

# WHICH DISTRIBUTION OF COMPETENCES FOR THE EU ?

## 1. THE CURRENT SITUATION

### 1.1. The evolution of the system

The competences of the EC/EU have grown in a rather accidental way. This is directly related to the political compromises made at the time. Different periods may be distinguished.

- *The origins*: the common market. The EC domains of competence were chosen as collateral aspects of the common market (agriculture, transport, trade). There was a safety valve should the powers conferred appear too limited: Art. 235 TEC (now 308).
- *The boost* the single market. At the time, the impact of the project was more clearly foreseen. Consequently, a general clause was established: Art. 100 A TEC (now 95).
- *Growth with limitations*: later, it was felt that the competences had to be extended, but there was less consensus about the modalities. Consequently, the extension happened, but with a lot of restrictive modalities : the pillar system, the complementary character of the EC interventions, and the subsidiarity principle. The system became as a result more extended and complex.

### 1.2. The current system and the categories of competences

#### 1.2.1. The principle : competences must be attributed

The European Community already has a system of delimitation of competences. Art. 5 TEC states that the Community must act within the limits of the powers conferred upon it by the Treaty and the objectives assigned to it. The Member States thus have the residual powers. Moreover, Art. 7 TEC requires each institution to act within the limits of the powers conferred upon it by the Treaty.

#### 1.2.2. The categories of competences

The system of competence attribution in the EC is structured along functional lines. Every action must be aimed at achieving the purposes of the Treaty (art. 2 TEC). It resulted in four categories of competences:

#### a) exclusive EC competences

Exclusivity of competence debars the Member States from acting in the area, regardless of whether the Community has already acted or not, unless the Community has explicitly authorised them to implement certain measures (monetary policy, fisheries and common commercial policy (partly)).

The principle of subsidiarity does not apply in this category; the principle of proportionality does.

#### b) shared/concurrent

The Member States are allowed to act as long as and to the extent that the Community has not yet acted. Once the Community moves to occupy a certain field, the Member States are prohibited from enacting legislation within that field.

In the exercise of these competences, both the principles of subsidiarity and proportionality have to be respected.

#### c) complementary

Both levels of authority have to competence to act and the action of one level does not debar the other level to act (e.g. development cooperation). Hence, simultaneous actions on both levels are allowed. The Union only intervenes to complement the actions of the Member States. The only obligation for the Member States is to respect the Community norms (supremacy).

#### d) excluded

In these areas, the Member States have exclusive competences. They are the only authority entitled to act and the action of the Community in this domain is excluded (by various stipulations).

### **1.2.3. Basically, the system functions**

This system has been criticised from various corners during the last years (for reasons analysed below). Some basic realities must be underlined :

- the system has delivered a lot, especially in the fields of the single market, the single market, and various flanking policies (environment, consumers, health, etc.)
- it remains difficult to adopt a measure, and it will become more difficult after the enlargement (typically, the codecision procedure requires a proposition of the Commission, a strong majority in the Council and a strong majority in the European Parliament)
- the level of legislative activity has diminished in the last ten years
- there are efficient judicial controls (as has been confirmed by the decision of the ECJ regarding the tobacco directive)

## **2. THE PROBLEMS**

The problems are fourfold.

### **2.1. Complexity**

This evolution has resulted in a complex organisation of competences in the treaties. This complexity is sometimes difficult to manage. Moreover, the legal provisions covering the distribution of EC competences are dispersed over the Treaty. This renders the system opaque and difficult to understand. In turn, this lack of clarity hampers democratic control, as it is unclear where political responsibility lies.

This being said, the debate has become biased. (a) All democratic systems have become more complex in the recent decades, and this is certainly obvious in most federal systems. (b) The organisation of competences is less complex than the procedures and the instruments used by the EU institutions. There is a confusion between different sources of the malaise of the public opinion. (c) Of course, political responsibility and democratic control would be made easier if power were not so dispersed, but this is the case and results from the reluctances of various governments to concentrate it. (d) The current competence distribution suffers clearly from a lack of legal certainty, but this is not a daily concern.

### **2.2. Creeping competence drift**

There is a fear that the EC/EU will continually expand its competences to the detriment of the competences of the Member States (and the regions). The perception that the distribution of competences in the EC is insufficiently specified strengthens this feeling of encroachment by the European institutions.

One must notice that this is more a feeling than a reality. The extension of EU competences is more apparent than real in various fields, where fundamental measures remain rare until now (education, culture, CFSP, police and justice cooperation). Furthermore, there has been a reduction of the number of directives adopted by the EC since 1995. Finally, when it is real, this extension is not really creeping, since the European Council has become the final decision center.

What is very real is the ambiguity of many national governments, which often defend an ambitious European agenda in the negotiations, and complain about the EU invasion in the national capitals. In fact, projects such as creating a single market and a single currency, or managing the globalisation, require a lot of initiatives.

It is obvious that some complaints about the alleged “drift of power” are in fact complaints about the impact of the free circulation and/or the free competition (in banking, in railways, in television, in local transport). In fact, they are directly linked to the hard core of the EC business.

### **2.3. Variety of the instruments**

A proliferation of instruments has occurred, the legal value of which has sometimes remained unclear. In turn, this has undermined the legal certainty and the accessibility of Community actions for the public opinion.

There is clearly a need for simplification.

### **2.4. Intensity of Community action and discretion for the Member States**

Some Member States (and regions) have complained that the Community acts in a very compelling way, leaving them no discretion whatsoever in implementing Community actions.

There is sometimes such a problem, but two points must be taken into consideration. First, this often results from the heavy decision procedures of the EU, and the compromises that they require. Second, once again, this is not linked to the repartition of competences but to the nature of the instruments, the *intensity* of the execution of Community competences.

### **2.5. Conclusions**

#### **2.5.1. Most problems are not basically linked to the question of competences**

The sum of topics mentioned in this domain indicates that there is a lot of confusion in the debate. This could paradoxically be a reason of its success. It is nevertheless absolutely necessary to distinguish. Otherwise, some solutions could reveal themselves worse than the problem they are meant to cure.

#### **2.5.2. A broad debate on the competences presents some dangers**

Giving a priority to the question of competences entails various dangers :

- The main priority of the next institutional negotiation should be to preserve the ability of the EU to decide and implement its decisions after the enlargement. The debate about competences could absorb a lot of energy, with a limited result.
- It is nonsensical to discuss about competences before discussing first the objectives. A huge part of the success of the European integration relied on this, and more specifically on Treaty provisions based on objectives, and not on competences.
- The debate about competences creates confusion between various problems. There is thus a risk that some solutions will not deal with the real problems.
- There are in fact existing legal solutions to dissipate misunderstandings (the subsidiarity control has been established in Maastricht, extended in Edimburgh,

and finally emphasized again in Amsterdam) but they are not always properly used. Permanent treaty changes cannot offer a substitute for this.

- A lot of complaints in the present context concern in fact some EU measures in the hard core of its competences : the single market and the competition policy. There is a real risk of undermining the economic integration that has been realised during the last 50 years.
- Some of the proposed solutions could as a matter of fact increase the problems that have been mentioned above. A more precise definition of competences will not simplify the treaties, but complicate them. It will not diminish the conflicts between authorities, but increase them. Some compromises reached in the Treaty of Nice (about trade policy, or immigration) provide very good illustrations.
- In sum, renegotiating the EU competences in depth could bring us to a treaty that will be more complex, more difficult to implement, less transparent and less democratic.

### 3. THE POSSIBLE SOLUTIONS

#### 3.1. A non-starter: Kompetenz-Katalog

Some entities, notably some German Länder, have called for 'Kompetenzabgrenzung' foreseeing an irrevocable fixing of the competences of the Community. However, such a 'Kompetenzabgrenzung' is not desirable for four reasons.

First, its political feasibility seems doubtful. Since legal formulae cannot provide an objective answer as to which level of authority is appropriate, such a Kompetenz-Abgrenzung requires a *political agreement* among the Member States on what is essential for European integration and should thus be dealt with at the European level. Such a consensus is however not likely.

Second, its practical feasibility seems questionable, as such a Kompetenz-Abgrenzung seems hard to reconcile with the *multi-level polity*, which the European Union (together with national, regional and local authorities) has increasingly become. In a multi-level polity, it is very difficult to specify any one level of authority which should be exclusively in charge of a certain matter.<sup>1</sup> It is unrealistic to isolate general policy areas like "free movement of goods" on the one hand, or areas like "family law" on the other, and to deem them to be respectively for the Community or for the Member States to decide on. Rather, the answer will depend upon the precise kind of policy issue in question, and it may well be that certain issues affecting the free movement of goods (such as the regulation of soft drugs) are most appropriately decided by Member States acting alone, whereas certain issues relating to the family (such as the treatment of non-national spouses) need to be regulated at Community level.

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<sup>1</sup> Take for example environment: policies to combat global warming are best dealt with on a supra-national level, the zoning of land at a national level, and other measures even best at the regional/local level.

Third, a Kompetenz-Katalog is especially precarious with regard to the internal market. In order to preserve the essence of the European construction (internal market and compensatory policies), it is crucial that the Community retains a high amount of *flexibility*, so as to be able to respond to new challenges. A Kompetenz-Katalog would be contrary to this need for flexibility.

Fourth, a Kompetenz-Katalog would require a significant degree of *precision* in its delimitation of competences. This hampers efficient government and would be a source of bureaucratisation for enterprises. Moreover, in order to respond to new challenges, permanent Treaty revisions would be required, rendering the precision of the text itself a source of instability.

### **3.2. Clarification and specification of the repartition of competences**

The following measures have been envisaged:

- 1) For every matter and sub-matter, the objectives could be specified, so as to ensure that every action can be judged on its suitability for achieving these objectives.
- 2) The concepts of exclusive and concurrent competences could be more clearly defined. For every matter and sub-matter, (i) the exclusive competences of the Member States and the EC/EU, and (ii) the shared and (iii) the complementary<sup>2</sup> competences should be clarified. This would clarify the fields for which the principle of subsidiarity applies (i.e. only concurrent competences). It can be envisaged to combine this exercise with a re-ordering of the treaties along logical lines. This could increase the clarity of the text, making it easier to locate responsibility.
- 3) It has been envisaged to devise an exclusive list of competences for the Member States (regardless of the fact that they have the residual competence). This is meant to increase their feeling of legal certainty.
- 4) A refining of Articles 95 TEC and 308 TEC is envisaged, so as to rule out any intrusion into 'no go'- areas by the Community. As regards Art. 95 TEC, it means to codify the 'acquis jurisprudentiel' (e.g. the ruling on the tobacco-directive). Concerning Art. 308 TEC, a stipulation could be added, providing that it cannot be used as a basis to move into 'no-go areas'. Moreover, the consent (instead of consultation) of the European Parliament (and the consultation of the Committee of the Regions) could be required.
- 5) Finally, in order to clarify 'who does what', the distinction between the Community and the Union could be abolished. The Union should be the 'only player in town', with a single legal personality, based upon one single Treaty. This requires that the necessary steps are taken to dismantle the pillar structure.

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<sup>2</sup> The Lamassoure Report of European Parliament here makes a further distinction between supplementary powers and political powers.

It must be realised that most of these measures will add nothing to the EU, except a new layer of complexity. Propositions (2) and (5) alone go into the direction of more simplicity. The other propositions could seriously harm the single market, especially in the perspective of an enlarged European Union. The definition of a clearer institutional design would have some *advantages*. It would lessen the fears of encroachment by the EC/EU upon Member state/regional competences, which in turn may open the door to the extension of QMV in some areas. By clearly identifying who does what, it also increases the transparency and thus the accountability of the decision-making system, and in that way contributes to the reconnection of citizens to the EU. But the outcome must remain a clearer design. This is not likely. Carefulness is thus strongly required.

### **3.3. A simplification and specification of the instruments**

Once it has been established that the Union has the competence to act in a certain matter, it should be specified *how* the Community is allowed to act. Hence, for every competence, all the instruments allowed (and not allowed) should be defined and their legal scope and enforceability specified. The number of instruments should be reduced.

In areas where EU action is perceived to be inadequate in the eyes of citizens (foreign policy, cross-border crime, ...), the EU should be equipped with the appropriate means to fill this 'delivery gap'.

In areas where EU action is perceived to be unduly intrusive, specific provisions should ensure that the principles of proportionality (Art. 5.3 TEC) and of 'Bundestreue' ('duty of cooperation') (Art. 10 TEC) are better respected:

- *Proportionality*: Public dissatisfaction with Community intervention seems to apply more to matters of proportionality (European intervention is too intrusive) than to matters of subsidiarity (Europe should not intervene at all). Hence, the proportionality of EU measures should be more closely assessed, and the use of compelling instruments should be scaled down in cases where it would not affect the effectiveness of an EC measure. However, this cannot be exclusively linked to a specific type of competence, as everything depends on the subject matter. Instead, policy-makers ought to give a thoroughly considered justification of the intensity of their action. The Amsterdam Protocol must be better enforced in this respect.

### 3.4. New things about subsidiarity

#### 3.4.1. Re-allocation of competences?

The application of the principle could possibly lead to the reallocation of competences.<sup>3</sup> Some competences could thus be transferred from the EU to the Member States *and vice versa*, as subsidiarity can work in both ways. This could offer a subsidiarity-induced re-shuffling of competences in certain fields as a leverage to expand the use of QMV in the council for other more important domains.

One area comes to mind regarding the transfer of competences from the EC to the Member States: *the second pillar of the CAP*. It can be asked to what extent there is case for a *common* rural policy. Should measures for the environment, countryside conservation and rural development in northern Sweden, the Greek islands, the Austrian Alps and the Polish countryside, really be decided and financed jointly? Member States could thus regain the primary responsibility for some of the measures under the rural development pillar, with however a supervisory role for the EU in order to avoid competition distortions in the internal market, arising from different levels of support as well as environmental dumping.

#### 3.4.2. Extended political control?

Several proposals have been made to strengthen the political control mechanisms regarding the respect of the subsidiarity principle. Most of these proposals favour the creation of a new political organ, composed of national (and regional) parliaments, which is to give opinions/rulings as to whether the principle of subsidiarity is being respected by the Community .

Another proposal concerns the creation of a 'Subsidiarity and Proportionality Committee', which is to deal with situations where one actor involved in the legislation procedure is unhappy with a proposal on the grounds of subsidiarity and proportionality. This committee, involving representatives of the Commission, the EP, the CoM and the Member states as well as a judge from the ECJ, would then assess the act in question and its opinion could be politically binding.

The drawbacks of these proposals are threefold. First, this would hamper legal predictability. Second, this would add to the current institutional complexity. Finally, it would weaken the Community method by adding new procedural requirements. It should be kept in mind that political control is already provided for by the Council of Ministers, which in turn is accountable to national Parliaments.

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<sup>3</sup> In this respect, it should be noted that the Bertelsmann Foundation has operationalised the principle in a way which goes beyond a mere competency execution rule. Instead, a (rather complicated) set of tests allows it to function as a rule for the distribution of competences. For this, both a first-level test, examining the necessity of action which goes beyond the individual Member States, and a second-level test, analysing whether Community action would necessarily be better and command sufficient public approval, are carried out. Bertelsmann Stiftung, Organising a federal structure for Europe. An EU catalogue of competences (2000).



### 4.3.3. Extended judicial control?

It can be envisaged to extend the judicial control by the ECJ to the intergovernmental pillars.

Moreover, thought should also be given as to whether it would be useful to give national Parliaments (and the Committee of the Regions) access to the ECJ, allowing them to question the legality of legislative Community acts, which touch upon their competences in the national setting. This could be extended to the regions, which given their powers in the national constitutional setting are co-responsible for the execution of certain aspects of Community law.

The Lamassoure Report of the European Parliament proposes another alternative. It suggests the creation of an additional referral procedure to the ECJ *before* the entry into force of a legislative measure. This could result in the application of the relevant measure being suspended. It could be initiated by the Council, the Commission, the Parliament, a qualified minority of Member States or a significant minority of so-called 'partner regions'. It should be based on the ground of non-compliance with the principle of subsidiarity.

The creation of a new chamber within the ECJ, which is to deal with matters of Kompetenzordnung, seems superfluous.

## **4. FINAL REMARKS**

Our final remarks concern three issues: (1) the link with the Community method, (2) the efficiency of Community policies, and (3) procedures for future revisions of the attribution of competences.

1. The question of 'who does what in Europe' cannot be resolved without taking into account the *efficiency of decision-making and the effectiveness of democratic and judicial control at the European level*. Rethinking the system of power sharing between the national and European level of government is therefore an exercise which is interdependent with the extension and strengthening of the *Community method*.
2. Both Declaration 23 and the Laeken Declaration are flawed, because they evade the question of the *efficiency of Community policies*. In fact, a lot of the issues raised, esp. regarding Kompetenzverteilung and simplification, can be addressed by increasing the efficiency of community policies.

A first example is the *CAP*. If the CAP would be rendered more market-oriented (by cutting intervention prices and by phasing-out and decoupling direct payments), there would be less need for detailed and cumbersome supply management measures (set-aside, quotas) and the associated bureaucratic nightmare.

Another example concerns the *structural funds*. These funds are currently by no means sufficiently concentrated but are dissipated over a wide range of areas and objectives. Rendering the policy more concentrated (and thereby efficient) would reduce the heavy bureaucracy and the corresponding administrative costs of the policy.

These examples show that the bureaucratic intrusion of the commission and the proliferation of instruments in several areas is not always due to bureaucratic drift on the part of the commission, but also to the refusal of the member states to reform the EU policies and to take on their responsibilities.

3. Thought should be given as to whether it is necessary to foresee new procedural arrangements for the revision of the competence distribution. Juppé/Toubon/Gaymard propose to enumerate competences in a 'loi organique', which would be easier to change than Treaty provisions. The Lamassoure Report of the European Parliament suggests that the list of powers should be reviewed ten years after its adoption, and thereafter every 20 years.

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