MONITORING THE DELIMITATION OF EC COMPETENCES: SOME REMARKS ON THE CURRENT DEBATE'S ORDER OF PRIORITIES

Francesco Maiani, Lausanne[*]

A. Introduction: the EC Institutions and the Delimitation of Competences

In many respects, the EC institutions have an important role to play with regard to the delimitation of the Community's competences. Of course the Community can act only within the limits of the powers conferred upon it by the Member States, a principle known as the principle of attributed powers[1]. However, the EC Treaty confers powers upon the Community by reference to objectives and functional goals, rather than by action or subject matter. The quest for hard and fast demarcations of competences, when reading some of the crucial articles of the Treaty, can be a very challenging and to some extent frustrating exercise[2]. In this respect, there is a world of difference between the Treaty and the Constitutions of most federal States: „The dynamic norms on competences to be found in EC law are designed to serve the gradual attainment of the Community's goals; the static norms on competences to be found in our Constitutions aim at transparency and moderation of power"[3]. This fluidity of the Treaty's articles on competences places the European Court of Justice – their ultimate interpreter – in a crucial position. The EC Treaty, moreover, does not define once and for all the boundary between EC and national legislative competences[4]. Whenever competences are shared between the EC and its Member States, it is for the EC legislature to define where that boundary exactly lies: within the limits of the powers conferred upon the Community, the progressive use of EC legislative competences results in a progressive reduction of national competences[5]. Therefore, to some extent the *exercise* of the EC's attributed competences has an impact on the actual *delimitation*

* I wish to thank Professor Roland Bieber, Jean Monnet Chair at the University of Lausanne, for his stimulating remarks and for his encouragement. My gratitude goes also to Professor Barbara Wilson, University of Lausanne, for her useful comments. I am of course sole responsible for the content of the present contribution.

1 See art. 5 § 1 ECT.

2 This is not meant to be a critical remark. Most probably, a sharp subject-based division of competences between the EC and its Member States would have rendered unattainable the enormously complex objective of economic integration. It has also been observed that clear-cut solutions to competence matters are unsuited to the needs of contemporary governance (see e.g. R. BIEBER, *Abwegige und zielführende Vorschläge: zur Kompetenzabgrenzung der Europäischen Union*, Integration 2001, 308; G. DE BÚRCA, *Reappraising subsidiarity's significance after Amsterdam*, Harvard Jean Monnet Working Paper 7/99).

3 A. LÒPEZ PINA, *I compiti pubblici nell'Unione europea*, Diritto e società, 1999, 205 (free translation).

4 See R. BIEBER, *On the mutual completion of overlapping legal systems: the case of the European Communities and the national legal orders*, ELR 1988, 147.

5 See Case 22/70, *ERTA*, [1971] ELR 263.

of competences. This explains why the principles of subsidiarity and proportionality, which strictly speaking only regulate the exercise of powers falling within the Community's jurisdiction, are usually referred to as a safeguard for national competences – i.e. in a perspective closely related with matters of delimitation of competences. These principles, which so to speak are designed to induce the EC legislature to moderation both on *if* and on *how* to legislate, are formally binding upon the institutions by virtue of art. 5 ECT.

In matters of EC law, the ECJ is the ultimate arbiter of all competence-related disputes: „It is the task of the Court, as the repository of the trust and confidence of the Community institutions, the Member States and the citizens of the Union, to perform [the] difficult function of upholding the constitutional division of powers between the Community and the Member States on the basis of objective criteria"[6]. It is for the Court to ensure observance of the principle of attributed powers. This is so without qualifications, even though in many cases determining the scope of a legal base can be difficult and controversial. It is also for the Court to ensure that the principles of subsidiarity and proportionality are observed. Here, however, a qualification is apposite. Formally speaking these principles are binding on the EC institutions and fully justiciable. Materially, however, they do not provide the judge with clear legal criteria to determine whether an act is consistent with them or not: the very questions they pose call for eminently political answers[7]. This explains the Court's self-restraint when reviewing EC legislation in the light of these principles: with some measure of approximation, it may be said that the Court will not strike down a legislative measure unless the latter is found to be manifestly 'inappropriate' in the light of subsidiarity or proportionality considerations[8]. Rather than by direct judicial review, compliance with subsidiarity and proportionality is to be ensured indirectly via a number of formal and procedural requirements set out in Protocol n. 30. Still, it must be stressed that full conformity of EC legislation with those principles falls largely under the responsibility of the Community's political institutions.

In the post-Nice process of preparation to the next intergovernmental conference (IGC), this constitutional set-up is undergoing a process of critical examination. „How to establish and monitor a more precise delimitation of powers between the European Union

---

6 Fennelly AG in Case C-376/98, *Germany v. EP and Council*, [2000] ECR I-8419, para. 4. See also Van Gerven AG in Case C-70/88, *EP v. Council*, [1990] ECR I-2041, para. 3.

7 See A.J. MACKENZIE STUART, *Subsidiarity – a busted flush?* in D. CURTIN/D. O'KEEFFE (eds.), *Constitutional adjudication in EC and national law*, Dublin 1992; see also A. D'ATENA, *Sussidiarietà e sovranità* in ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI (ed.), *Annuario 1999: la costituzione europea*, Padua 2000. Concerning the proportionality principle see the next footnote.

8 See R. DEHOUSSE, *Le principe de subsidiarité dans le débat constitutionnel européen*, in P. MAGNETTE (ed.), *La constitution de l'Europe*, Brussels 2000. Concerning the principle of proportionality, the intensity of judicial review varies according to the context in which it is invoked (see G. DE BÚRCA, *The principle of proportionality and its application in EC* law, YEL 1993, 105). Judicial review of EC legislation in the light of the proportionality principle is less intensive whenever the Court considers that it is reviewing policy choices falling under the EC legislature's discretion (see e.g. Case C-84/94, *UK v. Council*, [1996] ECR I-5755). It is submitted that the decision on the suitable *form* and *degree of detail* of EC legislative measures reflects, as a general rule, one such policy choice.

and the Member States, reflecting the principle of subsidiarity" is one of the questions set in the Declaration on the future of the Union[9].

As for the „establishment" of a more precise delimitation of powers, 'mild' reform projects seem to gather more support than 'radical' ones[10]. Those prominent features that have been recalled above will probably still be central to the future Community's *Kompetenzordnung*[11]. Not surprisingly, therefore, a considerable part of the debate focuses on the institutional safeguards on competences – that is, on „monitoring". In this respect, political and academic debate is very much concentrating on whether the function of policing the delimitation of competences should be entrusted to a new *ad hoc* institution, or whether new *ad hoc* procedures should be devised. Space precludes a detailed overview of all the various proposals that have been made to this effect. This brief note's limited ambition is to critically comment on some of these proposals and on the emphasis that is being placed on *ad hoc* – as opposed to general – institutional solutions.

B. Ad Hoc Judicial Procedures: a New Court, a New Ex Ante Urgency Procedure?

In a number of contributions to the debate on the future of the Union, it has been proposed to strengthen *judicial* overview regarding the observance of the principles on competences enshrined in the Treaty. The views as to how this result could be achieved are divergent. According to some, in order to have an effective control on competences a new judicial body should be created. Others consider that it would be sufficient to institute a new *ad hoc* judicial procedure before the ECJ. Hereafter these two hypotheses shall be examined in turn.

Let us first examine proposals to the effect that a new Constitutional Court should be created alongside the European Court of Justice. The new Court would be composed of members of the national Constitutional Courts (or highest jurisdictions) and by a member

---

9 Declaration n. 23 annexed to the Treaty of Nice (OJ 2001 C 80/1).

10 See the note prepared by the Convention's Secretariat on the plenary session of may 23 and 24 (doc. CONV. 60/02. All Convention documents are available online on the site http://european-convention.eu.int). In the very schematic dichotomy used in the text, 'radical' reforms project are, for instance, those proposing to delete articles 95 and 308 ECT from the Treaty (see e.g. David HEATCOATH AMORY, *Complementary competences – the way forward*, European Convention, Working Group V, Working Document 14); 'mild' reform projects are those suggesting that the system of competences should be clarified and improved, but not revolutionized (see e.g. G. DE BÚRCA/B. DE WITTE, *The delimitation of powers between the EU and its Member States*, available online on the site http://www.iue.it/RSC; R. BIEBER, *Kompetenzen und Institutionen im Rahmen eines EU-Verfassung*, contribution to the European Convention, available online on the site http://europa.eu.int/futurum).

11 *Id est* the 'functional' drafting of norms on competences, as well as the relevance of EC legislation to the delimitation of competences.

of the ECJ, and it would be competent to adjudicate whether acts of secondary legislation were *ultra vires*[12].

Before examining the merits of the proposal, it should be observed that some of its premises are not beyond argument. In their valuable contribution on the subject, Ulrich GOLL and Markus KENNTNER reach the conclusion that the ECJ would be unfit to adjudge on competence-related matters, since it has so far proved unwilling or unable to do so effectively[13]. In other words, their opinion seems to oppose the view expressed by Nial FENNELLY AG in the *Tobacco advertising* case: the Court should no longer „perform the difficult function of upholding the constitutional division of powers between the Community and the Member States" since it no longer is „the repository of the trust and confidence of […] the Member States and the citizens of the Union […]"[14]. This position is not entirely new: many authorized scholars have harshly criticized the Court's stance on competence-related matters[15]. It should be noted, however, that in the contribution at issue such a categorical conclusion is based on an analysis of the Court's case law that hardly takes notice of its significant developments of the last years[16]. In order to demonstrate that the Court is unwilling to 'monitor subsidiarity' effectively, the authors also stress that the Court has never annulled an act of the EC institutions on subsidiarity grounds. Which is true, but not conclusive: apart from all other considerations[17], this finding leaves open the question of whether that depends on the Court's alleged integrationist prejudice or on the very nature of the principle. Arguably, this aspect should be carefully examined before revolutionizing the Community's judicial system: if the non-justiciable character of the subsidiarity principle were the determinant factor, then the new Constitutional Court would perhaps find it difficult to ensure a stricter control over the EC legislature.

Be that as it may, before creating a new judicial body, alongside the ECJ, at least two serious problems should be considered.

---

12 Proposals sharing this approach diverge as to the kind of procedure that would be instituted before the new Court (see J.H.H. WEILER, *The European Union belongs to its citizens: three immodest proposals*, ELR 1997, 150 and U. GOLL/M. KENNTNER, *Brauchen wir ein Europäisches Kompetenzgericht?*, EuZW 2002, 101). However, this distinction is not crucial to the following discussion.

13 U. GOLL/M. KENNTNER, *op. cit.*

14 See *supra*, footnote 6

15 And, it should be added, equally authorized scholars have strenuously defended it. For an overview of this controversy see P. CRAG/G. DE BÚRCA, *EU Law*, 3d ed., Oxford 2002, 96-102

16 Reference is made here, e.g., to Joint Cases 267-268/91, *Keck & Mithouard*, [1993] ECR I-6097; Opinion 1/94, *WTO*, [1994] ECR I-5267; Opinion 2/94, *ECHR*, [1996] ECR I-1759; Case C-376/98, *Germany v. EP and Council*, [2000] ECR I-8419. More in general, the most radical criticisms of the Court's case law often fail to recognize that much of what has been condemned as the Court's *integrationist bias* is due to the *integrationist philosophy* of the document it is called to interpret – the Treaty. In this perspective, the Court's new approach to matters of competences and indeed the new rhetoric that colours the Court's case law of the last decade could possibly be explained in the light of the Treaty's new emphasis, post Maastricht, on the protection of national identity and competences (see A. DASHWOOD, *The limits of European Community powers*, ELR 1996, 113).

17 Relating, for instance, to the fact that so far the Court has had to decide on subsidiarity matters in a relatively low number of cases, and that arguably in none of these a breach of the subsidiarity principle was manifest.

Adjudication as to whether an act is *ultra vires* presupposes interpretation of that act's legal base(s). However, interpretation of the EC Treaty amounts to adjudication on competences in many other situations as well. For instance, when interpreting the scope of application of art. 87 ECT, the Court also gives a ruling (implicitly or otherwise) on the sphere within which States or sub-national entities are free to determine their subvention policy *vis-à-vis* their industries[18]. When interpreting, say, article 28 ECT, the Court gives a ruling on competences: it determines the extent to which Member States' competences have been abolished by that article[19]. Moreover, the scope of the *Community's* legislative competences is affected by those same rulings: for instance, to determine whether an act adopted under art. 95 ECT is *ultra vires* may well depend on the interpretation the Court gives to art. 28 ECT[20].

Let us consider a case in which the new Court would have to adjudicate whether a measure based on art. 95 ECT, whose stated objective is to remove obstacles to trade in goods between Member States, is *ultra vires*. Would the new Court be bound by the ECJ's case law on article 28 ECT, or would it have the power to give an autonomous interpretation? Both solutions, it is submitted, would be quite problematic. In the first hypothesis, the new Court would in the end be unable to 'monitor competences' thoroughly, since crucial determinations on the matter would rest with the ECJ. In the second, the ECJ's role as the ultimate interpreter of the Treaty would be seriously undermined. In both cases the potential for conflicts would be high.

The idea of creating a new Court poses also a connected, but distinct, procedural problem. Competence issues can arise in any procedure before the ECJ. This being the case, in order to ensure that the new Court has the final word *at least* on competence matters, a system of references or of appeal from the ECJ to the new Court should be created[21]. However, this would impose a heavy burden on a judicial system *already* suffering from a lack of coherence and transparency and already unable to „dispense justice without unacceptable delay"[22].

Let us now pass to consider the second proposal under examination, which is entirely different from that of establishing a new Court and calls for entirely different comments. According to the EP's resolution „on the division of competences between the European

---

18 See e.g. Joint Cases 62 and 72/87, *Exécutif régional wallon and SA Glaverbel v. Commission*, [1988] ECR 1573.

19 For the concept of „compétences abolies" see V. CONSTANTINESCO, *Compétences et pouvoirs dans les Communautés européennes*, Paris 1974; D. SIMON, *Le système juridique communautaire*, 3d ed., Paris 2002.

20 See Case C-376/98, *cit.* See also A. DASHWOOD, *op. cit.*

21 Not to do this would lead to a multiplication of the occasions for conflicting jurisprudence, and would curtail the scope of the new Court's jurisdiction. See N. REICH, *Brauchen wir eine Diskussion um ein Europäisches Kompetenzgericht?*, EuZW 2002, 257; see also, for similar considerations, O. DUE, *A constitutional court for the European communities*, in D. CURTIN/D. O'KEEFFE (eds.), *op. cit.*

22 This expression is borrowed from the document prepared by the ECJ and the CFI, *The future of the judicial system of the European Union*, 1999, p. 17 (this document is available on the site http://curia.eu.int). On the present difficulties of the Union's judicial system see also P.J.G. KAPTEYN, *Reflections on the future of the judicial system of the European Union after Nice*, YEL 2001, 173.

Union and its Member States"[23], judicial control on subsidiarity and proportionality could be improved by instituting a new urgency procedure, specifically dedicated to the adjudication of competence matters, which would take place before a special Chamber of the ECJ. This additional form of action to review EC legislation would have two innovative aspects: the grounds of review would be restricted to compliance with the subsidiarity and proportionality principles, and proceedings could be brought before the entry into force of the impugned act, with automatic suspensive effect. The proposed *ex ante* procedure, which has also been compared to the advisory procedure provided for in art. 300§6 ECT[24], is modelled on the procedure for the *contrôle de constitutionnalité des lois* before the French *Conseil Constitutionnel*[25].

This 'ancestry', though certainly noble, raises some perplexities about the new 'creature'. In fact, the advisory procedure has a very specific *raison d'être* that has no relation to ordinary judicial review of legislation[26]. More important still, there are significant differences between the European and the French systems of judicial review of legislation: procedural aspects that make perfect sense in one system might be inappropriate or dysfunctional in the other. These reservations may sound somewhat dogmatic, but they highlight a very tangible weakness of the proposal under discussion. According to the EP's resolution, the ECJ - like the *Conseil Constitutionnel* – would be required to give its ruling within one month from initiation of the proceedings. Because of its workload and due to its working procedures, the *Conseil Constitutionnel* has proved capable of coping with such a short deadline[27]. However, there is some reason to believe that the ECJ would not be able to review EC legislative acts within one month, or at any rate, not without dramatic changes to its procedural law: under the art. 300 ECT advisory procedure, often indicated as one of the models for the proposed new procedure, it takes the Court more than 12 months, on average, to issue an opinion. In this respect, it should be noted that the time factor is absolutely crucial in the economy of the proposal under discussion: were a minority of States, or worse still single Member States, empowered to freeze at will the entry into force of EC measures for a considerable period of time, the proper functioning of EC decision-making procedures would be disrupted[28].

A second and more important objection has also been raised. According to the proposal under examination, „the sole grounds admissible in this urgency procedure would be a con-

---

23 Adopted 16 of May 2002, not yet published in the Official Journal.

24 See e.g. H. FARNLEITNER/R.E. BÖSCH, *Making the subsidiarity principle operational*, contribution to the Convention (doc. CONV 241/02 CONTRIB. 87).

25 See the A. LAMASSOURE, *Report on the division of competences between the European Union and its Member States*, EP, Committee on constitutional affairs (doc. A5-113/2002), para. 8.2.

26 Opinion 1/75, ECR [1975] 1355.

27 See G. VEDEL's preface to D. ROUSSEAU, *Droit du contentieux constitutionnel*, 3d ed., Paris 1993; see also J. GICQUEL, *Droit constitutionnel et des institutions politiques*, 12th ed., Paris 1993, p. 752 and following.

28 This would in effect lead to unacceptable delay in decision-making procedures, and might also have the consequence of distorting voting procedures in Council: Member States opposed to the adoption of an EC measure could threaten the use of the *ex ante* judicial procedure – i.e. a long suspension of the entry into force of the act – in order to unduly obtain modifications and amendments.

flict of competences relating to non-compliance with the principles of subsidiarity and proportionality"[29]. As Antonio D'ATENA has convincingly pointed out, it is rather doubtful that a mere anticipation of the Court's review on EC measures would significantly affect the intensity of such review[30]. Given that the Court, under the ordinary procedures and out of respect for the EC legislature's discretionary power, is prepared to sanction only manifest breaches of the subsidiarity and proportionality principles, it is not clear why it would take a significantly different stance under the new urgency procedure.

Before turning to other matters, it may be helpful to summarize the observations that have been made so far. It is submitted that the creation of a new Constitutional Court would be highly problematic. Until the present time, no workable solution has been seemingly proposed to a known but crucial problem: how to isolate, for the purposes of creating a distinct jurisdiction, competence-related issues from the 'ordinary' issues arising when interpreting the Treaty[31]. From a procedural standpoint, moreover, this proposal hides a difficult choice: either the new Court is excluded from a significant number of decisions on whether EC measures are *ultra vires*, or it can have the last word on all such disputes but at a high cost for the proper administration of justice in the Community. As for the objective of ensuring stricter control on the observance of subsidiarity and proportionality, moreover, both proposed innovations – to change the judge, or to change the procedure – seem to take little notice of the (materially) limited justiciability of these principles.

It is submitted that adjudication on competences should remain firmly embedded in the actual judicial system of the Community. This is not to say that no improvements are possible. However, in our view, the Court's ability to monitor the delimitation of competences effectively could be improved to some extent by concentrating on the precision and clarity of the legal texts it is called to interpret and enforce, namely of those treaty articles conferring powers to the Community[32]. With reference to the principles of subsidiarity and proportionality, strengthening the formal requirements posed by Protocol n. 30 could also expand the area of effective judicial review[33].

Arguably, however, the impact of such reforms would not be dramatic. In particular, the observance of the subsidiarity and proportionality principles would still fall, apart from cases of 'manifest inappropriateness' of EC action, under the responsibility of the EC legislative authority. This leads us to the next part of the paper, in which discussion will focus on the political safeguards on the observance of the principles of subsidiarity and proportionality.

---

29 EP resolution, *cit.*, para. 43

30 A. D'ATENA, *op. cit.*

31 See U. EVERLING, *Quis custodiet custodies ipsos?*, EuZW 2002, 357; see also O. DUE, *op. cit.*

32 See also J.-C. PIRIS, *Statement to the Working Group on the principle of subsidiarity of the Convention on the future of the Union* (European Convention, Working group I, Working Document 4). Admittedly, this position reflects to some extent „la croyance (un peu naïve) que la précision accrue des textes pourrait conduire la Cour à un contrôle plus stricte" (V. CONSTANTINESCO, *Répenser les methods de partage et de contrôle des competences de l'Union européenne*, in EUROPEAN COMMISSION (ed.), *Europe 2004 – le grand débat. Setting the agenda and outlining the options*, Brussels 2001).

33 A. D'ATENA, *op. cit.*

C. Ad Hoc Political Procedures: 'Monitoring Subsidiarity' and EC Lawmaking

In the debate on the future of Europe two assumptions are seemingly accepted without much argument: that the Community legislature does not pay great attention to the principles of subsidiarity and proportionality, and that this responds to a natural inclination as far as the Commission and the European Parliament are concerned[34]. The validity of these assumptions will not be contested for mere reasons of space[35]. The Council is also generally listed among those institutional actors actively and systematically pursuing an (illegitimate) extension of the Community's powers[36]. Upon these premises, the idea that national parliaments should be more closely involved in the task of monitoring EC legislation in order to ensure its conformity with the subsidiarity principle has gained considerable support[37]. Things become controversial, however, when it comes to determining the form of this involvement. It has been argued that a new body composed of national parliamentarians should be entrusted with this task[38]. For their part, those opposed to such a solution normally react by enumerating all the institutional and political dysfunctions this would cause[39]. Instead of commenting on the various institutional solutions that have been proposed and adding to an already rich literature, the following pages will focus on more general aspects. In a way, their object is the debate on the future of the Union itself, some of its received opinions and its general direction.

In the first place, it may be useful to reconsider the debate's central concept: that of 'monitoring subsidiarity'. This concept, or rather this activity, is often referred to but rarely defined. In most cases, it is treated as if it were something fundamentally different from legislating, something qualitatively more limited. In the words of Jean-Claude PIRIS, however, „compliance with this principle cannot be examined in an artificial and theoretical way, just by looking at the title of an act; one has to look in depth at all the aspects, which are often very technical, of the dossier of the legislative act in question"[40]. Moreover, as it has been convincingly pointed out, in the mouth of the political actors involved in the legislative process, the subsidiarity argument may hide pure and simple disagreement on the

---

34 See e.g. A. LAMASSOURE's Presentation in SCOTTISH PARLIAMENT, European Committee Official Reports, Meeting n. 12/2001 (30 october 2001), Col 1218. H. HAENEL, *The complementary role of national parliaments and the European Parliament*, contribution to the European Convention (doc. CONV 255/02, CONTRIB. 89).

35 See however A. VON BOGDANDY/J. BAST, *The European Union's vertical order of competences: the current law and proposals for its reform*, CMLR 2002, 227.

36 See e.g. A. LAMASSOURE's Presentation in SCOTTISH PARLIAMENT, *op. cit.*; H. HAENEL, *op. cit.* For an historical analysis of the Council's attitude to competence issues see J.H.H. WEILER, *The transformation of Europe*, in ID., *The constitution of Europe*, Cambridge 1999.

37 See the note prepared by the Convention's Secretariat on the plenary session of april 15 and 16 (doc. CONV 40/02).

38 See e.g. D. HOEFFEL (French Senate), *Rapport fait au nom de la delegation du Sénat pour l'Union européenne sur une deuxième chambre européenne*, report n. 381/2001.

39 See e.g. HOUSE OF LORDS, seventh report of the select committee on the European Union (2001), *A second parliamentary chamber for Europe: an unreal solution to some real problems*, part 4.

40 J.-C. PIRIS, *op. cit.*

merits of the legislative proposal[41]. These two findings suggest that, for a political body, the line between 'monitoring subsidiarity' and participating fully (that is, on the merits) in decision-making procedures might be very tenuous, having regard both to the *workload* such a body would be confronted with and to the *nature* of its functions. In other words, it should be considered carefully whether in practice a clear-cut distinction can be drawn between a standing parliamentary committee 'monitoring subsidiarity' and a 'third chamber'[42], or between the two issues normally referred to as 'parliamentary control over subsidiarity' and 'the role of national parliaments in the Union's institutional architecture'.

This leads us to a second remark, relating to the general topic of EC decision-making procedures. As stated above, it is commonly accepted without argument that the Council insufficiently protects national competences. However, to take this unquestioningly as the basis for further discussion is to neglect an important question implicit in that very proposition: how can it be that the interests of national parliaments are not protected by an organ composed of ministers, accountable before those same national parliaments, and which happens to be the principal decision-making body of the Union? Of course, in these terms the question is naïve: „Practice shows that the governments often use the European channel for the implementation of the policies that they may not succeed in pursuing at the national level, neglecting the limits of competencies set in the Treaties"[43]. It has however the merit of highlighting the fact that the so-called 'Community method' encompasses a strong structural safeguard to protect national competences. Admittedly, this safeguard has not functioned properly over a period of time[44]. However, before even discussing more problematic solutions such as direct involvement of national parliamentarians in EC decision-making alongside the Council, it should be ascertained whether the factors preventing national parliaments from having a significant influence on the Council can be removed or not. These factors are known: national parliaments still dispose of insufficient and untimely information on European affairs; despite some significant improvements[45] the Council is still an opaque institution, considering that it performs legislative functions; in some instances parliaments themselves show scant interest in 'Euro-politics', and are more generally reticent to trigger major political crises in relation to 'Euro-politics'; in some Member States, the parliament disposes of inadequate instruments to steer its government's European policy; last but not least, qualified majority voting in Council marginalizes national parliaments and (combined with the Council's opacity) makes it even more difficult for

41 D. NICKEL, *The principle of subsidiarity and the European Parliament* (European Convention, Working Group I, Working Document 10).

42 See D. HOEFFEL, *op. cit.*, at page 26 and following; see also T. BLAIR, *Europe's political future*, speech by the Prime Minister to the Polish Stock Exchange, Warsaw, 6 October 2000.

43 I. PERNICE, *The role of national parliaments in the European Union*, in I. PERNICE/D. MELISSAS (eds.), *Perspectives of the Nice Treaty and the Intergovernmental Conference in 2004*, ECLN Series vol. 1, Baden-Baden 2002.

44 J.H.H. WEILER, *The transformation of Europe, op. cit.*

45 See Council Decision 2002/682 adopting the Council's rules of procedure (OJ 2002 L 230/7).

them to hold ministers to account[46]. Under all of these respects major improvements are possible, but to that end a whole range of significant and complex reforms both at the national[47] and at the European level[48] are necessary.

Rather surprisingly, however, these issues are seldom addressed in contributions about the observance of subsidiarity and proportionality, and the debate concentrates instead on how to introduce compensatory mechanisms to make good for what is after all a dysfunction of the Community's institutional system. In other words, debate seems to concentrate on reducing the *effects* rather than on tackling the *causes* of the dysfunction. This, it is submitted, is inconsistent with the mission set to the Convention and to the next IGC. The stated objectives of the process are to reform the Union's institutional system so as to make it more legitimate, more accountable, more transparent and more efficient[49]. This is the time and occasion to operate fundamental choices. If it is felt that the representation of national interest in EC decision-making should no longer be entrusted to ministers, because they would *inevitably* tend to act in a collusive way as infidel agents *vis-à-vis* their domestic principals (i.e. national parliaments), then the institution alongside the Council of a new body composed of part-time members and having no decisional powers won't be enough. The Council's composition will have to be called in question. It might be objected, with some reason, that this option has already been discarded, and that the Convention's perspective seems to be that of confirming the current system of national representation in the Community. That being so, the first item on the political agenda should be „how to improve the transparency and legitimacy of decision-making in Council and to ensure that national parliaments are not cut off from decision-making". These are very ambitious goals, requiring an intensive process of reflection and a strong political commitment on all levels.

---

46 On all of these aspects see the note prepared by the European Convention's secretariat, *The role of national parliaments in the European architecture* (doc. CONV 67/02); see also HOUSE OF COMMONS, European Scrutiny Committee, 33d Report of session 2001-02, *Democracy and accountability in the EU and the role of national parliaments.*

47 In many Member States the instruments national parliaments have at their disposal to control and steer their government's European policies could be strengthened. In this respect, the experience in some Member States – most notably in Scandinavian countries – suggests that membership in the EU does not result fatally in a loss of control of parliaments over governments. In some instances, however, national parliaments have shown little awareness of their own responsibilities in this respect. For a comparative study see A. MAURER, *National Parliaments in the European architecture: elements for establishing a best practice mechanism* (European Convention, Working Group IV, Working Document 8).

48 First and foremost, the Council's working methods should be reformed so as to bring its publicity standards close to those of a legislative chamber (see I. PERNICE, *op. cit.*; see also HOUSE OF COMMONS, *op. cit.*, § 18-32). Of course, this may be politically very difficult to achieve, since governments are likely to oppose the suppression of secrecy in Council. But after all this challenge responds to the *raison d'être* of the Convention: to bring about difficult reforms IGCs are unable to deliver. Secondly, communication between the institutions and national parliaments could be improved by amending Protocol n. 30: see XXIII COSAC (16 and 17 October 2000), *Contribution addressed to the institutions of the European Union.*

49 See the Laeken Declaration on the future of the European Union (Annex I to the Presidency Conclusions – Laeken European Council, 14 and 15 December 2001), under the heading „More democracy, transparency and efficiency in the European Union".

It is unfortunate that in the debate on the future of the Union these central issues have been so far overshadowed by the discussion on new *ad hoc* monitoring procedures[50].

This emphasis on *ad hoc* institutional solutions is unfortunate also for another reason. The current reform process aims at improving the coherence of the EC institutional system, its efficiency and its transparency to citizens. It is far from obvious that creating a double representation of national interests in the EU institutional system would be consistent with those aims. Arguably, there could be some measure of incoherence in entrusting political authority to institutions *already* encompassing a strong element of national representation and a strong in-built safeguard for national interests, based on ministerial representation, and creating at the same time a supervising body composed of national actors, but following a different criterion of representation.

It must be stressed that the preceding discourse does not purport to demonstrate that the Convention should not engage in devising new procedures, directly involving national parliamentarians, to achieve stricter political control on the EC legislator. Rather, it is meant to support the following observations.

From a *methodological* standpoint, one could wonder whether it wouldn't be more appropriate, before considering the introduction of new institutional checks on the EC legislature, to determine *who* exactly will be the legislature i.e., in other words, what will be the exact shape of EC decision-making procedures after 2004.

As for the *merits* of the different proposals that have been put forth, it suggests that if *ad hoc* monitoring procedures are eventually created, they should be unmistakeably exceptional in character, in order to leave intact the responsibilities of the Community institutions and in order not to render it exceedingly difficult for them to make decisions[51].

In any event, the possible creation of such an *ad hoc* procedure should not be seen as constituting a self-contained solution to the subsidiarity and proportionality issues raised by EC lawmaking.

Let us hypothesize that an exceptional procedure involving the national parliaments is finally instituted. Obviously, in order to be able to ring a 'subsidiarity alarm bell' and/or to give mandate to their representatives in a committee discussing EC legislative proposals, national parliaments will have to be able to *know* those legislative proposals and to *articulate national interest* in their regard. Any such procedure will work properly only if national parliaments will be able (and willing) to examine and debate EC policies on a regular basis. This suggests, again, that discussing on the exceptional procedures devised to ensure ob-

---

50 This observation does not obviously mean to say that every contribution proposing the institution of new *ad hoc* political procedures to monitor subsidiarity has ignored the question: see e.g. I. PERNICE, *op. cit.* and HOUSE OF COMMONS, *op. cit.*

51 In practical terms, this statement could be developed as follows: a 'conciliation committee', meeting *ad hoc* to discuss particularly contentious files from a subsidiarity point of view should be preferred to a permanent body entrusted with the task of systematically scrutinizing legislative proposals (see R.BIEBER, *Abwegige und zielführende Vorschläge*, *op. cit.*). However, the conditions for convening this body should be sufficiently strict so as not to render this (ulterior: see art. 251 ECT) conciliation procedure a permanent phase of EC lawmaking. See also the „early warning procedure" proposed by the European Convention's Working Group I (Working Group I, *Revised draft conclusions*, Working Document 19/1/02 REV 1).

servance of subsidiarity *before* considering the more general problem of the role of national parliaments in EU decision-making procedures amounts to an inversion of the logical order of the problems at issue.

D. Conclusion

The redefinition (or rediscovery) of the Union's tasks and competences is a most important item on the post-Nice agenda. As it has been rightly stressed, nothing is more detrimental to the Community's legitimacy than the impression that its competences are no longer limited[52]. This impression, which is in and of itself a relevant political fact, requires reconsideration and, if necessary, reform of the existing institutional safeguards preventing the EC from exceeding the limits of its powers or from misusing them. The wide community participating in the debate on the future of Europe is making a remarkable effort on the subject matter, and many innovative and stimulating ideas have been put forth, examined and discussed.

In the view of some, the system of judicial review of EC legislation should be reformed. The proposals made so far to this effect are however highly problematic. Moreover, the problems related to the observance of the subsidiarity and proportionality principles, which are felt as being the most acute, seem to fall (at least partly) outside the reach of judicial review and inside the precinct of the legislator's discretion. In this respect, a political solution seems to be more appropriate to the nature of the problem.

Concerning the possible political solutions, the discussion has from the start focussed on the possible creation of new procedures designed specifically to monitor the actions of the EC legislature. This is, in the author's view, quite unfortunate. In the first place, the Convention represents a unique occasion to discuss in an open manner even the most fundamental aspects of the Community's institutional system. This discussion should have precedence over the quest for other, more specific institutional arrangements. Before discussing how national parliaments could control from outside the EC legislature's acts, it should be discussed whether their position *within* the legislative process should be entirely or partially reconsidered and improved. In the second place, the philosophy of the post-Nice process seems to place a high value on transparency, accountability, coherence and efficiency of the institutional system. The objective of ensuring that the EC legislature does not exceed or misuse its powers, as important as it may be, cannot be considered in an absolute manner. It must be pursued in a way that is consistent with those other, equally important objectives of the post-Nice process. Special monitoring procedures will, in and of themselves, further complicate the Community's decision-making procedures, blur the division of responsibilities between the national and the supra-national level, complicate the Community's institutional system and possibly alter its delicate equilibrium. While this does not rule out entirely the creation of *ad hoc* institutional devices to solve specific problems, it certainly suggest that they should be only regarded as second best options.

---

52 See J.H.H. WEILER, *Europe belong to its citizens*, *op. cit.*