area of freedom, security and justice. There are indeed significant variations of power sharing that operate within the overall area of freedom,

¹⁵ *Final Report of Working Group V on Complementary Competencies*, CONV 375/1/02, Brussels 4 November 2002, pp. 6-7.

security and justice. There is nothing in the discussion of the Title on Union Competences that will help the interested onlooker to work this out. There, in other words, subject to what will be said below, no magic formula that applies to all areas of shared power that determines the precise delineation of power in any specific area. This is not a criticism as such. It is rather the consequence of the fact that the EU has been attributed competence in different areas through successive Treaty amendments, coupled with the fact that the precise degree of power it has been accorded differs as between these areas. The direct consequence is that within the regime of shared power, the amount of power wielded by the EU, and that left to the Member States, will be different in these diverse spheres. This is indirectly recognised by Article I-11(6), which states that the scope and arrangements for exercising the Union's competences shall be determined by the provisions specific to each area in Part III of the Constitution. If the interested citizen really wishes to know what can be done by the EU and by the Member State in any particular area of shared power, then it will be necessary to turn to the detailed Articles dealing with this in Part III.

The *degree of clarity provided by the constitutional provisions on shared power is also affected, as will be seen below, by overlap problems.* This is especially so in relation to boundary problems between particular instances of shared power, and the category of supporting, co-ordinating or complementary action.

(c) Containment

In the context of shared power, which is as we have seen the default position, the Member State can only exercise power to the extent that the Union has not exercised or has decided to cease to exercise its competence within these areas, Article I-11(2). Taken literally this looks like automatic pre-emption of Member State action where the Union has exercised its power. The consequence is that the amount of shared power held by the Member State in these areas will diminish over time. Power sharing would on this view be a one way bet, subject to the remote possibility that the EU decided not to exercise its competence within a specific area. If containment is a concern, then there is little here to give comfort to supporters of states' rights. This conclusion as to the import of Article I-11(2) must however be qualified in two respects.

First, Member States will only lose their competence within the regime of shared power to the extent that the Union has exercised *its* competence. Precisely what the EU's competence actually is within these areas can only be divined by considering the detailed provisions that divide power in areas as diverse as social policy, energy, the internal market and consumer protection.

Secondly, it would be wrong to conclude that the Member States lose their competence even where the EU has exercised its competence. It is important to note that Article I-11(2) is framed in terms of Member States losing their competence *to the extent* that the EU has exercised its competence in the relevant area. Whether the Member States lose their competence will therefore depend upon the extent to which the EU has exercised its competence. There are different ways in which the EU can intervene in a particular area,¹⁶ as recognised by the Working Group on Competences.¹⁷ The EU may choose to make uniform regulations, it may

¹⁶ S. Weatherill, 'Beyond Preemption? Shared Competence and Constitutional Change in the European Community', in D. O'Keefe and P. Twomey (eds.), *Legal Issues of the Maastricht Treaty* (Chancery Law Publishing, 1994), Ch. 2; M. Dougan, 'Minimum Harmonization and the Internal Market' (2000) 37 *CMLRev.* 853.

¹⁷ *Final Report of Working Group V*, n. 15, pp. 12-13.

harmonize national laws, it may engage in minimum harmonization, or it may impose requirements of mutual recognition. Thus, for example, where the EU chooses minimum harmonization, Member States will have room for action in the relevant area.

The upshot is that the real limits on Union competence must be found in the detailed provisions in Part III which delineate what the EU can do in the diverse areas where power is shared. It is these provisions, and the way in which the EU decides to legislate within these areas, that will determine the reality of the divide between state power and EU power. This is of course what we have always had to do in order to determine the boundaries between state and EU power.

7. Areas of Supporting, Complementary or Co-ordinating Action

(a) The Constitutional Provisions

The third principal category of competence is where the EU is limited to taking supporting, co-ordinating or complementary action. The *areas in which this species of competence applies are set out in Article I-16(2)*. They are industry, protection and improvement of human health, education, vocational training, youth and sport, culture, and civil protection. The *consequences of inclusion within this list are elaborated in Article I-11(5) and 16(3)*. Article I-11(5) provides that:

“In certain areas and in the conditions laid down in the Constitution, the Union shall have the competence to carry out actions to support, co-ordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas.

Article I-16(3) amplifies the boundaries of EU competence when it acts within these areas.

Legally binding acts adopted by the Union on the basis of the provisions specific to these areas in Part III may not entail harmonization of Member States’ laws or regulations.”

(a) Clarity

The delineation of a category in which the EU may only undertake supporting, co-ordinating or complementary action, with the corollary that it cannot harmonize Member State laws, is to be welcomed. Having said this, there can be little doubt that judged in terms of clarity this category of competence will prove to be problematic. This is so for a number of reasons. There will be *overlap and boundary problems between this category and that of shared power*. This was acknowledged in the Praesidium’s comment, where it accepted that, for example, regulation of the media might come under the internal market, which is shared power, or it might be regarded as falling within culture, where only supporting etc action is allowed.¹⁸

The *list of the areas in which the EU is limited to supporting action is incomplete*. A bare reading of Article I-16(2) gives the impression that there is a finite list of areas to which this type of competence applies. This impression is reinforced by the wording of the Article: the listed areas are not regarded as examples, but as the totality of this category. The structure of Part III serves further to reinforce this conclusion, since Chapter V of Title III is devoted to this category of competence, and contains the detailed provisions concerning the specific areas listed Article I-16(2). This impression is however belied when reading Part III as a whole. It

¹⁸ CONV 724/03, Brussels 26 May 2003, p. 82.

then becomes clear that there are other important areas in which the EU is limited, *prima facie* at least, to supporting etc action, notably in respect to some aspects of social policy, as exemplified by Article III-104, and certain facets of employment policy. We shall consider below why the EU chose to deal with these policies within a different head of EU competence, rather than include them within Article 16. Suffice it to say for the present that the underlying rationale was an unwillingness to be tied in these areas to the legal consequences, in terms of the limits of EU action, specified in Articles 11(5) and 16(3).

(b) Containment

It is clear that there are limits to what the EU can do in the areas listed in Article I-16(2). That is after all the very purpose of the category. The EU nonetheless has more competence in these areas than might be thought. This comes to the fore in the tension between Articles I-11(5) and I-16(4). The former is framed in terms of EU action *not superseding* Member State competence. The latter provides that legally binding acts of the Union adopted on the basis of the provisions specific to these areas *cannot entail harmonization* of Member States' laws. While it is clear that the EU cannot harmonize the law in these areas, it is equally clear that it can pass legally binding acts on the basis of the provisions specific to these areas in Part III. Where the EU does enact such legal acts they will bind the Member States and the competence of the Member States will be constrained to the extent stipulated by the legally binding act. The degree of this constraint will depend on the nature of the EU legal act passed. It is however clear that the EU is not prevented by Part I of the Constitution from enacting laws within the listed areas, provided that they do not entail harmonization and provided that there is foundation for the passage of such laws in the detailed provisions of Part III.

The meaning of supporting etc action, and hence the precise extent of EU power, varies somewhat in the different areas listed, but the general approach in Chapter V of Title III of Part III is as follows. Each of the substantive areas begins with an article setting out the objectives of Union action. Thus in relation to public health Article III-179(1) lists, *inter alia*, the improvement of public health, prevention of illness, and the obviation of dangers to health. The EU is to complement national action on these topics. Member States have an obligation to co-ordinate their policies on such matters, in liaison with the Commission.¹⁹ The Commission can co-ordinate action on such matters by, *inter alia*, exchanges of best practice, periodic monitoring and evaluation.²⁰ The EU can also pass laws to establish 'incentive measures' designed to protect human health, and combat cross-border health scourges, subject to the mantra that this shall not entail harmonization.²¹ Thus while harmonization is ruled out, the EU still has significant room for intervention through 'persuasive soft law', in the form of guidelines on best practice, monitoring and the like, and through 'legal incentive measures'.²² The same combination of soft law and legal incentive measures falling short of harmonization can be found in the other areas within this category.²³

¹⁹ Art. III-179(2).

²⁰ Art. III-179(2).

²¹ Art. III-179(5).

²² There are also aspects of public health that come within the shared power, where the scope for EU intervention is greater, Art. III-179(4).

²³ See, e.g., Art. III-180(2)-(3), industry; Art. III-181(5) culture; Art. III-182(4) education.

8. The Co-ordination of Economic, Employment and Social Policy

(a) Constitutional Provisions

The categories of competence discussed thus far have a certain symmetry. A division between exclusive, shared and supporting competence can be understood, notwithstanding the difficulties mentioned above. The existence of a specific head of competence dealing with common foreign and security policy is also readily explicable, given the distinct rules that apply in this area. The creation of a particular head of competence to deal with economic and employment policy does little to enhance the symmetry of the constitutional scheme. Article I-14 deals with this category:

“The Union shall adopt measures to ensure the co-ordination of the economic policies of the Member States, in particular by adopting broad guidelines for these policies. The Member States shall co-ordinate their economic policies within the Union.

Specific provisions shall apply to those Member States that have adopted the Euro.

The Union shall adopt measures to ensure co-ordination of the employment policies of the Member States, in particular by adopting guidelines for these policies.

The Union may adopt initiatives to ensure co-ordination of Member States’ social policies.”

(b) Clarity

There are a number of issues concerning this category of EU competence that must be disaggregated. The appropriate starting place is to consider the *rationale for its existence*. The existence of this category was controversial throughout the Convention, with some members calling for these areas to come within shared competence, while others argued for the inclusion of employment and social policy, as well as economic policy, within this separate category.²⁴ The Praesidium felt that the category should remain distinct because the specific nature of co-ordination of economic and employment policy merited separate treatment.²⁵ This Delphic utterance provides little by way of reasoned justification. The real explanation for the separate category was political. There would have been significant opposition to the inclusion of these areas within the head of shared competence. The very depiction of economic policy as an area of shared competence with the consequence of pre-emption of state action would have been potentially explosive in some quarters at least. It is equally clear that there were those who felt that the category of supporting, co-ordinating and complementary action was too weak. Hence the creation of the separate category, and hence its placement after shared power, but before the category of supporting, co-ordinating and complementary action.

There will be *boundary problems*, especially between Article I-14 and the category of shared power dealt with in Article I-13. Thus, for example, certain aspects of social policy are regarded as coming within shared power, while others fall within the category dealing with economic, employment and social policy. We shall see below that the divide is by no means clear. It is clear moreover that the *title of Article I-14 is incomplete*. The title refers to the co-ordination of eco-

²⁴ The same tensions were evident in the *Final Report of Working Group VI on Economic Governance*, CONV 357/02, Brussels 21 October 2002, p. 2.

²⁵ CONV 724/03, n. 18, p. 68.

conomic and employment policy, but the Article deals also with social policy. There is however a difference in language, in that the EU is enjoined in mandatory language to co-ordinate economic and employment policy, whereas it is accorded discretion in relation to social policy.

The *consequences of inclusion within this category are not entirely clear*. We have seen above that the constitutional schema for other categories is that Article I-11 spelt out the legal consequences of a particular species of EU competence for the division of power between the EU and the Member States. Article I-11 does not however do so in this instance. Article I-11(3) simply provides that the EU shall have competence to promote and co-ordinate the economic and employment policies of the Member States. The legal consequences of this category can therefore only be divined by considering the language of Article I-14, which is couched largely, albeit not wholly, in terms of co-ordination,²⁶ and by considering the detailed provisions in Part III that apply to these areas. This conclusion is subject to the point made above, when discussing shared power. Article I-13(1), which establishes shared power as the default position, might be read so as render Article I-11(2), which sets out the legal consequences for the division of power between Member States and the EU, applicable to Article I-14. The difficulties with this reading have however been explored above.

(c) Containment

We have seen that the rationale for creating this category was the political fear of placing such matters in the category of shared competence, balanced by an unwillingness to limit EU power by placing these areas in the category of supporting etc action. We have seen also that the legal consequences of this category for the division of power between the EU and the Member States are unclear in Part I, and can only be divined by placing close attention to the more specific provisions of Part III. These propositions can be exemplified by considering economic policy and social policy.

The detailed provisions concerning *economic policy* are to be found in Chapter II of Title III of Part III of the Constitution. It is clear that the EU has a range of powers that would not easily be accommodated in the category of competence concerning supporting, co-ordinating and complementary action. These powers allow the EU to take dispositive and peremptory action in certain circumstances. The powers can be regarded as relating to the 'promotion and co-ordination' of economic policy for the purposes of Article I-11(3), but it should be recognised that this is a broad reading of that language. Thus Article III-71(6) empowers the EU to enact laws laying down detailed rules to govern the multilateral surveillance procedure, which procedure is central to the strategy concerning broad guidelines of the economic policies of the Member States. Article III-72(1) allows the Council to adopt a decision laying down measures appropriate to an economic situation, in particular if severe difficulties arise in the supply of certain products. Article III-74(2) makes provision for the adoption of regulations or decisions specifying definitions for the application of the prohibition of privileged access by Union or state bodies to financial institutions. Article III-75(2) accords the same type of power in relation to the prohibition of overdraft facilities by Union or state bodies with the ECB or national central banks. The complex rules designed to control excessive budgetary deficits by Member States are ultimately backed up by the power to make binding decisions,

²⁶ Art. I-14(2) is the exception in this respect.

which can lead to the imposition of fines and other disadvantageous consequences, Article III-76(7)-(11). It is clear moreover that the possession of these powers by the EU was felt to be even more important in the light of enlargement.

The detailed rules on *social policy* are to be found in Chapter III of Title III of Part III of the Constitution. We have seen that Article I-13(2) stipulates that certain aspects of social policy, defined in Part III, come within shared power. We have seen also that Article I-14(4) states that the Union may adopt initiatives to ensure co-ordination of member States' social policies. The division of power between the EU and the Member States in the context of social policy is problematic for two related reasons.

It is, on the one hand, not stated expressly in Part III which aspects of social policy fall within shared power. The detailed provisions on social policy do not spell out in terms whether the different aspects thereof are to be regarded as a species of shared power. This can it seems only be divined through interpretation of the relevant articles. There is, for example, good reason to conclude from the wording and history of Article III-108 (ex Article 141) dealing with equal pay, that it is a species of shared power. The wording of other provisions such as Article III-104, which are couched in terms of the EU supporting or complementing Member State action, point in the opposite direction.

It is, on the other hand, important to consider carefully what the EU is enabled to do, even where it is limited to supporting or complementary action. Article I-16 establishes the category where the EU is limited to taking supportive, co-ordinating or complementary action. Social policy does not feature in the list of areas subject to this head of EU competence. Social policy is rather split between shared power, Article I-13(2), and the category of co-ordination of economic and employment policy, Article I-14(4). It is only through a close reading of the provisions on social policy that are framed in terms of supportive and complementary action that we can determine the real divide between EU and Member State power. Article III-103 sets out the general objectives of EU social policy, which include matters such as promotion of employment, improved living and working conditions, and social protection. The Article explicitly envisages harmonization. Article III-104 then provides that, with a view to achieving the objectives of Article III-103, the EU shall 'support and complement' the activities of the Member States in a number of fields.²⁷ Article III-104(2)(a) empowers the EU to make laws in these areas designed to, *inter alia*, encourage co-operation, exchange information and best practice, while excluding harmonization of laws. Article III-104(2)(b) provides that the EU may nonetheless in most of the listed fields pass laws²⁸ to 'establish minimum requirements for gradual implementation' of these objectives.²⁹

²⁷ These including workers' health and safety, working conditions, social security and social protection, protection of workers where the contract is terminated, information and consultation of workers, the collective interests of employers and employees, employment of third country nationals, integration of persons excluded from the labour market, equality between men and women at work, combating social exclusion, and the modernisation of social protection systems.

²⁸ Art. III-104(3) entails a departure from the ordinary legislative procedure in relation to the passage of some such laws.

²⁹ This is subject to the qualification in Art. III-104(5)(b) allowing Member States to impose more stringent requirements.

9. The Common Foreign and Security Policy

The three-pillar structure that characterised the previous EU Treaty has not been preserved in the Constitution. There are nonetheless distinct rules that apply in the context of foreign and security policy, and this warrants a separate head of competence for this area. It is set out in Article I-15:

“(1) The Union’s competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union’s security, including the progressive framing of a common defence policy, which might lead to a common defence.

(2) Member States shall actively and unreservedly support the Union’s common foreign and security policy in a spirit of loyalty and mutual solidarity and shall comply with the acts adopted by the Union in this area. They shall refrain from action contrary to the Union’s interests or likely to impair its effectiveness.”

Space precludes detailed analysis of the complex provisions relating to CFSP that are found in the Constitution. Suffice it to say for the present that decision-making in this areas continues to be more intergovernmental and less supranational by way of comparison with other areas of Union competence. It is the European Council and the Council that dominate decision-making, and the legal instruments applicable to CFSP are distinct from those generally applicable for the attainment of Union objectives.³⁰

10. The ‘Flexibility’ Clause

Article 308 (ex 235) has long been viewed with suspicion by those calling for a clearer delimitation of Community competences and in particular by the German Länder. Various calls for reform have been made before and during recent Intergovernmental conferences. This question was placed explicitly on the post-Nice and post-Laeken agenda for future reform of the Union. The Laeken Declaration expressly asked whether Article 308 ought to be reviewed, in light of the twin challenges of preventing the ‘creeping expansion of competences’ from encroaching on national and regional powers, and yet allowing the EU to ‘continue to be able to react to fresh challenges and developments and...to explore new policy areas’.³¹ The Working Group on Complementary Competences recognized the concerns about the use of Article 308. The Group nonetheless recommended the retention of the Article in order that it could provide for flexibility in limited instances.³²

The flexibility clause is now enshrined in Article I-17(1). It provides that if action by the Union should prove necessary in the framework of the policies defined in Part III to attain one of the Constitution’s objectives, and the Constitution has not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission, and after obtaining the consent of the European Parliament, shall take the appropriate measures. There is the additional requirement that the attention of national parliaments should be drawn to such proposals. It is moreover made clear that Article I-17 cannot be used to achieve harmonization in cases where this is precluded by the Constitution. The flexibility clause is likely to prove less controversial than its predecessor. The unanimity requirement means that it will be

³⁰ Art. I-39, Arts. III-195-215.

³¹ Laeken Declaration, n. 2, p. 22.

³² *Final Report of Working Group V*, n. 15, pp. 14-18.

even more difficult to use this power in an enlarged EU, and Article I-17 also requires the consent of the EP, as opposed to mere consultation. The need to use this power will also diminish, given that the Constitution has created a legal basis for action in the areas where recourse was previously had to Article 308.³³

11. Subsidiarity, Proportionality and the Role of National Parliaments

Article I-9(3) contains the subsidiarity clause. It provides that in areas that do not fall within the EU exclusive competence the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central, regional or local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The detailed operation of subsidiarity is to be accord with a Protocol discussed below. Article I-9(4) deals with proportionality, and states that the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution. There are a number of points that should be noted about subsidiarity and proportionality in the Constitution.

First, one of the problems that beset subsidiarity in the past was uncertainty about the meaning of exclusive competence.³⁴ This was important, given that the subsidiarity principle does not apply in that area. The Constitution has at the least obviated this problem, since it does provide a list of the areas that come within exclusive competence. We should remember nonetheless the boundary problems between the domain of exclusive and shared competence discussed above.

Secondly, the operation of subsidiarity must be seen in the light of the Protocol attached to the Constitution. There have been previous such instruments. Thus the 1993 Inter-institutional Agreement on Procedures for Implementing the Principle of Subsidiarity required all three institutions to have regard to the principle when devising Community legislation. This was re-confirmed by the Protocol on the Application of the Principles of Subsidiarity and Proportionality attached to the Treaty of Amsterdam.³⁵

The Protocol on the Application of the Principles of Subsidiarity and Proportionality attached to the Constitution builds on the principles contained in the earlier documents. The Protocol imposes an obligation to consult widely before proposing legislative acts.³⁶ The core idea is still that the Commission must provide a detailed statement concerning proposed legislation so that compliance with subsidiarity can be appraised. The statement must contain some assessment of the financial impact of the proposals, and there should be qualitative and, wherever possible, quantitative indicators to substantiate the conclusion that the objective can be better attained at Union level.³⁷ The Commission must submit an annual report on the application of subsidiarity to the European Council, the EP, the Council, and to national Par-

³³ See, e.g., Energy, Art. III-157(2); Civil Protection, Art. III-184(2); Economic Aid to Third Countries, Art. III-221(2).

³⁴ See, e.g., the differing views of A. G. Toth, 'A Legal Analysis of Subsidiarity', in D. O'Keefe and P. M. Twomey (eds.), *Legal Issues of the Maastricht Treaty* (Chancery, 1994), Chap. 3; J. Steiner, 'Subsidiarity under the Maastricht Treaty', *ibid.*, Chap. 4.

³⁵ See G. de Búrca, 'Reappraising Subsidiarity's Significance after Amsterdam' Jean Monnet Working Paper 7/1999 <www.jeanmonnetprogram.org>.

³⁶ The Protocol on the Application of the Principles of Subsidiarity and Proportionality, para. 2.

³⁷ *Ibid.* para. 4.

liaments.³⁸ The ECJ has jurisdiction to consider infringement of subsidiarity under Article III-270 (ex Article 230).³⁹

The most important innovation in the Protocol on Subsidiarity is the enhanced role accorded to national Parliaments. The Commission must send all legislative proposals to the national Parliaments at the same time as to the Union institutions. The national Parliaments must also be provided with legislative resolutions of the EP, and common positions adopted by the Council.⁴⁰ A national Parliament, or Chamber thereof, may, within six weeks, send the Presidents of the Commission, EP and Council a reasoned opinion as to why it considers that the proposal does not comply with subsidiarity.⁴¹ The EP, Council and Commission must take this opinion into account.⁴² Where non-compliance with subsidiarity is expressed by national Parliaments that represent one third of all the votes allocated to such Parliaments,⁴³ then the Commission must review its proposal.⁴⁴ The Commission, after such review, may decide to maintain, amend or withdraw the proposal, giving reasons for the decision.⁴⁵ A legal challenge for non-compliance with subsidiarity can be brought by the Member State, or 'notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it'.⁴⁶

Thirdly, it remains to be seen how subsidiarity and the Protocol operate in practice. It is clear that there will continue to be many areas in which the comparative efficiency calculus in Article I-9(3) is in favour of Community action. The very *raison d'être* of the Community will often demand Community action to ensure the uniformity of general approach required for a common market. This is evident from the Commission's reports made pursuant to the earlier Protocol,⁴⁷ and it may be of even greater importance in an enlarged Union.

It is equally clear that subsidiarity has had an impact on the existence and form of Community action. The Commission will consider whether action really is required at Community level, and its reasoning will be found in the recitals, or explanatory memorandum.⁴⁸ If Community action is required, the Commission will often proceed through directives rather than regulations. There has been a greater use of guidelines and codes of conduct. The idea of Community control with a 'lighter touch' fits with changes that pre-date the Constitution.

It remains to be seen how far the new provisions in the Protocol according greater power to national Parliaments affect the incidence and nature of EU legislation. Much will depend on the willingness of national Parliaments to devote the requisite time and energy to the matter. It should be noted that the national Parliament has to submit a reasoned opinion as to why it believes that the measure infringes subsidiarity. It will not be sufficient for the national Parliament simply to express dislike of the content of the measure. It will have to present

³⁸ *Ibid.* para. 8.

³⁹ *Ibid.* para. 7.

⁴⁰ *Ibid.* para. 3.

⁴¹ *Ibid.* para. 5.

⁴² *Ibid.* para. 6.

⁴³ National Parliaments with unicameral systems have two votes, while each Chamber in a bicameral system has one vote, *ibid.* para. 6.

⁴⁴ *Ibid.* para. 6. This threshold is lowered to one quarter where a Commission proposal emanates from a group of Member States under Art. III-165, which relates to the area of freedom, justice and security.

⁴⁵ *Ibid.* para. 6.

⁴⁶ *Ibid.* para. 7.

⁴⁷ Commission Report to the European Council, *Better Lawmaking 1999*, COM(1999) 562 final, 2.

⁴⁸ *Ibid.* 15-21.

reasoned argument as to why the Commission's comparative efficiency calculus is defective. This may not be easy, more especially if the Union measure is complex. It will be even more difficult for the requisite number of national Parliaments to present reasoned opinions in relation to the same Union measure so as to compel the Commission to review the proposal. Having said this, the Commission is likely to take seriously any such reasoned opinion, particularly if it emanates from the Parliament of a larger Member State.

12. Conclusion

There will be no attempt to summarise the reasoning in the previous pages. A number of more general conclusions can however be posited. First, it is clear from the preceding analysis that it is important to understand Part III of the Constitution, as well as the provisions in Part I, in order to evaluate the provisions on competence. It is only by doing so that one can draw conclusions about the reality of the divide between EU and Member State power.

Secondly, it is clear therefore that, leaving aside the domain of exclusive competence, much will depend on the precise degree of power accorded to the EU in the particular area in question, *and* on how the EU chooses to exercise its power in that area. This is especially true in relation to the default category of shared competence. The Member States will lose their competence *to the extent* that the EU decides to exercise *its* competence. The same is true, albeit to a lesser degree in relation to the category of supporting etc action. The Constitution places boundaries on EU competence in these areas, through the proscription on harmonization. We have seen however that the specific provisions in Part III nonetheless allow 'persuasive soft law' and 'formal laws embodying incentives'. These may, depending on their content and specificity, serve to accord a significant measure of power on real terms to the EU.

Thirdly, the difficulty of dividing power between different levels of government is an endemic problem within any non-unitary state. So too is the problem of ensuring that central power remains within bounds.⁴⁹ Experience from elsewhere is helpful. We should nonetheless be mindful of the distinctive features of the EU. The divide between EU and Member State power is not based on a general constitutional provision, such as an inter-state commerce clause, with the courts having the principal responsibility for determining its ramifications. The EU Constitution scheme is premised on categories of competence in Part I, coupled with detailed provisions in Part III, which elaborate the more specific nature and bounds of EU action in the many areas that comprise EU substantive law. It is German law that is probably closest to the categories of competence developed in the EU Constitution, and it may well be that the ECJ will draw on that domestic jurisprudence when adjudicating on difficult issues concerning competence within the EU.

⁴⁹ For a valuable analysis, see, E. Young, 'Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism' (2002) 77 *NYULRev* 1612.

